

## Refugee Protection in International Law

### UNHCR's Global Consultations on International Protection

Millions of people are today forced to flee their homes as a result of conflict, systematic discrimination, or other forms of persecution. The core instruments on which they must rely to secure international protection are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. This book examines key challenges the Convention faces, including the scope of the principle of *non-refoulement* and the proper application of the elements of the refugee definition. The Office of the United Nations High Commissioner for Refugees (UNHCR) commissioned papers on these issues from some of the world's pre-eminent international refugee experts, and these were discussed at a series of expert roundtable meetings during 2001 as part of UNHCR's Global Consultations on International Protection. The papers and roundtable conclusions are published here, together with an overview and the landmark declaration of the 2001 Ministerial Meeting of States Parties to the Convention and/or Protocol.

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# Refugee Protection in International Law

UNHCR's Global Consultations on International  
Protection

edited by

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**CAMBRIDGE**  
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge, CB2 2RU, UK  
40 West 20th Street, New York, NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa  
<http://www.cambridge.org>

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First published 2003

Printed in the United Kingdom at the University Press, Cambridge

*Typeface* Lexicon 1 A 9/12.5 pt. *System* L<sup>A</sup>T<sub>E</sub>X 2<sub>ε</sub> [TB]

*A catalogue record for this book is available from the British Library*

*Library of Congress Cataloguing in Publication data*

ISBN 0 521 82574 1 hardback  
ISBN 0 521 53281 7 paperback

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Daniel Bethlehem was called to the Bar in 1988, practising in international law from chambers at 20 Essex Street, London. He was a lecturer in international law at the London School of Economics from 1992 to 1998. In 1998, he took up the post of Deputy Director of the Lauterpacht Research Centre for International Law and a fellowship of Clare Hall at the University of Cambridge. He appears regularly as counsel before the International Court of Justice and other international and domestic tribunals.

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Erika Feller is currently the Director of the Department of International Protection with the Office of the United Nations High Commissioner for Refugees in Geneva. A constant thread running through her professional experience has been her work in and with international law, both in its theory, including its drafting, and in its practice. She has, in addition, a solid background in human rights work. Before taking up her first assignment with UNHCR as Senior Legal Adviser in the Office of the Director, Division of Refugee Law and Doctrine, she served for fourteen years as a diplomat with the Australian Foreign Service, both in Canberra and in Berlin, Rome, and Geneva. Since joining UNHCR, she has served in Geneva and in the field as the UNHCR Representative for Malaysia, Brunei, and Singapore.

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Elihu Lauterpacht was called to the Bar in 1950, was appointed a QC in 1970, and was knighted in 1996. He practises from chambers at 20 Essex Street, London. He became a Fellow of Trinity College at the University of Cambridge, United Kingdom, in 1953. The founder of the Research Centre for International Law in 1983, he was its first Director until 1995 since when he has been its Emeritus Director.

He was appointed an Honorary Professor of International Law at Cambridge University in 1994. He was Ad Hoc Judge in the *Genocide Case* before the International Court of Justice, sits regularly as an arbitrator in international proceedings, as well as appearing frequently as counsel before both domestic and international tribunals.

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He has also had brief temporary assignments in central Asia and in the Democratic Republic of Congo. Before that, he worked as a university assistant at the Institute of International Law at the University of Vienna, where he finished his doctoral thesis on UNHCR and its mandate (published in German by Duncker & Humblot, Berlin, 1992). From 1985 to 1988, he was research assistant at the Institute of Criminal Law at the University of Linz, Austria. He has published widely on international refugee law.

## Foreword

At the start of the twenty-first century, fifty years after the drafting of the 1951 Convention Relating to the Status of Refugees, international refugee protection is at a crossroads. In a globalizing world and a rapidly changing political environment, the Convention faces many challenges. These include new forms of persecution and conflict, complex mixed migration movements, the reluctance of many states to accept refugees, and restrictive interpretation of the Convention.

The papers and the conclusions contained in this volume are one outcome of the Global Consultations on International Protection, organized by UNHCR in 2000–2 to reinvigorate the international refugee protection regime. They address key questions relating to the 1951 Convention, where it was considered that greater clarity and coherence of interpretation was needed. They are the result of a series of expert roundtables which were held in 2001 as part of the Global Consultations.

This book examines some of the legal issues that are part of the system of governance for refugees. The cornerstone of this system remains the 1951 Convention and its 1967 Protocol. The aim is to ensure that this system can function more effectively, equitably, and efficiently, enabling refugees to obtain the protection to which they are entitled.

Refugee protection problems cannot be addressed in isolation. All stakeholders, whether they be international organizations, governments, judiciaries, civil society, non-governmental organizations, or academia, need to strengthen their partnerships and clarify their roles. Clearer understanding and more consistent implementation are an integral part of ensuring that refugee protection burdens and responsibilities are shared more equally, and that some of the world's most vulnerable individuals are able to find durable solutions to their plight and to enjoy the respect that they deserve.

The Declaration agreed by delegates at the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol in December 2001 called on States to 'strengthen asylum and render protection more effective'. I hope this volume will serve as a tool to assist those involved in refugee protection in this endeavour.

Ruud Lubbers  
*United Nations High Commissioner for Refugees*





## Preface

The world has changed radically since the establishment of UNHCR and the coming into force of the Convention Relating to the Status of Refugees some fifty years ago. The modern regime of international refugee protection has been built on these beginnings in the aftermath of the Second World War and is now a complex structure affording vital protection to millions of forcibly displaced people. Within this structure, the Convention and its 1967 Protocol are widely acknowledged as enduring instruments with a ‘central place in the international refugee protection regime’, as States Parties to the Convention and/or Protocol declared in December 2001.

Conclusions have, however, sometimes been drawn which put in question the ongoing relevance of the Convention or which seem to call for its complete overhaul, or even abandonment. Such conclusions are misguided, even dangerous. They contribute to the waning quality of asylum, as State commitment to protection using the available instruments starts to falter. UNHCR does of course recognize that the challenges today are many and various and that there are gaps in the protection framework, even while, at the core, the Convention regime’s fundamental principles are as sound and necessary as ever.

The Global Consultations on International Protection have been UNHCR’s effort to rise to modern challenges confronting refugee protection, to shore up support for the international framework of protection principles, and to explore the scope for enhancing protection through new approaches, which nevertheless respect the concerns and constraints of States and other actors. The process was designed to promote better understanding of today’s protection dilemmas, from the perspective both of the providers and of the beneficiaries of international protection. State interests and refugee needs have not been always easy to reconcile, but certainly the first step in this direction can only be taken when the possibilities and limitations are properly appreciated.

The Consultations were also conceptualized so as to realize better cooperation among all concerned. Best practices, or at least baselines, for making asylum systems work more justly and efficiently, coupled with a firming up of political will to improve the ‘doing’ of protection, not on an ad hoc and discretionary basis, but more predictably and consistently within the internationally agreed parameters, were likewise an objective. So too was a more reasoned approach to responsibility

sharing, in order to rationalize the assumption of responsibilities and balance the burdens in a more equitable manner. Finally, the Consultations had the goal of contributing to improved implementation of important framework principles, including by clarifying their meaning in a modern context.

The various issues raised in the course of the Global Consultations were organized along three ‘tracks’. The first culminated in an unprecedented Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol in Geneva in December 2001. The Declaration from that meeting – the first ever adopted by all States Parties – is reproduced in Part 1.3 of this book. That Declaration stands as an important measure of political commitment to better refugee protection within a strengthened Convention framework. The ‘second track’ of the Consultations involved a series of expert roundtables held during 2001 on specific issues in the interpretation of the 1951 Convention on which greater clarity is required, as set out in the table on p. xxi. A more harmonized understanding of how the Convention is to be applied in today’s world will, it is hoped, be one enduring outcome. The ‘third track’ brought together States and other actors, within the framework of the Executive Committee of the High Commissioner’s Programme, to examine various specific or thematic refugee protection concerns not directly, or not adequately, covered by the Convention and Protocol.

Overall the Global Consultations process has encouraged a cooperative spirit in tackling refugee issues. It has aroused an interest in multilateral dialogue to find solutions to an increasingly internationalized set of problems. The process has confirmed a willingness to pool concerns and jointly point the way forward to the durable resolution of problems whose solution is within our collective reach. Together, UNHCR and States have drafted an Agenda for Protection, which should help both to inform and to shape debate and policy formation. The Agenda comprises a comprehensive programme of action to tackle the various issues besetting refugee protection in today’s complex environment.

This book represents a key outcome very particularly of the second track roundtable meetings and the Summary Conclusions resulting from them. It focuses in a detailed manner on discrete legal issues of interpretation of the 1951 Convention, bringing together the expert papers presented to the participants at the roundtable meetings and their conclusions. The authors were asked to make proposals to establish common understandings on key issues of Convention interpretation in order to promote greater consistency in the application of the Convention in the different jurisdictions of the world. They were also asked to factor into their analysis subsequent developments in international law of relevance to forced displacement.

The book is introduced by an overview of refugee protection in international law, followed by a paper on the age- and gender-sensitive interpretation of the 1951 Convention and the text of the 2001 Declaration of the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol. The book then comprises nine

parts, each containing a paper by different leading international refugee experts on key issues of interpretation of the 1951 Convention. These concern *non-refoulement*, illegal entry, membership of a particular social group, gender-related persecution, internal flight, relocation or protection alternatives, exclusion, cessation, family unity and reunification, and UNHCR's supervisory responsibility under its Statute. Each of these issues was debated at an expert roundtable meeting in 2001 and the Summary Conclusions of those meetings follow the relevant paper.

I trust this book will offer a valuable resource for judges, adjudicators, legal practitioners, government officers, humanitarian workers, non-governmental refugee advocates, and academics alike in their various efforts towards the common goal of strengthening refugee protection worldwide. For its part, UNHCR will be drawing on these various contributions to refine its own guidelines, which it makes available pursuant to its responsibility under paragraph 8 of its Statute and Article 35 of the 1951 Convention itself.

Erika Feller  
*Director of International Protection*  
*Office of the United Nations High Commissioner for Refugees*

## Acknowledgments

UNHCR would like to thank the co-organizers of the expert roundtables held as part of the ‘second track’ of the Global Consultations on International Protection for their important substantive and financial contribution in making these events possible. The co-organizers involved were the International Migration Policy Institute of the Carnegie Endowment for International Peace, New York, United States; the Luso-American Foundation for Development, Lisbon, Portugal; the Lauterpacht Research Centre for International Law, University of Cambridge, United Kingdom; the International Institute of Humanitarian Law, San Remo, Italy; and the Graduate Institute of International Studies, Geneva, Switzerland. Other significant financial contributors to the overall Global Consultations process, who also therefore helped to make these roundtables happen, were Australia, Canada, the European Commission, Japan, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States. In addition, the governments of Canada, China, Costa Rica, Egypt, France, Hungary, Norway, and South Africa each hosted regional meetings in the context of the ‘third track’ of the Consultations which likewise made an important contribution to the process.

The editors would especially like to thank Kate Jastram and Alice Edwards, who provided valuable substantive and organizational input as consecutive focal points for the second track of the Global Consultations, as well as Eve Lester, the non-governmental organization (NGO) liaison officer for the Consultations.

In addition, the editors are most grateful for the input and comments of colleagues Nicholas Arons, Alexander Beck, Walter Brill, Walpurga Englbrecht, Diane Goodman, Nathalie Karsenty, Irene Khan, Janice Marshall, Hugh Massey, Sophie Muller, Shahrzad Tadjbakhsh, Mignon van der Liet, and Wilbert van Hövell. Thanks also go to Finola O’Sullivan, Treena Hall, Jennie Rubio, Caro Drake, and Martin Gleeson at Cambridge University Press, as well as Lesley Dingle at the Squire Law Library in Cambridge, for their kind support in seeing this project through to publication.

The publisher has used its best endeavours to ensure that the URLs for external websites referred to in this book are correct and active at the time of going to press. However, the publisher has no responsibility for the websites and can make no guarantee that a site will remain live or that the content is or will remain appropriate.

## Expert roundtables and topics under the ‘second track’ of the Global Consultations

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Roundtables	Topics
<b>1st Roundtable</b> Date: 3–4 May 2001 Venue: Lisbon Co-organizer: Carnegie Endowment for International Peace, Washington DC Hosted by: Fundação Luso-Americana para o Desenvolvimento	<ul style="list-style-type: none"><li>• Cessation (Article 1C)</li><li>• Exclusion (Article 1F)</li></ul>
<b>2nd Roundtable</b> Date: 9–10 July 2001 Venue: Cambridge Co-organizer: Lauterpacht Research Centre for International Law, Cambridge, UK	<ul style="list-style-type: none"><li>• Principle of <i>non-refoulement</i> (Article 33)</li><li>• Supervisory responsibility (Article 35)</li></ul>
<b>3rd Roundtable</b> Date: 6–8 September 2001 Venue: San Remo Co-organizer: International Institute of Humanitarian Law, San Remo, Italy	<ul style="list-style-type: none"><li>• Membership of a particular social group (Article 1A(2))</li><li>• Gender-related persecution (Article 1A(2))</li><li>• Internal protection/relocation/flight alternative</li></ul>
<b>4th Roundtable</b> Date: 8–9 November 2001 Venue: Geneva Co-organizer: Graduate Institute of International Studies, Geneva, Switzerland	<ul style="list-style-type: none"><li>• Illegal entry (Article 31)</li><li>• Family unity (Final Act of the 1951 UN Conference)</li></ul>

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## Table of cases

Many of the cases cited in this volume are available on the UNHCR website, [www.unhcr.org](http://www.unhcr.org), and on UNHCR's Refworld CD-ROM, available from the Protection Information Section, Office of the UN High Commissioner for Refugees, Case Postale 2500, CH-1211 Gen`eve 2 D`ep`ot, Switzerland, e-mail HQPR11@unhcr.org. Other useful websites, all of which are freely accessible, are given below.

### **Permanent Court of International Justice** *Consistency of*

*Certain Danzig Legislative Decrees with the Constitution of the Free City,*  
Series A/B, No. 6, 1925, 1925, Series A, No. 2, 30 Aug. 1924 376n

### **International Court of Justice**

Judgments are available on <http://www.icj-cij.org/icjwww/idecisions.htm>.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, p. 595 636n

*Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, ICJ Reports 1970, p. 4 431n

*East Timor (Portugal v. Australia)*, ICJ Reports 1995, p. 90 636n

*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7 105

*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 636n

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16 104–5, 113

*Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 329; and Merits, Judgment, ICJ Reports 1986, p. 14 141, 142, 147, 460n, 473n

- North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3 142–3, 148  
*Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*,  
 Advisory Opinion, ICJ Reports 1951, p. 15 104  
*South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p. 6 105  
*United States Diplomatic and Consular Staff in Tehran (Tehran Hostages Case)*, ICJ Reports,  
 1980, p. 3 152n, 223n

### **International Criminal Tribunal for the former Yugoslavia**

Judgments available at <http://www.un.org/icty/judgement.htm>.

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## Abbreviations

ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter), 1981
ACHR	American Convention on Human Rights, 1969
All ER	<i>All England Law Reports</i> (UK)
ALR	<i>Australian Law Reports</i>
Asian-African Refugee Principles	Principles Covering Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee, 1966
Banjul Charter	African Charter on Human and Peoples' Rights, 1981
BIA	Board of Immigration Appeals (USA)
BverwG	<i>Bundesverwaltungsgericht</i> (Federal Administrative Court, Germany)
BVG	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court, Germany)
CA	Court of Appeal
CAHAR	Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (Council of Europe)
Cartagena Declaration	Cartagena Declaration on Refugees, 1984
CASWANAME	Bureau of Central Asia, South-West Asia, North Africa and the Middle East (within UNHCR)
CAT	Convention Against Torture, 1984
CDR	Centre for Documentation and Research (within UNHCR)
CEDAW	Convention on the Elimination of Discrimination Against Women, 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination, 1965
CFR	Code of Federal Regulations (USA)

CIREFCA	International Conference on Central American Refugees
CJ	Chief Justice
CLR	<i>Commonwealth Law Reports</i>
CRC	Convention on the Rights of the Child, 1989
CRDD	Convention Refugee Determination Division (Canada)
CRR	<i>Commission des recours des réfugiés</i> (Refugee Appeals Commission, France)
DAC	Development Assistance Committee (OECD)
DIP	Division of International Protection (within UNHCR) until 1999; Department of International Protection from 1999
DLR	<i>Dominion Law Reports</i>
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECOSOC	UN Economic and Social Council
ECRE	European Council on Refugees and Exiles
EHRR	<i>European Human Rights Reports</i>
ELENA	European Legal Network on Asylum (ECRE)
EPAU	Evaluation and Policy Analysis Unit (within UNHCR)
ETS	European Treaty Series
Executive Committee	Executive Committee of the High Commissioner's Programme
FCA	Federal Court of Australia
FGM	female genital mutilation
HCA	High Court of Australia
HCHR	High Commissioner for Human Rights
HRC	Human Rights Committee
IAA	Immigration Appellate Authority (UK)
IARLJ	International Association of Refugee Law Judges
IAT	Immigration Appeal Tribunal (UK)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice



ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICVA	International Council of Voluntary Agencies
IFA	internal flight alternative
IFRCRCS	International Federation of Red Crescent and Red Cross Societies
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILO	International Labor Organization
ILR	<i>International Law Reports</i>
Imm AR	<i>Immigration Appeal Reports</i> (UK)
INA	Immigration and Nationality Act (USA)
INLA	Irish National Liberation Army
INLR	<i>Immigration and Nationality Law Reports</i>
INS	Immigration and Naturalization Service (USA)
IOM	International Organization for Migration
IPA	internal protection alternative
IRA	internal relocation alternative
IRB	Immigration and Refugee Board (Canada)
IRO	International Refugee Organization
J	Justice
LCHR	Lawyers Committee for Human Rights
LNTS	League of Nations Treaty Series
MINBYUN	Lawyers for a Democratic Society (Republic of Korea)
NGO	non-governmental organization
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NVwZ	<i>Neue Zeitschrift für Verwaltungsrecht</i>
NZLR	<i>New Zealand Law Reports</i>
OAS	Organization of American States
OAU	Organization of African Unity (African Union from 2002)
OAU Refugee Convention	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
OECD	Organization for Economic Cooperation and Development
OGH	<i>Oberster Gerichtshof</i> (Supreme Court, Austria)
OJ	<i>Official Journal of the European Communities</i>

PCIJ	Permanent Court of International Justice
QBD	Queen's Bench Division (UK)
RBAC	Regional Bureau for the Americas and the Caribbean (within UNHCR)
RDDE	<i>Revue du droit des étrangers</i>
RefLex	Digest of Canadian immigration and refugee law decisions of the IRB, CRDD, Immigration Appeal Division (IAD), Adjudication Division (AD), and of the Federal Court of Canada, available at <a href="http://www.irb.gc.ca/Legal/reflex/index.e.stm">http://www.irb.gc.ca/Legal/reflex/index.e.stm</a>
Refworld	UNHCR CD-ROM database of refugee-related information including case law and treaties
REK	<i>Rechtseenheidskamer</i> (Law Unity Chamber, the Netherlands)
RRT	Refugee Review Tribunal (Australia)
RSAA	Refugee Status Appeals Authority (New Zealand)
RWLG	Refugee Women's Legal Group (UK)
SCIP	Sub-Committee of the Whole on International Protection (of the Executive Committee)
SCR	<i>Supreme Court Reports</i> (Canada)
SOPEMI	Continuous Reporting System on Migration (OECD)
TPS	temporary protected status (USA)
UDHR	Universal Declaration of Human Rights, 1948
UKTS	United Kingdom Treaty Series
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Fund for Population Activities
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

UNITA	National Union for the Total Independence of Angola
Universal Declaration	Universal Declaration of Human Rights, 1948
UNREF	United Nations Refugee Fund
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USC	United States Code
WARIPNET	West African NGOs for Refugees and Internally Displaced Persons (Senegal)
WLR	<i>Weekly Law Reports</i> (UK)
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>



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# 1.1 Refugee protection in international law: an overall perspective

VOLKER TÜRK AND FRANCES NICHOLSON\*

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## I. Background

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention<sup>1</sup> are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin. For half a century, they have clearly demonstrated

\* The views expressed are the personal views of the authors and may not necessarily be shared by the United Nations or by UNHCR.

1 189 UNTS 150; 606 UNTS 267.

their adaptability to changing factual circumstances. Beginning with the European refugees from the Second World War, the Convention has successfully afforded the framework for the protection of refugees from persecution whether from repressive regimes, the upheaval caused by wars of independence, or the many ethnic conflicts of the post-Cold War era.<sup>2</sup>

International refugee protection is as necessary today as it was when the 1951 Convention was adopted over fifty years ago. Since the end of the Cold War, simmering tensions of an inter-ethnic nature – often exploited by populist politicians – have erupted into conflict and strife. Communities which lived together for generations have been separated and millions of people displaced – whether in the former Yugoslavia, the Great Lakes, the Caucasus, or Afghanistan. The deliberate targeting of civilians and their enforced flight have not only represented methods of warfare but have become the very objectives of the conflict. Clearly, this forced displacement is for reasons which fall squarely within the Convention refugee definition. Yet States in some regions have often been reluctant to acknowledge this at the outset of the crisis and have developed ad hoc, discretionary responses instead.

There are also many longstanding refugee situations resulting from conflicts which have not been resolved with the ending of the Cold War and have taken on a life of their own, often fuelled by the plunder of valuable natural resources and/or illicit trade in small arms.<sup>3</sup> Endemic instability and insecurity often accompany displacement within and from failed States or States where central government only controls part of the territory – hardly offering conditions for safe return.

The displacement resulting from such situations can pose particular problems to host States, especially if they provide asylum to large refugee communities, sometimes for decades. There is thus a real challenge as to how best to share responsibilities so as to ease the burden on any one State unable to shoulder it entirely. There is also a need to put in place burden sharing – not burden shifting – mechanisms which can trigger timely responsibility sharing in any given situation.

Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum seekers have also increased in recent years and present a major problem. Certain media and politicians appear increasingly ready to exploit the situation for their own ends.

In addition, security concerns since the attacks in the United States on 11 September 2001 dominate the debate, including in the migration area, and have at times overshadowed the legitimate protection interests of individuals. A number of countries have, for instance, revisited their asylum systems from a security angle

2 See generally, UNHCR, *The State of the World's Refugees* (Oxford University Press, 2000).

3 See, e.g., UN General Assembly resolution on the role of diamonds in fuelling conflict, UN doc. A/RES/55/56, 1 Dec. 2000; generally also <http://www.un.org/peace/africa/Diamond.html>. For the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9–20 July 2001, see UN doc. A/CONF.192/15 and <http://disarmament.un.org/cab/smallarms/>.

and have in the process tightened procedures and introduced substantial modifications, for example, by broadening grounds for detention or reviewing claims for the purpose of detecting potential security risks. In some situations, it has been noticeable that the post-September 11 context has been used to broaden the scope of provisions of the 1951 Convention allowing refugees to be excluded from refugee status and/or to be expelled. The degree of collaboration between immigration and asylum authorities and the intelligence and criminal law enforcement branches has also been stepped up.

The growth of irregular migration, including the smuggling and trafficking of people, presents a further challenge. These developments are in part a consequence of globalization, which has facilitated and strengthened transport and communication networks and raised expectations. In part, the increase in irregular migration can also be viewed as a result of restrictive immigration policies in many industrialized States, which oblige economic migrants and refugees alike to use irregular channels, whether they are in search of a better life or, more fundamentally, freedom from persecution. Visa requirements, carrier sanctions, readmission agreements, the posting of immigration officers abroad and other similar measures are all migration control tools which require proper protection safeguards and procedures if refugees are to be able to reach safety.

More specifically, in terms of the interpretation of the 1951 Convention itself, some States use various complementary forms of protection, which have had the effect in some instances of diverting Convention refugees to lesser forms of protection. When the protection afforded by international human rights instruments is also taken into account, the result is that many States now have several different procedures for determining international protection needs. This in turn raises questions concerning the inter-relationship between international refugee law on the one hand and international humanitarian and human rights law on the other.

Within the asylum procedure, systems in many States face significant challenges in ensuring a proper balance between the need for fairness and for efficiency. Dilemmas abound. How can notions such as safe third countries, and safe countries of origin or indeed accelerated procedures for manifestly unfounded cases, which have been introduced in many jurisdictions, be implemented both efficiently and in a protection-sensitive manner? Are the victims of violence and persecution by non-State actors – militias, paramilitary groups, separatist rebels, bandits, mafia, violent husbands – entitled to protection as refugees in another State? To what extent can the notion of ‘persecution’ and the ‘particular social group’ ground in the 1951 Convention refugee definition reasonably be extended to protect women from gender-related violence, not least rape in the context of conflict but also, perhaps, harmful traditional practices, trafficking or domestic violence? If only part of the State of origin is affected by conflict, to what extent are individuals able to relocate to other areas inside that State and how does this affect their claim for refugee protection? What bearing do other conventions such as the 1989 Convention on

the Rights of the Child<sup>4</sup> have on asylum procedures and the treatment of refugee children?

Differing approaches within regions have also led States to develop regionally specific legal frameworks for handling refugee claims. Such endeavours can strengthen refugee protection but need at the same time to ensure consistency with the 1951 Convention regime and thereby promote its ‘full and inclusive application’.<sup>5</sup> Concepts, such as the safe country of origin or safe third country notions, developed in some regions are sometimes also ‘exported’ to other parts of the world, which may receive far fewer claims or have less well-developed protection capacities.

Ultimately, the full realization of the international protection regime with the 1951 Convention at its heart hinges on the ability of the international community to find durable solutions to forced displacement situations, whether these be voluntary repatriation, resettlement in a third country, local integration, or a combination thereof. The challenge is how to realize solutions for individuals, as well as for refugee groups, which are both lasting and protection based.

In short, the 1951 Convention and 1967 Protocol are the global instruments setting out the core principles on which the international protection of refugees is built. They have a legal, political, and ethical significance that goes well beyond their specific terms. Reinforcing the Convention as the foundation of the refugee protection regime is a common concern. The Office of the United Nations High Commissioner for Refugees (UNHCR), as the guardian of the Convention, has a particular role to play, but this is a task which requires the commitment of all actors concerned.<sup>6</sup>

## II. The structure of the book and the purpose of this overview

The different parts of this book address nine key legal themes of contemporary relevance to the international refugee protection regime and in particular the interpretation of the 1951 Convention. These nine subjects were considered under the ‘second track’ of the Global Consultations on International Protection,

4 UNGA Res. 44/25, 20 Dec. 1989.

5 See, e.g., European Council, ‘Presidency Conclusions’, Tampere, Finland, 16–17 Oct. 1999, para. 13.

6 See generally, E. Feller, ‘International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future’, 83 *International Review of the Red Cross*, Sept. 2001, pp. 581–605; other special journal issues on the occasion of the fiftieth anniversaries of the 1951 Convention and of UNHCR include 14(1) *Revue Québécoise de droit international*, 2001; 10 *Forced Migration Review*, April 2001; and 35 *International Migration Review*, Spring 2001. See also, UNHCR, *The State of the World’s Refugees*, above n. 2; G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001); I. C. Jackson, *The Refugee Concept in Group Situations* (Kluwer Law International, The Hague, 1999).

which were launched by UNHCR in 2000 and are outlined in the table on p. xxi of this book.<sup>7</sup> The book is therefore a concrete outcome of the second track and is also specifically mentioned in the Agenda for Protection.<sup>8</sup> The wider political, operational, and other challenges to the refugee protection regime, which were addressed in the third of the three ‘tracks’ of the Global Consultations, lie outside the scope of this book, which focuses on selected aspects of the legal protection of refugees.<sup>9</sup>

The purpose of this overview is to provide additional background to the debate against which the examination of the nine legal topics developed in this book has proceeded, not least in the context of the ‘second track’ of the Global Consultations, but also beyond. The overview seeks to highlight the essential tenets of the issues emerging from the background papers and the discussions at the four expert roundtables held on these topics in 2001. At the same time, it attempts to synthesize possible ways forward on a number of issues, bearing in mind the complex nature of parts of the current debate. It is hoped that this overview can serve as a guide to the reader and provide some further insight into the current thinking on these issues.

In addition to this overview, Part 1 of the book contains a paper on the age- and gender-sensitive interpretation of the 1951 Convention. This indicates some of the ways in which gender equality mainstreaming and age-sensitivity are being or could be implemented to ensure the age- and gender-sensitive application of international refugee law. Part 1 also contains the text of the Declaration adopted at the first ever Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol, which was co-hosted by UNHCR and the Government of Switzerland in Geneva on 12–13 December 2001 as the ‘first track’ of the Global Consultations.

7 For further details, see also preface by the Director of International Protection, E. Feller, in this volume; UNHCR Global Consultations on International Protection, ‘Update’, Aug. 2002.

8 UNHCR, ‘Agenda for Protection’, UN doc. A/AC.96/965/Add.1, 26 June 2002.

9 Background papers written for the ‘third track’ of the Global Consultations intended to address these issues were UNHCR, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’, UN doc. EC/GC/01/4, 19 Feb. 2001; UNHCR, ‘The Civilian Character of Asylum: Separating Armed Elements from Refugees’, UN doc. EC/GC/01/5, 19 Feb. 2001; UNHCR, ‘Practical Aspects of Physical and Legal Protection with Regard to Registration’, UN doc. EC/GC/01/6\*, 19 Feb. 2001; UNHCR, ‘Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations’, UN doc. EC/GC/01/7, 19 Feb. 2001; UNHCR and IOM, ‘Refugee Protection and Migration Control: Perspectives from UNHCR and IOM’, UN doc. EC/GC/01/11, 31 May 2001; UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures)’, UN doc. EC/GC/01/12, 31 May 2001; UNHCR, ‘Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems’, UN doc. EC/GC/01/17,

4 Sept. 2001; UNHCR, ‘Complementary Forms of Protection’, UN doc. EC/GC/01/18, 4 Sept. 2001; UNHCR, ‘Strengthening Protection Capacities in Host Countries’, UN doc. EC/GC/01/19\*, 19 April 2002; UNHCR, ‘Voluntary Repatriation’, UN doc. EC/GC/02/5, 25 April 2002; UNHCR, ‘Local Integration’, UN doc. EC/GC/02/6, 25 April 2002; UNHCR, ‘Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities’, UN doc. EC/GC/02/7,

25 April 2002; UNHCR, ‘Refugee Women’, UN doc. EC/GC/02/8, 25 April 2002; and UNHCR, ‘Refugee Children’, UN doc. EC/GC/02/9, 25 April 2002. These documents are available on the UNHCR website, [www.unhcr.org](http://www.unhcr.org).

The nine parts of this book which follow Part 1 each address a key legal issue, namely, *non-refoulement*, illegal entry, membership of a particular social group, gender-related persecution, internal flight, relocation or protection alternatives, exclusion, cessation, family unity and reunification, and UNHCR's supervisory responsibility.

Each of these parts contains, first, the background paper which formed the basis for discussion at the relevant expert roundtable. These papers present the position of the individual refugee law expert. Sometimes a paper advocates one particular interpretation rather than the range of approaches which may exist. The papers do not therefore purport to be a definitive position, but rather are part of a process of taking the debate forward on key issues of interpretation on which opinion and jurisprudence continue to differ. Each paper has been updated in the light of the discussions and major relevant developments since the roundtables and is therefore more comprehensive than the earlier versions posted on the UNHCR website, [www.unhcr.org](http://www.unhcr.org), at the time of the second track of the Global Consultations.

Secondly, each part contains the 'Summary Conclusions' of the expert roundtable concerned which reflect the tenor of the discussion at the roundtable. These do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion on the issue under consideration. Finally, each part contains a list of participants at the roundtable. In the interests of ensuring a fruitful and in-depth discussion of the topics, and in view of funding and space constraints, UNHCR was obliged to limit participation in the expert roundtables. Participants were selected by UNHCR on the basis of their experience of and expertise in these issues. In drawing up the lists for the four roundtables, UNHCR's Department of International Protection reviewed the academic literature on the relevant topics, considered names suggested by governments and non-governmental organizations (NGOs), and consulted UNHCR field offices. Care was taken to ensure a diversity of viewpoints by including experts working in government, as well as NGOs, academia, the judiciary, and the legal profession. Regional and gender balance were also taken into consideration. To broaden discussion and draw on an even wider pool of experts, the discussion papers were posted on the UNHCR website for comments, which were received from States, NGOs, and many individuals.

The second track consultations process, including notably the Summary Conclusions, is already feeding into the policy-making process at the international level. Drawing on this process, UNHCR is in the process of revising, updating and publicizing its guidelines on many of the issues discussed at the roundtables. These are being issued as a series of 'UNHCR Guidelines on International Protection', the first two of which were issued in May 2002, followed by the third in February 2003.<sup>10</sup> These Guidelines are issued pursuant to UNHCR's supervisory role under

<sup>10</sup> UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating

its Statute<sup>11</sup> in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. They are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. At the regional level, the Summary Conclusions from the second track roundtable meetings have also begun to feed into discussions in other forums. One example concerns the Council of Europe's Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), as is described in greater detail below in section III.C on membership of a particular social group.

### III. The nine different topics of the papers and roundtable Summary Conclusions

This section provides a brief outline of each of the nine topics addressed in the papers and expert roundtable meetings. It identifies the significant new issues and understandings which have resulted from the process of analysis, discussion, and synthesis involved in the second track of the Global Consultations. Where relevant, it draws attention to areas where differing interpretations or approaches persist.

#### A. The scope and content of the principle of *non-refoulement*

Part 2 of this book contains a Legal Opinion by Sir Elihu Lauterpacht QC and Daniel Bethlehem on the scope and content of the principle of *non-refoulement*. It conducts a detailed survey of international and regional human rights and refugee law instruments and standards as they relate to the principle of *non-refoulement*, under both Article 33 of the 1951 Convention and international human rights law, their application by international courts, and their incorporation into national legislation. In our view, this represents a tangible and wide-ranging manifestation of State practice coupled with evidence of *opinio juris*.

Both the Opinion and the Summary Conclusions of the roundtable held in Cambridge, United Kingdom, in July 2001 state that *non-refoulement* is a principle of customary international law.<sup>12</sup> The Declaration of the December 2001 Ministerial

to the Status of Refugees', UN doc. HCR/GIP/02/02, 7 May 2002; UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', UN doc. HCR/GIP/02/01, 7 May 2002; UNHCR, 'Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the "Ceased Circumstances" Clauses)', UN doc. HCR/GIP/03/03, 10 Feb. 2003, available on [www.unhcr.org](http://www.unhcr.org).

11 Statute of the Office of the United Nations High Commissioner for Refugees, A/RES/428 (V), 14 Dec. 1950.

12 See also, e.g., Executive Committee, Conclusion No. 25 (XXXIII), 1982, para. b. A recent article goes as far as to assert that the principle of *non-refoulement* has acquired the status of *jus cogens*.

Meeting mentioned above also affirms the principle of *non-refoulement* as being embedded in customary international law.<sup>13</sup>

The Opinion shows that States' responsibility for their actions encompasses any measure resulting in *refoulement*, including certain interception practices, rejection at the frontier, or indirect *refoulement*, as determined by the law on State responsibility. On this issue, the Opinion brings into the analysis the draft Articles on State responsibility adopted by the International Law Commission of the United Nations on 31 May 2001<sup>14</sup> and endorsed by the General Assembly at the end of that year,<sup>15</sup> demonstrating how they affect State action. Such action may be taken beyond a State's borders or carried out by individuals or bodies acting on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. These actions are frequently carried out at borders far from public scrutiny, beyond borders in other countries, or on the high seas – the prohibition on *refoulement* applies in all such situations.

In their detailed analysis, Sir Elihu and Bethlehem also make a distinction between rejection, return, or expulsion in any manner whatsoever to torture or cruel, inhuman or degrading treatment or punishment, and such measures which result in return to a threat of persecution on Convention grounds. The former draws on principles of international human rights law and allows no limitation or exception. In the case of return to a threat of persecution, derogation is only permissible where there are overriding reasons of national security or public safety and where the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a third country.

See, J. Allain, 'The *Jus Cogens* Nature of *Non-Refoulement*', 13(4) *International Journal of Refugee Law*, 2001, pp. 533–58.

13 The Declaration acknowledged:

the continuing relevance and resilience of this international regime of rights and principles [comprising the 1951 Convention, its 1967 Protocol, other human rights and regional refugee protection instruments], including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.

For the full text of the Declaration, see Part 1.3 of this book.

14 International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', UN doc. A/CN.4/L.602, 31 May 2001. See also, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), ch. 2.

15 In a resolution on 12 Dec. 2001, the UN General Assembly, expressed 'its appreciation to the International Law Commission for . . . the completion of the final draft articles'. See UNGA, 'Report of the International Law Commission on the Work of its Fifty-Third Session', UN doc. A/RES/56/82, 18 Jan. 2002, para. 2.



Since the drafting of the Opinion, the attacks in the United States on 11 September 2001 and their aftermath have led governments to contemplate and/or introduce a range of security measures.<sup>16</sup> Obviously, States have legitimate concerns to ensure that all forms of entry and stay in their territories are not abused for terrorist ends. It is nevertheless essential that more stringent checks at borders, strengthened interception measures, particularly against illegal entrants, and other such measures also include mechanisms to ensure the identification of those with international refugee protection needs. It is therefore, for instance, important that admissibility procedures do not substitute for a substantive assessment of the claim, which could result in the State failing to identify someone in danger of return to persecution.<sup>17</sup>

In the contemporary context, it is worth recalling that the principle of *non-refoulement* also applies with respect to extradition.<sup>18</sup> The 1951 Convention does not in principle pose an obstacle to the extradition and prosecution of recognized refugees in third countries as long as the refugee character of the individual is respected by the third State, as set out in Article 32(2). In this case, the State's obligations towards the refugee would in effect be transferred to the extraditing State. Agreement would therefore need to be reached on return after prosecution has been completed and/or the sentence served (unless of course exclusion, cancellation or cessation arise), so that any danger of indirect *refoulement* is avoided. Extradition requests from the country of origin may, however, be persecutory in intent and therefore require particular scrutiny. If, in a specific case, it is assessed that extradition would amount to return to persecution, prosecution in the country of asylum would be the appropriate response.<sup>19</sup>

Whereas extradition is a response to crimes committed elsewhere, the exception to the *non-refoulement* principle in Article 33(2) of the 1951 Convention could under extraordinary circumstances also come into play in response to crimes committed in the country of refuge. The Convention specifies that refugees have obligations or duties towards the host country. This reflects the necessity that refugees not be

16 See generally, UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection', Nov. 2001.

17 *Ibid.*, paras. 5–9. See also, UNHCR, 'Regional Workshops in Ottawa, Ontario (Canada) and in Macau', UN doc. EC/GC/01/13, 31 May 2001; UNHCR, 'Refugee Protection and Migration Control: Perspectives from UNHCR and IOM', UN doc. EC/GC/01/11, 31 May 2001; UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', UN doc. EC/50/SC/CRP.17, 9 June 2000; UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', above n. 9.

18 See generally, Executive Committee Conclusion No. 17 (XXXI), 1980. The issue is also addressed in the paper on the application of the exclusion clauses by G. Gilbert in Part 7.1 of this book.

19 Where a serious crime has been perpetrated, multilateral conventions, including in the anti-terrorism context, have in recent years stipulated a duty to extradite or prosecute. In the post-September 11 context, there is a danger that the increased tendency to depoliticize offences in the extradition context could make persecution considerations secondary in the overall assessment of cases.

seen, and that refugees do not see themselves, as a category outside or beyond the law. While they are a special category of non-nationals, they are bound by the laws of their host country in the same way as others present on the territory. If they transgress the law or infringe public order in their country of asylum, they are fully liable under the relevant domestic laws. While criminal law enforcement measures do not in principle affect their refugee status, Article 33(2) provides an exception to the principle of *non-refoulement*. This means in essence that refugees can exceptionally be returned on two grounds: (1) in cases of a serious threat to the national security of the host country; and (2) in cases where their proven and grave criminal record constitutes a continuing danger to the community. The various elements of these extreme and exceptional circumstances need, however, to be interpreted restrictively. Any ultimate State action will also need to take account of other obligations under international human rights law.<sup>20</sup>

Article 33(2) recognizes that refugees posing such a danger may be expelled in pursuance of a decision reached in accordance with due process of law. In such situations, the danger to the country of refuge must be very serious. In addition, there must be a rational connection between the removal of the refugee and the elimination of the danger, *refoulement* must be the last possible resort to eliminate the danger, and the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*. In such cases, the procedural safeguards of Article 32 apply, including that States should allow a refugee a reasonable period of time to obtain admission to another country. In view of these safeguards, it is also inappropriate to use this exception to the *non-refoulement* principle to circumvent or short-circuit extradition procedures.

These issues have come under scrutiny in the judgment concerning *Suresh* issued by the Supreme Court of Canada in January 2002.<sup>21</sup> The Court accepted UNHCR's argument in its *factum* before the Court that Article 33 of the 1951 Convention should not be used to deny rights that other legal instruments make available to everyone without exception. It concluded that international law generally rejects deportation to torture, even where national security interests are at stake. In a key passage, the Court ruled:

In our view, the prohibition in the ICCPR [International Covenant on Civil and Political Rights] and the CAT [Convention Against Torture] on returning a refugee to face a risk of torture reflects the prevailing international norm.

20 For further information, see Human Rights Committee, 'General Comment No. 15: The Position of Aliens under the Covenant', 1986, UN doc. HRI/GEN/1/Rev/5, pp. 127–9, paras. 9–10; Committee on Migration, Refugees and Demography of the Council of Europe Parliamentary Assembly, 'Expulsion Procedures in Conformity with Human Rights and Enforced with Respect for Safety and Dignity', 10 Sept. 2001; Council of Europe Commissioner for Human Rights, 'Recommendation Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders', CommDH/Rec(2001), 19 Sept. 2001, available on <http://www.commissioner.coe.int/new/dyn/docs.asp?L=2&S=3>.

21 *Suresh v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, [2002] SCC 1, 11 Jan. 2002, available at <http://www.lexum.umontreal.ca/csc-ccc/en/rec/html/suresh.en.html>.

Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a ‘profound concern for refugees’ and its principal purpose is to ‘assure refugees the widest possible exercise of . . . fundamental rights and freedoms’ (Preamble). This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone.<sup>22</sup>

The Court recognized ‘the dominant status’ of the Convention Against Torture in international law as being consistent with the position taken by the Committee Against Torture.<sup>23</sup> It described ‘the rejection of state action leading to torture generally, and deportation to torture specifically’ as ‘virtually categoric’, arguing that ‘both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests’.<sup>24</sup> Such an assessment could appear to represent a stance that is less than the absolute ban on torture set out in the Convention Against Torture and other human rights instruments. It remains to be seen whether national, regional, or international courts will identify cases where the danger to the State outweighs the threat of torture upon return and how such an approach could be reconciled with the absolute ban on return to torture set out in numerous international human rights instruments (shown for some instruments through consistent interpretation by the relevant treaty monitoring bodies).

Most recently, the Council of Europe in May 2002 opened for signature Protocol No. 13 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances.<sup>25</sup> This new Protocol to the Convention, by barring the death penalty even ‘in time of war or of imminent threat of war’ (as is excluded from the Protocol No. 6 ban on the death penalty),<sup>26</sup> may further solidify the current jurisprudential understanding of the scope of *non-refoulement*. Jurisprudence under the European Human Rights Convention has generally dealt with the prohibition on return to torture, inhuman or degrading treatment or punishment under Article 3 of that Convention rather than the death penalty. For its part, the European Commission on Human Rights has ruled that it can be a breach of Protocol No. 6 to extradite or expel a person to another State where there is a real risk that the death penalty will be imposed.<sup>27</sup> The eventual entry into force of Protocol No. 13 may and,

22 Ibid., para. 72. 1966 International Covenant on Civil and Political Rights, 999 UNTS 171; 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc. A/RES/39/46.

23 *Suresh* judgment, above n. 21, para. 73.      24 Ibid., para. 76.

25 European Treaty Series (ETS) No. 187 and, for the Convention, ETS No. 5.

26 28 April 1983, ETS No. 114.

27 *Y. v. The Netherlands*, Application No. 16531/90, 68 Decisions and Reports 299, 1991; *Aylor Davis v. France*, Application No. 22742/93, 76 Decisions and Reports 164, 1994; *Leong Chong Meng v.*

in our view, should have the effect of barring in absolute terms the return of an individual from States Parties to these Protocols to situations where he or she may face the death penalty.

## B. Article 31 of the 1951 Convention Relating to the Status of Refugees: illegal entry

Part 3 of this book addresses the question of the interpretation of Article 31 of the 1951 Convention, which codifies a principle of immunity from penalties for refugees who come directly from a territory where their life or freedom is threatened and enter or are present in a country without authorization, as long as they present themselves to the authorities ‘without delay’ and ‘show good cause’ for their illegal entry or presence. The background paper by Guy S. Goodwin-Gill examines the origins of the text of this Article, its incorporation into national law, relevant case law, State practice, and the Conclusions of the Executive Committee of the High Commissioner’s Programme, as well as international standards relevant to the proper interpretation of Article 31.

Both Goodwin-Gill’s paper and the discussions at the November 2001 expert roundtable in Geneva assess the scope and definition of terms in Article 31(1) including, in particular, ‘coming directly’, ‘without delay’, ‘good cause’, and ‘penalties’. They conclude that it is generally recognized that refugees are not required to have come directly in the literal sense from territories where their life or freedom is threatened. Rather, Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited through other countries or who are unable to find effective protection in the first country or countries to which they flee. There is also general acceptance that asylum seekers have a presumptive entitlement to the benefits of Article 31 until they are ‘found not to be in need of international protection in a final decision following a fair procedure’.<sup>28</sup>

With regard to Article 31(2), this calls upon States not to apply to the movements of refugees within the scope of paragraph 1, restrictions other than those that are ‘necessary’, and only until their status is regularized locally or they secure admission to another country. In order to ensure that they adhere to the standards set out in Article 31(2), States also need to make ‘appropriate provision . . . at the national level to ensure that only such restrictions are applied as are necessary in the individual case, that they satisfy the other requirements of this Article, and that the relevant standards, in particular international human rights law, are taken into

*Portugal*, Application No. 25862/95, 1995; *Alla Raidl v. Austria*, Application No. 25342/94, 1995. See also, N. Mole, *Asylum and the European Convention on Human Rights* (Council of Europe Human Rights Files No. 9 (revised), Strasbourg, 2000), p. 24.

<sup>28</sup> Global Consultations on International Protection, ‘Summary Conclusions – Article 31 of the 1951 Convention’, expert roundtable, Geneva, Nov. 2001, para. 10(g).

account'.<sup>29</sup> Developments in international human rights law mean that any restrictions imposed may be on the basis of an administrative, semi-judicial, or judicial decision, as long as there is an appeal to a judicial body. Participants at the roundtable also agreed that '[t]he power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.'<sup>30</sup>

It is on this basis that the detention of asylum seekers and refugees represents an exceptional measure to be applied in the individual case, where it has been determined by the appropriate authority to be necessary in light of the circumstances of the case. Such a determination needs to be on the basis of criteria established by law in line with international refugee and human rights law. It should therefore not be applied unlawfully nor arbitrarily but only where it is necessary for the reasons outlined in Executive Committee Conclusion No. 44, for example for the protection of national security or public order (for instance, if there is a real risk of absconding). UNHCR's 1999 Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers provide further and updated guidance.<sup>31</sup> Both the Guidelines and the Summary Conclusions affirm generally recognized principles

29 Ibid., paras. 5 and 8. 30 Ibid., para. 11(a).

31 UNHCR, 'Revised Guidelines on the Detention of Asylum Seekers – Revision', 26 Feb. 1999. See also, UNHCR, 'Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice', UN doc. EC/49/SC/CRP.13, 4 June 1999; UNHCR, 'Detention of Asylum-Seekers in Europe', vol. 1 (4), *European Series*, Oct. 1995. In addition to the rights set out in general human rights treaties, relevant standards include the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, Economic and Social Council Res. 663 C (XXIV), 31 July 1957, and 2076 (LXII), 13 May 1977; the 1988 UN 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment'; Commission on Human Rights, 'Report of the Working Group on Arbitrary Detention – Deliberation No. 5 on the Situation of Immigrants and Asylum-Seekers of the Working Group on Arbitrary Detention', UN doc. E/CN.4/2000/4, Annex II, 28 Dec. 1999; Sub-Commission on the Promotion and Protection of Human Rights, 'Resolution on the Detention of Asylum-Seekers', UN doc. E/CN.4/Sub.2/2000/46, 18 Aug. 2000, pp. 66–7. Regional provisions include European Human Rights Convention, Art. 5(1); American Convention on Human Rights 1969, Art. 7(2), OAS Treaty Series No. 35; African Charter on Human and People's Rights 1981, Art. 5, 21 ILM, 58, 1982; Council of Europe, Commissioner for Human Rights, 'Recommendation Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders', ComMDH/Rec(2001)1, 19 Sept. 2001. For guidelines issued at the national level, see US Immigration and Naturalization Service, 'Detention Operations Manual' (containing a complete set of Detention Standards), available at <http://www.ins.gov/graphics/lawsregs/guidance.htm>; Immigration and Refugee Board of Canada, 'Guideline 4: Guidelines on Detention', 12 March 1998, available at [http://www.irb.gc.ca/en/about/guidlines/detention/detention\\_e.htm](http://www.irb.gc.ca/en/about/guidlines/detention/detention_e.htm); Australian Human Rights and Equal Opportunity Commission, 'Immigration Detention Guidelines', March 2000, available at [http://www.hreoc.gov.au/human\\_rights/asylum\\_seekers/index.html#idc.guidelines/](http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html#idc.guidelines/); European Council on Refugees and Exiles (ECRE), 'Research Paper on Alternatives to Detention: Practical Alternatives to the Administrative Detention of Asylum Seekers and Rejected Asylum Seekers', Sept. 1997, available at <http://www.ecre.org/policy/research.papers.shtml>.

concerning families and children, including that children under eighteen ought in principle not to be detained and that, where families are exceptionally detained, they should not be separated.<sup>32</sup>

Although there has been a tendency in some States to introduce or increase the detention of asylum seekers – often apparently in a move to deter future illegal arrivals – there would nevertheless be merit in examining in greater depth alternatives to detention. As both Goodwin-Gill and the expert roundtable note:

Many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint. Before resorting to detention, alternatives should always be considered in the individual case. Such alternatives include reporting and residency requirements, bonds, community supervision, or open centres. These may be explored with the involvement of civil society.<sup>33</sup>

Moves to promote fair but more expeditious asylum procedures, coupled with the prompt removal of those found not to be in need of international protection, can also reduce the need to resort to detention.

Where States do detain asylum seekers, this should not take place in prison facilities where criminals are held. Minimum procedural standards require that there should be a right to review the legality and the necessity of detention before an independent court or tribunal, in accordance with the rule of law and the principles of due process. Such standards also require that refugees and asylum seekers be advised of their legal rights, have access to counsel and to the judiciary, and be enabled to contact UNHCR.<sup>34</sup>

### C. Membership of a particular social group

Part 4 examines the interpretation of the phrase ‘membership of a particular social group’ contained in the Convention refugee definition in Article 1A(2) of the 1951 Convention.<sup>35</sup> This has been the least clear of the persecution

32 ‘Summary Conclusions – Article 31 of the 1951 Convention’, above n. 28, para. 11(f).

33 *Ibid.*, para. 11(g).

34 *Ibid.*, para. 11(i).

35 Art. 1A(2) of the 1951 Convention reads:

For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who: . . .

- (2) . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . .

grounds in the refugee definition,<sup>36</sup> but in recent years it has found its place alongside the other four Convention grounds (race, religion, nationality, and political opinion), allowing for a full application of the refugee definition. Depending on the particular circumstances of the case and the society of origin, many categories of particular social groups have been recognized, including for example subcategories of women, families, occupational groups, conscientious objectors, or homosexuals.

Two approaches have been developed in common law jurisdictions – the ‘protected characteristics’ and the ‘social perception’ approaches. By contrast, in civil law jurisdictions, the reasoning behind particular social group cases tends to be less developed, although the types of group recognized as particular social groups are often similar. The paper by T. Alexander Aleinikoff sets out the development of these two approaches in eight different jurisdictions.

What is known as the ‘protected characteristics’ approach examines whether a group is united by an immutable characteristic or by a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). By contrast, the ‘social perception’ approach examines whether or not a group shares a common characteristic which sets it apart from society at large. This latter approach is particularly strongly developed in Australian jurisprudence, while the former has been more emphasized in Canada, the United Kingdom, and the United States.

Analysis under one or other of these two approaches frequently converges, since groups whose members are targeted on the basis of a common immutable or fundamental characteristic are also often perceived as a social group in their societies. Sometimes, however, the two approaches may come to different conclusions, with the result that protection ‘gaps’ can arise, when either one or another approach is used alone. As Aleinikoff points out, while ‘most “protected characteristics” groups are likely to be perceived as social groups, there may also be particular social groups not based on protected characteristics’.<sup>37</sup> It is on this basis that the ‘social perception’ approach ‘moves beyond protected characteristics by recognizing that external factors can be important to a proper social group definition’.<sup>38</sup>

In order to avoid these protection gaps and to bring interpretation into line with the object and purpose of the 1951 Convention, Aleinikoff’s paper and the Summary Conclusions of the expert roundtable meeting in San Remo, Italy, in September 2001 suggest a combination of the two approaches. This reconciliatory proposition is reflected in UNHCR’s Guidelines on International Protection

36 The ground was added to the Convention refugee definition late in negotiations and does not in fact feature in UNHCR’s 1950 Statute.

37 See the paper by T. A. Aleinikoff in Part 4.1 of this book.

38 Ibid.

on membership of a particular social group released in May 2002. These define a particular social group as:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>39</sup>

In assessing whether an applicant claiming membership of a particular social group fulfils the refugee definition, common law courts and tribunals have generally recognized that the persecution or fear of it should not be the sole factor defining membership, even though it may be relevant in determining the visibility of the group in that society. As stated in one leading case:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.<sup>40</sup>

Similarly, it is widely accepted that an applicant claiming membership of a particular social group does not need to show that the members of that group know each other or associate with one another as a group. Rather, there is no requirement of cohesiveness either in relation to this or any other Convention ground and the relevant inquiry is whether there is a common element that group members share.<sup>41</sup>

In addition to the Guidelines on International Protection mentioned above, the 'second track' Global Consultations on this topic have fed into other processes under way at the regional level. For instance, the Summary Conclusions emerging from the expert roundtable on 'membership of a particular social group' were used as a starting point in discussions on the meaning of the term by a CAHAR working

39 UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group"', above n. 10, para. 11.

40 *Applicant A. v. Minister for Immigration and Ethnic Affairs*, High Court of Australia, (1997) 190 CLR 225 at 264; 142 ALR 331, per McHugh J. Note that some civil law jurisdictions have no problem accepting as a particular social group one that is defined by the persecution it suffers.

41 The judgment in *Secretary of State for the Home Department v. Montoya*, UK Immigration Appeal Tribunal, Appeal No. CC/15806/2000, 27 April 2001, expresses this position as follows: 'It is not necessary to show that the [particular social group] is a cohesive or organised or interdependent group. Cohesiveness is not a necessary condition (nor indeed a sufficient condition) for the existence of a particular social group.' More generally, the judgment draws on the jurisprudence of various common law countries to set out in some detail issues where jurisprudence is settled.



group of the Council of Europe, in Strasbourg on 14–15 March 2002. Various ideas from the Conclusions were also reflected in the working group's recommendations. This is only one example, but the hope in initiating the Global Consultations was very much that the process should feed into other initiatives, whether at an international, regional, or national level, to establish greater common ground and clarity on key contemporary refugee law matters under the 1951 Convention.

#### D. Gender-related persecution

Gender and sex are not specifically referred to in the refugee definition but the understanding of how gender is relevant to refugee law has advanced both in theory and in practice over the past decade. Part 5 examines these issues. It is now widely accepted that 'the refugee definition, properly interpreted, can encompass gender-related claims' and that gender 'can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment',<sup>42</sup> as concluded by the September 2001 San Remo expert roundtable on the issue and as is evident in the jurisprudence of many countries.<sup>43</sup>

Integral to this enhanced understanding is a clear distinction between the terms 'gender' and 'sex'. The UNHCR Guidelines on International Protection on gender-related persecution issued in May 2002 reflect this distinction as follows:

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of

42 Global Consultations on International Protection, 'Summary Conclusions – Gender-Related Persecution', San Remo expert roundtable, 6–8 Sept. 2001, paras. 1 and 3. See also, UNHCR symposium on gender-related persecution held in Feb. 1996 which resulted in a special issue of the *International Journal of Refugee Law*, Autumn 1997; UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10.

43 See R. Haines, 'Gender-related persecution'; A. Edwards, 'Age and gender dimensions in international refugee law'; T. A. Aleinikoff, 'Protected characteristics and social perceptions: an analysis of the meaning of "Membership of a Particular Social Group"', in Parts 5.1, 1.2 and 4.1 respectively of this book. Recent publications include W. Kälin, 'Gender-Related Persecution in Swiss Asylum Law', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002); N. Kelley, 'The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress', 13(4) *International Journal of Refugee Law*, 2001, pp. 559–68; K. Musalo and S. Knight, 'Steps Forward and Steps Back: Uneven Progress in the Law on Social Group and Gender-Based Claims in the United States', 13(1/2) *International Journal of Refugee Law*, 2001 pp. 51–70; T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, 2000); H. Crawley, *Refugees and Gender – Law and Process* (Jordans, Bristol, 2001).

persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex.<sup>44</sup>

Awareness and appreciation of the issues involved has been enhanced by guidelines on gender-related persecution, which have been issued by government agencies and NGOs in a large number of States and which provided a valuable resource in the drafting of the May 2002 UNHCR Guidelines cited above. In some countries, legislation explicitly defines gender-specific persecution as qualifying for refugee status. Sometimes this is done by specifying that the 'membership of a particular social group' ground can include cases involving gender-related persecution.<sup>45</sup> Sometimes legislation states that persecution because of gender and/or sexual orientation can result in the granting of refugee status.<sup>46</sup> In either case, this does not argue for the need of an extra Convention ground per se. Rather, we consider that such specification is added for clarity of interpretation.

The paper by Rodger Haines in this book focuses on how the refugee definition can be interpreted in a gender-sensitive manner in the case of claims made by female asylum seekers. In this respect, it has been instrumental that a vast majority of jurisdictions have recognized that the 1951 Convention covers situations where non-State actors of persecution, including husbands or other family members, inflict serious harm in a situation where the State is unable or unwilling to protect against such harm. As the UNHCR 2002 Guidelines on gender-related persecution state:

What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex . . . There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which

44 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 3. See also, Crawley, *Refugees and Gender*, above n. 43, pp. 6–9.

45 For instance, the Ireland's Refugee Act 1996, section 1, defines membership of a particular social group as including 'persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation'. South Africa's Refugee Act 1998 similarly specifies that members of a particular social group can include persons persecuted because of their gender, sexual orientation, class, or caste.

46 In Switzerland, Art. 3(2) of the 1998 Asylum Act states that 'motives of flight specific to women shall be taken into account'. In Sweden, the Minister of Migration, Asylum and Development Cooperation announced in Jan. 2002 that 1997 legislation would be changed to specify that persons persecuted due to sexual orientation should be given refugee status (rather than complementary protection as previously). In Germany, the Immigration Law approved by the Parliament in March 2002 in section 60 specifically prohibits the *refoulement* of aliens facing persecution because of their gender (in addition to the five Convention grounds).

inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.<sup>47</sup>

These issues are also examined in Part 1.2 of this book in the paper on age- and gender-sensitive dimensions of international refugee law by Alice Edwards.

It is worth recalling that refugee claims based on sexual orientation also contain a gender element. Indeed, such claims have now been recognized in many common law and civil law jurisdictions.<sup>48</sup> As the 2002 UNHCR Guidelines on gender-related persecution note:

A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.<sup>49</sup>

Another issue of particular contemporary concern relates to the potential international refugee protection needs of individuals – particularly women and minors – who are trafficked<sup>50</sup> into forced prostitution or other forms of sexual exploitation. Such practices represent 'a form of gender-related violence or abuse that can even lead to death'.<sup>51</sup> They can be considered a form of torture and cruel or inhuman or degrading treatment and can 'impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents'.<sup>52</sup> Trafficked women and minors may also 'face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination'.<sup>53</sup> Such

47 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 9 (footnotes omitted).

48 European Legal Network on Asylum (ELENA), 'Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status', European Council on Refugees and Exiles, London, Sept. 1997.

49 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 16.

50 A distinction is drawn here between smuggling and trafficking, as is made in the two protocols on these issues supplementing the UN Convention Against Transnational Organized Crime, UN doc. A/55/383, Nov. 2000.

51 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 18; UNHCR, 'Refugee Women', above n. 9, paras. 18–19. See also, A. Edwards, 'Resettlement: A Valuable Tool in Protecting Refugee, Internally Displaced and Trafficked Women and Girls', 11 *Forced Migration Review*, Oct. 2001, p. 31, at p. 34.

52 UNHCR Guidelines, *ibid.* 53 *Ibid.*

considerations have recently led decision makers in some States to recognize certain victims of trafficking as refugees or grant them complementary protection.<sup>54</sup>

Where asylum claims concern gender-related persecution, an assessment of the role of law in the persecution can be particularly important. For instance, a law may be assessed as persecutory in and of itself, but it may no longer be enforced, in which case the persecution may not live up to the well-founded fear standard.<sup>55</sup> Alternatively, even though a law exists prohibiting a persecutory practice, such as female genital mutilation or other harmful traditional practices, the State may still continue to condone or tolerate the practice, or may not be able to stop it effectively. In such cases, the practice would amount to persecution irrespective of the existence of a law aimed at its prohibition.

Considerable challenges nevertheless remain if the decisions and guidelines on gender-related persecution issued in many States are to be understood and implemented consistently. Strengthened training, commitment, and adequate resources are needed to ensure appropriate safeguards and a gender-sensitive environment are both in place and upheld. One key requirement, for instance, is for women to be enabled to make independent and confidential applications for asylum, without the presence of male family members if they so desire. It is also important for female asylum seekers to be offered legal advice and information about the asylum process in a manner and language they can understand. An increase in the number of trained female staff as evidenced in many asylum systems is a noted improvement. As UNHCR has stated, '[w]ithout these minimum safeguards, the refugee claims of women would often not be heard'.<sup>56</sup>

## E. Internal flight, relocation, or protection alternative

From the mid-1980s, a number of countries of asylum have increasingly used the concept known variously as the internal flight, relocation or protection alternative to deny refugee status to claimants who do not have a well-founded fear of persecution throughout the country of origin. This concept, which is addressed in Part 6 of the book, does not explicitly feature in the 1951 Convention, although

54 For examples see the paper by A. Edwards in Part 1.2 of this book.

55 See, *Modinos v. Cyprus*, European Court of Human Rights, Series A, No. 259, 16 EHRR 485, 25 March 1993; and more recently, *Secretary of State for the Home Department v. Z.*; *A. v. Secretary of State for the Home Department*; *M. v. Secretary of State for the Home Department*, English Court of Appeal, conjoined appeal of cases nos. C/2001/2766, C/2001/2520, and C/2001/2325, [2002] EWCA Civ 952, 5 July 2002.

56 UNHCR, 'Refugee Women', above n. 9, para. 15. See also, among others, UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, paras. 35–6; Crawley, *Refugees and Gender*, above n. 43, ch. 10; G. Hinshelwood, 'Interviewing Female Asylum Seekers', *International Journal of Refugee Law*, special issue, 1997, pp. 159–64.

it can be said to be inherent within it.<sup>57</sup> For the forty-two States which are party to the 1969 OAU Refugee Convention, the question of internal flight does not in any case arise, since in addition to reiterating the 1951 Convention refugee definition it specifically includes events prompting flight ‘in either part or the whole of his country of origin’.<sup>58</sup>

Various approaches to the issue have been developed and have in turn been applied inconsistently both among and within jurisdictions. This is why the issue was included in the second track of the Global Consultations and some progress has been made in establishing a common analytical approach to the questions which internal flight or relocation raises. Many aspects of this issue on which there can now be said to exist some common understanding are set out in the Summary Conclusions of the expert roundtable meeting held in San Remo, Italy, in September 2001 and reproduced in Part 6.2 of this book.

These recognize, for instance, that the ‘relevance of considering IPA/IRA/IFA [the internal protection, relocation or flight alternative] will depend on the particular factual circumstances of an individual case’.<sup>59</sup> This may appear obvious, but the corollary is that internal flight or relocation does not represent a procedural shortcut for deciding the admissibility of claims.<sup>60</sup> Rather, there is a need for substantive assessment of claims which raise internal flight questions if these individual circumstances are to be properly assessed.

Another area on which there appears to be a greater measure of agreement is that the complexity of the issues involved in the examination of internal flight or relocation means that this is not appropriately undertaken in accelerated or admissibility procedures. This is the position taken in the European Commission’s 2000 Draft Directive on asylum procedures which allows member States to adopt or retain accelerated procedures for claims suspected of being manifestly

57 See e.g., *Rasaratnam v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada, [1992] 1 FC 706, [1992] 1 FCJ 706 (CA), 1991; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, Canadian Court of Appeal, [1994] 1 FC 589, 10 Nov. 1993.

58 The 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, Art. I(2), defines the term ‘refugee’ as applying:

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. (emphasis added)

59 Global Consultations on International Protection, ‘Summary Conclusions on Internal Protection/Relocation/Flight Alternative’, 6–8 Sept. 2001, para. 1. The term ‘IPA/IRA/IFA’ was adopted at the roundtable meeting to acknowledge the different terms used to describe this notion. The exact label used is less important than the holistic assessment of the circumstances of each individual case.

60 UNHCR, ‘Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-called “Internal Flight Alternative” or “Relocation Principles”)', Feb. 1999, paras. 2 and 18.

unfounded but explicitly excludes internal flight cases from consideration under such procedures.<sup>61</sup> This represents a positive change from the (non-binding) London ‘Resolution on Manifestly Unfounded Claims’ approved by European Community Immigration Ministers in 1992 which considered internal flight cases to be manifestly unfounded and declared that they could be assessed under admissibility or accelerated procedures.<sup>62</sup> On this basis, cases involving a possible internal flight/relocation alternative properly need to be considered under the regular asylum procedure.

There is also general recognition (despite some earlier jurisprudence to the contrary)<sup>63</sup> that where return to an alternative region is under consideration the assessment should be forward-looking and examine the situation of the individual upon return. In any such assessment, the original reasons for flight are naturally likely to be indicative of any potential serious difficulties the individual might face if returned. Similarly, there is acknowledgment of the need for actual, physical, safe, and legal accessibility of a specific alternative location.

Differences remain, however, as to the relevance of the agent of persecution – particularly in cases involving non-State actors – where internal flight or relocation questions arise, and as to the conceptual ‘home’ for the analysis of whether internal flight or relocation is possible. There is also a need for greater clarity regarding the proper application of the ‘reasonableness’ test used in the majority of jurisdictions to assess the viability of the area of relocation.

In our view, the question of whether or not the agent of persecution is the State or a non-State actor is significant in internal flight or relocation cases. The need to examine a putative internal flight or relocation alternative is only relevant where the fear of persecution is limited to a specific part of the country, outside of which the feared harm cannot materialize. As noted by UNHCR in its 2001 paper on interpreting Article 1: ‘In practical terms, this excludes virtually all cases where the feared persecution emanates from or is condoned or tolerated by State agents, as these are normally presumed to exercise authority in all parts of the country.’<sup>64</sup> Such State agents will generally also include local and regional government authorities,

61 European Commission, ‘Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, COM(2000) 578 final, 20 Sept. 2000, Art. 28(2)(a). The amended proposal for a Council Directive on this issue presented by the Commission on 18 June 2002, COM(2002) 326 final, p. 15, reorders the provisions on manifestly unfounded applications, and the explanatory memorandum explains that as a result former Art. 28(2)(a) ‘is no longer necessary’. The position would thus appear not to have changed from that taken at the first draft.

62 EC Council of (Immigration) Ministers, ‘Resolution on Manifestly Unfounded Applications for Asylum’, 30 Nov.–1 Dec. 1992, para. 7. See R. Plender (ed.), *Basic Documents on International Migration Law* (Martinus Nijhoff, The Hague, 1999), pp. 474–7.

63 See, H. Storey, ‘The Internal Flight Alternative Test: the Jurisprudence Re-examined’, 10 *International Journal of Refugee Law*, 1998, p. 499, at pp. 509–11.

64 UNHCR, ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’, April 2001, para. 13 (footnotes omitted).

since they derive their authority from the national government. By contrast, where the fear emanates from non-State actors, consideration of internal relocation will more often be relevant.

With regard to the question of the proper conceptual ‘home’ within the refugee definition for the assessment of any potential internal flight or relocation alternative, there are different approaches. One views this as part of the analysis of the existence of a ‘well-founded fear’ of persecution for a Convention reason. Another regards it as part of the analysis of whether the asylum seeker is ‘unable, or . . . unwilling to avail himself [or herself] of the protection of that country’.

The latter approach is adopted by the ‘Michigan Guidelines on the Internal Protection Alternative’ issued in April 1999,<sup>65</sup> and is presented in this book in the paper by James C. Hathaway and Michelle Foster. It has been adopted by the New Zealand Refugee Status Appeals Authority. This proposes a two-stage approach which first ascertains the risk of persecution for a Convention reason in at least one part of the country and then determines the individual’s inability or unwillingness to avail him or herself of the protection of the country of origin on the basis of an assessment as to whether the asylum seeker has access to meaningful internal protection against the risk of persecution. Hathaway and Foster then identify four steps to assess whether an internal protection alternative (IPA) is available:

First, is the proposed IPA accessible to the individual – meaning access that is practical, safe, and legal? Second, does the IPA offer an ‘antidote’ to the well-founded fear of being persecuted shown to exist in the applicant’s place of origin – that is, does it present less than a ‘real chance’ or ‘serious possibility’ of the original risk? Third, is it clear that there are no new risks of being persecuted in the IPA, or of direct or indirect *refoulement* back to the place of origin? And fourth, is at least the minimum standard of affirmative State protection available in the proposed IPA?<sup>66</sup>

The more common approach favours a holistic analysis of the refugee claim, in which the different elements of the refugee definition are seen as an interrelated whole.<sup>67</sup> It is only by ascertaining the nature of the persecution feared, including in particular who the agent of persecution is, that it will become clear whether or not internal flight is relevant. If it is, a clear understanding of the nature of the well-foundedness of the feared persecution is intrinsic to an assessment of the viability of any alternative location in the country of origin.

In the understanding of this approach, the conceptual home of the assessment of an internal flight possibility is considered to be part of the examination of the

65 See J. C. Hathaway, ‘The Michigan Guidelines on the Internal Protection Alternative’, 21(1) *Michigan Journal of International Law*, 1999, p. 131, available on <http://www.refugeecaselaw.org/Refugee/guidelines.htm>.

66 See the paper by J. C. Hathaway and M. Foster in Part 6.1 of this book.

67 See also section IV of this introduction below.

well-foundedness of the feared persecution element of the refugee definition.<sup>68</sup> Locating the analysis of any putative alternative flight or relocation area here – far from providing ‘a basis for pre-emption of analysis of risk in the place of origin altogether’ as Hathaway and Foster argue in their conclusion – ensures that any assessment of risk in an alternative location draws on a clear understanding of the validity and basis for the well-founded fear in the area of origin. Such an understanding is thus a crucial element in the effective assessment of whether that – or indeed another – well-founded fear of persecution (whether or not for a Convention reason) or a fear of being forced back to the place of origin exists in the proposed alternative location.

A key tool under this approach in internal flight or relocation cases is whether it is reasonable for the asylum seeker concerned to establish him or herself in the proposed alternative location. This ‘reasonableness test’, which involves an assessment of the risk of future persecution and whether relocation would expose the individual to undue hardship, has been adopted by the great majority of jurisdictions as the appropriate test in such cases.<sup>69</sup> More generally, the concept of reasonableness is widely understood and applied in other areas of law. Such a test does not in the authors’ view ‘justify] the imposition of what amounts to a duty to hide (for example, by suppressing religious or political beliefs)’.<sup>70</sup> On the contrary, to make such a presumption would be exactly that – unreasonable, not to mention also contrary to basic human rights norms and therefore a misapplication of both the reasonableness test and international law.

For their part, Hathaway and Foster reject the reasonableness test ‘in favour of a commitment to assess the sufficiency of the protection which is accessible to the asylum seeker there [in the proposed alternative location]’. Indeed there are elements of reasonableness in Hathaway and Foster’s proposed four steps (particularly steps three and four). For instance, does the return of someone to an uninhabitable desert represent return to a location where the minimum standards of affirmative State protection are not met or is it simply unreasonable? Hathaway and Foster themselves suggest that the result is much the same.

Yet there remains a significant difference between the two approaches. Indeed, requiring assessment of whether the State is able and willing to provide protection to the individual concerned in every case, as in the Michigan Guidelines, effectively

68 This is also the position adopted by A. Fortín, ‘The Meaning of “Protection” in the Refugee Definition’, 12 *International Journal of Refugee Law*, 2001, pp. 548–76.

69 Among those countries adopting the reasonableness test in some form are Australia, Austria, Canada, Germany (in some cases), the Netherlands, Sweden, the United Kingdom, and the United States. Other jurisdictions, apart from the New Zealand Refugee Review Tribunal, adopt various different tests to determine if an internal flight/relocation possibility exists. For further details, see European Legal Network on Asylum, ‘The Application of the Concept of International Protection Alternative’ (research paper, European Council on Refugees and Exiles, London, 2000).

70 See Hathaway and Foster, conclusion of their paper in Part 6.1 of this book.



adds an additional criterion to the refugee definition. As mentioned above, it is rather in cases involving non-State agents of persecution that a need to examine whether there is a lack of protection arises.

Perhaps the difficulties in defining reasonableness exist because conditions in the country of origin and asylum may differ radically. These differences go to the core of global inequities resulting from instability and conflict, economic inequalities, the imperfect realization of human rights norms, and varying cultural expectations in different parts of the world. Fundamental human rights norms are nevertheless an important yardstick in any assessment of reasonableness, both of whether a well-founded fear would subsist in the alternative location and of whether relocation is practically sustainable in economic and social terms.

The reasonableness test contrasts with the fourth step set out by Hathaway and Foster in their paper. The latter views it as sufficient for the purposes of relocation that the minimum standards of affirmative State protection as set out in Articles 2–33 of the 1951 Convention are deemed to be upheld. This appears to imply that relocation of an individual is a valid consideration where only these minimum rights are respected and to ignore that States have obligations under the international human rights instruments to afford a considerably more comprehensive range of rights to those under their jurisdiction. The effect would appear to be a restrictive understanding of the rights States are obliged to guarantee, which could have the rather incongruous result that a persecuted person would not appear to be entitled to the same level of protection as a fellow citizen.<sup>71</sup>

In effect, the Hathaway–Foster approach seems to equate the responsibility of States to guarantee and safeguard the rights and freedoms of their own citizens, and in particular those who are forcibly displaced within their territories, with the concept of international refugee protection. Recognizing the potential for misunderstanding different notions of protection and its ensuing dangers, the drafters of the Guiding Principles on Internal Displacement<sup>72</sup> were mindful of the need to ensure that there be no specific status attached to internally displaced persons (IDPs). While parallels to refugee law were drawn in certain respects, the drafters were aware of the danger that confining IDPs to a closed status could potentially undermine the exercise of their human rights in a broader sense.

As mentioned above, another standard applied includes the concept of undue hardship, which is broader, since it includes examination of the infringement of fundamental human rights.<sup>73</sup> While there is general agreement that conditions in

71 See, N. Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?', 14 *International Journal of Refugee Law*, 2002, p. 4.

72 'Guiding Principles on Internal Displacement', addendum to report submitted to the Commission on Human Rights by the Representative of the Secretary-General for Internally Displaced Persons, Francis Deng, UN doc. E/CN.4/1998/53/Add.2, 11 Feb. 1998.

73 See e.g., the leading *Thirunavukkarasu* case, above n. 57, and *R. v. Secretary of State for the Home Department and another, ex parte Robinson*, English Court of Appeal (Civil Division), [1997] 4 All ER

the alternative location should allow the individual concerned to lead a relatively normal life in the context of the country concerned, consensus is lacking when it comes to questions of access to employment, accommodation, or social assistance. Given the divergence in the implementation of economic and social rights in particular in different States around the world, this is where the reasonableness approach recommended in paragraph 91 of the UNHCR *Handbook*<sup>74</sup> comes into play.

One approach proposed by the legal practitioner Ninette Kelley has been to adopt ‘a human rights-based approach to “reasonableness”’.<sup>75</sup> She suggests that, if it is found that there is a reasonable chance the persecutor will not persecute the asylum seeker in the alternative location, it should be determined ‘whether meaningful protection is otherwise available in that area’. She proposes that the appropriate benchmark for such a determination should be ‘whether the claimant’s basic civil, political, and socio-economic human rights, as expressed in the refugee Convention and other major human rights instruments, would be protected there’.<sup>76</sup> This would not result in too formulaic a framework and would at the same time avoid too loose an interpretation of the ‘reasonableness’ criteria.

In the light of these considerations, the intention in the UNHCR Guidelines on International Protection on the internal flight or relocation alternative currently in preparation is to provide clearer guidance on these and related issues, by drawing on recent discussions and developments to flesh out the guidelines first produced in February 1999. Further clarification as to how the reasonableness test should be applied will it is hoped assist the majority of States that apply this test to do so more fairly and consistently.

## F. Exclusion

Part 7 of the book addresses the exclusion clauses contained in Article 1F of the 1951 Convention. The proper application of the exclusion clauses has been an issue of concern for some time.<sup>77</sup> This is so both in the context of the identification and exclusion of *génocidaires* from among the refugees from the Rwandan genocide in 1994 and in the context of industrialized States’ asylum policies and their concern to limit access of those not deserving of refugee protection to the benefits of the 1951 Convention. The proper application of the exclusion clauses

210, 11 July 1997, which both use the phrase ‘undue hardship’. See also, Storey, ‘The Internal Flight Alternative Test: The Jurisprudence Re-examined’, above n. 63, at p. 527.

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

75 Kelley, ‘Internal Flight/Relocation/Protection Alternative: Is it Reasonable?’, above n. 71, at p. 36.

76 *Ibid.* (emphasis added).

77 See e.g., UNHCR, ‘The Exclusion Clauses: Guidelines on Their Application’, 1 Dec. 1996; ‘Exclusion from Protection’, 12 *International Journal of Refugee Law*, special supplementary issue, 2000.

has also come into focus as a result of parallel moves to ensure that perpetrators of major human rights crimes do not enjoy impunity. In particular, such moves include the establishment of the international criminal tribunals for the former Yugoslavia and for Rwanda in the 1990s, and more recently that of the International Criminal Court. Concerns about exclusion have been heightened since the attacks in the United States on 11 September 2001, as States have turned increased attention to these clauses in a move to ensure that terrorists are not able to abuse asylum channels.

The 1951 Convention is very clear on the issue: certain acts are so grave that they render their perpetrators undeserving of international protection and the refugee framework should not stand in the way of serious criminals facing justice.<sup>78</sup> The refugee definition is so framed as to exclude from the ambit of the Convention persons who have committed particularly serious offences. If properly applied, the Convention does not therefore offer safe haven to serious criminals. Indeed, the rigorous application of the exclusion clauses ensures the credibility of individual asylum systems.

When the interpretation and application of Article 1F were discussed at the expert roundtable meeting in Lisbon, Portugal, in May 2001, the participants found that this should take an ‘evolutionary approach’, and draw on developments in other areas of international law since 1951.<sup>79</sup> The meeting examined contemporary understandings of behaviour at the core of the exclusion clauses, while promoting in tandem a sensitive application that takes account of international legal developments in other fields, including notably in the areas of international criminal law, international human rights, and international humanitarian law. The participants also considered the exclusion clauses to be of an exceptional nature and that they should be applied scrupulously and restrictively in view of the potentially serious consequences of exclusion for the individual concerned.

The three different sets of crimes contained in Article 1F are analyzed in greater depth in the paper by Geoff Gilbert. They represent an exhaustive list. They concern an individual who has committed, first, ‘a crime against peace, a war crime, or a crime against humanity’, secondly, ‘a serious non-political crime [committed] outside the country of refuge prior to his [or her] admission to that country as a refugee’, and, thirdly ‘acts contrary to the purposes and principles of the United Nations’.

Interpretation of Article 1F(b) concerning serious non-political crimes has been the area on which State practice varies the most, and is therefore the subject of closest scrutiny. The definition of a ‘serious’ offence needs to be judged against international standards, taking into account factors such as the nature of the act, the actual

78 See UNHCR, ‘Addressing Security Concerns Without Undermining Refugee Protection’, Nov. 2001.

79 Global Consultations on International Protection, ‘Summary Conclusions – Exclusion from Refugee Status’, Lisbon expert roundtable, 30 May 2001, para. 2.

harm inflicted, the form of criminal procedures used, the nature of the penalty and whether most jurisdictions would consider the act in question as a serious crime. Its interpretation is also linked to the principle of proportionality, the question being whether the consequences – eventual return to persecution – are proportionate to the type of crime that was committed. The updated UNHCR Guidelines on International Protection on the application of the exclusion clauses<sup>80</sup> propose that a serious crime refer to a capital crime or a very grave punishable act. This would include homicide, rape, arson, and armed robbery. In relation to the meaning of ‘non-political’, the ‘predominance’ test is used in most jurisdictions to help determine the nature of the crime in question, that is, whether the offence could be considered to have a predominantly political character. The motivation, context, methods, and proportionality of a crime to its objectives are important factors in evaluating its political nature.<sup>81</sup>

One important issue in assessing cases raising exclusion issues is the need to maintain a clear distinction between Article 1F and other Articles of the Convention, including in particular Article 33(2). The latter concerns the future risk that a recognized refugee may pose to the host State. It involves the withdrawal of protection from *refoulement* for refugees who pose a serious danger to the community in the host State, for example, as a result of particularly heinous crimes committed there and their potential for repetition. With respect to the interpretation of the term ‘danger to the security of the country’, the Supreme Court of Canada, in its January 2002 judgment in the *Suresh* case, stated that ‘[t]he threat must be “serious”, grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm’.<sup>82</sup>

Exclusion and expulsion remain two different processes, although States in their practice generally emphasize the desire to expel or remove excluded persons from their territory, rather than resort to prosecution. In some cases, this may create a tension with applicable international human rights law.<sup>83</sup> With the increasing expansion of international and universal criminal jurisdiction, this problem may become progressively resolved.

The complexity of the issues exclusion cases raise is a key reason for their examination to be maintained in the regular asylum procedure, or in the context of a specialized exclusion unit, rather than at the admissibility stage or in accelerated

80 UNHCR, ‘Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees’, forthcoming 2003.

81 One case considered on appeal providing further clarification on the interpretation of the term ‘serious non-political crime’ and adjudicated since the completion of the paper by G. Gilbert concerns *Minister for Immigration and Multicultural Affairs v. Daljit Singh*, High Court of Australia, [2002] HCA 7, 7 March 2002.

82 *Suresh v. Canada (Minister of Citizenship and Immigration)*, above n. 21 and analysis in the text there.

83 For relevant international human rights law provisions applying *non-refoulement* as a component of the prohibition on torture or cruel, inhuman, or degrading treatment, see the paper by Lauterpacht and Bethlehem in Part 2.1 of this book, paras. 6–10.

procedures. This ensures an individualized decision is made in keeping with due process standards by a competent authority with appropriate expertise in refugee and criminal law. Obviously, the question of the applicability of the exclusion clauses does not arise in each and every asylum case. While there is no need for a rigid formula requiring separate, consecutive consideration of inclusion and exclusion factors, the reasons why refugee protection may be needed as well as reasons why the claimant may not deserve it need to be considered together in a holistic assessment. It would be possible, for instance, for exclusion to come first in the case of indictments by international tribunals in clear-cut Article 1F(c) cases or in the case of appeal proceedings where the focus of the examination lies on the applicability of the exclusion clauses.

## G. Cessation

Like exclusion, the cessation clauses contained in Article 1C of the 1951 Convention and examined in Part 8 of this book have come under increased scrutiny in recent years. In part, this has resulted from the ending of a number of refugee situations after the end of the Cold War, as well as from a concern to realize durable solutions especially in the context of protracted refugee situations, and from the evolution of standards for and a stress on voluntary repatriation as the durable solution sought by the majority of refugees. While not necessarily the same, cessation in the context of large-scale influxes and the ending of temporary protection caused considerable debate in the 1990s.

Against this background, the paper by Joan Fitzpatrick and Rafael Bonoan<sup>84</sup> examines the experience and proper application of the cessation clauses. These concern both Article 1C(1)–(4) of the 1951 Convention based on a change in personal circumstances – re-availment of national protection, re-acquisition of nationality, acquisition of a new nationality, and re-establishment in the country of origin – as well as those based on ceased circumstances under Article 1C(5)–(6). In relation to the former, Fitzpatrick and Bonoan identify ‘voluntariness, intent and effective protection’ as crucial in any assessment and stress the importance of ‘careful analysis of the individual’s motivations and of assessment of the bona fides and capacities of State authorities’.

It is, however, on ceased circumstances cessation that States have focused particular attention, even though they have generally rarely invoked these clauses. This

84 This paper has been drawn together from two separate papers by these authors, which were presented at the expert roundtable on cessation in Lisbon in May 2001: J. Fitzpatrick, ‘Current Issues in Cessation of Protection under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention’; R. Bonoan, ‘When is Protection No Longer Necessary? The “Ceased Circumstances” Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973–1999’.

has been not least because of the administrative costs involved, the possibility that an individual may in any case be entitled to remain with some other status, and/or a preference for naturalization under Article 34 of the 1951 Convention. Indeed, cessation is not to be equated with or viewed as triggering automatic return. It can, for instance, also be an administrative formality whereby responsibility is transferred from the authorities dealing with refugee matters to another department within a government dealing generally with immigration issues.

Drawing on the practice of both UNHCR and States, the background paper and the Summary Conclusions of the expert roundtable held in Lisbon in May 2001 indicate substantial agreement that change in the country of origin needs to be of a 'fundamental, stable and durable character' if the cessation clauses are to be invoked.<sup>85</sup> The Summary Conclusions also recommend that the assessment examining the application of the general cessation clauses should include 'consideration of a range of factors including human security, the sustainability of return, and the general human rights situation', and suggest that refugees themselves be involved in procedures and processes to make such an assessment.<sup>86</sup>

Another issue of contemporary concern is the question of exceptions to any general declaration of cessation. One exception is that on the basis of 'compelling reasons arising out of previous persecution' as referred to in Article 1C(5) and (6). This is now well established in State practice as extending beyond the actual terms of this provision to apply to refugees under Article 1A(2) of the 1951 Convention. In such circumstances, the best State practice in keeping with the spirit of the Convention allows for the continuation of refugee status, although States sometimes accord such individuals subsidiary statuses, which may not necessarily provide a secure legal status or preserve 'previously acquired rights' as stipulated by the Executive Committee.<sup>87</sup> Other exceptions involve those for whom return is prohibited under human rights treaties, including those who would suffer serious economic harm if repatriated. There may also be strong humanitarian reasons for not applying cessation to refugees whose long stay in the host country has resulted in strong family, social, and economic ties. This exception is recognized in State practice through the granting of long-term residence status to such individuals.

Cessation in relation to situations of mass influx which overwhelm individual asylum processes has also been an area where States have sought to develop practice, including notably in the European Union's Directive on temporary protection approved in August 2001.<sup>88</sup> Where access to the asylum procedure has been

85 Executive Committee, Conclusion No. 69 (XLIII) 1992, para. b.

86 Global Consultations on International Protection, 'Summary Conclusions – Cessation of Refugee Status', Lisbon expert roundtable, 3–4 May 2001, paras. 10 and 12.

87 Executive Committee, Conclusion No. 69, above n. 85, para. e.

88 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L212/12, 7 Aug. 2001.

suspended for the duration of temporary protection, it is now widely recognized that those affected by the ending of temporary protection must be allowed to apply for asylum if they wish and must also be able to validate compelling reasons arising out of past persecution. A recent example concerns the case of Kosovo Albanian refugees who had fled to Albania between April 1998 and May 1999, whose temporary status was revoked by the Albanian authorities in March 2002. The ending of temporary protection was coupled with the possibility for individuals to apply for asylum. It also provided for assisted repatriation by UNHCR for those wishing to return home.<sup>89</sup>

A final issue where clarity is lacking in the practice of some States concerns the situation where cessation concepts are applied at the stage of procedures to assess asylum claims. This is particularly complex in cases where the individual clearly left the country of origin as a refugee, applied for asylum but his or her case is only examined after a protracted period of time, during which circumstances have changed considerably in his or her country. Where there may be fundamental changes in the country of origin during the course of the asylum procedure, it is the authorities which bear the burden of proving such changes are fundamental and durable.<sup>90</sup>

UNHCR has updated its guidance on the cessation clauses in the light of the discussions which have taken place in the context of the second track of the Global Consultations and the wealth of material UNHCR has received in response to this background paper.<sup>91</sup> The focus of the update will need to be a balanced one – flexible and yet in accordance with the fundamental tenets underlying the rationale of the cessation clauses.

## H. Family unity and refugee protection

Part 9 of the book addresses the scope of the right to family unity and how family reunification can be used to implement that right. The basis for this right is found in Recommendation B of the Final Act of the 1951 Conference of Plenipotentiaries which affirms among others that ‘the unity of the family . . . is an essential right of the refugee’.<sup>92</sup> It is also based on provisions of international human rights

89 Albanian National Commission for Refugees, ‘National Commission for Refugee Revokes the Status of Temporary Protection for the Remaining Kosovars’, press release, 29 March 2002.

90 Global Consultations on International Protection, ‘Summary Conclusions – Cessation of Refugee Status’, above n. 86, para. 27.

91 See above n. 10.

92 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952, Recommendation B. There is no mention of a right to family unity per se in the 1951 Convention itself, except obliquely in Art. 12(2) requiring States Parties to respect ‘rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage’ and in Art. 24 mentioning a right on a par with nationals to family allowances and other related social security as may

and international humanitarian law which apply to all human beings regardless of their status. In the case of refugees, the responsibility to uphold this right falls also in part on the country of asylum, since, unlike voluntary migrants, refugees cannot be expected to reunite in their country of origin.

The paper on this topic by Kate Jastram and Kathleen Newland examines the scope of the right to family unity for refugees and asylum seekers in international law. In doing so, it draws not only on relevant State practice and academic literature but also on the experience of UNHCR in the field and with resettlement cases, the latter on the basis of information provided by UNHCR field offices and the resettlement section at UNHCR headquarters in Geneva. The paper gives examples of practical experience and dilemmas faced by UNHCR, for instance, when refugee families seek to reunify.

One issue concerns the question of ‘derivative status’, whereby family members accompanying someone who is recognized as a refugee are also granted refugee status or a similarly secure status with the same rights. In the light of increased awareness of gender-related and child-specific forms of persecution, the Summary Conclusions of the roundtable held in Geneva in November 2001 also affirm that ‘each family member should be entitled to the possibility of a separate interview if he or she so wishes and principles of confidentiality should be respected’.<sup>93</sup>

Moves by States to expel or deport one member of an intact refugee family already in a country of asylum can also affect family unity. In such cases, the State must balance a number of rights and considerations, which restrain its margin of action if it wishes to separate a family. Deportation or expulsion could constitute an interference with the right to family unity unless this is justified in accordance with international standards. The European Court of Human Rights found such an interference in the case of *Amrollahi v. Denmark* (Application No. 56811/00, judgment of 11 July 2002) and set out criteria to be taken into consideration in making such an assessment. The case concerned an Iranian national, who had deserted from the Iranian army and fled to Denmark. Granted first temporary and then permanent residence, he had married a Danish woman with whom he had two children. Upon his conviction for drug trafficking, however, the Danish authorities sought to expel him in the interests of the prevention of disorder and crime and on the grounds that he did not have a well-founded fear of persecution in Iran. The Court found his expulsion to be in accordance with the law but that, since it was *de facto* impossible for him and his family to continue their life together outside Denmark, it would

be offered to nationals. See also at the regional level, Council of Europe, Committee of Ministers, Recommendation No. R (99) 23 to member States on family reunion for refugees and other persons in need of international protection, 15 Dec. 1999; Council of Europe, Committee of Ministers, Recommendation Rec(2002)4 on the Legal Status of Persons Admitted for Family Reunification, 26 March 2002; European Commission, ‘Amended Proposal for a Council Directive on the right to family reunification’, COM(2002) 225 final, 2 May 2002, ch. V.

<sup>93</sup> Global Consultations on International Protection, ‘Summary Conclusions – Family Unity’, Geneva expert roundtable, Nov. 2001, para. 7.



be disproportionate to the aims pursued and in violation of the right to respect for family life.

The definition of the family towards which the State has obligations is an issue where cultural practices and expectations differ and where State practice varies. As noted in the Summary Conclusions:

The question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors. For the purposes of family reunification, 'family' includes, at the very minimum, members of the nuclear family (spouses and minor children).<sup>94</sup>

In sum, family reunification can be seen as a practical way of implementing the right to family unity, since this can otherwise become disrupted as a result of flight. The Conclusions of the November 2001 expert roundtable in Geneva affirm that '[r]espect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated'.<sup>95</sup> In some cases, where family members are dispersed in different countries of asylum, it may, however, prove difficult to agree on criteria as to where family reunification should ultimately take place. This is an area for further international standard setting. Indeed, if families are kept together or are able to reunite, this greater stability significantly enhances refugees' ability to become self-reliant and thus promotes the full realization of durable solutions.

## I. UNHCR's supervisory responsibility

The question of UNHCR's supervisory role under the UNHCR Statute in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol has received heightened attention in recent years, not least because it was felt that implementation of the 1951 Convention is not adequate or is lacking in many parts of the world and that strengthened international supervision could ensure better norm compliance. Part 10 of this book examines these issues and the paper by Walter Kälin identifies a variety of different contemporary approaches to the monitoring of compliance with international treaties, particularly in the area of human rights. In addition, he outlines a number of supervisory systems which have evolved in other subject areas under the responsibility

94 *Ibid.*, para. 8. For the particular situation of separated children and family unity, see UNHCR, 'Refugee Children', above n. 9, paras. 4–9.

95 'Summary Conclusions – Family Unity', above n. 92, para. 5. See also, UNHCR, 'Refugee Women', above n. 9, paras. 14–17.

of international organizations, including systems evolved by the International Labour Organization, the International Narcotics Control Board, and the Organization for Economic Cooperation and Development. Identifying some of the problems of replicating existing mechanisms, Kälin sets out options both for more radical reforms and for a 'light' version to enhance monitoring of the implementation of the 1951 Convention in a manner that is complementary to UNHCR's own supervisory responsibility. The Summary Conclusions of the expert roundtable held in Cambridge in July 2001 draw on this analysis and also present a number of possible approaches.

As far as UNHCR is concerned, the organization has adopted certain organizational practices, which aim to realize this objective and basic function without jeopardizing operational effectiveness on the ground. Integral to the success of these practices is the organization's capacity to monitor State practice (including jurisprudence), to analyze it, and to intervene where necessary to redress a situation to counter negative developments. These practices, which are widely accepted as extending to a broad range of intervention and advocacy activities have, generally, met with the acquiescence of States whose cooperation is a necessary precondition for the effective exercise of any supervisory function. These practices, coupled with States' acceptance, also form the backdrop to the basic (operational) framework of UNHCR's supervisory role.

A recent example of such practices concerns the consolidation and updating of existing UNHCR guidelines and legal position papers as a series of Guidelines on International Protection, the first of which were issued in May 2002.<sup>96</sup> This more systematic presentation flows directly from the organization's supervisory responsibility. It thus follows a tradition of advising the authorities, courts, and other bodies on the interpretation and practical application of the provisions of international refugee instruments. In a sense, the Guidelines on International Protection, although the outcome of lengthy consultations with many actors across the globe in the context of the second track of the Global Consultations, are but a beginning. The next step is implementation, which requires commitment as well as understanding of the complex issues involved.

UNHCR's supervisory role needs, however, to be strengthened further. In enhancing supervision, it is crucial to bear in mind the lessons learned from the human rights mechanisms where the proliferation of different supervisory mechanisms has led to duplication, compartmentalization, and coordination problems, thus undermining to some extent their effectiveness. This needs to be avoided in the refugee context. Indeed this was very much echoed in a roundtable delegates' meeting held on 13 December 2001 in the context of the Ministerial Meeting in Geneva, which favoured flexible, creative approaches rather than more rigid structures. One proposal made at that time was to resuscitate a reconfigured

96 See above n. 10. *Ibid.* for Guidelines on cessation issued in February 2003.

Sub-Committee on International Protection of the Executive Committee to provide a forum for all the parties most interested in international protection issues to address them in a systematic, detailed, and yet dynamic way.<sup>97</sup> Whatever further model or arrangement finally emerges in the area of international refugee protection, it will need to build on the existing structure (which is UNHCR) and advance the achievements that have already been made.<sup>98</sup>

#### IV. Protection from persecution in the twenty-first century

Over the last fifty years, the development of international refugee and human rights law has helped spearhead a revolution in the overall international legal regime. Before that, the way a State treated its citizens was regarded as an internal matter over which it had sovereign control. If a State violated the rights of foreigners on its territory, the State of nationality could intervene to provide its nationals with diplomatic or consular protection. As for refugees, there was a protection vacuum and it was necessary to create a specific regime of rights for them. The underlying broader international framework of international protection predates the establishment of UNHCR, not least because of the various legal and institutional arrangements that preceded the creation of UNHCR and the adoption of the 1951 Convention.<sup>99</sup> It draws heavily on different sources of international law and has evolved generally over time from the idea of international protection as a surrogate for consular and diplomatic protection to include broader notions of human rights protection.

With the strengthening of these protections, the individual has come to be recognized as the inherent bearer of human rights. The failure or inability of the country of origin to fulfil its responsibility to safeguard human rights has become a matter of international concern and responsibility, even of humanitarian intervention. Today, the institution of international refugee protection, whilst unique in the international legal system, is embedded in the broader international human rights protection regime and also generally linked to effective forms of international cooperation.<sup>100</sup> In recognition of this situation, courts in various jurisdictions have increasingly declared the Convention to be a living instrument capable

97 Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 'Chairperson's Report on Roundtable 1 "1951 Convention and 1967 Protocol Framework: Strengthening Implementation"', 13 Dec. 2001.

98 See also, Agenda for Protection, above n. 8, p. 7; UNHCR, 'The Forum', 20 Oct. 2002; UNHCR, "'Convention Plus': Questions and Answers', 20 Jan. 2003.

99 Indeed, the preamble to the 1951 Convention expressly refers to the desirability of revising and consolidating previous international agreements and of extending 'the scope of and the protection accorded by such instruments'.

100 V. Türk, 'UNHCR's Supervisory Responsibility', 14(1) *Revue Québécoise de Droit International*, 2001, p. 135 at p. 138.

of affording protection to refugees in a changing international environment.<sup>101</sup> Its core elements – the refugee definition and the principle of *non-refoulement* – remain as valid today as ever. They need to be interpreted in the light of these international legal developments, not only when assessing asylum claims but also in related areas such as immigration or extradition.

There continue of course to be varying interpretations in different jurisdictions as to whom international protection should be extended and as to what constitutes persecution under the 1951 Convention. Indeed, the Convention, like other international instruments, does not prescribe specific conduct as long as the required result is reached. This book represents part of a process intended to establish greater common ground in the interpretation of the Convention by States, their courts, and decision makers, as well as to identify areas where further work is needed. Apart from anything else, more consistent interpretation of the Convention in different jurisdictions can be expected to reduce the incentive for onward secondary movement which varying interpretations may represent.

A comprehensive analysis of the different elements of the refugee definition as evidenced in the different jurisdictions is beyond the scope of this overview. It may nevertheless be useful to make some brief observations regarding the core, inter-related issues of fear of persecution and lack of protection in their contemporary context as the Convention embarks upon another half-century.

With regard to the term ‘persecution’, a legal definition of persecution for the purposes of refugee status determination exists neither in the 1951 Convention nor elsewhere in international law.<sup>102</sup> This being said, it is true that persecution is now defined in the 1998 Statute of the International Criminal Court but it is clearly limited there to persecution for the purposes of defining a crime of a particularly serious nature which warrants international criminal jurisdiction and which is one amongst crimes of a similar type contained in the Statute of the International Criminal Court.<sup>103</sup> As such, it does not therefore have any relevance to defining persecution in refugee law. Conversely, though, it is possible to deduce from the various crimes contained in the Statute the conclusion that their victims are often refugees, which would indicate the breadth of the notion of persecution in the refugee law context.

The fact that ‘persecution’ is not legally defined has presented a problem for some and been of legal significance to others. Those for whom this poses a problem have attempted to define it, for instance, as being ‘the sustained or systemic violation of basic human rights demonstrative of a failure of state protection’, or even more

101 See e.g., *R. v. Uxbridge Magistrates' Court and Another, ex parte Adimi*, English High Court (Divisional Court), [1999] Imm AR 560, 29 July 1999; Refugee Appeal No. 71462/99, New Zealand Refugee Status Appeals Authority, 27 Sept. 1999; *R. v. Secretary of State for the Home Department, ex parte Adan*; *R. v. Secretary of State for the Home Department, ex parte Aitseguer (conjoined appeals)*, UK House of Lords, [2001] 2 WLR 143, 19 Dec. 2000.

102 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), p. 66.

103 See Statute, UN doc. A/CONF.183/9\*, Art. 7(2).

simply as serious harm plus the failure of State protection.<sup>104</sup> Recent legislation in Australia<sup>105</sup> as well as the European Commission's Draft Directive on those qualifying for refugee status or other subsidiary protection<sup>106</sup> has also sought to define persecution.

Those who like us consider the lack of definition to be indicative of the deeper rationale behind the very interpretation of persecution see in attempts to define it a risk that could limit a phenomenon that has unfortunately shown itself all too adaptable in the history of humankind. The lack of a legal definition of persecution 'is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term'.<sup>107</sup> As UNHCR's paper on interpreting Article 1 notes:

The on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, expressed in the UNHCR *Handbook*, that persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element. While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself (though particularly egregious forms undoubtedly will be so considered), a persistent pattern of consistent discrimination will usually, on cumulative grounds, amount to persecution and warrant international protection.<sup>108</sup>

Another issue relates to the meaning of the word 'protection' in the phrase 'is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. Some commentators view such protection as referring to the protection of the individual's fundamental rights and freedoms ordinarily provided inside the

104 See J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), pp. 104–5; Refugee Women's Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK*, July 1988, p. 5. This approach has been adopted by courts in various jurisdictions, such as *Canada (Attorney General) v. Ward*, Supreme Court of Canada, [1993] 2 SCR 689; *R. v. Immigration Appeal Tribunal and Another, ex parte Shah*; *Islam v. Secretary of State for the Home Department*, House of Lords, [1999] 2 AC 629; *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, [2002] HCA 14, 11 April 2002, at para. 115.

105 Australian Migration Legislation Amendment Act (No. 6) 2001, Sept. 2001, which amends the Migration Act 1958 so that, among other things, it does not apply Art. 1A(2) of the 1951 Convention in cases where a person has a well-founded fear of persecution 'for one or more of the reasons mentioned in that Article unless: (a) that reason is the essential and significant reason . . . for the persecution; and (b) the persecution involves serious harm to the person; and (c) . . . systematic and discriminatory conduct'. The Act also gives examples of instances of such 'serious harm'.

106 European Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM(2001) 510 final, 12 Sept. 2001, Arts. 11 (the nature of persecution) and 12 (the reasons for persecution).

107 UNHCR, 'Interpreting Article 1', above n. 64, para. 16.

108 *Ibid.*, para. 17 (footnotes omitted). See also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), paras. 50–3.

country of origin. This approach views protection provided by the international community as ‘fundamentally a form of surrogate or substitute protection’ for the national protection States should provide.<sup>109</sup> In this view, ‘in addition to identifying the human rights potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of “persecution” must also comprehend scrutiny of the State’s ability and willingness effectively to respond to that risk’.<sup>110</sup> The case law of a range of common law jurisdictions has attributed considerable importance to this view,<sup>111</sup> although it has also been noted that ‘[t]his somewhat extended meaning may be, and has been, seen as an additional – though not necessary – argument in favour of the applicability of the Convention to those threatened by non-State agents of persecution’.<sup>112</sup>

Other authors, including ourselves, have argued that the protection referred to in the refugee definition refers only to the diplomatic or consular protection available to citizens who are outside the country of origin.<sup>113</sup> Changing its meaning has the danger of importing human rights doctrine (such as exhaustion of local remedies) into the refugee law context in an inappropriate manner and adding *de facto* an additional, more restrictive requirement to the refugee definition, which is at variance with international law. As the UNHCR paper on interpreting Article 1 states:

Textual analysis, considering the placement of this element, at the end of the definition and following directly from and in a sense modifying the phrase ‘is outside his country of nationality’, together with the existence of a different test for stateless persons, suggests that the intended meaning at the time of drafting and adoption was indeed external protection. Historical analysis leads to the same conclusion. Unwillingness to avail oneself of this external protection is understood to mean unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur.<sup>114</sup>

109 Hathaway, *The Law of Refugee Status*, above n. 104, p. 135. 110 *Ibid.*, p. 125.

111 See e.g., *Zalzali v. Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, 27 ACWS 3d 90, 30 April 1991; and, more recently, the judgments of Lord Lloyd of Berwick in *Adan v. Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293 at 304C–E; *Horvath v. Secretary of State for the Home Department*, UK House of Lords, [2000] 3 WLR 379, 6 July 2000.

112 UNHCR, ‘Interpreting Article 1’, above n. 64, para. 36 (footnotes omitted). Most recently, McHugh and Gummow JJ of the Australian High Court found that ‘[t]he “internal” protection and “surrogacy” protection theories as a foundation for the construction of the Convention add a layer of complexity to that construction which is an unnecessary distraction’: *Khawar* case, above n. 104, para. 73.

113 See the *Handbook*, paras. 97–100, with respect to this phrase, which, though they are not explicit on the point, provide only examples relating to diplomatic or consular protection. For a detailed account of the drafting and subsequent history of this element of the definition, see also, Fortin, ‘The Meaning of “Protection”’, above n. 68.

114 UNHCR, ‘Interpreting Article 1’, above n. 64, para. 35 (footnotes omitted). See also, Fortin, ‘The Meaning of “Protection”’, above n. 68.

The UNHCR paper argues that the two approaches are, in effect, not contradictory, adding: ‘Whichever approach is adopted, it is important to recall that the definition comprises one holistic test of interrelated elements. How the elements relate and the importance to be accorded to one or another element necessarily falls to be determined on the facts of each individual case.’<sup>115</sup> Walter Kälin has likewise sought to bridge the gap between these approaches by arguing that the ‘unable to avail himself’ clause of the refugee definition:

has lost much of its original meaning as the function of diplomatic and consular protection has fundamentally changed since the 1951 Convention was drafted. Although such protection remains important in many regards, it has lost its original function of securing basic rights to aliens at a time when international human rights were virtually non-existent . . .

These changes [the emergence of international human rights law] provide strong reasons for an interpretation of the text of Article 1A(2) . . . giving the notion of ‘protection’ in the ‘unable to avail himself’ clause an extended meaning that also covers internal protection. This presents a logical extension of the original idea of the drafters of the 1951 Convention that regarded persecution and lack of protection as the two core requirements of the refugee definition.<sup>116</sup>

In the interest of establishing common ground between these differing interpretations of the term ‘protection’ in the refugee definition, it is also significant that a recent judgment by the High Court of Australia adopted the composite interpretation favoured by UNHCR and Kälin. The Court found that there is both a broader and a narrower sense in which the term protection should be viewed. Gleeson CJ ruled:

[A]ccepting that, at that point of the Article [1A(2)], the reference is to protection in the narrower sense, an inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection in the wider sense, or may be related to a possibility that seeking such protection could result in return to the place of persecution. During the 1950s, people fled to Australia from communist persecution in Hungary. They did not, upon arrival, ask the way to the Hungarian Embassy.<sup>117</sup>

115 UNHCR, ‘Interpreting Article 1’, above n. 64, para. 37.

116 W. Kälin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’, 15 *Georgetown Immigration Law Journal*, 2001, No. 3, pp. 427–8. International law experts have questioned the assertion that developments in international human rights law have rendered diplomatic protection obsolete, thus pointing towards the need for both forms of protection. For its part, the International Law Commission’s ‘First Report on Diplomatic Protection’ warns that ‘[t]o suggest that universal human rights conventions . . . provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy’. See, Special Rapporteur, J. R. Dugard, ‘First Report on Diplomatic Protection’, International Law Commission, 52nd session, UN doc. A/CN.4/506, 9 March 2000, paras. 10–32 at para. 25.

117 *Khawar* case, above n. 104, para. 22.

In a related area – that of non-State agents of persecution – which was a significant issue of contention in the 1990s, efforts to establish an interpretation consistent with the object and purpose of the 1951 Convention have begun to show some positive signs of convergence in State practice. Such cases can relate, for instance, to situations where a State is unwilling to extend protection to certain segments of the population (as recent jurisprudence on gender-related persecution shows) or where it condones/tolerates the persecution of such persons. These cases may also concern persecution in a situation where a State is too weak and hence unable effectively to guarantee respect for human rights throughout its territory. Recent developments in France, Germany, and Switzerland, three key States which had not recognized the concept in all its various permutations, suggest that there is a move towards acceptance that those with a well-founded fear of persecution by non-State actors come within the 1951 Convention refugee definition.<sup>118</sup> Within the European Union, the European Commission's Draft Directive on the refugee definition states clearly that it is immaterial whether the persecution stems from State or non-State actors.<sup>119</sup>

## V. Conclusion

The various aspects of the interpretation of the 1951 Convention examined in this edited collection reveal the breadth of practice and experience in interpreting the 1951 Convention which exists in different jurisdictions. Such variations do not necessarily present problems as long as the obligations contained in the Convention are upheld, although there is of course value in fostering clearer common understandings of interpretative issues, as the papers and documents in this book seek to do. Ultimately, international refugee law is less an exact science than a regime that needs to be responsive to individual circumstances.

In our view, there are dangers in trying to incorporate too rigid and formulaic a framework into the interpretation of the refugee definition. As the High Court of Australia has recognized: 'There are particular components in the relevant definition. However, they must not mislead the decision-maker into atomising

118 See V. Türk, 'Non-State Agents of Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002), pp. 95–109; Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', above n. 115; the contributions by W. Kälin, R. Marx, and M. Combarouno on persecution by non-State agents in International Association of Refugee Law Judges, *The Changing Nature of Persecution*, fourth conference, Berne, Switzerland, Oct. 2000, pp. 43, 60 and 75 respectively, available at <http://www.ark-cra.ch/iarlj/EN/E.cnt.main1.htm>. In Germany, the Immigration Law signed into law by the Federal President on 20 June 2002 specifically states that those persecuted by non-State agents for one of the Convention grounds qualify for refugee status. This law was subsequently rescinded by the Federal Constitutional Court for reasons of formality.

119 European Commission, Proposal for a Council Directive on minimum standards for qualification and status as refugees, above n. 106, Art. 11(2)(a).



the concept in the Convention. It must be considered as a whole.<sup>120</sup> A fixed paradigm cannot take account of the diversity of human experience and ever-changing circumstances. Hence the need for a holistic assessment responsive to the particular situation of the individual concerned. The 1951 Convention provides the broad framework, which is embedded in the overall context of international law, and in particular in international human rights law and international humanitarian law. Executive Committee Conclusions, UNHCR guidelines, and State practice, including jurisprudence, provide more concrete indications as to how individual cases could and should be dealt with – but each case is necessarily unique.

The different topics examined in this book also need to be seen in the context of the broader contemporary refugee challenges outlined briefly at the start of this overview. The effectiveness of international refugee protection in years to come hinges on the ability of States and the international community to address these challenges whether they involve strategies to separate armed elements in refugee camps, to manage complex migration flows, or to realize durable solutions to the plight of refugees. These initiatives are in turn part of the intricate mosaic of international cooperation which needs to be strengthened if the international community is to address wider economic, social, and political problems in refugee-producing countries, global inequities, small arms trade, and so on, which can all lead to the forced displacement of populations within and beyond national borders. To succeed, such international cooperative endeavours require the involvement of all actors, from governments, civil society, international organizations, the legal profession, and NGOs to refugees themselves.

It is in this spirit that the Global Consultations have sought to inject new energy into the development of international refugee protection and thereby counter unwarranted trends at the national and even regional levels. Comprehensive solutions through which the burdens and responsibilities of hosting refugees are more equitably shared ultimately lie at the international level, even though regional cooperation efforts can also serve to strengthen protection. As noted by the chair of the Refugee Affairs Appeal Board of South Africa:

Regional refugee protection schemes have become a trend throughout the world. While there are positive benefits to ensuring that neighbouring countries meet the standards set out in international refugee law, we must be careful not to create regional ‘fortresses’ . . . If implemented properly, regional refugee protection programs in Africa and elsewhere could

120 *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, (2000) 170 ALR 553, (2000) 201 CLR 293, 13 April 2000, para. 53, citing *Applicant A. v. Minister for Immigration and Ethnic Affairs*, above n. 40, (1997) 190 CLR 225 at 257 per McHugh J, who ruled: ‘[A]n instrument is to be construed as a whole and . . . words are not to be divorced from their context or construed in a manner that would defeat the character of the instrument’.

strengthen the rights of refugees while reducing irregular movement and illegal immigration.<sup>121</sup>

From the legal point of view there is a real benefit to be gained from the greater interaction of international refugee law with other branches of the law, including most notably international and regional human rights and international humanitarian law. One example of the importance of such interaction concerns internally displaced persons, who cannot rely on international refugee law since they have not crossed an international border. The 1998 Guiding Principles on Internal Displacement<sup>122</sup> can be seen as ‘a breakthrough in recognizing the importance and value of seeing the relationship between these three branches of international law [international humanitarian, human rights, and refugee law] and drawing on the strengths of each’.<sup>123</sup> Developments in international criminal law in recent years, which have made considerable strides towards bringing perpetrators of crimes against humanity and war crimes to justice, also point towards the possibility of ending impunity for at least some of the crimes which can oblige people to flee.

In conclusion, it is perhaps fitting to remember the context in which the complex legal issues raised in this book operate. What better words to choose than the opening statement at the December 2001 Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol made by President Vaira Vīķe-Freiberga of Latvia, who fled her country as a child after the Second World War:

No one leaves their home willingly or gladly. When people leave their earth, the place of their birth, the place where they live, it means that there is something very deeply wrong with the circumstances in their country. And we should never take lightly this plight of refugees fleeing across borders. They are signs, they are symptoms, they are proof that something is very wrong somewhere on the international scene. When the moment comes to leave your home, it is a painful choice . . . It can be a costly choice. Three weeks and three days after my family left the shores of Latvia, my little sister died. We buried her by the roadside and were never able to return and put flowers on her grave.

And I like to think that I stand here today as a survivor who speaks for all those who died by the roadside – some buried by their families and others not. And for all those millions across the world today who do not have a voice, who cannot be heard. They are also human beings, they also suffer, they also

121 A. Arbee (Chairperson, Refugee Affairs Appeal Board, South Africa), ‘The Future of International Protection’, in *The Changing Nature of Persecution*, above n. 118, p. 271 at p. 274.

122 See above n. 72.

123 R. Brett and E. Lester, ‘Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead’, 83 *International Review of the Red Cross*, Sept. 2001, p. 713 at p. 714. See also, S. Jaquemet, ‘The Cross-Fertilization of International Humanitarian Law and International Refugee Law’, 83 *International Review of the Red Cross*, Sept. 2001, p. 651.

have their hopes, their dreams and their aspirations. Most of all, they dream of a normal life . . .

I entreat you . . . when you think about the problem of refugees to think of them not in the abstract. Do not think of them in the bureaucratic language of ‘decisions’ and ‘declarations’ and ‘priorities’ . . . I entreat you, think of the human beings who are touched by your decisions. Think of the lives who wait on your help.<sup>124</sup>

124 Vaira Vike-Freiberga, President of Latvia and former refugee, opening statement to Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, Geneva, 12 Dec. 2001.

## 1.2 Age and gender dimensions in international refugee law

ALICE EDWARDS\*

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### I. Context

International refugee law has evolved in significant ways over the last fifty years, as it has been required to adapt to new and changing refugee situations and humanitarian challenges. The removal of dateline and geographical limitations by virtue of the 1967 Protocol, and developments in other bodies of international law, have ‘fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses’.<sup>1</sup> The Preamble to the 1951 Convention

\* The views expressed are the personal views of the author, and are not necessarily shared by the UN or UNHCR.

1 See the paper by R. Haines on gender-related persecution in Part 5.1 of this book. For the 1951 Convention Relating to the Status of Refugees, see 189 UNTS 150 and for the 1967 Protocol thereto, see 606 UNTS 267.

calls on States ‘to assure refugees the widest possible exercise of [their] fundamental rights and freedoms’, necessitating an analysis of refugee law within the wider humanitarian and human rights context. International human rights law and international humanitarian law instruments complement the safeguards for refugees enumerated in the 1951 Convention. Importantly, these bodies of law reinforce the non-discriminatory basis of international law in general, which impacts on international refugee law in particular. The text, object and purpose of the 1951 Convention require that it be interpreted and applied in a non-discriminatory way. The codification of women’s and children’s rights has also substantially advanced understandings of equal treatment and equal rights within the international refugee protection framework. Age and gender perspectives have thus become important features of international refugee law over the last decade.

This paper will consider, in particular, Articles 1A(2), 1F and 1C, from these perspectives, thus complementing the other papers in this book. It presents a snapshot of some of the key aspects of refugee status determination which could benefit from age- and gender-sensitive approaches. In so doing, it sets out the evolution of the understanding of the refugee definition to include child-specific forms of persecution, persecution by non-State agents, and claims based on sexual orientation or as a result of being trafficked. It challenges certain preconceptions that have had the effect of denying protection under the 1951 Convention to claims not conforming to the ‘adult male’ standard. These legal issues, which nevertheless fall within the framework of the ‘second track’ of the Global Consultations with its focus on clearer interpretation of the 1951 Convention,<sup>2</sup> are not drawn together elsewhere in the book in this way. Their inclusion here gives them their proper prominence in international refugee law, while also recognizing that such approaches are still under development.

The logical first step to achieving a non-discriminatory application of refugee law is to ensure that age- and gender-sensitive and -inclusive asylum procedures are in place. The importance of equal access to asylum procedures cannot be overstated. This includes the implementation of a myriad of simple measures in order to foster an open and receptive environment. The second step is to adopt age and gender sensitive interpretations of international refugee law. This includes a full understanding of the differential impact of law and its interpretation on women *vis-à-vis* men, on children<sup>3</sup> *vis-à-vis* adults, and on the elderly *vis-à-vis* able-bodied adults. It further requires an understanding of the double impact of age and gender dimensions on some claims, particularly those of young girls. This necessarily entails a clear understanding of the differences between sex and gender. Gender refers to the relationship between women and men based on socially or culturally constructed

2 For further information on UNHCR’s Global Consultations see the Preface and Part 1.1 of this book.

3 ‘Children’ for the purposes of this paper are persons under the age of eighteen years, unless otherwise specified.

and defined identities, status, roles, and responsibilities that are assigned to one sex or another, while sex is a biological determination.<sup>4</sup>

While there has been an overall trend towards recognition of gender-related claims (and less in relation to age-related claims), some States and judiciaries continue to fail to apply a full interpretation of the refugee definition. Not only are age and gender relevant to the identification of types of persecution feared, it is equally important that the entire refugee definition be age and gender inclusive. Notwithstanding the crucial importance of such a focus, the real challenge to refugee status determination is to give true effect to the individualized nature of the inquiry, characterized not only by age and sex, but also by cultural, religious, political, physical, mental, and other factors.

### A. The human rights narrative

At the outset, it is important to reflect on how normative international law, while intending to protect all individuals, may exclude certain persons from the realization of its protective scope on account of its lack of differentiation between the impact of various provisions on different groups or individuals. Some commentators have argued that '[t]he normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined'.<sup>5</sup> The writer, however, finds that it is not the normative structure of international law that has marginalized the rights of women, nor the fact that laws tend to be written in gender-neutral language.<sup>6</sup> The real issue is the gulf between the global purpose of international law to benefit all persons, and the marginalization of women from its ambit. This is mirrored in society at large, with women often finding themselves on the sidelines of society. The application of international law in general and international refugee law in particular has been rooted in the public/private dichotomy, which has often been translated into a male/female and political/apolitical divide.<sup>7</sup> This has not been caused by the law itself, but by social perceptions of the roles and responsibilities of women vis-à-vis men.

It was not until differences in the forms of persecution facing women were identified, and a holistic gender-sensitive and gender-inclusive approach to refugee law

4 See among others, UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol on the Status of Refugees', UN doc. HCR/GIP/02/01, Geneva, 7 May 2002 (hereinafter UNHCR, 'Guidelines on Gender-Related Persecution', 2002), para. 3.

5 H. Charlesworth, C. Chinkin, and S. Wright, 'Feminist Approaches to International Law', in *International Rules: Approaches from International Law and International Relations* (ed. R. J. Beck, A. C. Arend, and R. D. Vander Lugt, Oxford University Press, 1996), p. 265.

6 Except for specific international treaties directly related to women, such as the Convention on the Elimination of Discrimination Against Women 1979.

7 H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001), p. 18.

was promoted, that specific claims of women and other gender claims were recognized as falling within the purview of the 1951 Convention. As Spijkerboer has pointed out, 'derivative persecution' of female asylum seekers on the basis of their family membership is more readily accepted by decision makers than that of direct persecution where the claimant has to establish that she has suffered or fears persecution on a particular Convention ground.<sup>8</sup> The assortment of asylum claims of women in particular rests in gender stereotypes of accepted and 'believed' roles. It is these stereotypes which need to be deconstructed, rather than there being a need to recreate international norms. Anyone who does not conform to the adult male standard is affected by narrow understandings of international law. These stereotypes also affect the claims of children or the elderly or other age groupings, which do not correspond to that standard. For example, children are not readily seen as full members of society, benefiting from rights equal to those of adults. It is an individual right to seek and to enjoy asylum from persecution, which is implicit in the 1951 Convention. Thus, in order to ensure that international refugee law is applied in a non-discriminatory way to all individuals, age and gender approaches are vital components of any analysis.

Developments in refugee protection (outlined below) must be seen within a broader framework of advancements in international human rights law, including, in particular, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and its Optional Protocol,<sup>9</sup> the Declaration on the Elimination of Violence Against Women 1993,<sup>10</sup> the Convention on the Rights of the Child 1989<sup>11</sup> and its Optional Protocols on the Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography,<sup>12</sup> the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995<sup>13</sup> and the follow-up 'Beijing Plus 5' Special Session of the General Assembly,<sup>14</sup> and jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda,<sup>15</sup> as well as the Statute of the International Criminal Court.<sup>16</sup>

8 T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Dartmouth, 2000), as restated in Crawley, above n. 7, p. 19.

9 1249 UNTS 13 and UNGA resolution A/RES/54/4, 6 Oct. 1999.

10 UNGA resolution 48/104, 20 Dec. 1993.

11 UNGA resolution 44/25, 20 Nov. 1989 (hereinafter 'CRC').

12 Both UNGA resolution 54/263, 25 May 2000; entered into force on 12 Feb. 2002 and 18 Jan. 2002 respectively.

13 'Report of the Fourth World Conference on Women, Platform for Action', UN doc. A/CONF.177/20, 17 Oct. 1995.

14 'Women 2000: Gender Equality, Development and Peace in the Twenty-First Century', 23rd Session of the General Assembly, UN doc. A/55/341, 5–9 June 2000.

15 International Criminal Tribunal for the former Yugoslavia (ICTY), judgment in the case of *Kunarac, Kovac and Vukovic*, Case No. IT-96-23 and IT-96-23/1, 22 Feb. 2001, found rape to be a crime against humanity as well as a violation of the laws or customs of war. This judgment was upheld by the ICTY Appeals Chamber on 12 June 2002. See also paper by R. Haines, Part 5.1 of this book.

16 Arts. 7(1)(g) and 8(2)(xxii) of the Statute of the International Criminal Court (ICC) specifically define a 'crime against humanity' and a 'war crime' as including 'rape, sexual slavery, enforced

These measures have advanced global trends towards gender inclusion and equal treatment between the sexes, and have given special attention to children.<sup>17</sup> Human rights law has had the effect of moving predominantly private harm to an act that infringes international human rights law as a result of State tolerance or condonation. As UNHCR's 'Guidelines on Gender-Related Persecution' state:

International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act.<sup>18</sup>

This does not suggest, however, that it is necessary to identify a violation of human rights law in each and every case in order to establish persecution, although persecution will usually involve breaches of human rights law. Prior to the enumeration of women's human rights in international instruments, it cannot be said that rape did not amount to persecution for the purposes of the 1951 Convention. It still existed as a form of persecution. Rather, the international legal framework has helped to move away from male-dominated perspectives and to conceptualize the nature of such violence as a serious human rights violation. Many gender-related claims to refugee status draw on international law or pronouncements of the United Nations in order to support the persecutory nature of the violence in question.<sup>19</sup> As there is no internationally accepted definition of what constitutes 'persecution', it would be unwise to limit its application to serious human rights abuses. It is possible that all forms of persecution have not yet been identified or codified in international human rights law. International human rights law does, however, have a role to play in clarifying some forms of persecution as serious human rights violations. As Jacqueline Bhabha and Wendy Young suggest in relation to children's rights, the 'best interests of the child' principle, as derived from Article 3 of the Convention on the Rights of the Child (CRC), 'operates as

prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. Art. 8(2)(b)(xxii), concerning international armed conflicts, differs slightly from Art. 7(1)(g) in defining other forms of sexual violence as being those 'also constituting a grave breach of the Geneva Conventions'. Art. 8(2)(e)(vi), concerning internal armed conflicts, gives the same list of war crimes except that 'any other form of sexual violence' is defined as one 'constituting a serious violation of article 3 common to the four Geneva Conventions'. Arts. 7(1)(c) and 7(2)(c) further include 'enslavement' as a crime against humanity, with specific reference to trafficking in women and children; Art. 6(d) identifies the imposition of measures intended to destroy, in whole or in part, a national, ethnic, racial, or religious group, by preventing births within the group, as 'genocide', as well as the forcible transfer of children of the group to another group, per Art. 6(e).

17 There is still a large void in relation to the rights of some other groups, such as the elderly and persons with disabilities.

18 UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 9.

19 See, also, P. Goldbert and B. Passade Cissé, 'Gender Issues in Asylum Law after Matter of R.A.', *Immigration Briefings*, Feb. 2000, p. 1.



an interpretative aid [to international refugee law], broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms'.<sup>20</sup> Prior to the adoption and entry into force of the CRC, however, children were still entitled to the enjoyment of rights as individuals under other international instruments.

## B. Recent developments

### 1. Gender

There has been significant progress in relation to the recognition of gender-related claims to refugee status over the last decade. In 1985, the Executive Committee of the High Commissioner's Programme first referred to the fact that 'women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A(2)', although it was left to States' discretion 'in the exercise of their sovereignty' whether or not to do so.<sup>21</sup> In 1990, there was the first mention of providing skilled female interviewers in refugee status determination procedures as well as ensuring access by women asylum seekers to such procedures, 'even when accompanied by male family members'.<sup>22</sup> UNHCR's 1991 'Guidelines on the Protection of Refugee Women' created the impetus for subsequent resolutions, advising that 'special efforts may be needed to resolve problems faced specifically by refugee women',<sup>23</sup> and urging that refugee status determination officials be given training regarding the claims of women asylum seekers.<sup>24</sup> Consequently, in 1993, there was encouragement to States to develop 'appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men'.<sup>25</sup> In October 1995, and again in 1996, 1997, and 1999,<sup>26</sup> the Executive Committee went further and

call[ed] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women ... In

20 J. Bhabha and W. Young, 'Not Adults in Miniature: Child Asylum Seekers and the New US Guidelines', 11 *International Journal of Refugee Law*, 1999, p. 84, at p. 98.

21 Executive Committee, Conclusion No. 39 (XXXVI), 1985, on refugee women and international protection, para. k.

22 Executive Committee, Conclusion No. 64 (XLI), 1990, on refugee women and international protection, para. a(iii).

23 UNHCR, 'Guidelines on the Protection of Refugee Women', Geneva, 1991, para. 4.

24 *Ibid.*, para. 75.

25 Executive Committee, Conclusion No. 73 (XLIV), 1993.

26 See Executive Committee, Conclusions No. 79 (XLVII), 1996, para. o; No. 81 (XLVIII), 1997, para. t; and No. 87 (L), 1999, para. n, respectively.

accordance with the principle that women's rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.<sup>27</sup>

Throughout this period, States began responding to the call for the introduction of safeguards, including the development of guidelines, in order to ensure equitable access to asylum procedures. The United States, Australia, Canada, and the Netherlands were the first States to accept the challenge.<sup>28</sup> UNHCR held a symposium on gender-based persecution in 1996 to examine comparative practices with a view to improving protection for women who fear persecution on gender-related grounds.<sup>29</sup> As a culmination of these developments, judicial reasoning took on new approaches, moving away from paradigms dominated by the experiences of male refugees, and towards a gender-sensitive and gender-inclusive interpretation and application of refugee law that gave equal significance to the sometimes different, although no less serious, forms of persecution feared by women. Case law has recognized a wide range of valid claims, including sexual violence, domestic violence, punishment and discrimination for transgression of social mores, sexual orientation, female genital mutilation, and trafficking, as outlined briefly in the paragraphs which follow.

Rape and sexual violence inflicted by members of the armed forces have been recognized as a ground for refugee status.<sup>30</sup> These decisions have paralleled developments in international human rights law confirming, for instance, that the rape of

27 Executive Committee, Conclusion No. 77 (XLVI), 1995, para. g.

28 US Immigration and Naturalization Service, 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women', 26 May 1995; Department of Immigration and Humanitarian Affairs, Australia, 'Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers', July 1996; Immigration and Refugee Board, Canada, 'Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update', 13 Nov. 1996; and Netherlands Immigration and Naturalization Service, 'Working Instruction No. 148: Women in Asylum Procedures', subsequently superseded by guidelines in the Aliens Circular 2000.

29 'UNHCR Symposium on Gender-Based Persecution, Geneva, 22–23 Feb. 1996', 9 *International Journal of Refugee Law*, special issue, Autumn 1997.

30 See e.g., *Olympia Lazo-Majano v. Immigration and Naturalization Service*, US Court of Appeals (9th Circuit), 813 F.2d 1432, 9 June 1987 (El Salvadorean woman raped by sergeant of Salvadorean armed forces, political opinion); *Matter of D.V.*, US Board of Immigration Appeals, Interim Decision No. 3252, 25 May 1993 (Haitian woman gang-raped by soldiers after fall of Aristide government because of her active membership in a church group supporting that government); *Grajo v. Immigration and Naturalization Service*, 124 F.3d 203 (7th Circuit), 1997; *Fuentes v. Immigration and Naturalization Service*, 127 F.3d 1105 (9th Circuit), 1997; Decision of 7 Sept. 2001, Administrative Court Frankfurt am Main, Ref. No. 1 E 31666/97.A(1); *Raquel Martin de Mejía v. Peru*, Inter-American Commission on Human Rights, Case No. 10.970, Report No. 5/96, 1 March 1996 (Peruvian woman raped by armed forces for alleged membership of guerrilla group, later granted asylum in Sweden). The Center for Gender and Refugee Studies at Hastings College of the Law, University of California, USA, maintains a useful database of decisions on gender-related asylum claims and other relevant material at <http://www.uchastings.edu/cgrs/>.

a 17-year-old female detainee by an official of the State was an especially grave and abhorrent form of ill-treatment and that the accumulation of acts of violence, especially the act of rape, amounted to torture.<sup>31</sup> Similarly, judgments of the international tribunals for the former Yugoslavia and Rwanda confirming enslavement, rape, and torture as crimes against humanity<sup>32</sup> and genocide<sup>33</sup> have further clarified the international legal position regarding such acts. Victims of domestic violence where the State is unable or unwilling to intervene to provide protection have in recent years increasingly also been recognized as refugees, not least as a result of evolving jurisprudence on ‘membership of a particular social group’.<sup>34</sup>

The position adopted by the Executive Committee that ‘women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group”<sup>35</sup> has been accepted in numerous jurisdictions.<sup>36</sup> Again, human rights

31 *Aydin v. Turkey*, European Court of Human Rights, Case No. 57/1996/676/866, 25 Sept. 1997.

32 *Kunarac, Kovac and Vukovic*, above n. 15. See also, *Prosecutor v. Anto Furundzija*, ICTY, Case No. IT-95-17/1-T, 10 Dec. 1998, upheld on appeal 21 July 2000.

33 *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-96-4-T, 2 Sept. 1998.

34 See e.g., *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary of State for the Home Department*, UK House of Lords, [1999] 2 AC 629, [1999] 2 All ER 545 (hereinafter *Shah and Islam*) (two Pakistani women falsely charged with infidelity flee violence by their husbands and severe sanctions under Pakistani law, membership of a particular social group, social mores); *Minister of Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, [2002] HCA 14, 11 April 2002 (Pakistani woman subject to severe domestic violence); *Matter of R.A.*, Interim Decision No. 3403, Board of Immigration Appeals, 11 June 1999 (Guatemalan citizen subject to brutal violence by her husband, membership of a particular social group, political opinion); *Aguirre-Cervantes v. Immigration and Naturalization Service*, US Court of Appeals (9th Circuit), 242 F.3d 1169, 21 March 2001 (19-year-old Mexican girl abused by her father granted status on the basis of ‘family membership’); Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority (RSAA), 16 Aug. 2000 (Iranian woman and son subject to custody battle, cumulative discrimination).

35 Executive Committee, Conclusion No. 39, above n. 21.

36 See e.g., *Shah and Islam*, above n. 34; *Fatin v. Immigration and Naturalization Service*, Court of Appeals (3rd Circuit), 12 F.3d. 1233, 1993 (18-year-old Iranian woman, wearing the *chador* and freedom of expression and equality of the sexes); *Matter of S.A.*, Board of Immigration Appeals, Interim Decision No. 3433, 27 June 2000 (21-year-old Moroccan woman subject to severe physical abuse by her father on account of her differing religious beliefs about the role of women in Moroccan society), cf. *Fisher v. Immigration and Naturalization Service*, 79 F. 3d 955 (9th Circuit), 1996; *Matter of D.*, US Immigration Court, San Francisco, California, 3 July 1996, available at <http://www.uchastings.edu/cgrs/law/ij/9.pdf> (Afghan woman with well-founded fear of persecution on grounds of political opinion and religion); Refugee Appeal No. 71427/99, above n. 34; Refugee Appeal No. 2039/93 *Re M.N.*, New Zealand RSAA, 12 Feb. 1996 (Iranian woman subject to cumulative discrimination amounting to a real chance of persecution on grounds of race, religion, and political opinion at hands of State and male family members); Refugee Appeal No. 2223/94, New Zealand RSAA, 30 July 1996; Refugee Appeal No. 915/92 *Re S.Y.*, New Zealand RSAA, 29 Aug. 1994 (imputed political opinion); *Elkebir*, French *Commission des recours des réfugiés* (CRR, Refugee Appeal Commission), 22 July 1994 (Westernized Algerian woman threatened by Islamic militants, lack of State protection); *Sahraoui*, French CRR, 8 Feb. 1995 (being too Westernized); *Haj Ahmed*, French CRR, 30 Nov. 2000 (divorced woman, raising children on her own

developments have buttressed such interpretations. The European Court of Human Rights has found, for instance, that there was a real risk of the applicant, an Iranian refugee accused of adultery,<sup>37</sup> being subjected to treatment contrary to Article 3 of the European Convention on Human Rights,<sup>38</sup> including potentially death by stoning, if she were returned to Iran.

Other claims of gender-related persecution have included those concerning the practice of female genital mutilation, and refugee status has now been recognized in such cases in a number of jurisdictions.<sup>39</sup> For its part, the European Parliament has expressed the hope that member States of the European Union will recognize the right to asylum of women and girls at risk of being subjected to such treatment.<sup>40</sup> A further recent example of gender-related persecution concerns victims of trafficking, who have in some cases also been granted refugee status.<sup>41</sup>

Initiatives promoting the inclusion of women asylum seekers within refugee status determination processes and gender-sensitive interpretations of refugee law have also had the positive corollary effect of accepting the non-traditional claims of some men who breach social roles attributed to their sex.<sup>42</sup> Just as women who

in Algeria). These issues are also addressed by the Australian High Court in *Khawar*, above n. 34, paras. 52, 123, 134, and 150.

37 *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000.

38 European Convention on the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

39 See e.g. *In re Fauziya Kasinga*, US Board of Immigration Appeals, File No. A73 476 695, 13 June 1996 (19-year-old Togolese woman, FGM and forced marriage); *Annan v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), [1995] 3 FC 25, 6 July 1995; *Soumah*, French CRR, 7 Dec. 2001; A., French CRR, 18 Sept. 1991; *Soumahoro*, French CRR, 17 July 1995, cited in M. Laurain, 'Membership of a Particular Social Group in Recent French Case Law' (paper submitted to the Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), Council of Europe, Strasbourg, doc. CAHAR-PSG (2002) 4 fre, 14 March 2002); Decision No. IFAS 220.268/0-XI/33/00, Austrian Independent Federal Asylum Senate (IFAS/UBAS, second instance asylum authority), Vienna, 21 March 2002 (refugee status granted on basis of membership of the group of Cameroonian women who are to be circumcised).

40 E. V. Martinez-Orozco, 'Report on Female Genital Mutilation', A5-0285/2001, European Parliament, 17 July 2001, p. 13/32.

41 See e.g., Decision No. T98-06186, CRDD No. 298, 2 Nov. 1999 (Thai woman in sex trade debt bondage, refugee status as member of social group of women and/or former sex trade workers); *Dzhygun*, UK Immigration Appeal Tribunal, Appeal No. CC-50627-99 (00TH00728), 17 May 2000 (refugee status of trafficked Ukrainian woman upheld on appeal); Decision No. 99/20/0497-6, Austrian Administrative Court (*Verwaltungsgerichtshof*, 3rd instance), 31 Jan. 2002 (denial of asylum to Nigerian woman trafficked into prostitution overruled and returned for re-consideration).

42 See section II.A.3 below. Cases include *Ourbih*, French CRR (sections réunis (SR)), Decision No. 269875, 15 May 1998 (Algerian transsexuals a particular social group); *Djellal*, French CRR (SR), Decision No. 328310, 12 May 1999; *Aourai*, French CRR, Decision No. 343157, 22 Feb. 2000; *Meguenine*, French CRR, 12 July 2001 (all three cases involving Algerians openly proclaiming their homosexuality), cited in Laurain, 'Membership of a Particular Social Group in Recent French Case Law', above n. 39. See, also, *Re G.J.*, Refugee Appeal No. 1312/93, New Zealand RSAA, 1 NLR 387, 30 Aug. 1995 (Iranian homosexual recognized as member of particular social group,

refuse to wear the veil in some societies are seen as transgressing accepted social mores, male homosexuals, for example, in some societies also find themselves in breach of both gender roles and social rules and are persecuted as a result. The rapidity with which such cases have been seen as falling within the parameters of Article 1A(2) of the 1951 Convention demonstrates dynamic progression towards a correct understanding of the gendered nature of particular claims.

By 2000, there was widespread acceptance that gender can 'influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment',<sup>43</sup> although the Executive Committee continued to express its concern about the 'less than full application of international refugee instruments by some States Parties'.<sup>44</sup> In 1998, Norway introduced guidelines on determining refugee status<sup>45</sup> and, two years later, the United Kingdom introduced guidelines on gender-sensitive approaches to refugee law and procedures.<sup>46</sup> Sweden has introduced two sets of guidelines, one on women and the other on sexual orientation, with a focus on procedural aspects of asylum determination.<sup>47</sup> At the time of writing this paper, however, Sweden has yet to accept that the claims of women or those based on sexual orientation fit within the 'particular social group' ground of the refugee definition, although Sweden has said publicly that legislative changes are in train to correct this.<sup>48</sup> The current Swedish 'Guidelines on Women' do emphasize, however, that 'women's expressions of protest and their refusal to submit are often directed towards social, cultural and religious norms' that are supported by political and religious arms of society. The Swedish 'Guidelines on Sexual Orientation' also refer to contravention of strict religious practices. This hints that such activities can be appropriately classified as political or religious in character for the purposes of

analysis of other jurisprudence on sexual orientation); *Hernandez-Montiel v. Immigration and Naturalization Service*, US Court of Appeals (9th Circuit), No. A72-994-278, 225 F.3d 1084, 24 Aug. 2000 (Mexican 'gay men with female sexual identities' a particular social group); *Matter of Marcelo Tenorio*, US Board of Immigration Appeals (BIA), File No. A72-093-558, 1999; *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, [2000] FCA 211, 6 March 2000. For an overview of cases in Europe, North America, South Africa, Australia, and New Zealand, see European Legal Network on Asylum (ELENA), 'Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status' (European Council on Refugees and Exiles (ECRE), June 1997).

43 UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 6. See also, paper by R. Haines, Part 5.1 of this book.

44 Executive Committee, Conclusion No. 89 (LI), 2000.

45 Royal Ministry of Justice and the Police, 'Guidelines for Determining Refugee Status in Norway', 15 Jan. 1998.

46 UK Immigration Appellate Authority, 'Asylum Gender Guidelines', Nov. 2000.

47 Migration Board, Legal Practice Division, Sweden, 'Gender-Based Persecution: Guidelines for the Investigation and Evaluation of the Needs of Women for Protection', 28 March 2001, and Migration Board, Sweden, 'Guidelines for the Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is Cited as a Ground', 28 Jan. 2002.

48 Statement by the Swedish delegate to the final 'third track' meeting of the Global Consultations on International Protection on refugee women, Geneva, 24 May 2002. Currently, such claimants are granted subsidiary or complementary forms of protection.

the 1951 Convention refugee definition. Several non-governmental organizations have also produced valuable guidance in the absence of State action.<sup>49</sup>

In comparison, Ireland, Panama, South Africa, and Venezuela have opted specifically to identify ‘sex’, ‘gender’, and/or ‘sexual orientation’ as grounds for claiming refugee status.<sup>50</sup> Still other countries have included references to specific forms of gender-related persecution, rather than adding an additional ground. Switzerland, for instance, expressly provides in legislation that the ‘motives of flight specific to women shall be taken into account’.<sup>51</sup> Guatemala refers to sexual violence and other gender-based persecution.<sup>52</sup> Germany prohibits *refoulement* of aliens facing persecution because of their gender, in addition to *refoulement* of those facing persecution on one or more of the Convention grounds.<sup>53</sup> In 1995, the Austrian Ministry of the Interior issued an order specifying that ‘on the basis of the [1951] Geneva Convention and the 1991 Asylum Law, rape, just like any other violation of a person’s integrity, is a ground for asylum, provided that it was motivated by one of the reasons enumerated in the [1951] Geneva Convention’.<sup>54</sup> A correct interpretation of the refugee definition does not, however, require that another ground be added.<sup>55</sup> Nonetheless, it is clear that specific reference to ‘sex’ or ‘sexual orientation’ within the law has the effect of removing any remaining doubt that persons facing gender-related persecution are protected by the 1951 Convention.

UNHCR, throughout its Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention, adopted a gender- and age-inclusive approach. In addition, States Parties urged that separate agenda items on refugee women and on refugee children be included in relation to the ‘third track’ of the Consultations.<sup>56</sup> Within the documentation on refugee women,

49 See, e.g., ECRE, ‘Position on Asylum Seeking and Refugee Women’, Dec. 1997; Refugee Women’s Legal Group, ‘Gender Guidelines for the Determination of Asylum Claims in the UK’, July 1998; National Consortium on Refugee Affairs, South Africa, ‘Gender Guidelines for Asylum Determination’, 1999; Irish Refugee Council, ‘Guiding Principles on Asylum-Seeking and Refugee Women’, June 2001.

50 The 1996 Irish Refugee Act, section 1, defines membership of a particular social group as including ‘persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation’; Panamanian Executive Decree No. 23, 10 Feb. 1998, Art. 5, includes ‘gender’; the 1998 South African Refugee Act specifies that members of a particular social group can include persons persecuted because of their ‘gender, sexual orientation, class or caste’; the National Assembly of Venezuela, Decree of 3 Oct. 2001, Art. 5, adds the ground of ‘sex’ to the refugee definition.

51 1998 Asylum Act, Art. 3(2).

52 Government Accord No. 383-2001, Guatemala, 14 Sept. 2001, Art. 11(d).

53 Immigration Law, section 60, signed into law by Federal President, June 2002.

54 Order of the Austrian Ministry of Interior, No. 97.101/10/SL III/95.

55 See UNHCR, ‘Guidelines on Gender-Related Persecution’, 2002, above n. 4, para. 6; and Global Consultations, ‘Summary Conclusions – Gender-Related Persecution’, San Remo expert roundtable, 6–8 Sept. 2001, para. 1.

56 UNHCR, ‘Refugee Women’, Global Consultations on International Protection, UN doc. EC/GC/02/8, 25 April 2002, Parts V and VI; and UNHCR, ‘Refugee Children’, UN doc. EC/GC/02/9, 25 April 2002.

a section was dedicated to the continuing need for gender-sensitive interpretation and -application of refugee law. A section on trafficking also highlighted the particular vulnerabilities of refugee women as targets of trafficking rings, in addition to finding that some trafficked persons may be able to mount valid claims to refugee status, where the State has been unable or unwilling to protect them against such forms or threats of harm.<sup>57</sup> As indicated in the Introduction in Part 1.1 of this book, the second track specifically included gender-related persecution as a separate discussion at the expert roundtable in San Remo, 6–8 September 2001.

## 2. Age

Less has been said in relation to the age dimension in the interpretation and application of international refugee law. Like sex and sexual orientation, age is not included in the refugee definition in Article 1A(2) of the 1951 Convention as a specific ground for seeking asylum. Nonetheless, the range of potential claims with an age dimension is broad, including forcible or under-age recruitment into military service,<sup>58</sup> family or domestic violence,<sup>59</sup> infanticide, forced or underage marriage,<sup>60</sup> female genital mutilation,<sup>61</sup> forced labour, forced prostitution, child pornography, trafficking,<sup>62</sup> and children born outside of strict family planning rules.<sup>63</sup> Although refugee children are entitled to access the same protection as refugee adults, their special vulnerabilities require that an age-sensitive approach be adopted in relation to substantive aspects of refugee law as well as procedures. If not, the risk of failing to recognize child-specific forms of persecution or underestimating the particular fears of children is high. Age-sensitive approaches are particularly relevant to children, although they are also important for the elderly, who may, for example, suffer severe discrimination (including exclusion) amounting to persecution.

The claims of many children often incorporate a gender element. For example, young girls, as opposed to adult women, are most likely to be threatened with female genital mutilation. Thus, such cases necessarily import both an age and a gender dimension which are often overlooked. Is the girl at risk of persecution based on

57 UNHCR, 'Refugee Women', above n. 56, Parts V and VI.

58 See, *Minister for Immigration and Multicultural Affairs v. Applicant Z.*, Federal Court of Australia, [2001] FCA 1823, 19 Dec. 2001, in which an appeal was dismissed, finding that 'able-bodied Afghan men' do not constitute a 'particular social group'.

59 Decisions Nos. U95-00646, U95-00647, U95-00648, CRDD, 15 Jan. 1997, 67 *Reflex*, 26 May 1997 (principal claimant a 12-year-old citizen of both USA and UK, persecution based on sexual abuse by British father), see below n. 93 for appeal to the Federal Court of Canada (Trial Division). Decision No. TA0-05472, CRDD, 30 May 2001 (teenage unaccompanied minor subject to physical abuse by his father and verbal abuse by both parents in Poland).

60 See *Re W. (Z.D.)*, CRDD No. 3, No. U92-06668, 19 Feb. 1993.

61 See, by way of comparison, the cases mentioned above n. 39.

62 See, by way of comparison, the cases mentioned above n. 41.

63 See *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, [2000] HCA 19, (2000) 170 ALR 553, 13 April 2000.

her sex, as a girl, or her age, as a young girl, or both? Are young boys who flee forcible recruitment being persecuted by reason of their sex, or because of their age, or both? In both these examples, their vulnerability to particular forms of persecution is compounded by these two factors: age and gender. Cases of young girls frequently see the convergence of age and gender dynamics. In other cases, the question of age is of overriding significance, such as in child prostitution and child pornography, which affect boys and girls, albeit to different degrees in different contexts. Their shared characteristic is their young age. Even in cases involving politically or religiously motivated persecution, age-sensitive approaches are needed in order to ensure an accurate refugee status determination.

While international human rights law, including especially Article 22 of the CRC and its Optional Protocols, has significantly advanced the rights of the child, refugee law has not progressed to the same degree. Although many States recognize the right of children to seek asylum, there is often a complete absence of analysis in judicial decisions as to how their age may affect their claim. Similarly, the Executive Committee Conclusions are all but devoid of references to child asylum seekers and their special needs in relation to access to asylum systems, although they are reasonably comprehensive in so far as they promote the 'best interests' of the child<sup>64</sup> and identify specific forms of protection issues facing children, including 'physical violence, sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention'.<sup>65</sup> The link between these forms of harm and claims to refugee status is, however, missing. In 1987, the Executive Committee underlined the special situation of unaccompanied and separated children, including 'their needs as regards determination of their status',<sup>66</sup> although no more was said.

Few countries have adopted guidelines to assist decision makers in handling the special circumstances of asylum-seeking children. Canada adopted guidelines on procedural and evidentiary aspects of children's claims in 1996, followed by the United States in 1998.<sup>67</sup> More recently, Finland has adopted guidelines for interviewing (separated) minors.<sup>68</sup> UNHCR has also developed guidelines on unaccompanied children.<sup>69</sup> At the time of writing, UNHCR, together with other

64 See CRC, Art. 3(1).

65 Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. e; as repeated in part in Executive Committee, Conclusion No. 59 (XL), 1989, on refugee children, paras. h and i; No. 72 (XLIV), 1993; No. 74 (XLV), 1994; No. 79 (XLVII), 1996; and Executive Committee, Conclusion No. 84 (XLVIII), 1997, on refugee children and adolescents (in its entirety); No. 85 (XLIX), 1998, paras. k and dd; No. 87 (L), 1999, para. o; and No. 89 (LI) of 2000.

66 Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. i.

67 Immigration and Refugee Board, Canada, 'Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues', 30 Sept. 1996; US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims', 10 Dec. 1998.

68 Directorate of Immigration Finland, 'Guidelines for Interviewing (Separated) Minors', March 2002.

69 UNHCR, Community Service Guidelines, 'Working with Unaccompanied Children: A Community-based Approach,' revised May 1996, pp. 39–52; UNHCR, 'Guidelines on Policies



humanitarian agencies, was in the process of finalizing the ‘Inter-Agency Guiding Principles on Unaccompanied and Separated Children’, which include a short section on children in refugee status determination.<sup>70</sup>

## II. Age and gender in the refugee definition

### A. Inclusion

#### 1. *Non-State agents of persecution*

Whether persecution, within the context of the 1951 Convention definition, can be derived from non-State actors or agents, as opposed to State agents, has been at the forefront of debate on international refugee law. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*<sup>71</sup> clarifies that, while persecution is normally related to action by the authorities of a country, it may also emanate from sections of the population, if the acts are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.<sup>72</sup> This conforms with the 1951 Convention refugee definition itself which does not prescribe from whom the persecution must originate. Similarly, neither the 1969 Organization of African Unity (OAU) Refugee Convention,<sup>73</sup> nor the 1984 Cartagena Declaration on Refugees,<sup>74</sup> contains a requirement that the persecutor be the State.

In most common law countries, persecution at the hands of non-State actors has now been accepted, in situations where the State is unable or unwilling to offer effective protection against such harm (the so-called protection view).<sup>75</sup> The

and Procedures in Dealing with Unaccompanied Children Seeking Asylum’, Feb. 1997 (hereinafter UNHCR, ‘Guidelines on Unaccompanied Children Seeking Asylum’, 1997). See, also, ECRE, ‘Position Paper on Refugee Children’, Nov. 1996; UNHCR and International Save the Children Alliance in Europe, ‘Separated Children in Europe Programme: Statement of Good Practice’, Dec. 1999.

70 UNHCR, UN Children’s Fund (UNICEF), International Committee of the Red Cross, International Rescue Committee, Save the Children (UK), and World Vision International, ‘Inter-Agency Guiding Principles on Unaccompanied and Separated Minors’, forthcoming 2002.

71 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992).

72 *Ibid.*, para. 65.

73 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 Sept. 1969, 1001 UNTS 45.

74 Adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico, and Panama, in Cartagena, 19–22 Nov. 1984.

75 See, for instance, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, High Court of Australia, [2000] HCA 55, 26 Oct. 2000; *Zalzali v. Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, [1991] 3 FC 605; *Canada (Attorney General) v. Ward*, Supreme Court of Canada, [1993] 2 SCR 689; *Adan v. Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293; *Horvath v. Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577.

European Commission's Draft Directive on standards for qualification as a refugee, supports this view and has proposed that persecution may originate from non-State actors, thus advancing the cause of gender-related claims.<sup>76</sup> In contrast, civil law jurisdictions are more divided and tend to require some level of accountability of the State.<sup>77</sup> While some discrepancy remains between the case law in different jurisdictions, a trend is emerging towards a general acceptance that persecution can be at the hands of non-State actors, at least where the State refuses to offer protection, and, increasingly, where the State proves unable to do so.

For many gender-related claims, the view adopted can be a determining factor in the grant of refugee protection. It can also be a key factor in many non-gender-related cases today, given the specific nature of armed conflicts and civil wars, where the State is often unable to exercise effective control or offer satisfactory protection. In fact, acceptance of non-State agents of persecution was first advanced in cases with no gender component.<sup>78</sup>

Claims to refugee status on the basis of domestic violence are the ultimate test of the durability of the so-called protection-based approach. Substantial positive case law now exists on this question.<sup>79</sup> Most recently, the High Court of Australia in *Khawar* reconfirmed the approach adopted by the House of Lords in *Horvath*, in which the failure of the State to provide protection was seen as 'the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme'.<sup>80</sup> By so doing, the High Court reaffirmed the decision of the Federal Court of Australia to grant refugee status to Mrs Khawar, who claimed she was the victim of serious and prolonged domestic violence on the part of her husband and members of his family, and that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection. Such refusal was considered not only to be a mere inability to provide protection, but also 'alleged tolerance and condonation'.<sup>81</sup>

Although still largely untested, claims to refugee status on the basis of being trafficked for the purposes of sexual slavery or enforced prostitution are as plausible as other claims of gender-related persecution and invoke the non-State actor issue. As UNHCR states, '[t]he forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related

76 European Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM(2001), 510 final, 12 Sept. 2001, Art. 9(1).

77 See, V. Türk, 'Non-State Agents of Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002), pp. 95–109, for State practice in Germany, Switzerland, France, and Italy. See also, W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', 15(3) *Georgetown Immigration Law Journal*, Spring 2001, pp. 415–31.

78 See the *Adan*, *Horvath* and *Ward* cases, above n. 75.      79 See the cases listed above n. 34.

80 *Horvath* case, above n. 75, [2001] 1 AC 489 at pp. 497–8, restated by Gleeson CJ in *Khawar*, above n. 34, at para. 19.

81 *Khawar*, above n. 34, at para. 30.

violence or abuse that can even lead to death'.<sup>82</sup> Although such practices are most often characterized as a form of persecution perpetrated by non-State actors, the direct complicity of the police or other State officials in such activities is not uncommon.

There is no reason why a victim of trafficking,<sup>83</sup> who fears returning home due to the real possibility of being re-trafficked, targeted for reprisals, or threatened with death, should not be granted refugee status where the State of origin is unable or unwilling to protect that person against such harm. Severe community ostracism or discrimination may also rise to the level of persecution in an individual case. Of course, many forms of persecution, such as rape, sexual violence, physical assault, and other forms of violence, amount to criminal acts. The trafficking experience can also render some victims stateless and eligible to apply for refugee status as stateless persons under Article 1A(2) of the 1951 Convention.<sup>84</sup>

Two recent cases illustrate some of these issues. An Austrian High Administrative Court decision, involving a citizen of Nigeria who was sold by her adoptive parents into forced prostitution and trafficked to Italy, suffering severe ill-treatment, annulled a preceding negative decision on the grounds of illegality of substance. The earlier decision was found to have wrongly reasoned that 'the risk she claimed was clearly not attributable to the reasons set forth in the [1951] Geneva Convention'.<sup>85</sup>

82 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', 2002, above n. 4, para. 18; UNHCR, 'Refugee Women', above n. 56, paras. 18–19. See also, A. Edwards, 'Resettlement: A Valuable Tool in Protecting Refugee, Internally Displaced and Trafficked Women and Girls', 11 *Forced Migration Review*, Oct. 2001, p. 31, at p. 34.

83 A distinction is drawn here between smuggling and trafficking. Art. 3 of the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the 2000 UN Convention Against Transnational Organized Crime, UN doc. A/55/383, defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

84 UNHCR, 'Activities in the Field of Statelessness: Progress Report', UN doc. EC/51/SC/CRP.13, 30 May 2001, para. 18:

Trafficked women may have their documents stolen or destroyed either on arrival in a third country or prior to transfer, often making it impossible to prove their status when they try to re-enter their country. They may be placed in detention in the country to which they have been transported illegally, and may linger there for years because of the refusal of the country of citizenship to readmit them in the absence of evidence of their nationality, and refusal of the country of detention to release them without proper documentation.

85 Decision No. 99/20/0497-6, above n. 41 (author's translation).

The United Kingdom Immigration Appeal Tribunal's decision in *Lyudmyla Dzhygun* accepted that trafficking could amount to persecution in the absence of State protection, but struggled with the issue of whether victims of crime could constitute a 'particular social group'. The Tribunal finally decided that it could not see how being a victim of a crime precluded an individual from being a member of a 'particular social group'.<sup>86</sup> The group was defined as 'women in the Ukraine who are forced into prostitution against their will', stating that this group exists independently of the persecution it fears.<sup>87</sup>

Such cases raise not only the issue of the correct interpretation of 'persecution' for the purposes of the 1951 Convention definition and the identification of the appropriate ground, but also the causal link between the persecution and the ground – the question of whether the persecution was 'for reasons of' one of the Convention grounds. There have been mixed results in this regard. In the now famous case of *Shah and Islam*,<sup>88</sup> it was well accepted that the two Pakistani women satisfied the element of persecution, having been found to be at risk of false accusations of adultery, an act punishable in Pakistan by flogging or stoning to death. The decision rested on whether the claimants were at risk of being persecuted 'for reasons of' their membership in a particular social group, which in this case was considered to be 'Pakistani women'. Lord Hoffmann found that two elements were needed in cases involving non-State agents of persecution:

First, there is the threat of violence to the claimant by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. The combination of these two elements was held to constitute persecution within the meaning of the Convention.<sup>89</sup>

This approach has been further clarified by subsequent decisions and has found voice in UNHCR's 'Guidelines on Gender-Related Persecution':

In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner, or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established,

<sup>86</sup> See, *Dzhygun*, above, n. 41, para. 34.

<sup>87</sup> *Ibid.*, para. 29. See also, Decision No. T98-06186, CRDD, above n. 41; Decision No. V95-02904, CRDD, 26 Nov. 1997; *An Li v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), IMM-1023-95, 30 March 2001; *Matter of J.M.*, US Immigration Court, San Pedro, California, 3 Dec. 1996, available on <http://www.uchastings.edu/cgrs/law/ij/364.pdf>.

<sup>88</sup> *Shah and Islam*, above n. 34.

<sup>89</sup> *Ibid.*, per Lord Hoffmann. For more on the causal link or nexus, see papers by T. A. Aleinikoff on membership of a particular social group, in Part 4.1, and by R. Haines on gender-related persecution, in Part 5.1, of this book. See, in contrast, *Matter of R.A.*, Interim Decision No. 3403, above n. 34.

whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is established.<sup>90</sup>

This approach is adopted to ensure the equitable treatment of men and women before the law. Traditionally, claims to asylum by men involved a *direct* link between the action of the State to suppress, intimidate, or imprison the claimant and one or more of the Convention grounds. To accept only direct links between persecution and the State would be to discriminate against women who are more likely to be subjected to indirect links between the persecution and the actions of the State, through an inability or an unwillingness of the State to protect them. It may also exclude the non-traditional claims of some men. This is to apply a gender analysis to the application of the law. Similarly, an age-sensitive analysis needs to be promoted. Children are often subjected to persecution by non-State actors, including parents, other family members, guerrilla groups, or their community. In some cases of persecution at the hands of government officials, parents or guardians can be implicated in the persecution. As has been noted, '[t]hey may participate directly, as when a child is sold, married, forced into hazardous work or subjected to child abuse or female genital mutilation', or they may 'acquiesce in the abuse, whether through voluntary consent or fear'.<sup>91</sup> The same standard applied to gender-related claims should equally apply to age-related claims. Thus, where a child has been subjected to abuse at the hands of a non-State actor, it will amount to persecution where the State has been unable or unwilling to provide protection to the child against such harm.

What amounts to 'protection' in this sense has not been fully tested. Absent a complete breakdown of State apparatus, it has been presumed that the State is capable of protecting its citizens. Clear and convincing confirmation of its inability to do so seems to be the standard in order to rebut this presumption.<sup>92</sup> A Canadian case, with age and gender dimensions, demonstrates the difficulties in this regard.<sup>93</sup> The

90 UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 21. See also, 'Summary Conclusions on Gender-Related Persecution', San Remo, above n. 55, para. 6.

91 Bhabha and Young, above n. 20, pp. 107–8.

92 See e.g., *Attorney General of Canada v. Ward*, above n. 75.

93 *Canada (Minister of Citizenship and Immigration) v. Smith*, Federal Court of Canada (Trial Division), [1999] 1 FC 310, [1998] FCJ No. 1613, 29 Oct. 1998 (see above n. 59 for earlier CRDD decision of 15 Jan. 1997 in this case). For a negative decision, see *R.O.I. (Re)*, CRDD No. 235, 1996 (UK and Iran), and for positive decisions, see *U.C.R. (Re)*, CRDD No. 94, 2001 (France); *D.I.P. (Re)*, CRDD No. 288, 1996 (USA); *G. (B.B.) (Re)*, CRDD No. 397, 1994 (Beirut). In several of these cases, the issue of child abduction was raised, including in relation to persecution and possible exclusion. In *U.C.R.*, the panel found that the threat of 'international kidnapping of children to a country that is not a signatory to the Hague Convention [on the Civil Aspects of International Abduction], by its very nature, [is] a serious and continuing breach of fundamental rights, both of the children and the mother, [and] thus amounts to persecution within the meaning of the definition'. In

principal applicant in this case was a 12-year-old boy who was a citizen of both the United States and the United Kingdom. The Convention Refugee Determination Division (CRDD) initially granted him asylum, finding that he belonged to a group of ‘young boys who are victims of incest’. The Division found that both the United States and the United Kingdom had deprived him of some of the basic rights enumerated in Articles 19–37 of the CRC and that such a violation amounted to persecution. On appeal, however, the Federal Court overturned the earlier decision, finding that a claimant:

must advance ‘clear and convincing’ evidence of a State’s inability to afford protection. Several visits to the police were not considered sufficient to rebut the presumption. When the State in question is a democratic State, the claimant must do more than simply show that he went to see some members of the police force and that his or her efforts were unsuccessful.

In contrast, in a similar case the CRDD held that the claimant was successful in rebutting the presumption. It was held that the claimant had no choice but to flee France from the threat of abduction by the children’s Syrian father, as all the witnesses and written testimony were consistent in saying that the claimant had no choice but to flee and, further, all available judicial remedies had been exhausted.<sup>94</sup> In a further case, the CRDD found that there was no State protection (by the United States) against the forcible abduction or recourse against the forcible separation from the mother. In stating this, the CRDD in the latter case specifically clarified that the reasoning did not reflect on the United States’ ability to provide protection to its citizens in general, but was rather a reflection of the ability of the United States to provide adequate protection to these particular children in their particular circumstances.

By analogy to the above cases asserting a higher burden on persons originating from democratic countries, cases involving ‘non-democratic societies’ therefore seem to require less action on the part of the claimant in order to prove a lack of State protection. There is no doubt that objective information about the country of origin must be produced to support the claim that there is an absence of State protection. This evidence should indeed be clear and convincing, although independent reports and data may be challenged where an individual is refused protection by the State of origin on several occasions. There should not, however, be a higher standard imposed upon claimants originating from democratic societies. States should be held to the same standards of accountability and protection.<sup>95</sup> A State may have

relation to the application of the exclusion clauses, it found that the mother had not committed an act contrary to the purposes and principles of the UN in bringing her children to Canada, as her intention was to protect them from a real and imminent danger.

<sup>94</sup> *U.C.R. (Re)*, CRDD No. 94, 2001.

<sup>95</sup> It is arguable that there should even be a higher standard on democratic States to ensure needed protection.

instituted a plethora of systems to protect individuals. Whether these systems work in reality is the ultimate issue; that is, are these protections accessible, effective, and durable? An individual should not be required to exhaust all available remedies in order to establish that protection is unavailable in cases where the fear of persecution is particularly serious or imminent. To put it differently, the responsiveness of the State in providing protection should increase in direct proportion to the vulnerability of the particular individual. If the State would take concrete action in the case of a child or a woman beaten in the street by a stranger, but does not do so in relation to a child or woman subjected to violence at home, it could be determined that the State has withheld protection from those citizens. The public/private dichotomy is never more pronounced than in these types of cases and is often reflected in the level of protection available to such individuals.

## 2. *Assessing the well-founded nature of the fear*

The understanding of the term 'persecution' is fundamental to an accurate determination of a particular case, especially in relation to age and gender-specific claims. One issue that can become an obstacle to a child's claim to refugee status is how to make an accurate assessment of the well-foundedness of the fear of persecution. Where certain forms of persecution are explicitly identified, such as sexual abuse, female genital mutilation, or forcible marriage, an assessment of the nature of the persecution will be less controversial. In these cases, it is possible to indicate particular human rights provisions in support of the claim. It becomes more difficult when an asserted form of persecution by a child would not amount to persecution in the eyes of an adult. As Bhabha and Young note: 'Actions which when directed at adults might be considered mere harassment or interference, could amount to persecution when applied to children.'<sup>96</sup> They illustrate this as follows:

Aggressive police questioning, handcuffing, slapping or rough handling that may not constitute 'serious harm' for an adult, for example, may produce lasting damage, physical or psychological trauma in a child that amounts to persecution, particularly if the child is young or physically frail.<sup>97</sup>

For the elderly, their frailty or lack of mobility could also make threats rise to the level of persecution compared to more active persons, as they would be less able to avoid them or to escape. Certain legitimate forms of punishment for adults might amount to persecution for either children or elderly persons. Cumulative forms of discrimination against the elderly, including exclusion from social and economic life, could rise to the level of persecution in particular cases.<sup>98</sup>

<sup>96</sup> Bhabha and Young, above n. 20, p. 104.

<sup>97</sup> Ibid.

<sup>98</sup> These considerations could also apply to the disabled.

### 3. *Avoiding persecution*

Some gender-related cases, particularly those based on sexual orientation, have raised the issue of the degree to which one could be required to suppress one's opinions or activities in order to avoid persecution. This has been directly related to establishing the well-founded nature of the persecution, and also has implications for possible internal relocation alternatives (see section II.A.5 below). In cases based on political opinion or religion, it has been consistently held that one cannot be expected to suppress one's political opinion or religious beliefs in order to avoid persecution.<sup>99</sup> To suggest otherwise would be contrary to the true essence of international refugee protection. Nonetheless, a few cases concerning 'sexual orientation' have given rise to lengthy discussions on the extent to which a homosexual can be expected to 'discreetly' or 'safely practice his homosexuality'.<sup>100</sup> Although the Refugee Review Tribunal in the Australian case of *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs* recognized that it might be an infringement of a fundamental human right to be forced to suppress or conceal one's sexuality,<sup>101</sup> it found that it is not as freely accepted that it would be an infringement if one were required, for safety's sake, simply not to proclaim that sexuality openly.<sup>102</sup> The appeal to the Federal Court did not fully decide this question, confining its decision to whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in Sri Lanka, disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationships established as a result.<sup>103</sup> Should a member of a social group be required to be discreet about that membership in order to avoid persecution, while another individual is not expected to repress their political or religious beliefs? Is this not applying a different standard to cases argued on the grounds of political opinion or religion to those argued under 'particular social group'? A German judgment, in

99 See, UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', forthcoming, 2003 (hereinafter UNHCR, 'Guidelines on Internal Flight or Relocation Alternative', forthcoming, 2003).

100 See Decision No. V95/03188, Refugee Review Tribunal, 12 Oct. 1995, appealed to Federal Court of Australia as *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, above n. 42, and *R. v. Secretary of State for the Home Department, ex parte Binbasi*, [1989] Imm AR 595, High Court (Queen's Bench Division), 20 July 1989; cf. Decision No. IV/IE06244/81, Administrative Court (*Verwaltungsgericht*) Wiesbaden, 26 April 1983 (refugee status on the basis of membership of a particular social group of homosexuals in Iran).

101 *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, above n. 42. See also, *Toonen v. Australia*, Human Rights Committee, Communication No. 488/1992, UN doc. CCPR/C/50/D/488/1992, 4 April 1994, which held that laws prohibiting consensual homosexual acts in private violate the right to private life under Art. 17 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

102 *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, FCA, above n. 42, paras. 18–35.

103 *Ibid.*, para. 24.



contrast, ruled that the applicant should not have to refrain from homosexual activity and live inconspicuously.<sup>104</sup> It found it to be as unacceptable to expect someone to avoid persecution by living a hidden homosexual life, as to suggest someone deny and hide their religious beliefs or try to change their skin colour.

As stated earlier, human rights law can assist in the identification of forms of persecution, although it is not necessary in each and every case to identify a human rights violation in order to establish a well-founded fear of persecution. International refugee law operates to assist persons in need of protection because of a well-founded fear of being persecuted on one or more of the five grounds, and is thus not limited to fear of a breach of one's individual human rights. Whether or not it is a universal right publicly to display one's sexuality is not the critical issue, as suggested by the Australian case discussed above. Rather, international refugee law is premised on the protection of individuals in fear of being persecuted for reasons of their race, religion, nationality, membership of a particular social group, or political opinion. Human rights law in the sense of the Australian case discussed above has been used to narrow the protections available under the 1951 Convention and highlights the danger of having to link a fear of being persecuted with a human rights violation.

#### 4. *'Particular social group' versus the other grounds*

A stumbling block to earlier decisions by domestic courts has, to some extent, been the failure of the refugee definition in Article 1A(2) of the 1951 Convention specifically to identify 'sex' or 'age' as individual grounds of persecution. As has been noted:

The drafters of the Convention failed singularly to reflect in words what has long been a reality – that crimes with a basis in gender are as persecutory in Convention terms as any other crimes when the harm inflicted is sufficiently serious and when they are part of a carefully calculated effort to achieve a political end.<sup>105</sup>

In applying the refugee definition to claims of gender-related persecution, creative judicial reasoning has, therefore, necessarily been invoked. This is not to suggest that the refugee definition has been distorted to 'fit' particular claims based on gender within it. Rather, a proper interpretation of the definition was until recently neither advanced nor accepted. Cases raising an age component have yet to benefit fully from an age-sensitive analysis.

104 Case No. IV/IE06244/81, above n. 100.

105 E. Feller, Director, Department of International Protection, UNHCR, 'Rape is a War Crime: How to Support the Survivors: Lessons from Bosnia – Strategies for Kosovo', presentation, Vienna, 18–20 June 1999.

Early decisions tended to view the gender-specific claims of women within the 'particular social group' ground, due, in large part, to the failure of decision makers to recognize actions by women as political. Yet Heaven Crawley notes that 'nowhere are the effects of the public/private dichotomy on the understanding of women's experiences more evident... than with regard to the concept of "politics"'.<sup>106</sup> Subsequent judgments have found that gender-related persecution can be characterized as racial, ethnic, religious, or political in nature, or a combination of one or more of these grounds, although decision makers more consistently rely on the 'social group' ground. Claimants often raise 'political opinion' or 'religion' as a valid ground, yet decisions rarely analyze them in depth. As important as the 'fifth' ground is to age- and gender-related claims, a full application of the refugee definition requires a full and equal utilization of the other Convention grounds. Why is it so difficult to recognize the acts of a woman in transgressing social customs as political?<sup>107</sup> Why are certain acts (for instance, acts contravening religious dress codes) considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict been seen as only criminal and not also racial in character?<sup>108</sup>

The meaning of 'political opinion' has largely been defined to include 'opinions contrary to or critical of the policies of the government or ruling party'.<sup>109</sup> In comparison, Goodwin-Gill supports a broader definition of 'any opinion on any matter in which the machinery of State, government, and policy may be engaged'.<sup>110</sup> Based on these definitions, young girls who refuse to be subjected to harmful traditional practices, imposed on them by family, community, or village leaders, would struggle to demonstrate that they were expressing a 'political opinion' of dissent or opposition to the machinery of the State, government, and policy. Even Goodwin-Gill's broader definition requires that the 'State, government, or policy' be 'engaged' in order to see a particular opinion as 'political'. Surely, the failure of the State to engage to prevent harmful practices or to punish those engaging in it should also be considered 'political', especially in the face of harmful practices that violate fundamental human rights? Should not political opinion apply to any

106 Crawley, *Refugees and Gender*, above n. 7, p. 21.

107 See, e.g., statements made in *Re M.N.*, Refugee Appeal No. 2039/93, above n. 36, in relation to the first instance decision: 'The Refugee Status Section did not even remotely come to grips with this aspect [the political opinion and religion aspect] of the appellant's case.'

108 UNHCR Vienna Regional Office, 'Asylum-Seekers in Austria: An Analysis and Case Study of the Legal Situation and Administrative Practice', Feb. 1995, pp. 207–12. Reference is made to several cases in which rape of civilian women by soldiers in armed conflict were not considered as 'persecution' within the meaning of the refugee definition, but criminal behaviour.

109 A. Grahl Madsen, *The Status of Refugees in International Law* (A. W. Sijthoff, Leyden, 1972), p. 220.

110 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), p. 49. See also *Ward*, above n. 75, which endorsed this definition.

thought, opinion, action, or inaction that can be seen as questioning or opposing the views of authority or society at large, whatever the type of authority in place? The latter would include any form of authority that has the power to impose laws or social rules, or to punish or to discriminate against those refusing to participate in accepted social or cultural practices or rites, including tribal leaders, traditional healers, and village chiefs. Jurisprudence in industrialized States often fails to see such activities as political in nature due to its inherent bias towards Western political structures, and has ignored the political apparatus in non-Western countries. Rather, it would seem more correct when interpreting the term 'political' to look to the context in which the human rights abuse or persecution took place. The definition given to 'political opinion', as with the refugee definition as a whole, needs to be individualized to take account of the situation in different countries of origin. This is especially important in countries where authority devolves to regional or village levels.

Interestingly, some applications for refugee status on the grounds of sexual orientation have been considered under 'political opinion', despite the fact that many homosexuals do not consider their sexual orientation to be a political matter.<sup>111</sup> Is it political to engage in homosexual acts or to adopt an overtly homosexual lifestyle? The answer to this question will depend on whether the decision maker considers sexual orientation to be, on the one hand, an innate or immutable characteristic or one so fundamental to a person's identity that a claimant ought not be compelled to change it,<sup>112</sup> or, on the other hand, a choice. Relying on the latter, it may well be 'political' to actively pursue a homosexual lifestyle. Conversely, relying on the former analysis, it would not be necessarily seen as a political gesture to engage in sexual activity, but rather a natural aspect of being a human being. Of course, a political opinion subversive to the laws and/or policies of the State may be attributed to a homosexual on the basis of that person's sexual orientation or lifestyle.

There has been some recognition that refusing to wear the veil in some Islamic societies where there is disproportionate punishment as a consequence amounts to persecution for reasons of 'religion'.<sup>113</sup> Similarly, laws that impose serious penalties on homosexuality could be considered under the 'religion' ground, where these laws are rooted in religious doctrine. Even in cases involving strict religious codes to justify discriminatory and persecutory laws and action against certain groups, courts and tribunals have not always readily categorized such policies or action as religious in nature, but have preferred to rely on the 'particular social group' ground.

111 See *Dykon v. Canada (Minister for Employment and Immigration)*, Canadian Federal Court (Trial Division), (1994) 87 FTR 98, Sept. 1994, quoted in ELENA, 'Research Paper on Sexual Orientation', above n. 42, pp. 1–2.

112 See, Decision No. T-91-04459, *Jorge Alberto Inaudi*, CRDD, 4 April 1992.

113 See above n. 36.

The social group ground has been the least developed of the five grounds, with gender-related claims finally attempting to settle its true scope. There continue to be, however, two different schools of thought as to how specifically defined the particular social group must be. For example, several jurisdictions have rejected that women *per se* constitute a ‘particular social group’, largely out of fear of a flood of such claims, yet overlooking the requirement that simply being a woman would not suffice to meet each element of the definition. Other supporters of this view have argued that the ‘particular social group’ ground is not a ‘safety net’ for all forms of persecution that do not fall within the other four grounds.<sup>114</sup> The expansion of the refugee definition from the one contained in UNHCR’s Statute,<sup>115</sup> which omits the social group ground altogether, to its later inclusion in the 1951 Convention definition, could nevertheless be viewed as further evidence that at least part of the intention of adding an additional ground was to secure protection for persons outside the four other grounds.

UNHCR, in its recent ‘Guidelines on International Protection’ on membership of a particular social group, has stated that women can be a ‘particular social group’ for the purposes of the refugee definition. Using the large size of the group as a means for refusing to recognize ‘women’ as a social group is rejected by UNHCR as having ‘no basis in fact or reason, as the other grounds are not bound by this question of size’.<sup>116</sup> The Summary Conclusions from the San Remo expert roundtable also reflect this analysis, stating: ‘It follows that sex can properly be within the ambit of the social group category, with women being a clear subset defined by innate and immutable characteristics, and who are frequently treated differently to men.’<sup>117</sup>

The same can be said in relation to age-related claims. It follows that ‘children’ or ‘the elderly’ as a whole could form a social group. Normally, given the factual circumstances of a given case, the group will be narrower than this, such as ‘young boys in Y society’. Unlike gender-related cases, theoretically, age-related cases could challenge the ‘protected characteristics’ test,<sup>118</sup> in so far as one’s age is neither

114 For an overview, see the paper by Aleinikoff, Part 4.1 of this book.

115 Statute of the Office of the High Commissioner for Refugees 1950, A/RES/428 (V), 14 Dec. 1950, para. 6(ii).

116 See UNHCR’s ‘Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’, UN doc. HCR/GIP/02/02, 7 May 2002 (hereinafter UNHCR, ‘Guidelines on Membership of a Particular Social Group’, 2002), paras. 18 and 19; as well as UNHCR, ‘Guidelines on Gender-Related Persecution’, 2002, above n. 4, para. 31.

117 ‘Summary Conclusions on Gender-Related Persecution’, above n. 55, para. 5.

118 This is one legal interpretative approach used to define ‘particular social group’ by examining whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. Sex would be considered as an immutable characteristic. See, UNHCR, ‘Guidelines on Membership of a Particular Social Group’, 2002, above n. 116, para. 6. See also, *Ward*, above n. 75; and the paper by Aleinikoff, Part 4.1 of this book.

‘innate nor immutable’ due to continuous change over time. However, the fact that a particular individual is unable to change his or her own age, except with the passage of time, should surely identify ‘age’ as, at least, an immutable characteristic. The ‘social perception’ approach<sup>119</sup> would seem to avoid such dilemmas, as in most situations children are seen as a particular social group by the society in which they live. In contrast, ‘sexual orientation’ cases relying on the ‘particular social group’ ground could face difficulty under the ‘social perception’ approach where the individual’s sexuality is hidden from public view or where he or she has not acted to alert the authorities or others to it, even where discriminatory laws carry harsh or excessive penalties. Many jurisdictions accept that an individual’s sexuality is immutable, or at least so fundamental to identity that he or she ought not to be compelled to forsake it, for the purposes of the ‘protected characteristics’ approach.<sup>120</sup>

The paper in this book by T. Alexander Aleinikoff further concludes that ‘an applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists’.<sup>121</sup> This is the only correct interpretation and has been accepted in many jurisdictions, including recent statements by Gleeson CJ of the Australian High Court in *Khawar*:<sup>122</sup>

Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely.<sup>123</sup>

## 5. *Internal flight possibilities*

When a State is directly involved in acts of persecution, through its officials, the question of a possible internal flight or relocation alternative to the claimant is ‘presumed’ not to be relevant.<sup>124</sup> This is a correct presumption. It is not required that the asylum seeker prove that he or she will be persecuted throughout the

119 This is an approach which considers whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.

120 See ELENA, ‘Research Paper on Sexual Orientation’, above n. 42.

121 See the paper by Aleinikoff, Part 4.1 of this book.

122 *Khawar* case, above n. 34, para. 33.      123 *Ibid.*, para. 35.

124 Global Consultations, ‘Summary Conclusions on Internal Protection/Relocation/Flight Alternative’, San Remo expert roundtable, 6–8 Sept. 2001, para. 2. See also, the paper by J. C. Hathaway and M. Foster in Part 6.1 of this book; UNHCR, ‘Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called “Internal Flight Alternative” or “Relocation Principle”’, Geneva, Feb. 1999, see Annex, paras. 1–3; cf. UNHCR, ‘Guidelines on Internal Flight or Relocation Alternative’ (forthcoming, 2003), above n. 99.

country.<sup>125</sup> However, this standard has not yet been extended to non-State actor cases. The Summary Conclusions from the expert roundtable in San Remo state that '[w]here the risk of being persecuted emanates from a non-State actor, IPA/IRA/IFA [internal protection/relocation/flight alternative] may more often be a relevant consideration',<sup>126</sup> even though an individual may have suffered persecution and may already have proved as part of the claim that the State is unable or unwilling to provide effective protection against further harm. Thus, if we accept that, in cases where the State is the direct agent of persecution, it is in control of its agents, can we not also assume that, if the State is unable or unwilling to protect the claimant in the place of the original persecution, it would also be unable or unwilling to protect the claimant in another part of the territory? The fact that we judge non-State actor cases, which are most often raised in age- and gender-related claims, against a different standard from those cases of persecution by the State, is to discriminate indirectly against women and children. Thus, the presumption should work in favour of all types of case, rebuttable by evidence of the fact that the claimant could have relocated, and could in the future relocate, elsewhere.

Where an assessment of a possible internal alternative is considered relevant to a particular case, the next step is to consider whether it would be 'reasonable' to require the claimant to return there, according to UNHCR and a large number of jurisdictions.<sup>127</sup> J. C. Hathaway and M. Foster in their paper in this book analyze the availability of a place of internal relocation in the context of the extent to which an individual would be protected in that place. Protection in this sense is predicated on respect for human rights. The 'reasonableness' approach similarly analyzes respect for international human rights law, but in addition places specific emphasis on the particular situation of the individual. Both these approaches require an analysis of the potentially differential impact of return on different groups (women vis-à-vis men, as well as children vis-à-vis adults, and elderly vis-à-vis able-bodied adults), although the 'reasonableness' approach more readily points to age and gender inclusiveness. As has been stated elsewhere in the text, international human rights law is an important guiding tenet of international refugee law, although refugee law is not restricted to such an analysis.

Unaccompanied or single women may face particular hardships in areas of potential return, including perhaps community ostracism, isolation, or severe discrimination. It may not even be possible in some countries for unmarried women to live alone.<sup>128</sup> Hathaway and Foster note that 'cases involving child applicants have

125 UNHCR, *Handbook*, above n. 71, para. 91.

126 Summary Conclusions on IPA/IRA/IFA, above n. 124, para. 2.

127 E.g. Australia, Austria, Canada, Germany (in some cases), Sweden, the UK, and the USA.

128 See, *Haj Ahmed*, French CRR, above n. 36; *Gonzales-Cambana v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-933-96, 1997, also cited in the paper by Hathaway and Foster, Part 6.1 of this book.

stressed the importance of access to education and basic economic subsistence'.<sup>129</sup> The Canadian case of *Elmi* helpfully stated:

What is merely inconvenient for an adult might constitute 'undue hardship' for a child, particularly the absence of any friend or relation. Moreover, in the case of a child whose education has already been disrupted by war, and who would arrive in [the internal relocation area] without any money, there arises the question not simply of 'suitable employment' but of a livelihood at all.<sup>130</sup>

The impact of internal relocation on unaccompanied or separated children should only ever be considered in exceptional circumstances. For accompanied children, it may be a legitimate issue depending on the full circumstances of the case, although a detailed analysis of the impact of return on persecuted children would need to be carefully weighed. A child may believe that he or she has reached safety in the country of asylum. To return a child to the country of origin may induce devastating psychological effects. Depending on the age of a child, he or she may not understand the concept of distance and may believe that 'anywhere' within the country is dangerous.

The particular vulnerabilities of older persons have also been considered in a number of cases, albeit with mixed results.<sup>131</sup> The cases have taken into account level of education and literacy, family links, language abilities, and disability in assessing 'reasonableness' or 'undue hardship'. As with children, what might be difficult or cumbersome for an able-bodied adult might amount to undue hardship for an older person.

## B. Exclusion

As stated above, there has been progress in relation to recognizing rape, sexual slavery, and other forms of sexual violence as war crimes or crimes against humanity under the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Statute of the International Criminal Court. Such violations should, therefore, be considered similarly in terms of excludable crimes. In the context of armed conflict, they would fall under Article 1F(a), or in other situations as serious, non-political crimes under Article 1F(b).

The exclusion clauses raise, in particular, age-related questions. The case of child soldiers is a typical example where complex factual and legal issues come into play.

129 Hathaway and M. Foster, Part 6.1 of this book, referring to the German Federal Constitutional Court, Decision of 24 March 1997, 2 BvR 1024/95, NVwZ 97, 65.

130 *Elmi v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-580-98, 12 March 1999, para. 13. See also Hathaway and Foster, Part 6.1 of this book.

131 See Hathaway and Foster, *ibid.*

The Graça Machel study on the *Impact of Armed Conflict on Children*<sup>132</sup> brought to light the situation facing child soldiers in many armed conflict situations throughout the world. Its sequel, released in 2001, dedicates a chapter to child soldiers.<sup>133</sup> Moreover, international human rights safeguards have been put in place to protect children from being involved in hostilities or forcibly conscripted into armed forces. Articles 1 and 2 of the CRC Optional Protocol on the Involvement of Children in Armed Conflict 2000 provide that persons under eighteen years should not take part in direct hostilities and that States should take all feasible measures to ensure that children under eighteen are not compulsorily recruited. Article 8 of the Statute of the International Criminal Court lists ‘conscripting children under the age of fifteen years’ as a war crime. These are important defining parameters, which indicate that in most cases, children who have committed serious crimes during the course of armed conflict are not only perpetrators of those crimes, but are equally the victims of abuse. Geoff Gilbert warns in his paper in this book that ‘States should not contribute to the traumatization of the child by washing their hands of them through the process of exclusion from refugee status’.<sup>134</sup>

Article 40 of the CRC provides that States shall establish a minimum age for criminal responsibility. This can vary from ten to fifteen years, and can result in unequal treatment of children seeking asylum in different jurisdictions. Where there are discrepancies in age limits, it is not clear whether the applicable age of criminal responsibility is that in the child’s home State, or that in the country of asylum. Caution would indicate that the higher age of the two should be applied, although this would also lead to inconsistent decision-making within and between jurisdictions. Where a child otherwise fulfilling the refugee definition is below the age of criminal responsibility, they cannot be excluded from refugee status. For those children who have reached that age, one must determine if they possessed the mental capacity at the time of the commission of the crime.

In determining *mens rea*, consideration ought to be given to a wide range of factors. These include the age of the claimant at the time of becoming involved with the armed group (the younger the age, the lesser the responsibility), his or her reasons for joining the armed group (was it voluntary or coerced or in defence of oneself or others?), the consequences of a refusal to join, the length of time as a member, the forced use of drugs, alcohol, or medication, promotion within the ranks due to actions undertaken, the level of education and understanding of the events in question, and the trauma, abuse, or ill-treatment suffered by the child as a result of his or her participation. Children become soldiers in a variety of ways, through

132 Report of G. Machel, Expert of the Secretary-General of the United Nations, *Impact of Armed Conflict on Children*, United Nations and UNICEF, 1996, available on <http://www.unicef.org/graca/>.

133 G. Machel, *The Impact of War on Children* (Hurst & Co., London, 2001).

134 See the paper by G. Gilbert, ‘Current issues in the application of the exclusion clauses’, in Part 7.1 of this book.



conscripted, pressure, kidnapping, as a way to protect their families,<sup>135</sup> or as a way to support their families economically. Child soldiers are used for forced sexual services, as combatants, messengers, porters, or cooks.<sup>136</sup> The application of the exclusion clauses to children is a complex and sensitive process. Michael S. Gallagher argues that, as child soldiers can be seen as victims of war crimes, Article 39 of the CRC comes into play, requiring 'recovery and reintegration' to be the 'only permissible governmental goal for such children'.<sup>137</sup> UNHCR states that, where a child is below the minimum age, he or she cannot be considered by the State concerned as having committed an excludable offence.<sup>138</sup> Children should be given the benefit of the doubt in all cases, and clear and convincing evidence is needed to show why a particular child should be excluded. The principle of the 'best interests' of the child should be taken into account, in relation to both exclusion and post-exclusion action.

Increasingly, women are becoming publicly active in politics and may be directly involved in excludable acts. Depending on the position of women (including their rights and status) in the society concerned, however, it may be particularly necessary to take into account issues of duress and intimidation. As has been outlined above in relation to children, women may not only participate in a violent action for instance, they may also be the victim, being subjected to rape and other forms of sexual slavery and forced labour. Men may also be forced into participating in excludable acts, by threats to their family members or by threats of death to themselves. Most importantly, decision makers should not make assumptions about culpability on the basis of the individual's ethnic origin, race, religion, political opinion, social group, age, or sex. Clear and credible evidence must be forthcoming in all cases.

### C. Cessation

While much has been written about the application and interpretation of Article 1A(2) of the 1951 Convention in a gender sensitive manner (and less about age), little has been written in relation to the cessation clauses, Article 1C. The 'compelling reasons' exception to Article 1C(5) and (6), in particular, needs to import age and gender sensitive analyses. As the UNHCR *Handbook* notes, the exception sub-clauses 'deal with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even

135 Machel, above n. 133, pp. 8–9.      136 *Ibid.*, p. 7.

137 M. S. Gallagher, 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum', 13 *International Journal of Refugee Law*, 2001, p. 310, at p. 333.

138 UNHCR's 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', forthcoming, 2003.

if fundamental changes have occurred in the country of origin'.<sup>139</sup> Given the potentially serious consequences of return, the general cessation clauses are necessarily personalized. To import age and gender considerations into the cessation exception, it is important to understand the nature of the persecution suffered and the gravity of its effects on each individual. The psychological effects of rape and sexual violence on women assume, in many cases, that return may never be possible, particularly if the family or society of origin is likely to ostracize or otherwise victimize the refugee. In such cases, 'return involves much more than physical aspects of return'.<sup>140</sup>

A UNHCR study in Bosnia and Herzegovina offers an analysis of return prospects of minority women, including victims of sexual violence and torture. While the study does not deal specifically with the cessation clauses, many of its ideas can be imported into such an analysis. The study concluded that:

ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons, should be offered protection and alternative durable solutions [to return home]. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return.<sup>141</sup>

For victims of sexual violence, 'fundamental change' in the country of origin would necessarily include police and judicial measures to ensure the swift arrest and prosecution of alleged perpetrators of such violence. It should also necessarily require appropriate medical and psychosocial help. The effect on the principal victim is not the only consideration in relation to the 'compelling reasons' exception. The impact of return on other family members, including spouses and children, needs to be carefully weighed. A child or spouse may have been a witness to the violence, and return could invoke serious psychological damage. Fear of community ostracism or victimization, including physical abuse and attacks, can be very real, especially for victims of sexual violence returning to very traditional communities. This level of social ostracism also affects other members of the family.

For recognized child refugees who have suffered severe persecution, there would be very few situations where cessation would apply. It could be said that a traumatized child will always fall under the 'compelling reasons' exception. Sometimes children appear to survive trauma better than adults. This is not always true, and close medical and psychological advice should be sought. The ability of children to suppress violent memories is in many cases the direct result of the trauma they have suffered. The fact that a child has spent a long time in a host country must

139 UNHCR, *Handbook*, above n. 71, para. 136.

140 See, UNHCR and UNHCHR, 'Daunting Prospects – Minority Women: Obstacles to their Return and Integration', Sarajevo, Bosnia and Herzegovina, April 2000, p. 16.

141 *Ibid.*

work in the child's favour. Uprooting children can be very disruptive, even under the most peaceful and voluntary conditions. Returning children to the scenes of violent crimes can have untold psychological damage on them.

### III. Age and gender in asylum procedures

The age and gender sensitive implementation of asylum procedures should not only address questions of access to the determination procedure. It ought to provide separate interviews for female asylum seekers, as well as an 'open and reassuring environment' so as to establish trust between the interviewer and the claimant and to 'help the full disclosure of sometimes sensitive and personal information'.<sup>142</sup> The often male-oriented nature of questioning can mean that women who have been involved in indirect political activity or to whom political opinion has been attributed do not always disclose their full story. As UNHCR's 'Guidelines on Gender-Related Persecution' have noted, '[f]emale claimants may also fail to relate questions about "torture" to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, "honour killings", forced marriage, etc.)'.<sup>143</sup> These are among the range of procedural safeguards that need to be put in place to ensure that all claimants have equal access to a determination procedure. Failing to provide all adult members of a family with separate interviews can later place the refugee family in a precarious situation.

Provision of separate interviews can affect not only initial inclusion decisions but also subsequent decisions on cessation of refugee status due to fundamental change in the country of origin. For example, a husband establishes that he was actively involved in political activities and risked persecution in his country of origin. As a result, he is granted refugee status. After a declaration of general cessation has been made on the basis of ceased circumstances under Article 1C(5), he may have no right to remain in the country of asylum. His wife in contrast who was sexually assaulted and persecuted on the basis of her ethnicity never applied for asylum. Had she applied for asylum initially, she might have been able to establish 'compelling reasons' arising out of past persecution in order to be exempted from the application of general cessation.<sup>144</sup> The fact that her claim was not detected at the time and can now not be invoked successfully in its own right in relation to cessation shows a fundamental error in the asylum system. Where such errors occur, the appropriate solution would be to allow a full hearing of the asylum application of the individual who was initially not heard, although this is not ideal. The victim may no longer be able to establish that she is at risk of future persecution, even though she may have

142 UNHCR, 'Guidelines on Gender-Related Persecution', above n. 4, para. 36(iv).

143 *Ibid.*, para. 36(vii).

144 *Mehmet Brahim v. Immigration Appeal Tribunal and Secretary of State for the Home Department*, High Court of Justice (Queen's Bench Division), Case No. CO/2238/2001.

compelling reasons arising out of past persecution to avoid cessation of status had it been so granted in the first place. Therefore, any subsequent hearings ought to take into account her status at the time of flight in order to give effect to the intention of international refugee law and to compensate for the serious administrative error.

Similarly, the claims of children and the elderly necessitate special care and attention. There is an extra burden on States to take all appropriate measures to ensure that a child seeking asylum receives appropriate protection and humanitarian assistance.<sup>145</sup> This would include at a minimum:

- Unaccompanied and separated children seeking asylum should not be refused access to the territory.<sup>146</sup>
- Due to their vulnerability, applications by children for refugee status should be given priority and every effort should be made to reach a decision promptly and fairly. Appeals should be processed fairly and expeditiously.
- Unaccompanied asylum-seeking children should be represented by an adult familiar with the child's background and have access to legal representation.<sup>147</sup>
- Interviews should be conducted by specially qualified and trained personnel.

As UNHCR has noted:

Particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults.<sup>148</sup>

The manner in which a child's rights may be violated may be different from those of adults.<sup>149</sup> In particular, the claims of children have suffered from:

scepticism about the reliability of child testimony, deference to local traditions implemented by non-state actors and considered oppressive by the asylum seeker, [and] narrow construal of the 'membership of a particular social group' to exclude broad demographic characteristics such as age.<sup>150</sup>

145 CRC, Art. 22.

146 UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, Executive Summary.

147 Ibid., Part 8: Procedures. See also, UNHCR, 'Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems', UN doc. EC/GC/01/12, 4 Sept. 2001, Annex.

148 UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, para. 8.6.

149 Ibid., para. 8.7.      150 Bhabha and Young, above n. 20, p. 98.

Instead, an awareness of cultural differences in children's behaviour is sometimes critical to an accurate assessment of the case. Children from different backgrounds interact differently with persons in positions of authority. For instance, in some cultures it is normal for children not to look adults in the eye, but in other cultures this can be interpreted as lying.<sup>151</sup>

Older persons may be acutely traumatized by the refugee flight experience, especially where they are without family members, or where they have never been outside their country of origin. They may not be able to articulate their claims due to a lack of education, disorientation, or memory loss. As with other asylum seekers, they should be given advice in a manner and language they understand.

#### **IV. Conclusion**

The application of normative rules to individual circumstances in a non-discriminatory way is an essential ingredient of full and inclusive refugee status determination. This requires an assessment of the intentions of the law (in the case of Article 1A(2), to protect persons from persecution) and the differential impact a particular approach can have on different individuals. Taking the 'adult male' as the standard distorts the nature, not only of the claims of some women and children, but also of those of men who do not conform to male stereotypes. It is important to recognize that our different backgrounds colour our understandings and interpretations of law. Applying age- and gender-sensitive analyses to law means identifying the individual nature of the inquiry.

Focusing on the individuality of claims should lead to a non-discriminatory approach, and ensure that individuals are not discriminated against on the basis of race, colour, sex, language, religion, national or social origin, property or birth, or other status. Making generalizations about different groups is not always helpful and can overlook important differences. Although international law is intended to govern relations between States, human rights law (and refugee law) have at their centre the rights of individuals. Thus, the failure of a State to fulfil its obligations can result in a breach of an individual's rights, as well as a breach of human rights (and refugee) law. A State's failure in this regard includes unwillingness or inability to protect. Thus a State not only has an obligation under international human rights (and refugee) law to refrain from directly breaching its provisions, it must equally take measures to protect individuals from breaches by other individuals. Forms of persecution perpetrated by State and non-State actors are, therefore, valid.

On this basis, it is conceivable that the failure of a State to protect an individual from persecution by a non-State actor could amount to a human rights violation by

151 Directorate of Immigration, Finland, 'Guidelines for Interviewing (Separated) Minors', above n. 68.

that State. Human rights law in this respect contributes in some cases to a clearer identification of particular forms of persecution, although the 1951 Convention does not require that a human rights violation be acknowledged in order to establish ‘persecution’. Importantly, the protections available under international refugee law should not be narrowed by strict alignment with international human rights law, especially in light of existing preconceptions and interpretations of law that do not always recognize age and gender dimensions, as well as the fact that not all forms of persecution have yet been codified in international human rights law.

To adopt and implement age- and gender-sensitive interpretations of the 1951 Convention is also to recognize the inherent bias in legal formulation – the fact that ‘sex’, ‘sexual orientation’, or ‘age’ were omitted from the refugee definition resulted from the lack of understanding of the fact that individuals may suffer different forms of persecution, for different reasons, including age- and gender-related ones. It is also a reflection of inequalities in society at the time of drafting the 1951 Convention, which continue to influence its interpretation and application. Age- and gender-inclusive approaches are not only critical for an accurate interpretation and application of Article 1A(2). The exclusion and cessation clauses and all other aspects of the 1951 Convention should equally benefit from such analyses. As stated above, the underlying objective of applying age- and gender-sensitive approaches is to give true effect to the individualized nature of refugee status determination.

### 1.3 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees

*Ministerial Meeting of States Parties, Geneva, Switzerland,  
12–13 December 2001*<sup>1</sup>



#### **Preamble**

We, representatives of States Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, assembled in the first meeting of States Parties in Geneva on 12 and 13 December 2001 at the invitation of the Government of Switzerland and the United Nations High Commissioner for Refugees (UNHCR),

1. Cognizant of the fact that the year 2001 marks the 50th anniversary of the 1951 Geneva Convention relating to the Status of Refugees,

2. Recognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope,

3. Recognizing the importance of other human rights and regional refugee protection instruments, including the 1969 Organization of African Unity (OAU) Convention governing the Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration, and recognizing also the importance of the common European asylum system developed since the 1999 Tampere European Council Conclusions, as well as the Programme of Action of the 1996 Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States,

4. Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law,

<sup>1</sup> **Editorial note:** The Declaration is also available as UN doc. HCR/MMSP/2001/09, 16 Jan. 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para. 4, adopted on 18 Dec. 2001.

5. Commending the positive and constructive role played by refugee-hosting countries and recognizing at the same time the heavy burden borne by some, particularly developing countries and countries with economies in transition, as well as the protracted nature of many refugee situations and the absence of timely and safe solutions,

6. Taking note of complex features of the evolving environment in which refugee protection has to be provided, including the nature of armed conflict, ongoing violations of human rights and international humanitarian law, current patterns of displacement, mixed population flows, the high costs of hosting large numbers of refugees and asylum-seekers and of maintaining asylum systems, the growth of associated trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding and returning those not entitled to or in need of international protection, as well as the lack of resolution of long-standing refugee situations,

7. Reaffirming that the 1951 Convention, as amended by the 1967 Protocol, has a central place in the international refugee protection regime, and believing also that this regime should be developed further, as appropriate, in a way that complements and strengthens the 1951 Convention and its Protocol,

8. Stressing that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among all States,

### **Operative paragraphs**

1. Solemnly reaffirm our commitment to implement our obligations under the 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments;

2. Reaffirm our continued commitment, in recognition of the social and humanitarian nature of the problem of refugees, to upholding the values and principles embodied in these instruments, which are consistent with Article 14 of the Universal Declaration of Human Rights, and which require respect for the rights and freedoms of refugees, international cooperation to resolve their plight, and action to address the causes of refugee movements, as well as to prevent them, *inter alia*, through the promotion of peace, stability and dialogue, from becoming a source of tension between States;

3. Recognize the importance of promoting universal adherence to the 1951 Convention and/or its 1967 Protocol, while acknowledging that there are countries of asylum which have not yet acceded to these instruments and which do continue generously to host large numbers of refugees;



4. Encourage all States that have not yet done so to accede to the 1951 Convention and/or its 1967 Protocol, as far as possible without reservation;

5. Also encourage States Parties maintaining the geographical limitation or other reservations to consider withdrawing them;

6. Call upon all States, consistent with applicable international standards, to take or continue to take measures to strengthen asylum and render protection more effective including through the adoption and implementation of national refugee legislation and procedures for the determination of refugee status and for the treatment of asylum-seekers and refugees, giving special attention to vulnerable groups and individuals with special needs, including women, children and the elderly;

7. Call upon States to continue their efforts aimed at ensuring the integrity of the asylum institution, *inter alia*, by means of carefully applying Articles 1F and 33(2) of the 1951 Convention, in particular in light of new threats and challenges;

8. Reaffirm the fundamental importance of UNHCR as the multilateral institution with the mandate to provide international protection to refugees and to promote durable solutions, and recall our obligations as State Parties to cooperate with UNHCR in the exercise of its functions;

9. Urge all States to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or its 1967 Protocol and to ensure closer cooperation between States parties and UNHCR to facilitate UNHCR's duty of supervising the application of the provisions of these instruments;

10. Urge all States to respond promptly, predictably and adequately to funding appeals issued by UNHCR so as to ensure that the needs of persons under the mandate of the Office of the High Commissioner are fully met;

11. Recognize the valuable contributions made by many non-governmental organizations to the well-being of asylum-seekers and refugees in their reception, counselling and care, in finding durable solutions based on full respect of refugees, and in assisting States and UNHCR to maintain the integrity of the international refugee protection regime, notably through advocacy, as well as public awareness and information activities aimed at combating racism, racial discrimination, xenophobia and related intolerance, and gaining public support for refugees;

12. Commit ourselves to providing, within the framework of international solidarity and burden-sharing, better refugee protection through comprehensive strategies, notably regionally and internationally, in order to build capacity, in particular in developing countries and countries with economies in transition, especially those which are hosting large-scale influxes or protracted refugee situations, and to strengthening response mechanisms, so as to ensure that refugees have access to safer and better conditions of stay and timely solutions to their problems;

13. Recognize that prevention is the best way to avoid refugee situations and emphasize that the ultimate goal of international protection is to achieve a durable solution for refugees, consistent with the principle of *non-refoulement*, and commend States that continue to facilitate these solutions, notably voluntary repatriation

and, where appropriate and feasible, local integration and resettlement, while recognizing that voluntary repatriation in conditions of safety and dignity remains the preferred solution for refugees;

14. Extend our gratitude to the Government and people of Switzerland for generously hosting the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.

## 2.1 The scope and content of the principle of *non-refoulement*: Opinion

SIR ELIHU LAUTERPACHT AND DANIEL BETHLEHEM\*

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\* The authors would like to thank Rodney Neufeld, Research Associate of the Lauterpacht Research Centre, for his research assistance in the preparation of this Opinion and, in particular, in respect of the compilation of the annexes. **Editorial note:** This Opinion was completed on 20 June 2001 on the basis of the law and other pertinent factors at that point. It is reproduced here without substantive revision. A number of editorial notes have, however, been inserted for purposes of publication, in order to reflect an up-to-date position (as of February 2003) on such matters as the ratification of the international treaties referred to in the text.]

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## I. Introduction

1. We have been asked by the Office of the United Nations High Commissioner for Refugees (UNHCR) to examine the scope and content of the principle of *non-refoulement* in international law. We have not been asked to address particular cases or specific circumstances in which the principle has been in issue but rather to comment on the interpretation and application of the principle in general. It goes without saying that the interpretation and application of the principle in specific cases will hinge on the facts involved. The present opinion is limited to a preliminary analysis of the matter.

2. *Non-refoulement* is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

3. The above description is no more than a summary indication of what the concept is about in relation to refugees. There are, in addition, other contexts in which

the concept is relevant, notably in the more general law relating to human rights concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment.

#### A. Contexts in which *non-refoulement* is relevant

4. The concept of *non-refoulement* is relevant in a number of contexts – principally, but not exclusively, of a treaty nature. Its best known expression for present purposes is in Article 33 of the 1951 Convention Relating to the Status of Refugees:<sup>1</sup>

1. No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

5. The principle also appears in varying forms in a number of later instruments: (a) the 1966 Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee,<sup>2</sup> Article III(3) of which provides:

No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion

1 No. 2545, 189 UNTS 150 (hereinafter ‘1951 Convention’).

2 Report of the Eighth Session of the Asian-African Legal Consultative Committee held in Bangkok, 8–17 Aug. 1966, p. 335 (hereinafter ‘Asian-African Refugee Principles’). Art. III(1) of the as yet unadopted Draft Consolidated Text of these principles revised at a meeting held in New Delhi on 26–27 Feb. 2001 provides as follows:

No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.

The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person’s presence is a danger to the national security and public order of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[**Editorial note:** These Principles were adopted by Resolution 40/3 on 24 June 2001, at a meeting at which the Committee was also renamed the Asian-African Legal Consultative Organization. The text of Article III was not changed.]

which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

(b) the 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967,<sup>3</sup> Article 3 of which provides:

1. No person referred to in article 1, paragraph 1 [seeking asylum from persecution], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

(c) the 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>4</sup> Article II(3) of which provides:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].

(d) the 1969 American Convention on Human Rights,<sup>5</sup> Article 22(8) of which provides:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

<sup>3</sup> A/RES/2132 (XXII) of 14 Dec. 1967.

<sup>4</sup> 1001 UNTS 45 (hereinafter 'OAU Refugee Convention').

<sup>5</sup> American Convention on Human Rights or 'Pact of San José, Costa Rica', 1969, Organization of American States (OAS) Treaty Series No. 35, 9 ILM 673.

(e) the 1984 Cartagena Declaration,<sup>6</sup> Section III, paragraph 5 of which reiterates:

the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.

6. The principle of *non-refoulement* is also applied as a component part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment. For example, Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>7</sup> provides:

1. No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

7. Likewise, Article 7 of the 1966 International Covenant on Civil and Political Rights<sup>8</sup> provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This obligation has been construed by the UN Human Rights Committee, in its General Comment No. 20 (1992), to include a *non-refoulement* component as follows:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.<sup>9</sup>

8. The corresponding provision in Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>10</sup> has similarly been interpreted by the European Court of Human Rights as imposing a prohibition on *non-refoulement*.<sup>11</sup>

6 Cartagena Declaration on Refugees, embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama held in Cartagena, 19–22 Nov. 1984. See, UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. II, pp. 206–11 (hereinafter 'Cartagena Declaration').

7 A/RES/39/46, 10 Dec. 1984 (hereinafter 'Torture Convention').

8 999 UNTS 171, 6 ILM (1967) 368 (hereinafter 'ICCPR').

9 HRI/HEN/1/Rev.1, 28 July 1994, at para. 9.

10 European Treaty Series No. 5 (hereinafter 'European Convention on Human Rights').

11 See *Soering v. United Kingdom* (1989), series A, no. 161, 98 ILR 270, at para. 88; *Cruz Varas v. Sweden* (1991), series A, no. 201; 108 ILR 283, at para. 69; *Vilvarajah v. United Kingdom* (1991), series A, no. 215; 108 ILR 321, at paras. 73–4 and 79–81; *Chahal v. United Kingdom* (1996), *Reports of Judgments*



9. *Non-refoulement* also finds expression in standard-setting conventions concerned with extradition. For example, Article 3(2) of the 1957 European Convention on Extradition precludes extradition ‘if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons’.<sup>12</sup> Similarly, Article 4(5) of the 1981 Inter-American Convention on Extradition precludes extradition when ‘it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons’.<sup>13</sup>

10. By reference to the 1951 Convention, the Torture Convention and the ICCPR, 169 States, representing the overwhelming majority of the international community, are bound by some or other treaty commitment prohibiting *refoulement*. This number increases when account is taken of other international instruments, including instruments applicable at a regional level. A table showing participation in the key international instruments that include a *non-refoulement* component appears as Annex 2.1 to this chapter.

## B. The interest of UNHCR

11. The interest of UNHCR in *non-refoulement* arises from its special responsibility to provide for the international protection of refugees.

### 1. *The establishment of UNHCR and its mandate*

12. Some consideration of the emergence and structure of UNHCR is required in order to appreciate the significance of a number of later developments in the mandate of UNHCR that have a bearing on the question of *non-refoulement*.

13. In 1946, the UN General Assembly established the International Refugee Organization (IRO) as a Specialized Agency of the United Nations of limited duration. Having regard to the prospective termination of the mandate of the IRO and the continuing concerns over refugees, the UNGA, by Resolution 319 (IV) of 3 December 1949, decided to establish a High Commissioner’s Office for Refugees ‘to discharge the functions enumerated [in the Annex to the Resolution] and such other functions as the General Assembly may from time to time confer upon it’.<sup>14</sup> By Resolution 428 (V) of 14 December 1950, the UNGA adopted the Statute of the Office

*and Decisions* 1996-V; 108 ILR 385, at para. 75; *Ahmed v. Austria* (1997), *Reports of Judgments and Decisions* 1996-VI; 24 EHRR 278, at paras. 39–40; *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211.

12 European Treaty Series No. 24. 13 OAS Treaty Series No. 60, p. 45.

14 A/RES/319 (IV), 3 Dec. 1949, at para. 1.

of the United Nations High Commissioner for Refugees.<sup>15</sup> UNHCR was thus established as a subsidiary organ of the UNGA pursuant to Article 22 of the UN Charter.

14. Paragraph 1 of the UNHCR Statute describes the functions of the UNHCR as follows:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

15. Paragraph 6 of the Statute identifies the competence of UNHCR *ratione personae* as extending to any person

who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.<sup>16</sup>

16. Paragraph 7 of the Statute indicates exceptions to the competence of UNHCR including any person in respect of whom

there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.<sup>17</sup>

17. The function and competence of UNHCR is thus determined by reference to the particular circumstances of the persons in need of international protection. It is not determined by reference to the application of any treaty or other instrument or rule of international law, by any temporal, geographic, or jurisdictional consideration, by the agreement or acquiescence of any affected State, or by any other factor.<sup>18</sup>

15 A/RES/428 (V), 14 Dec. 1950 (hereinafter 'the Statute'). 16 UNHCR Statute, at para. 6B.

17 UNHCR Statute, at para. 7(d). Art. 6 of the London Charter refers to crimes against peace, war crimes, and crimes against humanity. Art. 14(2) of the Universal Declaration of Human Rights provides that the right to seek and enjoy asylum 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

18 The fundamental importance of the UNHCR Statute as a basis for the international protection function of UNHCR, particularly in respect of States that had not acceded to the 1951 Convention or 1967 Protocol, was emphasized by the Executive Committee of the High Commissioner's Programme in Conclusion No. 4 (XXVIII) 1977.

UNHCR's mandate is to provide international protection *inter alia* to persons who are outside their country of origin in consequence of a well-founded fear of persecution and who come within the other requirements of paragraph 6B of the Statute and are not otherwise excluded from UNHCR competence by the terms of paragraph 7 of the Statute.

18. Paragraph 9 of the Statute provides that UNHCR 'shall engage in such additional activities . . . as the General Assembly may determine'. The General Assembly has over the past fifty years extended UNHCR's competence to encompass all categories of persons in need of international protection who may not fall under the Statute definition and has affirmed the breadth of the concept of 'refugee' for these purposes. For example, initially through the notion of UNHCR's good offices but later on a more general basis, refugees fleeing from generalized situations of violence have been included within the competence of the UNHCR.<sup>19</sup>

19. By 1992, a Working Group of the Executive Committee of the High Commissioner's Programme was able to describe UNHCR's mandate in the following terms:

The evolution of UNHCR's role over the last forty years has demonstrated that the mandate is resilient enough to allow, or indeed require, adaptation by UNHCR to new, unprecedented challenges through new approaches, including in the areas of prevention and in-country protection. UNHCR's humanitarian expertise and experience has, in fact, been recognised by the General Assembly as an appropriate basis for undertaking a range of activities not normally viewed as being within the Office's mandate. The Office should continue to seek specific endorsement from the Secretary-General or General Assembly where these activities involve a significant commitment of human, financial and material resources.

The Working Group confirmed the widely recognised understanding that UNHCR's competence for refugees extends to persons forced to leave their countries due to armed conflict, or serious and generalised disorder or violence [even though] these persons may or may not fall within the terms of the 1951 Convention relating to the Status of Refugees (1951 Convention) or its 1967 Protocol. From the examination of the common needs of the various

19 See, for example, A/RES/1499 (XV), 5 Dec. 1960, which invited UN members to consult with UNHCR 'in respect of measures of assistance to groups of refugees who do not come within the competence of the United Nations'; A/RES/1673 (XVI), 18 Dec. 1961, which requested the High Commissioner 'to pursue his activities on behalf of the refugees within his mandate or those for whom he extends his good offices, and to continue to report to the Executive Committee of the High Commissioner's Programme and to abide by directions which that Committee might give him in regard to situations concerning refugees'; A/RES/2039 (XX), 7 Dec. 1965, which requested the High Commissioner 'to pursue his efforts with a view to ensuring an adequate international protection of refugees and to providing satisfactory permanent solutions to the problems affecting the various groups of refugees within his competence'; A/RES/31/35, 30 Nov. 1976, endorsing ECOSOC Resolution 2011 (LXI) of 2 Aug. 1976, which commended UNHCR for its efforts 'on behalf of refugees and displaced persons, victims of man-made disasters, requiring urgent humanitarian assistance' and requested the High Commissioner to continue his activities for 'alleviating the suffering of all those of concern to his Office'.

groups for which the UNHCR is competent, it is clear that, with protection at the core of UNHCR's mandate, displacement, coupled with the need for protection, is the basis of UNHCR's competence for the groups. The character of the displacement, together with the protection need[ed], must also determine the content of UNHCR's involvement.

The Working Group considered that the same reasoning held true for persons displaced within their own country for refugee-like reasons. While the Office does not have any general competence for this group of persons, certain responsibilities may have to be assumed on their behalf, depending on their protection and assistance needs. In this context, UNHCR should indicate its willingness to extend its humanitarian expertise to internally displaced persons, on a case-by-case basis, in response to requests from the Secretary-General or General Assembly.<sup>20</sup>

20. Although UNHCR is accorded a special status as the guardian of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,<sup>21</sup> it is not limited in the exercise of its protective functions to the application of the substantive provisions of these two treaties. UNHCR may therefore rely on whatever instruments and principles of international law may be pertinent and applicable to the situation which it is called upon to address. Thus, for example, in parallel with reliance on *non-refoulement* as expressed in the 1951 Convention and the 1967 Protocol, the circumstances of particular cases may warrant UNHCR pursuing the protection of refugees coming within its mandate by reference to the other treaties mentioned above, as well as other pertinent instruments, including appropriate extradition treaties, or by reference to *non-refoulement* as a principle of customary international law.

## 2. *The Executive Committee of the High Commissioner's Programme*

21. Resolution 319 (IV) of 3 December 1949, by which the UNGA decided to establish UNHCR, provided that UNHCR should '[r]eceive policy directives from the United Nations according to methods to be determined by the General Assembly'.<sup>22</sup> It further indicated that '[m]eans should be provided whereby interested Governments, non-members of the United Nations, may be associated with the work of the High Commissioner's Office'.<sup>23</sup>

20 Note on International Protection, A/AC.96/799, 25 Aug. 1992, at paras. 14–16. This assessment was endorsed by the Executive Committee in Conclusion No. 68 (XLIII) 1992 on International Protection and implicitly by the UNGA in *inter alia* Resolution 47/105 of 16 Dec. 1992 concerning assistance to refugees, returnees, and displaced persons in Africa.

21 1967 Protocol attached to the 1951 Convention Relating to the Status of Refugees, No. 8791, 606 UNTS 267 (hereinafter '1967 Protocol'). As is addressed further below, the essential effect of the 1967 Protocol was to enlarge the scope of application *ratione personae* of the 1951 Convention. In the case of States not otherwise party to the 1951 Convention, the 1967 Protocol gave rise to an independent obligation to apply the terms of the 1951 Convention as amended by the Protocol.

22 A/RES/319 (IV), 3 Dec. 1949, at Annex 1, para. 1(c).

23 A/RES/319 (IV), 3 Dec. 1949, at Annex 1, para. 2.

22. Reflecting these objectives, paragraph 4 of the UNHCR Statute provides:

The Economic and Social Council may decide, after hearing the views of the High Commissioner on the subject, to establish an advisory committee on refugees, which shall consist of representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem.

23. Pursuant to this provision, the UN Economic and Social Council (ECOSOC) established an Advisory Committee on Refugees ('Advisory Committee') by Resolution 393 (XIII) B of 10 September 1951. The object of the Advisory Committee was to advise UNHCR at its request on the exercise of its functions.

24. In the light of continuing concerns over the situation of refugees, the UNGA, by Resolution 832 (IX) of 21 October 1954, requested ECOSOC 'either to establish an Executive Committee responsible for giving directives to the High Commissioner in carrying out his programme . . . or to revise the terms of reference and composition of the Advisory Committee in order to enable it to carry out the same duties'.<sup>24</sup> In response, ECOSOC, by Resolution 565 (XIX) of 31 March 1955, reconstituted the Advisory Committee as an Executive Committee, to be known as the United Nations Refugee Fund (UNREF) Executive Committee.

25. Having regard, *inter alia*, to the emergence of 'new refugee situations requiring international assistance', the UNGA, by Resolution 1166 (XII) of 26 November 1957, requested ECOSOC

to establish, not later than at its twenty-sixth session, an Executive Committee of the High Commissioner's Programme to consist of the representatives of from twenty to twenty-five States Members of the United Nations or members of any of the specialised agencies, to be elected by the Council on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem, this Committee to take the place of the UNREF Executive Committee and to be entrusted with the terms of reference set forth below:

...

- (b) To advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office;
- (c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help solve specific refugee problems remaining unsolved after 31 December 1958 or arising after that date . . .

...

- (e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above . . .<sup>25</sup>

24 A/RES/832 (IX), 21 Oct. 1954, at para. 4.      25 A/RES/1166 (XII), 26 Nov. 1957, at para. 6.

26. Accordingly, ECOSOC, by Resolution 672 (XXV) of 30 April 1958, established the Executive Committee of the High Commissioner's Programme ('Executive Committee') with a membership of twenty-four States. Resolution 672 (XXV) provided that the Executive Committee shall '[d]etermine the general policies under which the High Commissioner shall plan, develop and administer the programmes and projects required to help solve the problems referred to in resolution 1166 (XII)'.<sup>26</sup> Membership of the Executive Committee, progressively expanded since its establishment, currently stands at fifty-seven States.<sup>27</sup>

27. Participation in Executive Committee meetings is at the level of Permanent Representative to the United Nations Office in Geneva or other high officials (including ministers) of the Member concerned. The Executive Committee holds one annual plenary session, in Geneva, in October, lasting one week. The Executive Committee's subsidiary organ, the Standing Committee, meets several times during the year. The adoption of texts takes place by consensus. In addition to participation in Executive Committee meetings by members of the Committee, a significant number of observers also attend on a regular basis and participate in the deliberations.

28. The Executive Committee was established by ECOSOC at the request of the UNGA. The Committee is thus formally independent of UNHCR and operates as a distinct body of the United Nations. In the exercise of its mandate, the Executive Committee adopts Conclusions on International Protection ('Conclusions') addressing particular aspects of UNHCR's work.

29. While Conclusions of the Executive Committee are not formally binding, regard may properly be had to them as elements relevant to the interpretation of the 1951 Convention.<sup>28</sup>

## **II. The 1951 Convention (as amended by the 1967 Protocol)**

### **A. The origins of the 1951 Convention**

30. The origins of the 1951 Convention are to be found in the work of the Ad Hoc Committee on Statelessness and Related Problems ('Ad Hoc Committee')

<sup>26</sup> E/RES/672 (XXV), 30 April 1958, at para. 2(a).

<sup>27</sup> The current membership of the Executive Committee comprises: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Democratic Republic of Congo, Denmark, Ethiopia, Finland, France, Germany, Greece, the Holy See, Hungary, India, Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Lebanon, Lesotho, Madagascar, Mexico, Morocco, Mozambique, Namibia, the Netherlands, Nicaragua, Nigeria, Norway, Pakistan, the Philippines, Poland, the Russian Federation, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Tanzania, Thailand, Tunisia, Turkey, Uganda, the United Kingdom, the United States, and Venezuela.

<sup>28</sup> See further para. 214 below.

appointed by ECOSOC by Resolution 248 (IX) of 8 August 1949 with the mandate to ‘consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention’. This in turn drew on a Report of the UN Secretary-General prepared at the request of ECOSOC which highlighted various arrangements and initiatives concerning refugees that had operated in the period of the League of Nations.<sup>29</sup> Against the background of these earlier arrangements and initiatives, the Secretary-General submitted for the consideration of the Ad Hoc Committee a preliminary draft convention based on the principles contained in the earlier instruments.<sup>30</sup> The subsequent work of the Ad Hoc Committee on the basis of this proposal culminated in a draft Convention Relating to the Status of Refugees<sup>31</sup> which formed the basis of a Conference of Plenipotentiaries convened by the UNGA from 2 to 25 July 1951.<sup>32</sup> The Conference concluded with the adoption of the Convention Relating to the Status of Refugees dated 28 July 1951.<sup>33</sup> The Convention entered into force on 22 April 1954.

## B. The 1951 Convention

31. As stated in its preambular paragraphs, the object of the 1951 Convention is to endeavour to assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations and

29 The institutional initiatives for the protection of refugees of this period operated within a legal framework of various instruments including:

- Arrangements with regard to the issue of certificates of identity to Russian refugees of 5 July 1922 (LNTS, vol. XIII, No. 355);
- Arrangements relating to the issue of identity certificates to Russian and Armenian refugees, supplementing and amending the previous arrangements dated 5 July 1922 and 31 May 1924 of 12 May 1926 (LNTS, vol. LXXXIX, No. 2004);
- Arrangements relating to the legal status of Russian and Armenian refugees of 30 June 1928 (LNTS, vol. LXXXIX, No. 2005);
- Convention Relating to the International Status of Refugees of 28 June 1933 (LNTS, vol. CLIX, No. 3663);
- Provisional arrangement concerning the status of refugees coming from Germany of 4 July 1936 (LNTS, vol. CLXXI, No. 3952);
- Convention Concerning the Status of Refugees Coming from Germany of 10 February 1938 (LNTS, vol. CXCII, No. 4461); and
- Additional Protocol to the 1936 Provisional Arrangement and 1938 Convention Concerning the Status of Refugees Coming from Germany of 14 September 1939 (LNTS, vol. CXCVIII, No. 4634).

30 See the Memorandum by the Secretary-General, E/AC.32/2, 3 Jan. 1950.

31 A/CONF.2/1, 12 March 1951. 32 A/RES/429 (V), 14 Dec. 1950.

33 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952.

the Universal Declaration of Human Rights.<sup>34</sup> For the purposes of the 1951 Convention, the term ‘refugee’ is defined to apply, first, to any person who had been considered a refugee under the earlier arrangements or under the IRO Constitution, and, secondly, to any person who

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>35</sup>

32. Paragraphs D–F of Article 1 go on to indicate various exclusions to the application of the Convention. In particular, pursuant to Article 1F, the provisions of the Convention shall not apply

to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of his refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

33. The substantive parts of the Convention go on to address such matters as the juridical status of refugees, the respective rights and obligations of refugees and Contracting States, and the provision of administrative assistance to refugees. Articles 31–33 of the Convention set out various safeguards in the following terms:

**Article 31 Refugees unlawfully in the country of refuge**

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such

34 Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 Dec. 1948 (hereinafter ‘Universal Declaration’) at preambular paras. 1 and 2.

35 1951 Convention, Art. 1A(2).



restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

### **Article 32 Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

### **Article 33 Prohibition of expulsion or return ('refoulement')**

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

34. Article 35(1) of the Convention provides that the Contracting States undertake to cooperate with UNHCR in the exercise of its functions, particularly its supervisory responsibility. Of some importance, Article 42(1) precludes the making of reservations in respect *inter alia* of Article 33 concerning *non-refoulement*.

## **C. The 1967 Protocol**

35. In the light of on-going concern over the situation of refugees and the limitation on the personal scope of the 1951 Convention, a Colloquium on the Legal Aspects of Refugee Problems was organized in Bellagio, Italy, in April 1965. The outcome of this meeting was agreement amongst the participants that the 1951 Convention ought to be adapted 'to meet new refugee situations which have arisen, and thereby to overcome the increasing discrepancy between the

Convention and the Statute of the Office of the High Commissioner for Refugees'.<sup>36</sup> The Colloquium further agreed that the most appropriate way of adapting the 1951 Convention would be through the adoption of a Protocol to 'remove the existing dateline (1 January 1951) in Article 1A(2) of the Convention'.<sup>37</sup> A Draft Protocol achieving this end was prepared and annexed to the Report of the Colloquium.

36. The Draft Protocol formed the basis of the 1967 Protocol Relating to the Status of Refugees. As stated in its preambular paragraphs, the objective of the 1967 Protocol was to ensure 'that equal status should be enjoyed by all refugees covered by the definition in the [1951] Convention irrespective of the dateline 1 January 1951'. Article I(1) and (2) of the Protocol accordingly provided:

1. The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the [1951] Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of Article 1 of the [1951] Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words ' . . . as a result of such events', in Article 1A(2) were omitted.

37. The operative definition of the term 'refugee' for the purposes of both the 1951 Convention and the 1967 Protocol thus reads as follows:

Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

38. Article II(1) of the 1967 Protocol provides that the States Parties to the Protocol undertake to cooperate with the UNHCR in the exercise of its functions. Article VII reiterates the preclusion on reservations indicated in Article 42(1) of the 1951 Convention. The Protocol entered into force on 4 October 1967.

39. At present, 140 States are party to the 1951 Convention and/or the 1967 Protocol: 133 States<sup>38</sup> are party to both the 1951 Convention and the 1967 Protocol;<sup>39</sup>

36 Colloquium on the Legal Aspects of Refugee Problems, Note by the High Commissioner, A/AC.96/INF.40, 5 May 1965, at para. 2.

37 *Ibid.*, para. 3.

38 This includes the Holy See. [**Editorial note:** By 1 Feb. 2003 three more States – Belarus, the Republic of Moldova and Ukraine – had acceded to both the 1951 Convention and 1967 Protocol, while Saint Kitts and Nevis had acceded to the 1951 Convention alone. This brought the total of States party to both instruments to 136 and the total of those party to one or other instrument to 144.]

39 See Annex 2.1 hereto.

four States are party to the 1951 Convention alone;<sup>40</sup> and three States are party to the 1967 Protocol alone.<sup>41</sup>

#### D. The approach to interpretation

40. As this study is largely concerned with the interpretation of *non-refoulement* as expressed in Article 33 of the 1951 Convention, it will be convenient if we first set out briefly the principal elements in the process of treaty interpretation. The starting point is necessarily Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969,<sup>42</sup> which are generally accepted as being declaratory of customary international law. Those Articles provide as follows:

##### **Article 31 General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

##### **Article 32 Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in

40 Madagascar, Monaco, Namibia, and Saint Vincent and the Grenadines. [Editorial note: By 1 Feb. 2003, Saint Kitts and Nevis had also acceded to the 1951 Convention alone.]

41 Cape Verde, the United States, and Venezuela.

42 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (hereinafter 'Vienna Convention').

order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

41. While the text of a treaty will be the starting point, the object and purpose of the treaty as well as developments subsequent to its conclusion will also be material. Reference to the object and purpose of a treaty is an essential element of the general rule of interpretation. It will assume particular importance in the case of treaties of a humanitarian character. The matter was addressed by the International Court of Justice (ICJ) in its 1951 Advisory Opinion on *Reservations to the Genocide Convention* in terms that could apply equally to the 1951 Convention as follows:

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilising purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d'être* of the convention.<sup>43</sup>

42. The relevance of subsequent developments is also explicitly affirmed as part of the general rule of interpretation in Article 31(3) of the Vienna Convention. This requires that any subsequent agreement or practice of the parties regarding the interpretation of a treaty must be taken into account as well as 'any relevant rules of international law applicable in the relations between the parties'.

43. The importance for the purposes of treaty interpretation of subsequent developments in the law was addressed by the ICJ in its 1971 Advisory Opinion in the *Namibia* case, in the context of its interpretation of the League of Nations Covenant over South West Africa, in the following terms:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions

<sup>43</sup> *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15, at p. 23.

of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and *its interpretation cannot remain unaffected by the subsequent development of the law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.* In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its function, may not ignore.<sup>44</sup>

44. This analysis is echoed in judicial opinion more broadly. For example, pre-dating the *Namibia* Advisory Opinion, although evidently informing the assessment of the Court in the passage just quoted, Judge Tanaka, in a Dissenting Opinion in the 1966 *South West Africa* case, observed that developments in customary international law were relevant to the interpretation of a treaty concluded forty years previously, particularly in view of the ethical and humanitarian purposes of the instrument in question.<sup>45</sup> This assessment, and the Court's subsequent analysis in the *Namibia* case, was echoed more recently by Judge Weeramantry in the 1997 *Gabcikovo-Nagymaros* case in respect of human rights instruments more generally.<sup>46</sup> Addressing the *raison d'être* of the principle, Judge Weeramantry observed as follows:

Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.<sup>47</sup>

45. The point also finds support in the jurisprudence of other international tribunals. In respect of the interpretation and application of the European Convention on Human Rights, for example, the European Court of Human Rights has observed that 'the Convention is a living instrument which . . . must be interpreted in the light of present day conditions'.<sup>48</sup>

44 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at para. 53 (emphasis added).

45 *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p. 6, at pp. 293–4.

46 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, at pp. 114–15.

47 *Ibid.*, p. 114.

48 *Tyler v. United Kingdom*, Judgment of the European Court of Human Rights, 25 April 1978, Series A, No. 26, at para. 31. See also R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th edn, Longman, Harlow, 1992), at pp. 1274–5; *The Kronprins Gustaf Adolf (1932) Annual*

46. A further element to be borne in mind is the concept of the cross-fertilization of treaties. This is a process which is familiar in the law of international organizations and involves the wording and construction of one treaty influencing the interpretation of another treaty containing similar words or ideas.<sup>49</sup> Its application is not excluded in relation to humanitarian treaties.

47. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the *travaux préparatoires* and circumstances of the conclusion of the treaty, to confirm the meaning resulting from the application of the general rule of interpretation or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. While reference by international courts and tribunals to the *travaux préparatoires* of a treaty is common, it is a practice that has significant shortcomings particularly in the case of treaties negotiated at a time and in circumstances far distant from the point at which the question of interpretation and application arises.<sup>50</sup> The *travaux préparatoires* of the 1951 Convention must, therefore, for the purposes of the interpretation of the Convention, be approached with care. The world of 1950–51 in which the Convention was negotiated was considerably different from the present day circumstances in which the Convention falls to be applied.

## E. Preliminary observations

48. Before turning to the detail of Article 33, a number of preliminary observations are warranted. First, the 1951 Convention binds only those States that are a party to it. Pursuant to Article I(2) of the 1967 Protocol, a State that is a party to the Protocol though not to the 1951 Convention will also be bound ‘to apply Articles 2 to 34 inclusive of the [1951] Convention’. The *non-refoulement* obligation in Article 33 of the 1951 Convention will only be opposable to States that are a party to one or both of these instruments.

49. Secondly, the 1951 Convention is of an avowedly humanitarian character. This emerges clearly from the preambular paragraphs of the Convention which notes the profound concern expressed by the United Nations for refugees and the objective of assuring to refugees the widest possible exercise of the fundamental

*Digest* (1931–32), No. 205, p. 372, at p. 374; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 182; *Fubini Claim* (1959), 29 ILR 34, at p. 46.

49 The practice is addressed in E. Lauterpacht, ‘The Development of the Law of International Organizations by the Decisions of International Tribunals’ *Recueil des Cours*, vol. 1976-VI, at pp. 396–402.

50 See also, I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984), p. 142.

rights and freedoms referred to in the 1948 Universal Declaration of Human Rights. It goes on to record the recognition by all States of ‘the social and humanitarian nature of the problem of refugees’.<sup>51</sup>

50. The humanitarian character of the 1951 Convention also emerges clearly from its origin in the work of the Ad Hoc Committee on Statelessness. It is evident, too, in the very definition of the term ‘refugee’ in Article 1A(2) of the Convention which speaks of persons who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ are outside their country of origin. The protection afforded to refugees by Articles 31–33 of the Convention further attests the Convention’s humanitarian character. The humanitarian responsibilities of States towards refugees pursuant to the 1951 Convention have also been repeatedly affirmed in Conclusions of the Executive Committee.

51. Thirdly, within the scheme of the 1951 Convention, the prohibition on *refoulement* in Article 33 holds a special place. This is evident in particular from Article 42(1) of the Convention which precludes reservations *inter alia* to Article 33. The prohibition on *refoulement* in Article 33 is therefore a non-derogable obligation under the 1951 Convention. It embodies the humanitarian essence of the Convention.

52. The non-derogable character of the prohibition on *refoulement* is affirmed in Article VII(1) of the 1967 Protocol. It has also been emphasized both by the Executive Committee and by the UNGA.<sup>52</sup> The Executive Committee, indeed, has gone so far as to observe that ‘the principle of *non-refoulement* . . . was progressively acquiring the character of a peremptory rule of international law’.<sup>53</sup>

53. Fourthly, the fundamental humanitarian character and primary importance of *non-refoulement* as a cardinal principle of refugee protection has also been repeatedly affirmed more generally in Conclusions of the Executive Committee over the past twenty-five years. Thus, for example, in 1980, the Executive Committee ‘[r]eaffirmed the fundamental character of the generally recognized principle of *non-refoulement*’.<sup>54</sup> In 1991, it emphasized ‘the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection’.<sup>55</sup> In 1996, it again reaffirmed ‘the fundamental importance of the principle of *non-refoulement*’.<sup>56</sup> Numerous other similar statements to this effect are apparent. The fundamental importance of *non-refoulement* within the scheme of refugee protection has also been repeatedly affirmed in resolutions of the General Assembly.<sup>57</sup>

51 At preambular para. 5.

52 Conclusion No. 79 (XLVII) 1996, at para. (i); A/RES/51/75, 12 Feb. 1997, at para. 3.

53 Conclusion No. 25 (XXXIII) 1982, at para. (b).

54 Conclusion No. 17 (XXXI) 1980, at para. (b).

55 Conclusion No. 65 (XLII) 1991, at para. (c).      56 Conclusion No. 79 (XLVII) 1996, at para. (j).

57 See, for example, A/RES/48/116, 24 March 1994, at para. 3; A/RES/49/169, 24 Feb. 1995, at para. 4; A/RES/50/152, 9 Feb. 1996, at para. 3; A/RES/51/75, 12 Feb. 1997, at para. 3.

## F. The interpretation of Article 33(1) of the 1951 Convention

54. The prohibition on *refoulement* is set out in Article 33(1) of the 1951 Convention in the following terms:

No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

55. Article 33(2) contains exceptions to the principle. These will be addressed further below.

56. The starting point for the interpretation of this Article must be the words of the provision itself, read in the context of the treaty as a whole. As observed in the course of the preceding remarks on the principles of interpretation relevant to this exercise, the object and purpose of the 1951 Convention – its humanitarian character – as well as subsequent developments in the law and any subsequent agreement and practice of the parties regarding interpretation, will also be material. As the text is the starting point, it will be convenient to proceed by way of an analysis that follows the language of the provision.

### 1. *Who is bound?*

#### (a) The meaning of 'Contracting State'

57. The first question that requires comment is who is bound by the prohibition on *refoulement*, i.e. what is meant by the term 'Contracting State'. A related question concerns the scope of this term *ratione loci*, i.e. what are the territorial limits of the obligation on a 'Contracting State'.

58. The term 'Contracting State' refers to all States party to the 1951 Convention. By operation of Article I(1) of the 1967 Protocol, it also refers to all States party to the 1967 Protocol whether or not they are party to the 1951 Convention.

59. The reference to 'Contracting States' will also include all sub-divisions of the Contracting State, such as provincial or state authorities, and will apply to all the organs of the State or other persons or bodies exercising governmental authority. These aspects are uncontroversial elements of the law on state responsibility expressed most authoritatively in the Articles on State Responsibility adopted by the International Law Commission (ILC) of the United Nations on 31 May 2001 ('State Responsibility Articles') in the following terms:

#### **Attributions of conduct to a State**

##### **Article 4 Conduct of organs of a State**

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial



or any functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State.

#### **Article 5 Conduct of persons or entities exercising elements of governmental authority**

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>58</sup>

60. In accordance with equally uncontroversial principles of state responsibility, the responsibility of 'Contracting States' under Article 33(1) of the 1951 Convention will also extend to:

- (a) the conduct of an organ placed at the disposal of a State by another State if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed;<sup>59</sup>
- (b) the conduct of a person or group of persons in fact acting on the instructions of, or under the direction or control of, the State;<sup>60</sup>
- (c) the conduct of a person or group of persons in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority;<sup>61</sup> and
- (d) conduct which is not otherwise attributable to a State but which has nonetheless been acknowledged and adopted by the State as its own.<sup>62</sup>

61. These principles will be particularly relevant to the determination of the application of the principle of *non-refoulement* in circumstances involving the actions of persons or bodies on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. In principle, subject to the particular facts in issue, the prohibition on *refoulement* will therefore apply to circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons act on behalf of a Contracting State or in exercise of the governmental activity of that State. An act of *refoulement* undertaken by, for example, a private air carrier or

58 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, A/CN.4/L.602, 31 May 2001.

59 State Responsibility Articles, at Art. 6.

60 Ibid., Art. 8.    61 Ibid., Art. 9.    62 Ibid., Art. 11.

transit official acting pursuant to statutory authority will therefore engage the responsibility of the State concerned.

(b) Is the responsibility of the Contracting State limited to what occurs on its territory?

62. The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.

63. As a general proposition States are responsible for conduct in relation to persons ‘subject to or within their jurisdiction’. These or similar words appear frequently in treaties on human rights.<sup>63</sup> Whether a person is subject to the jurisdiction of a State will not therefore depend on whether they were within the territory of the State concerned but on whether, in respect of the conduct alleged, they were under the effective control of, or were affected by those acting on behalf of, the State in question.

64. Although focused on treaties other than the 1951 Convention, this matter has been addressed by both the Human Rights Committee and the European Court of Human Rights in terms which are relevant here.

65. For example, in *López Burgos v. Uruguay*, involving the alleged arrest, detention, and mistreatment of López Burgos in Argentina by members of the ‘Uruguayan security and intelligence forces’, the Human Rights Committee said:

[A]lthough the arrest and initial detention and mistreatment of López Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol (‘... individuals subject to its jurisdiction...’) or by virtue of article 2(1) of the Covenant (‘... individuals within its territory and subject to its jurisdiction...’) from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

The reference in article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ does not affect the above conclusions because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occur.

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights ‘to all individuals within its territory and subject

63 See, e.g., Art. 2(1) of the ICCPR, Art. 1 of the 1966 Optional Protocol to the ICCPR, UNGA Res. 2200A (XXI), Art. 1 of the ECHR, and Art. 1(1) of the ACHR.

to its jurisdiction', but *it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit on the territory of another State*, whether with the acquiescence of the Government of that State or in opposition to it . . . .

. . . [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>64</sup>

66. The same view has been expressed by the European Court of Human Rights. In *Loizidou v. Turkey*, for example, the question arose as to whether acts by Turkish troops outside Turkey were capable of falling within the jurisdiction of Turkey. Concluding that they could, the European Court of Human Rights said:

[T]he concept of 'jurisdiction' under [article 1 of the European Convention on Human Rights] is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention . . . In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>65</sup>

67. The reasoning in these cases supports the more general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.

64 Communication No. 52/1979, *López Burgos v. Uruguay*, Views of the Human Rights Committee of 29 July 1981, at paras. 12.1–12.3 (emphasis added). See also Communication No. 56/1979, *de Casariego v. Uruguay*, Views of the Human Rights Committee of 29 July 1981, at paras. 10.1–10.3.

65 *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights, Judgment of 23 Feb. 1995, Series A, No. 310, 103 ILR 622, at paras. 62–3. References in the text have been omitted.

## 2. *Prohibited conduct*

68. Consideration must now be given to the nature of the act prohibited by Article 33(1). What is meant by the phrase ‘expel or return (*‘refouler’*) . . . in any manner whatsoever’?

69. As the words ‘in any manner whatsoever’ indicate, the evident intent was to prohibit any act of removal or rejection that would place the person concerned at risk. The formal description of the act – expulsion, deportation, return, rejection, etc. – is not material.

70. It has sometimes been suggested that *non-refoulement* does not apply to acts of extradition or to non-admittance at the frontier. In support of this suggestion, reference has been made to comments by a number of delegations during the drafting process to the effect that Article 33(1) was without prejudice to extradition.<sup>66</sup> It has also been said that *non-refoulement* cannot be construed so as to create a right to asylum – something that is not granted in the 1951 Convention or in international law more generally.

### (a) *Applicability to extradition*

71. There are several reasons why extradition cannot be viewed as falling outside the scope of Article 33(1). First, the words of Article 33(1) are clear. The phrase ‘in any manner whatsoever’ leaves no room for doubt that the concept of *refoulement* must be construed expansively and without limitation. There is nothing, either in the formulation of the principle in Article 33(1) or in the exceptions indicated in Article 33(2), to the effect that extradition falls outside the scope of its terms.

72. Secondly, that extradition agreements must be read subject to the prohibition on *refoulement* is evident both from the express terms of a number of standard-setting multilateral conventions in the field and from the political offences exception which is a common feature of most bilateral extradition arrangements. Article 3(2) of the 1957 European Convention on Extradition and Article 4(5) of the 1981 Inter-American Convention on Extradition, noted above, support the proposition.

73. Thirdly, such uncertainty as may remain on the point is dispelled by the unambiguous terms of Conclusion No. 17 (XXXI) 1980 of the Executive Committee which reaffirmed the fundamental character of the principle of *non-refoulement*, recognized that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution, called upon States to ensure that the principle of *non-refoulement* was taken into account in treaties relating to extradition and national legislation on the subject, and expressed the hope that due regard would be had to the principle of *non-refoulement* in the application of existing treaties relating to extradition.<sup>67</sup>

66 See, e.g., the discussion in *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr Paul Weis (Cambridge University Press, 1995), pp. 341–2.

67 Conclusion No. 17 (XXXI) 1980, paras. (b)–(e).

74. Fourthly, any exclusion of extradition from the scope of Article 33(1) would significantly undermine the effectiveness of the 1951 Convention in that it would open the way for States to defeat the prohibition on *refoulement* by simply resorting to the device of an extradition request. Such a reading of Article 33 would not be consistent with the humanitarian object of the Convention and cannot be supported.

75. Finally, we would also note that developments in the field of human rights law, at both a conventional and customary level, prohibit, without any exception, exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment *inter alia* by way of their extradition. Although this development is not by itself determinative of the interpretation of Article 33(1) of the 1951 Convention, it is of considerable importance as the law on human rights which has emerged since the conclusion of the 1951 Convention is an essential part of the framework of the legal system that must, by reference to the ICJ's observations in the *Namibia* case, be taken into account for the purposes of interpretation.

#### (b) Rejection at the frontier

76. As regards rejection or non-admittance at the frontier, the 1951 Convention and international law generally do not contain a right to asylum. This does not mean, however, that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution. What it does mean is that, where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge. No other analysis, in our view, is consistent with the terms of Article 33(1).

77. A number of considerations support this view. First, key instruments in the field of refugee protection concluded subsequent to 1951 explicitly refer to 'rejection at the frontier' in their recitation of the nature of the act prohibited. This is the case, for example, in the Asian-African Refugee Principles of 1966, the Declaration on Territorial Asylum of 1967 and the OAU Refugee Convention of 1969. While, again, these provisions cannot be regarded as determinative of the meaning of Article 33(1) of the 1951 Convention, they offer useful guidance for the purposes of interpretation – guidance that is all the more weighty for its consistency with the common humanitarian character of all of the instruments concerned.

78. Secondly, as a matter of literal interpretation, the words 'return' and 'refouler' in Article 33(1) of the 1951 Convention may be read as encompassing rejection at the frontier. Indeed, as one commentator has noted, in Belgian and French law, the term '*refoulement*' commonly covers rejection at the frontier.<sup>68</sup> As any ambiguity in the terms must be resolved in favour of an interpretation that is consistent with the humanitarian character of the Convention, and in the light of the qualifying

68 Weis, *The Refugee Convention, 1951*, p. 342.

phrase, we are of the view that the interpretation to be preferred is that which encompasses acts amounting to rejection at the frontier.

79. Thirdly, this analysis is supported by various Conclusions of the Executive Committee. Thus, in Conclusion No. 6 (XXVIII) 1977, the Executive Committee explicitly reaffirmed ‘the fundamental importance of the observance of the principle of *non-refoulement* – both *at the border* and within the territory of a State’.<sup>69</sup> Further support for the proposition comes from Conclusion No. 15 (XXX) 1979 which, in respect of refugees without an asylum country, states as a general principle that:

[a]ction 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 principle of *non-refoulement*.<sup>70</sup>

80. The Executive Committee goes on to note, in terms which are equally germane to the issue at hand, that:

[i]t 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*.<sup>71</sup>

81. Additional support also comes from Conclusion No. 53 (XXXIX) 1988 in respect of stowaway asylum seekers which provides *inter alia* that ‘[l]ike other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin’.<sup>72</sup>

82. These Conclusions attest to the overriding importance of the principle of *non-refoulement*, even in circumstances in which the asylum seeker first presents himself or herself at the frontier. Rejection at the frontier, as with other forms of pre-admission *refoulement*, would be incompatible with the terms of Article 33(1).

83. Fourthly, this analysis also draws support from the principles of attribution and jurisdiction in the field of state responsibility noted above. Conduct amounting to rejection at the frontier – as also in transit zones or on the high seas – will in all likelihood come within the jurisdiction of the State and would engage its responsibility. As there is nothing in Article 33(1) of the 1951 Convention to suggest that it must be construed subject to any territorial limitation, such conduct as has the effect of placing the person concerned at risk of persecution would be prohibited.

84. It may be noted that Article I(3) of the 1967 Protocol provides *inter alia* that the Protocol ‘shall be applied by States Parties hereto without any geographic limitation’. While this clause was evidently directed towards the references to ‘events occurring in Europe’ in Article 1B(1) of the 1951 Convention, it should also

69 Conclusion No. 6 (XXVIII) 1977, para. (c) (emphasis added).

70 Conclusion No. 15 (XXX) 1979, at para. (b).

71 *Ibid.*, para. (c) (emphasis added). 72 Conclusion No. 53 (XXXIX) 1988, at para. 1.

be read as an indication of a more general intention to the effect that the protective regime of the 1951 Convention and the 1967 Protocol was not to be subject to geographic – or territorial – restriction.

85. Fifthly, this analysis is also supported by the appreciation evident in repeated resolutions of the General Assembly that the principle of *non-refoulement* applies to those seeking asylum just as it does to those who have been granted refugee status. The point is illustrated by UNGA Resolution 55/74 of 12 February 2001 which states *inter alia* as follows:

The General Assembly

...

6. *Reaffirms* that, as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and *calls upon all States to refrain from taking measures that jeopardise the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards;*

...

10. *Condemns* all acts that pose a threat to the personal security and well-being of refugees and asylum-seekers, such as *refoulement*...<sup>73</sup>

86. Finally, attention should be drawn to developments in the field of human rights which require that the principle of *non-refoulement* be secured for all persons subject to the jurisdiction of the State concerned. Conduct amounting to rejection at the frontier will normally fall within the jurisdiction of the State for the purposes of the application of human rights norms. These developments are material to the interpretation of the prohibition of *refoulement* under Article 33(1) of the 1951 Convention.

### 3. *Who is protected?*

87. The next question is who is protected by the prohibition on *refoulement*?

88. The language of Article 33(1) is seemingly clear on this point. Protection is to be afforded to ‘a refugee’. Pursuant to Article 1A(2) of the 1951 Convention, as amended by Article I(2) of the 1967 Protocol, the term ‘refugee’ applies to any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

73 A/RES/55/74, 12 Feb. 2001, at paras. 6 and 10 (emphasis added).

(a) *Non-refoulement* is not limited to those formally recognized as refugees

89. The argument is sometimes made that *non-refoulement* only avails those who have been formally recognized as refugees. The basis for this contention is that refugee status is conferred formally as a matter of municipal law once it has been established that an asylum seeker comes within the definition of ‘refugee’ under Article 1A(2) of the 1951 Convention. There are several reasons why this argument is devoid of merit.

90. Article 1A(2) of the 1951 Convention does not define a ‘refugee’ as being a person who has been *formally recognized* as having a well-founded fear of persecution, etc. It simply provides that the term shall apply to any person who ‘owing to well-founded fear of being persecuted . . .’. In other words, for the purposes of the 1951 Convention and the 1967 Protocol, a person who satisfies the conditions of Article 1A(2) is a refugee regardless of whether he or she has been formally recognized as such pursuant to a municipal law process. The matter is addressed authoritatively by the *Handbook on Procedures and Criteria for Determining Refugee Status* prepared by UNHCR as follows:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>74</sup>

91. Any other approach would significantly undermine the effectiveness and utility of the protective arrangements of the Convention as it would open the door for States to defeat the operation of the Convention simply by refusing to extend to persons meeting the criteria of Article 1A(2) the formal status of refugees.

92. That the protective regime of the 1951 Convention extends to persons who have not yet been formally recognized as refugees is apparent also from the terms of Article 31 of the Convention. This provides, in paragraph 1, that:

[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

74 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), at para. 28 (hereinafter ‘UNHCR *Handbook*’).



93. Refugees who enter and are present in the territory of a State illegally will, almost inevitably, not have been formally recognized as refugees by the State concerned. Article 31 nevertheless precludes the imposition of penalties on such persons. The only reasonable reading of this provision is that penalties cannot be imposed on those who come within the definition of a refugee in Article 1A(2) regardless of whether they have been formally recognized as such. To the extent that Article 31 applies regardless of whether a person who meets the criteria of a refugee has been formally recognized as such, it follows, *a fortiori*, that the same appreciation must apply to the operation of Article 33(1) of the Convention. The *refoulement* of a refugee would put him or her at much greater risk than would the imposition of penalties for illegal entry. It is inconceivable, therefore, that the Convention should be read as affording greater protection in the latter situation than in the former.

94. This approach has been unambiguously and consistently affirmed by the Executive Committee over a twenty-five-year period. Thus, in Conclusion No. 6 (XXVIII) 1977 the Executive Committee

[r]affirm[ed] the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State – of persons who may be subjected to persecution if returned to their country of origin *irrespective of whether or not they have been formally recognized as refugees*.<sup>75</sup>

95. This was subsequently reaffirmed by the Executive Committee in Conclusion No. 79 (XLVII) 1996 and Conclusion No. 81 (XLVIII) 1997 in substantially the same terms:

The Executive Committee . . . (j) Reaffirms the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, *whether or not they have been formally granted refugee status*.<sup>76</sup>

96. The same view has been endorsed in UNGA Resolution 52/103 of 9 February 1998, where the General Assembly *inter alia* reaffirmed:

that everyone is entitled to the right to seek and enjoy in other countries asylum from persecution, and, as asylum is an indispensable instrument for the international protection of refugees, calls upon all states to refrain from taking measures that jeopardize the institution of asylum, in particular, by

<sup>75</sup> Executive Committee, Conclusion No. 6, (XXVIII) 1977 at para. (c) (emphasis added).

<sup>76</sup> Conclusion No. 79 (XLVII) 1996, at para. (j) (emphasis added). Para. (i) of Conclusion No. 81 (XLVIII) 1997 is cast in almost identical terms.

returning or expelling refugees or *asylum-seekers* contrary to international human rights and to humanitarian and refugee law.<sup>77</sup>

This has been reiterated by the UNGA in subsequent resolutions.<sup>78</sup>

97. Other instruments express the same approach. The Asian-African Refugee Principles, for example, refer simply to persons 'seeking asylum'. Similarly, the Declaration on Territorial Asylum refers to asylum seekers. The OAU Refugee Convention and the American Convention on Human Rights are cast in broader terms still, providing respectively that '[n]o *person* shall be subjected . . .' and '[i]n no case may an *alien* be . . .'.

98. Developments in the law of human rights more generally preclude *refoulement* in the case of a danger of torture, cruel, inhuman or degrading treatment or punishment without regard to the status of the individual concerned. This approach, which focuses on the risk to the individual, reflects the essentially humanitarian character of the principle of *non-refoulement*. Differences in formulation notwithstanding, the character and object of the principle in a human rights context are the same as those under the 1951 Convention. Both would be undermined by a requirement that, for the principle to protect individuals at risk, they must first have been formally recognized as being of some or other status.

99. In sum, therefore, the subject of the protection afforded by Article 33(1) of the 1951 Convention is a 'refugee' as this term is defined in Article 1A(2) of the Convention, as amended by the 1967 Protocol. As such, the principle of *non-refoulement* will avail such persons irrespective of whether or not they have been formally recognized as refugees. *Non-refoulement* under Article 33(1) of the 1951 Convention will therefore protect both refugees and asylum seekers.

#### (b) Need for individual assessment of each case

100. The implementation of the principle of *non-refoulement* in general requires an examination of the facts of each individual case. In particular a *denial* of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of *refoulement*.

101. The importance of such a review as a condition precedent to any denial of protection emerges clearly from Conclusion No. 30 (XXXIV) 1983 of the Executive Committee in respect of the problem of manifestly unfounded or abusive applications for refugee status or asylum. Noting the problem caused by such applications and the 'grave consequences for the applicant of an erroneous determination and the resulting need for such a decision to be accompanied by appropriate procedural safeguards', the Executive Committee recommended that:

<sup>77</sup> A/RES/52/103, 9 Feb. 1998, at para. 5 (emphasis added).

<sup>78</sup> See, e.g., A/RES/53/125, 12 Feb. 1999, at para. 5.

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.<sup>79</sup>

102. These guidelines reflect those drawn up earlier by the Executive Committee on the determination of refugee status more generally.<sup>80</sup>

(c) **Mass influx**

103. The requirement to focus on individual circumstances as a condition precedent to a denial of protection under Article 33(1) must not be taken as detracting in any way from the application of the principle of *non-refoulement* in cases of the mass influx of refugees or asylum seekers. Although by reference to passing comments in the *travaux préparatoires* of the 1951 Convention, it has on occasion been argued that the principle does not apply to such situations, this is not a view that has any merit. It is neither supported by the text as adopted nor by subsequent practice.

104. The words of Article 33(1) give no reason to exclude the application of the principle to situations of mass influx. On the contrary, read in the light of the humanitarian object of the treaty and the fundamental character of the principle, the principle must apply unless its application is clearly excluded.

105. The applicability of the principle in such situations has also been affirmed unambiguously by the Executive Committee. The Executive Committee, in Conclusion No. 22 (XXXII) 1981, said:

**I. General**

...

2. Asylum seekers forming part of such large-scale influx situations are often confronted with difficulties in finding durable solutions by way of voluntary repatriation, local settlement or resettlement in a third country. Large-scale influxes frequently create serious problems for States, with the result that certain States, although committed to obtaining durable solutions, have only found it possible to admit asylum seekers without undertaking at the time of admission to provide permanent settlement of such persons within their borders.

3. It is therefore imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment, pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers.

<sup>79</sup> Executive Committee, Conclusion No. 30 (XXXIV) 1983, at para. (e)(i).

<sup>80</sup> See Executive Committee, Conclusion No. 8 (XXVIII) 1977.

## II. Measures of protection

### A. Admission and *non-refoulement*

1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.

2. In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.<sup>81</sup>

106. The Executive Committee expressed the same view in response to the humanitarian crisis in the former Yugoslavia in Conclusion No. 74 (XLV) 1994.<sup>82</sup>

107. Other developments in the field of refugee protection also reflect the view of States that *non-refoulement* applies in situations of mass influx. Thus, the application of the principle to such situations is expressly referred to in both the OAU Refugee Convention and the Cartagena Declaration and has been consistently referred to by the UNGA as a fundamental principle of protection for refugees and asylum seekers.

108. More recently, the application of the principle of *non-refoulement* in cases of ‘temporary protection’ – a concept that is designed to address the difficulties posed by mass influx situations – has been clearly accepted. The point is illustrated by the ‘Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons’ currently in preparation by the Commission of the European Communities.<sup>83</sup> The fundamental character of the principle of *non-refoulement* in circumstances of mass influx is affirmed in the opening sentence of the Commission’s Explanatory Memorandum to this Proposal as follows:

As envisaged by the conclusions of the Presidency at the Tampere European Council in October 1999, a common European asylum system must be based on the full and inclusive application of the Geneva Convention, maintaining the principle of *non-refoulement*.

81 Conclusion No. 22 (XXXII) 1981.      82 Conclusion No. 74 (XLV) 1994, at para. (r).

83 Commission of the European Communities, ‘Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof’, provisional version, May 2000. On the basis of this proposal, a Directive was adopted by the Council at its meeting on 28–29 May 2001. The final text of the Directive has not yet been published. [Editorial note: The final text of the Directive was formally adopted by the Council on 20 July 2001 and published in OJ 2001 No. L212/12. Article 3(2) reaffirms: ‘Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding *non-refoulement*.’]

109. The draft text then affirms the importance of the principle of *non-refoulement* at a number of points.<sup>84</sup> The matter is, for example, addressed in unambiguous terms in the commentary to Article 6(2) of the draft, defining the circumstances in which temporary protection comes to an end, in the following terms:

This paragraph defines the elements on which the Council decision [governing the expiry of temporary protection] must be based. It must be established that the persons receiving temporary protection must be able to return in safety and dignity in a stable context and in conditions where their life or freedom would not be threatened on account of their race, religion, nationality, membership of a particular social group or political opinions and where they would not be subjected to torture or to inhumane or degrading treatment or punishment. The concepts of safety and dignity in the case of returns imply the cessation of the causes which led to the mass influx, possibly a peace and reconstruction process, conditions guaranteeing respect for human rights and the rule of law.<sup>85</sup>

110. Even more recently, UNHCR, addressing State practice in respect of the protection of refugees in mass influx situations in February 2001, observed as follows:

Group determination [of refugee status] on a prima facie basis means in essence the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to the exodus. Its purpose is to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it. It is widely applied in Africa and in Latin America, and has in effect been practised in relation to large-scale flows in countries, such as those in Southern Africa, that have no legal framework for dealing with refugees.<sup>86</sup>

111. That is not to say that refugee protection in conditions of mass influx is free from difficulties. It is not. But we have not found any meaningful evidence to suggest that these difficulties exclude the application of the principle of *non-refoulement*. The relevance and applicability of Article 33(1) in situations of mass influx is clear.

#### 4. *The place to which refoulement is prohibited*

##### (a) 'Territories' not 'States'

112. We next consider the identification of the place to which *refoulement* is prohibited, i.e. what is meant by the words 'to the frontiers of territories'.

<sup>84</sup> See draft Arts. 6(2) and 27.

<sup>85</sup> Explanatory Memorandum, at Art. 6(2).

<sup>86</sup> UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', EC/GC/01/4, 19 Feb. 2001, at para. 6.

113. The first point to note is that this expression does not refer only to the refugee or asylum seeker's country of origin (whether of nationality or former habitual residence), even though the fear of persecution in such territory may well be at the root of that person's claim to protection. The reference is to the frontier of 'territories', in the plural. The evident import of this is that *refoulement* is prohibited to the frontiers of *any* territory in which the person concerned will be at risk – regardless of whether those territories are the country of origin of the person concerned.

114. Secondly, it must be noted that the word used is 'territories' as opposed to 'countries' or 'States'. The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on *refoulement* to territory where the person concerned would be at risk.

(b) 'Third countries'

115. The same prohibition also precludes the removal of a refugee or asylum seeker to a third State in circumstances in which there is a risk that he or she might be sent from there to a territory where he or she would be at risk.

116. Article 33(1) cannot, however, be read as precluding removal to a 'safe' third country, i.e. one in which there is no danger of the kind just described. The prohibition on *refoulement* applies only in respect of territories where the refugee or asylum seeker would be at risk, not more generally. It does, however, require that a State proposing to remove a refugee or asylum seeker undertake a proper assessment as to whether the third country concerned is indeed safe.

117. The soundness of this interpretation of Article 33(1) derives support from a number of sources. First, in the context of human rights law, it is clear that *non-refoulement* precludes 'the indirect removal . . . to an intermediary country' in circumstances in which there is a danger of subsequent *refoulement* of the individual to a territory where they would be at risk.<sup>87</sup> The State concerned has a responsibility to ensure that the individual in question is not exposed to such a risk.

118. Secondly, a number of instruments adopted since 1951 in the refugee field are cast in terms that suggest that a State proposing to remove a refugee or asylum seeker must consider whether there is a possibility of his or her subsequent removal

<sup>87</sup> *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211 at 228.

to a place of risk. Thus the Asian-African Refugee Principles prohibit measures ‘which would result in compelling [a person seeking asylum] to return to or remain in a territory’ where he or she would be at risk. Similarly, the OAU Refugee Convention prohibits measures ‘which would compel [a person] to return to or remain in a territory’ where they would be at risk. In the light of the common humanitarian character of the 1951 Convention and these later instruments, the broader formulation in these later instruments supports an interpretation of Article 33(1) of the 1951 Convention which precludes removal to a place from which the refugee would be in danger of subsequent removal to a territory of risk.

119. Thirdly, from the information provided by UNHCR, it appears to be well accepted by States operating ‘safe country’ policies that the principle of *non-refoulement* requires such policies to take account of any risk that the individual concerned may face of subsequent removal to a territory of risk. In other words, ‘safe country’ policies appear to be predicated on the appreciation that the safety of the country to which the refugee is initially sent must include safety from subsequent *refoulement* to a place of risk.

120. Fourthly, this view is also expressly stated in Conclusion No. 58 (XL) 1989 of the Executive Committee which, addressing refugees and asylum seekers who move in an irregular manner from a country where they have already found protection, provides that they may be returned to that country ‘if... they are protected there against *refoulement*’.

121. Having regard to these factors, the prohibition of *refoulement* in Article 33(1) of the 1951 Convention must be construed as encompassing the expulsion, return or other transfer of a refugee or asylum seeker both to a territory where he or she may be at risk directly and to a territory where they may be at risk of subsequent expulsion, return, or transfer to another territory where they may be at risk.

## 5. *The threat to life or freedom*

122. We turn next to examine the meaning of the words ‘where his life or freedom would be threatened’.

123. Common sense dictates a measure of equation between the threat which precludes *refoulement* and that which is at the core of the definition of the term ‘refugee’ pursuant to Article 1A(2) of the 1951 Convention, namely, that the person concerned has a well-founded fear of being persecuted. Any other approach would lead to discordance in the operation of the Convention. As a matter of the internal coherence of the Convention, the words ‘where his life or freedom would be threatened’ in Article 33(1) must therefore be read to encompass territories in respect of which a refugee or asylum seeker has a ‘well-founded fear of being persecuted’.

124. This reading of Article 33(1) draws support from the *travaux préparatoires*, and the commentaries thereon, of the Convention. Thus, for example, Dr Paul Weis, former Head of UNHCR’s Legal Division, commented on the use of the phrase in question in both Articles 31(1) and 33(1) of the 1951 Convention as follows:

The words ‘where their life or freedom was threatened’ [in Article 31(1)] may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees ‘escaping from persecution’ and to the obligation not to turn back refugees ‘to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinion’. In the course of drafting these words, ‘country of origin’, ‘territories where their life or freedom was threatened’ and ‘country in which he is persecuted’ were used interchangeably.

...

The words ‘to the frontiers where his life or freedom would be threatened’ [in Article 33(1)] have the same meaning as in Article 31 paragraph 1, that is, the same meaning as ‘well-founded fear of persecution’ in Article 1A(2) of the Convention. It applies to the refugee’s country of origin and any other country where he also has a well-founded fear of persecution or risks being sent to his country of origin.<sup>88</sup>

125. The same conclusion was expressed by Professor Atle Grahl-Madsen in a seminal study on the 1951 Convention in the following terms:

[T]he reference to ‘territories where his life or freedom would be threatened’ does not lend itself to a more restrictive interpretation than the concept of ‘well-founded fear of being persecuted’; that is to say that any kind of persecution which entitles a person to the status of a Convention refugee must be considered a threat to life or freedom as envisaged in Article 33.<sup>89</sup>

126. In the light of these comments, there is little doubt that the words ‘where his life or freedom would be threatened’ must be construed to encompass the well-founded fear of persecution that is cardinal to the definition of ‘refugee’ in Article 1A(2) of the Convention. Article 33(1) thus prohibits *refoulement* to the frontiers of territories in respect of which a refugee has a well-founded fear of being persecuted.

127. This conclusion notwithstanding, the question arises as to whether the threat contemplated by Article 33(1) is not in fact broader than simply the risk of persecution. In particular, to the extent that a threat to life or freedom may arise other than in consequence of persecution, the question is whether this will also preclude *refoulement*.

128. A number of factors suggest that a broad reading of the threat contemplated by Article 33(1) is warranted. First, as has been noted, the UNGA has extended UNHCR’s competence over the past fifty years to include those fleeing from more generalized situations of violence. To the extent that the concept of ‘refugee’ has evolved to include such circumstances, so also must have the scope of Article 33(1).

<sup>88</sup> Weis, *The Refugee Convention*, 1951, pp. 303 and 341.

<sup>89</sup> A. Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2–11, 13–37* (UNHCR Division of International Protection, Geneva, 1997), pp. 231–2.



The Article must therefore be construed to include circumstances of generalized violence which pose a threat to life or freedom whether or not this arises from persecution.

129. Secondly, this broad reading is in fact consistent with the express language of Article 33(1). In keeping with the humanitarian objective of the Convention, the protective regime of Article 33(1) must be construed liberally in a manner that favours the widest possible scope of protection consistent with its terms.

130. Thirdly, this interpretation of Article 33(1) draws support from various Conclusions of the Executive Committee which identify UNHCR's functions, and the scope of *non-refoulement*, in terms of 'measures to ensure the physical safety of refugees and asylum-seekers' and protection from a 'danger of being subjected to torture'.<sup>90</sup>

131. Fourthly, a broad formulation also finds support in the approach adopted in various instruments since 1951. Thus, for example, the American Convention on Human Rights is cast in terms of a danger of violation of the 'right to life or personal freedom'. The Asian-African Refugee Principles and the OAU Refugee Convention both refer to circumstances threatening 'life, physical integrity or liberty'. The Cartagena Declaration is cast in terms of threats to 'lives, safety or freedom'. The Declaration on Territorial Asylum, equally broad but in another dimension, refers simply to a threat of 'persecution', without qualification.

132. Fifthly, developments in human rights law are also relevant. To the extent that, as a matter of human rights law, there is now an absolute prohibition on *refoulement* where there is a real risk that the person concerned may be subjected to torture or cruel, inhuman or degrading treatment or punishment, Article 33(1) must be construed to encompass this element. The words 'where his life or freedom would be threatened' must therefore be read to include circumstances in which there is a real risk of torture or cruel, inhuman or degrading treatment or punishment.

133. In the light of these considerations, the words 'where his life or freedom would be threatened' must be construed to encompass circumstances in which a refugee or asylum seeker (a) has a well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life, physical integrity, or liberty.

134. A further element requires comment, namely, the likelihood of the threat materializing. How probable must the threat be to trigger the operation of the principle of *non-refoulement*? What is the standard of proof to which a refugee or asylum seeker will be held for the purposes of this provision?

135. Drawing on the threshold of proof in respect of the determination of refugee status for the purposes of Article 1A(2), whether a refugee has a well-founded fear of being persecuted or faces a real risk of torture, etc. or of some other threat to life, physical integrity, or liberty, will be something to be established 'to a reasonable

90 See, e.g., Conclusion No. 29 (XXXIV) 1983, para. (b); and Conclusions Nos. 79 (XLVII) 1996 and 81 (XLVIII) 1997, paras. (j) and (i) respectively.

degree' taking account of all the relevant facts.<sup>91</sup> This threshold will require more than mere conjecture concerning a threat but less than proof to a level of probability or certainty. Adopting the language of the Human Rights Committee and the European Court of Human Rights in respect of *non-refoulement* in a human rights context, the appropriate test will be whether it can be shown that the person concerned would be exposed to a 'real risk' of persecution or other pertinent threat.<sup>92</sup>

## 6. *The nature of the threat*

136. The final element of Article 33(1) addresses the nature of the threat to the refugee, characterized as a threat 'on account of his race, religion, nationality, membership of a particular social group or political opinion'.

137. This element, which imports into Article 33(1) the language of the definition of the term 'refugee' in Article 1A(2) of the Convention, operates as a qualification on the threat contemplated in Article 33(1). Thus, on a narrow construction of the Article, a threat to life or freedom would only come within the scope of the provision if it was on account of race, religion, nationality, membership of a particular social group or political opinion.

138. In the light of the conclusions above to the effect that the threat contemplated by Article 33(1) must be construed broadly to include developments in both UNHCR's mandate and the law on human rights more generally, the question arises as to the weight that is now to be given to the qualifying phrase. What if life or freedom is threatened or persecution is foreseen on account of reasons other than those specified? To what extent is it necessary for the refugee to show not only a threat to his or her life or freedom but also that it is threatened on account of one of these specific causes? The problem arises in particular when the flight of the refugee is occasioned by a situation of generalized violence in the country of origin.

139. In such situations it is appropriate to look at the matter more broadly. It is the facts that matter – that the person concerned is facing some objectively discernible threat of persecution or to life or freedom. The precise identification of the cause of that threat is not material. Such an approach follows the extension of UNHCR's mandate as mentioned above – an extension which should not be limited in its effect by rigid insistence on the original words of the 1951 Convention. This approach appears also to have commended itself to the Executive Committee which, in Conclusion No. 6 (XXVIII) 1977, reaffirmed the fundamental importance of the principle of *non-refoulement* in respect simply of 'persons who may be subjected to persecution' without reference to possible reasons. Conclusion No. 15 (XXV) 1979 similarly refers to persecution in unqualified terms, namely:

91 UNHCR *Handbook*, at para. 42. 92 This matter is addressed further below.

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 recognized principle of *non-refoulement*.<sup>93</sup>

140. Also relevant is the fact that texts adopted since 1951 set out the threat contemplated without qualification. Thus, for example, both the Asian-African Refugee Principles and the Declaration on Territorial Asylum are cast simply in terms of persecution. The OAU Refugee Convention and the Cartagena Declaration, while including references to persecution subject to the same enumerated formulation as in Article 33(1) of the 1951 Convention, make express provision for persons who have fled from situations of generalized violence seriously disturbing public order.

141. These considerations suggest that too much weight should not be placed on the qualifying phrase in Article 33(1). We are not, however, ultimately troubled by this element as, at least insofar as the threat of persecution is concerned, the consequences of discarding reference to the criteria may not be of great practical significance. There are likely to be few instances of persecution that cannot be addressed by reference to one or more of the criteria enumerated in the qualifying phrase.

142. Two concluding observations may be made. First, we would observe that one reason for the continuing relevance of the qualifying phrase in Article 33(1) is that the same conditions continue to be important for the purposes of determining who is a refugee under Article 1A(2). The authoritative UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, for example, provides that '[i]n order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated'.<sup>94</sup>

143. Secondly, we have not addressed specifically the meaning to be given to the terms 'race', 'religion', 'nationality', 'membership of a particular social group', and 'political opinion' in Article 33(1) of the 1951 Convention. For the reasons just stated, we do not consider them to be of controlling importance. Also, the meaning of these terms in Article 33(1) will be identical to their meaning in Article 1A(2). An examination of the meaning of Article 1A(2) goes beyond the scope of this Opinion. For completeness, we note simply that the meaning of these terms for the purposes of Article 1A(2) is addressed in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.<sup>95</sup>

## 7. *Conclusions in respect of this subsection*

144. In the light of the preceding analysis, the essential elements of the principle of *non-refoulement* under Article 33(1) of the 1951 Convention can be summarized as follows:

93 Conclusion No. 15 (XXX) 1979, para. (b).

94 *Ibid.*, para. 66.

95 *Ibid.*, paras. 66–86.

- (a) It binds Contracting States to the 1951 Convention and States Parties to the 1967 Protocol, including all subdivisions and organs thereof and other persons or bodies exercising governmental authority.
- (b) The responsibility of States party to these conventions will also extend to:
  - (i) the conduct of an organ placed at the disposal of a State by another State if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed;
  - (ii) the conduct of a person or group of persons in fact acting on the instructions of, or under the direction or control of, the State;
  - (iii) the conduct of a person or group of persons in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority; and
  - (iv) conduct which is not otherwise attributable to a State but which has nonetheless been acknowledged and adopted by the State as its own.
- (c) The responsibility of States party to these conventions will also be engaged in circumstances in which persons come under the effective control of the State or are affected by those acting on behalf of the State more generally.
- (d) It precludes any act of *refoulement*, of whatever form, including non-admittance at the frontier, that would have the effect of exposing refugees or asylum seekers to:
  - (i) a threat of persecution on account of race, religion, nationality, membership of a particular social group or political opinion;
  - (ii) a real risk of torture or cruel, inhuman or degrading treatment or punishment; or
  - (iii) a threat to life, physical integrity or liberty.
- (e) It requires a review of individual circumstances as a condition precedent to any denial of protection.
- (f) It is applicable to situations of mass influx and temporary protection.
- (g) It prohibits *refoulement* to any territory where the refugee or asylum seeker would be at risk, including to a territory where the refugee or asylum seeker may not be at risk directly but from which they would be in danger of being subsequently removed to a territory where they would be at risk.

#### G. Article 33(2): the exceptions

145. Article 33(2) of the 1951 Convention provides:

The benefit of the present provision [prohibiting *refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for

regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

## 1. *General observations*

### (a) Relationship to Article 1F

146. First, although not cast in identical terms, there is an evident overlap between the exceptions in Article 33(2) and the exclusion clause which forms part of the definition of a refugee in Article 1F of the 1951 Convention. This provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

147. In an important respect, Article 33(2) indicates a higher threshold than Article 1F insofar as, for the purposes of the former provision, it must be established that the refugee constitutes a danger to the security or to the community of the country of refuge. The provision thus hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past. Thus, if the conduct of a refugee is insufficiently grave to exclude him or her from the protection of the 1951 Convention by operation of Article 1F, it is unlikely to satisfy the higher threshold in Article 33(2).

148. Secondly, a comparison of Article 33(2) and Article 1F suggests an important element of the scope of Article 33(2) which is not otherwise readily apparent on the face of the provision. Article 1F(b) provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that 'he has committed a serious non-political crime *outside the country of refuge prior to his admission to that country as a refugee*'.<sup>96</sup> In contrast, Article 33(2) provides *inter alia* that *non-refoulement* protection cannot be claimed by a refugee 'who, having been convicted of a particularly serious crime, constitutes a danger to the community of [the] country [in which he is]'. Whereas Article 1F(b) refers to crimes committed *outside the country of refuge prior to admission*, Article 33(2) is silent on the question of where and when the crime in question must have been committed.

96 Emphasis added.

149. A common sense reading of Article 33(2) in the light of Article 1F(b) requires that it be construed so as to address circumstances *not* covered by Article 1F(b). Any other approach would amount to treating the scope of the two provisions as being very largely the same and would raise the question of why Article 33(2) was required at all. In our view, therefore, construed in the context of the 1951 Convention as a whole, Article 33(2) must be read as applying to a conviction for a particularly serious crime committed in the country of refuge, or elsewhere, *subsequent to admission as a refugee*, which leads to the conclusion that the refugee in question is a danger to the community of the country concerned.

150. This reading of Article 33(2) draws some support from the *travaux préparatoires* of and commentaries on the Article. Grahl-Madsen, for example, notes that in the original version of Article 33(2),

it was a condition for expulsion or *refoulement* that the refugee had been ‘lawfully convicted in that country’, that is to say in the country from which he is to be expelled or returned. The reference to ‘that country’ was, however, deleted as a result of a Swedish proposal. The Swedish delegate explained that his amendment had been intended ‘to cover such cases as, for example, that of a Polish refugee who had been allowed to enter Sweden and who, in passing through Denmark, had committed a crime in that country’.

It will be seen that this contingency is covered by the provision in Article 1F(b), according to which a person who ‘has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee’, is not entitled to any of the benefits of the Convention. On the other hand, there can be no doubt that the deletion of the words ‘in that country’ is important in other respects. If the Polish refugee in the Swedish delegate’s example already had been admitted to and resided in Sweden, and then went on a visit to Denmark and committed a crime there, the fact that the crime was committed and a final judgment passed outside Sweden would not prevent the Swedish authorities from expelling the refugee by virtue of Article 33(2).<sup>97</sup>

(b) The trend against exceptions to the prohibition of *refoulement*

151. The interpretation of Article 33(2) must also take account of other factors. Particularly important is the trend, evident in other textual formulations of the principle of *non-refoulement* and in practice more generally since 1951, against exceptions to the principle of *non-refoulement*. Thus, although both the Asian-African Refugee Principles and the Declaration on Territorial Asylum allow exceptions for

<sup>97</sup> Grahl-Madsen, *Commentary on the Refugee Convention 1951*, p. 237. See also Weis, *The Refugee Convention, 1951*, p. 343.

‘overriding reasons of national security or in order to safeguard the population’, the Declaration imposes a constraint on *refoulement* in circumstances in which the exceptions apply in the following terms:

Should a State decide in any case that exception to the principle [of *non-refoulement*] stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.<sup>98</sup>

152. Thus, even in cases where a State may, for permitted reasons, expel or reject an asylum seeker, it must consider the possibility of sending him to a safe third State rather than to a State where he would be at risk.

153. Expressions of *non-refoulement* subsequent to the Declaration on Territorial Asylum limit exceptions even further. Thus, although the OAU Refugee Convention indicates various grounds excluding the application of the Convention in general,<sup>99</sup> *non-refoulement* is not subject to exception. Likewise, *non-refoulement* is not subject to exception in either the American Convention on Human Rights or the Cartagena Declaration.

154. Developments in the field of human rights law also exclude exceptions to *non-refoulement*. *Non-refoulement* in a human rights context allows of no limitation or derogation. The principle simply requires that States ‘must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*’.<sup>100</sup>

155. This trend against exceptions to *non-refoulement* outside the framework of the 1951 Convention has been reflected in the approach of the Executive Committee. Thus, although Article 33(2) of the 1951 Convention might be invoked to justify extradition following conviction for a serious crime elsewhere, Conclusion No. 17 (XXXI) 1980 makes it clear that ‘refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution’.<sup>101</sup> Equally, although situations of mass influx might be said to pose a danger to the security of the country of refuge, Conclusion No. 22 (XXXII) 1981 makes it clear that ‘[i]n all cases [of large-scale influx] the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed’.<sup>102</sup> The Executive Committee has similarly affirmed the

98 Declaration on Territorial Asylum, Art. 3(3).

99 See Art. I(4)–(5) of the OAU Refugee Convention.

100 As per General Comment No. 20 (1992) of the Human Rights Committee (HRI/HEN/1/Rev.1, 28 July 1994).

101 Conclusion No. 17 (XXXI) 1980, at para. (c).

102 Conclusion No. 22 (XXXII) 1981, at para. II(A)(2).

application of *non-refoulement* in circumstances involving the irregular movement of refugees and asylum seekers notwithstanding the destabilizing effects of such movement.<sup>103</sup>

156. *Guidelines for National Refugee Legislation* adopted by a joint OAU/UNHCR Working Group in December 1980 go further still. In respect of *non-refoulement*, these *Guidelines* provide simply:

No person shall be rejected at the frontier, returned or expelled, or subjected to any other measures that would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons mentioned in paragraph 1(a) and (b) of Section 1 [reflecting the definitions of ‘refugee’ in both the 1951 Convention and the OAU Refugee Convention].<sup>104</sup>

No reference is made here to any permissible exceptions to *non-refoulement*.

157. In so far as these *Guidelines* may be regarded as an authoritative interpretation of the commitments of States under both the 1951 Convention and the OAU Refugee Convention, they suggest that the trend against exceptions since 1951 reflects an evolution in the development of the law concerning *non-refoulement* more generally which would exclude any exceptions to *non-refoulement*. This would be particularly so in circumstances in which the threat of persecution, or the threat to life or freedom, involves a danger of torture or cruel, inhuman or degrading treatment or punishment. It would also apply in circumstances in which the threat would be of such severity that, even though it might not come within the scope of torture or cruel, inhuman or degrading treatment or punishment, it might either be regarded as being on a par with such treatment or would come within the scope of other non-derogable human rights principles.<sup>105</sup> Any other approach would fetter *non-refoulement* under Article 33 of the 1951 Convention to the conceptions of the drafters of the Convention a half-century ago and would leave the principle significantly out of step with more recent developments in the law. This would amount to a retrogressive approach to the construction of a principle that, given its humanitarian character, would ordinarily warrant precisely the opposite approach.

158. This notwithstanding, we are not ultimately persuaded that there is a sufficiently clear consensus opposed to exceptions to *non-refoulement* to warrant reading the 1951 Convention without them. There remains an evident appreciation

103 Conclusion No. 58 (XL) 1989, at para. (f).

104 UNHCR, *Guidelines for National Refugee Legislation*, 9 Dec. 1980, at section 6(2).

105 These would include, for example, the prohibitions on the arbitrary deprivation of life and on slavery and servitude (see, e.g., ICCPR, Arts. 4(2), 6(1), and 8(1) and (2); ECHR, Arts. 2, 4(1), and 15(2); and ACHR, Arts. 4(1), 5(1), and 27(2)).



amongst States,<sup>106</sup> within UNHCR,<sup>107</sup> and amongst commentators<sup>108</sup> that there may be some circumstances of overriding importance that would, within the framework of that Convention, legitimately allow the removal or rejection of individual refugees or asylum seekers. We are, therefore, of the view that the exceptions to the prohibition of *refoulement* pursuant to Article 33(2) of the 1951 Convention subsist but must be read subject to very clear limitations.

(c) Limitations on the interpretation and application of the exceptions in Article 33(2)

159. These limitations are as follows:

- (i) The national security and public safety exceptions indicated in Article 33(2) constitute the only permissible exceptions to *non-refoulement* under the 1951 Convention.
- (ii) The application of these exceptions is subject to the caveat that they will not apply in circumstances in which the threat constitutes, or may be regarded as being on a par with, a danger of torture or cruel, inhuman or degrading treatment or punishment or would come within the scope of other non-derogable human rights principles.
- (iii) Given the humanitarian character of *non-refoulement* and the serious consequences to a refugee or asylum seeker of being returned to a country where

106 A review of municipal measures incorporating *non-refoulement* indicates a range of exceptions to the principle often, though not always, reflecting the formulation in Art. 33(2) of the 1951 Convention. While such measures support the view that some exceptions to *non-refoulement* subsist as a matter of custom, we have been hesitant for a number of reasons to rely on this practice as evidence of the current state of customary international law more generally. First, much of this legislation is dated. Secondly, to the extent that municipal measures depart from the terms of applicable international instruments or other principles of international law they suggest that the State concerned is in breach of its international obligations. Thirdly, municipal measures in this field exhibit little uniformity in approach. It is virtually impossible, therefore, to draw any coherent guidance threads from such practice for purposes of customary international law. For example, while some States have enacted exceptions to *non-refoulement*, very many others which have expressly incorporated the principle have not done so. Others preclude expulsion to States where there would be a threat of persecution. Fourthly, to the extent that there may be a difference between State practice in the municipal sphere and State practice in international fora involving, for example, the adoption and interpretation of international instruments, we have preferred the latter practice on the ground that this better reflects *opinio juris*.

107 See, e.g., UNHCR's 'Note on the Principle of *Non-Refoulement*', Nov. 1997, prepared in the context of a Nov. 1997 European Union seminar on the implementation of the 1995 EU Resolution on minimum guarantees for asylum procedures. For the latter, see OJ 1996 C274/13. Addressing the issue of exceptions to *non-refoulement*, UNHCR notes that "[w]hile the principle of *non-refoulement* is basic, it is recognised that there may be certain legitimate exceptions to the principle' (at section F).

108 Goodwin-Gill, for example, comments as follows: '*non-refoulement* is not an absolute principle. "National security" and "public order", for example, have long been recognized as potential justifications for derogation.' G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1998), p. 139.

he or she is in danger, the exceptions to *non-refoulement* must be interpreted restrictively and applied with particular caution.<sup>109</sup>

- (iv) The exceptions under Article 33(2) may only be applied in strict compliance with due process of law. Compliance with due process is expressly required by Article 32(2) of the 1951 Convention in respect of expulsion. To the extent that *refoulement* would pose a potentially greater threat to a refugee or asylum seeker than expulsion, we are of the view that, at the very least, the due process safeguards applicable to expulsion must be read into the application of the exceptions to *refoulement*. The strict observance of due process safeguards would also be required by general principles of human rights law.
- (v) In any case in which a State seeks to apply the exceptions to the principle of *non-refoulement*, the State should first take all reasonable steps to secure the admission of the individual concerned to a safe third country.

## 2. *Specific observations*

160. Turning to the terms of Article 33(2), three aspects require specific comment: its scope of application *ratione personae*; the interpretation and application of the national security exception; and the interpretation and application of the danger to the community exception.

### (a) The scope of Article 33(2) *ratione personae*

161. In the earlier discussion of the scope of application of Article 33(1), the point was made that the prohibition of *refoulement* pursuant to this provision protects both refugees and asylum seekers irrespective of any formal determination of status. In the absence of compelling reasons to the contrary, the personal scope of Article 33(2) must be read as corresponding to that of the primary rule to which it is an exception. The term ‘refugee’ in Article 33(2) therefore encompasses refugees and asylum seekers irrespective of any formal determination of status.

### (b) The interpretation and application of the national security exception

162. Article 33(2) provides that the prohibition of *refoulement* cannot be claimed by a refugee ‘whom there are reasonable grounds for regarding as a danger to the security of the country in which he is’.

163. A number of elements of this exception require comment.

109 In this regard, we agree with the view expressed by UNHCR in its ‘Note on the Principle of *Non-Refoulement*’ of Nov. 1997, referred to above, that, ‘in view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society’ (at section F).

(i) *The prospective nature of the danger*

164. Simply as a matter of textual interpretation, the exception is clearly prospective in its application. In other words, it is concerned with danger to the security of the country in the future, not in the past. While past conduct may be relevant to an assessment of whether there are reasonable grounds for regarding the refugee to be a danger to the country in the future, the material consideration is whether there is a prospective danger to the security of the country.

(ii) *The danger must be to the country of refuge*

165. Also evident on its face, the exception addresses circumstances in which there is a prospect of danger to the security of the country of refuge. It does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally. While there is nothing in the 1951 Convention which limits a State from taking measures to control activity within its territory or persons subject to its jurisdiction that may pose a danger to the security of other States or of the international community, they cannot do so, in the case of refugees or asylum seekers, by way of *refoulement*. The exceptions in Article 33(2) evidently amount to a compromise between the danger to a refugee from *refoulement* and the danger to the security of his or her country of refuge from their conduct. A broadening of the scope of the exception to allow a country of refuge to remove a refugee to a territory of risk on grounds of possible danger to other countries or to the international community would, in our view, be inconsistent with the nature of this compromise and with the humanitarian and fundamental character of the prohibition of *refoulement*.

166. This assessment draws support from developments in the field of human rights which preclude *refoulement* where this would expose the individual concerned to the danger of torture or cruel, inhuman or degrading treatment or punishment notwithstanding circumstances of public emergency and irrespective of the conduct of the individual concerned.<sup>110</sup>

(iii) *A State's margin of appreciation and the seriousness of the risk*

167. Article 33(2) does not identify the kinds of acts that will trigger the application of the national security exception. Nor does it indicate what will amount to sufficient proof of a danger to the security of the country. This is an area in which States generally possess a margin of appreciation.

168. This margin of appreciation is, however, limited in scope. In the first place, there must be 'reasonable grounds' for regarding a refugee as a danger to the security of the country in which he is. The State concerned cannot, therefore, act either arbitrarily or capriciously. The relevant authorities must specifically address the question of whether there is a future risk; and their conclusion on the matter must be supported by evidence.

110 See, e.g., *Chahal v. United Kingdom* (1997) 108 ILR 385, at paras. 74–81.

169. Secondly, the fundamental character of the prohibition of *refoulement*, and the humanitarian character of the 1951 Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention. This is particularly so given the serious consequences for the individual of *refoulement*. The danger to the security of the country in contemplation in Article 33(2) must therefore be taken to be very serious danger rather than danger of some lesser order.

170. This assessment draws support from the terms of Article 1F which excludes the application of the Convention where there are serious reasons for considering that the person concerned has *inter alia* committed a crime against peace, a war crime or a crime against humanity, a serious non-political crime, or acts contrary to the purposes and principles of the United Nations. These are all acts of a particularly grave nature. As the threshold of prospective danger in Article 33(2) is higher than that in Article 1F, it would hardly be consistent with the scheme of the Convention more generally to read the term ‘danger’ in Article 33(2) as referring to anything less than very serious danger.

171. The same conclusion is confirmed by the *travaux préparatoires* of the Convention and the commentaries thereon. Thus, for example, Grahl-Madsen notes the statement of the United Kingdom delegate to the drafting conference that ‘[a]mong the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum’. Grahl-Madsen goes on to suggest:

If a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another State, he is threatening the security of the former country. The same applies if he works for the overthrow of the Government of his country of residence by force or other illegal means (e.g. falsification of election results, coercion of voters, etc.), or if he engages in activities which are directed against a foreign Government, which as a result threaten the Government of the country of residence with repercussions of a serious nature. Espionage, sabotage of military installations and terrorist activities are among acts which customarily are labelled as threats to national security.<sup>111</sup>

172. He also mentions acts ‘endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned’.<sup>112</sup>

(iv) *The assessment of risk requires consideration of individual circumstances*

173. It has already been emphasized that a *denial* of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of *refoulement*. This view is supported by the language of Article 33 which refers to ‘a

111 Grahl-Madsen, *Commentary on the Refugee Convention 1951*, pp. 235–6.

112 *Ibid.*

refugee'. It is also supported by the scheme and character of the principle of *non-refoulement* which is essentially designed to protect each individual refugee or asylum seeker from *refoulement*. The emphasis by the Executive Committee on the need for a personal interview even in the case of manifestly unfounded or abusive applications further supports this view.

174. It is the danger posed by the individual in question that must be assessed. It will not satisfy the requirement that there be 'reasonable grounds' for regarding a refugee as a danger to the security of the country for such an assessment to be reached without consideration of his or her individual circumstances.

175. The requirement of individual assessment is also important from another perspective. In the light of the limitations on the application of the exceptions in Article 33(2) mentioned above, the State proposing to remove a refugee or asylum seeker to his or her country of origin must give specific consideration to the nature of the risk faced by the individual concerned. This is because exposure to some forms of risk will preclude *refoulement* absolutely and without exception. This applies notably to circumstances in which there is a danger of torture or cruel, inhuman or degrading treatment or punishment. Before a State can rely on an exception in Article 33(2), it must therefore take all reasonable steps to satisfy itself that the person concerned would not be exposed to such danger or some other comparable danger as discussed above.

176. The requirement that there should be an individual assessment goes additionally to the point that there must be a real connection between the individual in question, the prospective danger to the security of the country of refuge and the significant alleviation of that danger consequent upon the *refoulement* of that individual. If the removal of the individual would not achieve this end, the *refoulement* would not be justifiable.

(v) *The requirement of proportionality*

177. Referring to the discussions in the drafting conference, Weis put the matter in the following terms:

The principle of proportionality has to be observed, that is, in the words of the UK representative at the Conference, whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were permitted to stay.<sup>113</sup>

178. The requirement of proportionality will necessitate that consideration be given to factors such as:

- (a) the seriousness of the danger posed to the security of the country;
- (b) the likelihood of that danger being realized and its imminence;
- (c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;

113 Weis, *The Refugee Convention, 1951*, p. 342.

- (d) the nature and seriousness of the risk to the individual from *refoulement*;
- (e) whether other avenues consistent with the prohibition of *refoulement* are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.

179. It must be reiterated that a State will not be entitled to rely on the national security exception if to do so would expose the individual concerned to a danger of torture or cruel, inhuman or degrading treatment or punishment or a risk coming within the scope of other non-derogable principles of human rights. Where the exception does operate, its application must be subject to strict compliance with principles of due process of law.

(c) The interpretation and application of the ‘danger to the community’ exception

180. Article 33(2) provides that the prohibition of *refoulement* cannot be claimed by a refugee ‘who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.

181. Many of the elements considered above in respect of the interpretation of the national security exception will apply *mutatis mutandis* to the interpretation and application of the ‘danger to the community’ exception. It, too, is clearly prospective in nature. While past conduct will be relevant to this assessment, the material consideration will be whether there is a danger to the community in the future.

182. Similarly, the danger posed must be to the community *of the country of refuge*. This follows simply from the words of the clause. The issue is not whether the refugee poses a threat to some community elsewhere. Such a threat may be addressed through normal criminal or other procedures. It is only where the potential danger is to the community *of the country of refuge* that the exception will operate.

183. Other elements discussed above in respect of the national security exception that will also apply to the ‘danger to the community’ exception include the requirement to consider individual circumstances and the requirement of proportionality and the balancing of the interests of the State and the individual concerned. Equally, while the assessment of the danger to the community allows the State of refuge some margin of appreciation, there are limits to its discretion. Indeed, these are more specific than in the case of the national security exception. In particular, the operation of the danger to the community exception requires that the refugee must have been (a) convicted by a final judgment, (b) of a particularly serious crime. Absent these factors, the issue of whether that person poses a future risk to the community of the country concerned does not even arise for consideration.

184. A number of elements specific to the exception require further comment.

(i) *Relationship to Article 1F*

185. The relationship between Article 33(2) and the exclusion clauses in Article 1F has already been considered. It nevertheless bears repetition that the ‘danger to the community’ exception can only apply to a conviction by a final judgment in respect of a particularly serious crime committed in the country of refuge, or elsewhere, *subsequent to admission as a refugee*. This flows from the scope of Article 1F(b) of the Convention. The significant factor is that a State cannot rely on the exception to justify *refoulement* in circumstances in which the refugee in question had been convicted of a crime in his or her country of origin, or elsewhere, *prior to admission to the country of refuge as a refugee*.

(ii) *‘Particularly serious crime’*

186. The text of Article 33(2) makes it clear that it is only convictions for crimes of a particularly serious nature that will come within the purview of the exception. This double qualification – *particularly* and *serious* – is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated pursuant to this provision only in the most exceptional of circumstances. Commentators have suggested that the kinds of crimes that will come within the purview of the exception will include crimes such as murder, rape, armed robbery, arson, etc.<sup>114</sup>

187. However, the critical factor here is not the crimes that come within the scope of the clause but whether, in the light of the crime and conviction, the refugee constitutes a danger to the community of the country concerned. The commission of, and conviction for, a particularly serious crime therefore constitutes a threshold requirement for the operation of the exception. Otherwise the question of whether the person concerned constitutes a danger to the community will not arise for consideration.

(iii) *‘Conviction by a final judgment’*

188. The importance of the requirement of a conviction by a final judgment is that the exception cannot be relied upon in the face of mere suspicion. Only a conviction based on a criminal standard of proof will suffice. ‘Final judgment’ must be construed as meaning a judgment from which there remains no possibility of appeal. It goes without saying that the procedure leading to the conviction must have complied with minimum international standards.

189. In the light of this element, where a question of the application of the exception arises, the conduct of the proceedings leading to the underlying conviction will also require consideration.

<sup>114</sup> See, for example, Weis, *The Refugee Convention, 1951*, p. 342.

(iv) *'Danger to the community'*

190. The essential condition of the 'danger to the community' exception is that there must be a sound basis for the assessment that the refugee concerned constitutes a danger to the community of the country of refuge. Two elements require comment: the meaning of the word 'danger' and the meaning of the word 'community'.

191. Regarding the word 'danger', as with the national security exception, this must be construed to mean very serious danger. This requirement is not met simply by reason of the fact that the person concerned has been convicted of a particularly serious crime. An additional assessment is called for which will hinge on an appreciation of issues of fact such as the nature and circumstances of the particularly serious crime for which the individual was convicted, when the crime in question was committed, evidence of recidivism or likely recidivism, etc. Thus, it is unlikely that a conviction for a crime committed in the distant past, where there may have been important mitigatory circumstances, and where there is no evidence of recidivism could justify recourse to the exception.

192. As to the meaning of the word 'community', it is evident that this is intended as a reference to the safety and well-being of the population in general, in contrast to the national security exception which is focused on the larger interests of the State. This notion of the safety and well-being of the population appears in other expressions of the principle of *non-refoulement* subsequent to 1951. The Asian-African Refugee Principles, for example, refer to 'overriding reasons . . . safeguarding populations'. The Declaration on Territorial Asylum refers similarly to 'overriding reasons . . . in order to safeguard the population'.

### III. The role and content of customary international law

#### A. The role of customary international law

193. Although there may be some inclination to regard the 1951 Convention and the other relevant treaties as an exhaustive statement of the law relating to the matters covered by them, it must be recalled that there remain some aspects of relations between States on the subject of refugees and *non-refoulement* that are not covered by such treaties.

194. For one thing, there are still some fifty States that are not parties to the 1951 Convention and the 1967 Protocol. Such States are therefore not formally bound by the Convention and, in particular, the provision relating to *non-refoulement*. Are such States free, therefore, of any obligations relating to the treatment of refugees? This question can only be answered in the negative. All States will be bound by such customary international legal obligations as exist in respect of refugees.



195. There are other contexts in which the customary international law of *non-refoulement* are relevant. Within even those States that are parties to the 1951 Convention or other pertinent texts and have adopted the necessary legislation to enable domestic effect to be given to the treaties, there may well be some need to supplement the legislation by reference to the customary international law position. *A fortiori*, the same is true when there is no legislation but when the national courts are able to treat customary international law as part of the law of the land. In short, the evolution of customary international law rules in the area is important and must be acknowledged. Indeed, it may well be that the relevant rules amount to *jus cogens* of a kind that no State practice and no treaty can set aside. That the principle of *non-refoulement* amounts to a rule of *jus cogens* was suggested by the Executive Committee as early as 1982.<sup>115</sup> Subsequent comments to this effect are to be found in the Cartagena Declaration of 1984 and in the views of the Swiss Government.<sup>116</sup>

## B. The sources of the customary international law on *non-refoulement*: the role of treaties

196. Having regard to the fact that it is from treaties – and the application thereof – that the practice of States relevant to the determination of the content of customary international law in this field is principally to be derived, there is a preliminary question that must be answered at the outset. Is it acceptable to use treaties and treaty practice as a source of customary international law? There is cogent authority for an affirmative reply to this question.

### 1. General

197. It is well established that conventional principles can, and frequently do, exist side-by-side with customary principles of similar content. In the *Nicaragua* case, for example, the ICJ accepted that the prohibition on the threat or use of force in Article 2(4) of the UN Charter also applied as a principle of customary international law. The fact that the customary principle was embodied in a multilateral convention did not mean that it ceased to exist as a principle of customary law, even as regards States that were parties to the convention.<sup>117</sup> This conclusion is consistent

115 Executive Committee, Conclusion No. 25 (XXXIII) 1982, at para. (b). In Conclusion No. 79 (XLVII) 1996, the Executive Committee emphasized that the principle of *non-refoulement* was not subject to derogation.

116 The Cartagena Declaration on Refugees of 1984 concluded *inter alia* that the principle of *non-refoulement* 'is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*' (at section III, para. 5). On the views of the Swiss Government, see FFE/BBI, 1994 III, at pp. 1486–7.

117 *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, at para. 73, Merits, Judgment, ICJ Reports 1986, p. 14, at paras. 174–9.

with the Court's earlier jurisprudence in the *North Sea Continental Shelf* cases in which it had accepted that largely identical rules of customary law and treaty law on the delimitation of the continental shelf could exist side-by-side.<sup>118</sup>

198. The existence of a conventional principle not only does not preclude the existence of a customary principle of similar content; it may influence the creation of such a rule of custom. In the *North Sea Continental Shelf* cases, for example, the ICJ examined the contention of Denmark and the Netherlands that a customary rule may be generated by State practice in compliance with a conventional rule. The ICJ said:

The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention [of 1958 on the Continental Shelf] no rule of customary international law in favour of the equidistance principle, and no such rule was crystallised in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice – and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed...<sup>119</sup>

199. While the Court went on to note that such a process should not lightly be regarded as having occurred, the underlying principle that conventional rules can be regarded 'as reflecting, or as crystallising, received or at least emergent rules of customary international law' was not disputed.<sup>120</sup> The same analysis is reflected in the Court's judgment in the *Nicaragua* case.<sup>121</sup>

200. In the *North Sea Continental Shelf* case, the Court identified three elements that will be material to any determination of whether such a process of crystallization

118 *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3, at paras. 64 and, 70–4.

119 *Ibid.*, p. 3, at paras. 70 and 71. 120 *Ibid.*, p. 3, at para. 63.

121 *Merits*, Judgment, ICJ Reports 1986, p. 14, at para. 183.

has occurred. First, the conventional rule ‘should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’.<sup>122</sup> Secondly, ‘even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected’.<sup>123</sup> Thirdly, within whatever period has passed since the first expression of the conventional rule,

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>124</sup>

#### (a) Fundamentally norm-creating character

201. The conventional expressions of the principle of *non-refoulement* in instruments such as the 1951 Convention, the OAU Refugee Convention, the American Convention on Human Rights, and the Torture Convention are of a norm-creating character, as opposed to the mere expression of contractual obligations, and have been widely accepted as such. This view has been expressed in the context of refugees, for example, in successive Conclusions of the Executive Committee. For example, in Conclusion No. 6 (XXVIII) 1977, the Executive Committee observed that ‘the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States’.

202. In Conclusion No. 17 (XXXI) 1980, the Executive Committee ‘[r]eaffirmed the fundamental character of the generally recognized principle of *non-refoulement*’. The point was expressed more forcefully still in Conclusion No. 25 (XXXIII) 1982 in which the Executive Committee ‘[r]eaffirmed the importance of the basic principles

122 *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3, at para. 72.

123 *Ibid.*, p. 3, at para. 73.

124 *Ibid.*, p. 3, at para. 74. This element embodies the twin requirements for the creation of custom independently of any conventional rule, namely, a settled practice by States and *opinio juris* or belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it. See further the judgment of the Court at para. 77. In the *Nicaragua* case, the Court added to its earlier analysis as follows:

It is not to be expected that in the practice of States the application of the [rule] in question should have been perfect . . . The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

See *Merits*, Judgment, ICJ Reports 1986, p. 14, at para. 186.

of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law'. Similar statements are to be found in more recent Conclusions of the Executive Committee.<sup>125</sup>

203. In addition to the normative character of the principle of *non-refoulement* in various treaties, the principle is also reflected in a number of important non-binding international texts either expressed in normative terms or affirming the normative character of the principle. A particularly important example is the Declaration on Territorial Asylum adopted by the UNGA unanimously on 14 December 1967. Other instruments of a similar character include the Asian-African Refugee Principles, the Cartagena Declaration, and various expressions of the principle by the Council of Europe.<sup>126</sup>

204. The interpretation of the prohibition of torture or cruel, inhuman or degrading treatment or punishment contained in Article 3 of the European Convention on Human Rights, Article 7 of the ICCPR, and Article 5 of the Banjul Charter<sup>127</sup> as including an essential *non-refoulement* component further confirms the normative and fundamental character of the principle, particularly as the relevant texts make no explicit reference to *non-refoulement*.

205. The matter was addressed in some detail by the European Court of Human Rights in the *Soering* case in the context of extradition in the following terms:

Article 3 [of the European Convention on Human Rights] makes no provision for exceptions and no derogation from it is permissible . . . This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading

125 See, e.g., Conclusion No. 79 (XLVII) 1996, at para. (j), and Conclusion No. 81 (XLVIII) 1997, at para. (i).

126 See, e.g., Recommendation No. R (1984) 1 of 25 Jan. 1984 on the 'Protection of Persons Satisfying the Criteria in the Geneva Convention Who are Not Formally Recognised as Refugees', adopted by the Committee of Ministers of the Council of Europe, which '[considers] that the principle of *non-refoulement* has been recognised as a general principle applicable to all persons'.

127 1981 Banjul Charter or African Charter on Human and Peoples' Rights, 21 ILM (1982) 58 (hereinafter 'Banjul Charter').

Treatment or Punishment, which provides that ‘no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture’. The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedoms and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment [*sic*] of the Article, and in the Court’s view, this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.<sup>128</sup>

206. This reasoning has subsequently been adopted by the European Court of Human Rights in cases concerning expulsion and *refoulement*.<sup>129</sup> This was recently expressed in the judgment of the Court on admissibility of 7 March 2000 in *T.I. v. United Kingdom* in the following terms:

It is . . . well-established in [the Court’s] case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 (see, amongst other authorities, the *Ahmed v. Austria* judgment of 17 December 1996, *Reports* 1996-VI, p. 2206, §§ 39–40).<sup>130</sup>

207. The approach of the European Court has paralleled that of the Human Rights Committee in respect of the interpretation of Article 7 of the ICCPR. Thus, in General Comment No. 20 (1992) on the interpretation of Article 7 of the ICCPR prohibiting torture or cruel or inhuman or degrading treatment or punishment, the Human Rights Committee stated *inter alia* as follows:

128 *Soering v. United Kingdom*, 98 ILR 270, at para. 88.

129 See, e.g., *Cruz Varas v. Sweden*, 108 ILR 283, at para. 69; *Vilvarajah v. United Kingdom*, 108 ILR 321, at paras. 102–3; and *Chahal v. United Kingdom*, 108 ILR 385, at paras. 73–4 and 79–81.

130 *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211 at 228.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity . . .

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

. . .

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.<sup>131</sup>

208. The same analysis is also evident in decisions of the African Commission on Human and Peoples' Rights ('African Commission on Human Rights') established under the Banjul Charter.<sup>132</sup>

(b) Widespread and representative State support, including those whose interests are specially affected

209. Turning to the requirement that there should be widespread and representative participation in the conventions said to embody the putative customary rule, including the participation of States whose interests are specially affected, the extent of State participation in the 1951 Convention, the 1967 Protocol, the Torture

131 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994.

132 See, e.g., Communication No. 97/1993, *John K. Modise v. Botswana*, cited in E. A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (Martinus Nijhoff, The Hague, 1996). The Commission found that the deportation of Modise constituted cruel, inhuman, or degrading treatment. [Editorial note: The case, decided at the Commission's 28th session on 23 Oct.–6 Nov. 2000, is available at <http://www1.umn.edu/humanrts/africa/comcases/97-93c.html>. See in particular, para. 91.]

Convention, the ICCPR, and other conventions which embody the principle of *non-refoulement* indicates near universal acceptance of the principle. So, for example, as Annex 2.1 hereto reflects, of 189 members of the UN, 135 are party to the 1951 Convention, 134 are party to the 1967 Protocol (140 being party to one or both of these instruments), 121 are party to the Torture Convention, and 146 are party to the ICCPR.<sup>133</sup> When other instruments – such as the European Convention on Human Rights, the OAU Refugee Convention, the American Convention on Human Rights, and the Banjul Charter – are taken into account, 170 of the 189 members of the UN, or around 90 per cent of the membership, are party to one or more conventions which include *non-refoulement* as an essential component. Of the nineteen UN members that are not party to any of these agreements, seven were members of the UN on 14 December 1967 when the Declaration on Territorial Asylum was unanimously adopted by the General Assembly. Particularly in the absence of any indication of opposition to the principle of *non-refoulement* as reflected in the Declaration, they may be taken to have consented to the principle. Of the remaining twelve UN members – Bhutan, Brunei Darussalam, Kiribati, the Federated States of Micronesia, Nauru, Oman, Palau, Saint Kitts and Nevis, Saint Lucia, the United Arab Emirates, and Vanuatu – there is no suggestion from any of them of opposition to the principle.

210. As these figures indicate, participation in some or other conventional arrangement embodying *non-refoulement* is more than simply ‘widespread and representative’. It is near universal, including by States whose interests are specially affected.

### (c) Consistent practice and general recognition of the rule

211. Turning to the question of consistent practice and general recognition of the rule, the ICJ, in the *Nicaragua* case, looked for evidence of State practice and *opinio juris* in State participation in treaties embodying the rule, in other instances in which States had expressed recognition of the rule and in the work of international bodies.

212. The near universal participation by States in one or more treaty regimes embodying as an essential element the principle of *non-refoulement* has already been noted. Following the methodology of the ICJ, support for the existence of a rule of custom of similar content can be deduced from such practice. Also important is the wide recognition of the principle in instruments such as the Declaration on Territorial Asylum, the Asian-African Refugee Principles and the Cartagena

133 Note, these figures do not include the participation of non-members of the UN in various of these conventions, notably Switzerland, which is a party to the 1951 Convention, the 1967 Protocol, the ECHR, the ICCPR, and the Torture Convention, and the Holy See, which is a party to the 1951 Convention and 1967 Protocol. [Editorial note: By 1 Feb. 2003, 141 States were party to the 1951 Convention, 139 were party to the 1967 Protocol, 132 were party to the Torture Convention, and 149 were party to the ICCPR.]

Declaration. Although non-binding in character, the State practice and *opinio juris* which these instruments reflect support the existence of a customary principle of *non-refoulement*.

213. To this practice may also be added the widespread practice by States of either expressly incorporating treaties embodying *non-refoulement* into their internal legal order or enacting more specific legislation reflecting the principle directly. Around eighty States have either enacted specific legislation on *non-refoulement* or have expressly incorporated the 1951 Convention or 1967 Protocol into their internal law. As Annex 2.2 below illustrates, this figure increases to some 125 States when account is taken of municipal measures giving effect to other treaties embodying the principle. The widespread incorporation of this principle into the internal legal order of States can be taken as evidence of State practice and *opinio juris* in support of a customary principle of *non-refoulement*.

214. Of particular importance under this heading also are the Conclusions of the Executive Committee. As previously noted, the Executive Committee is a body composed of the representatives of States having 'a demonstrated interest in, and devotion to, the solution of the refugee problem'. Adopting the language of the ICJ in its *North Sea Continental Shelf* judgment, the Executive Committee is thus composed of representatives of States 'whose interests are specially affected' by issues concerning refugees. With a membership of fifty-seven States having a declared interest in the area, Conclusions of the Executive Committee can, in our view, be taken as expressions of opinion which are broadly representative of the views of the international community. This is particularly the case as participation in meetings of the Executive Committee is not limited to, and typically exceeds, its membership. The specialist knowledge of the Committee and the fact that its decisions are taken by consensus add further weight to its Conclusions.

215. As far back as 1977, the Executive Committee commented upon the fundamental humanitarian character of the principle of *non-refoulement* and its general acceptance by States.<sup>134</sup> This has been reaffirmed subsequently.<sup>135</sup> The importance of the principle has been emphasized recently in Conclusions Nos. 79 (XLVII) 1996 and 81 (XVVIII) 1997 in substantially the same terms as follows:

The Executive Committee,

...

Reaffirms the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to

134 Conclusion No. 6 (XXVIII) 1977.

135 Conclusion No. 25 (XXXIII) 1982. See also Conclusion No. 17 (XXXI) 1980.



torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>136</sup>

(d) Conclusions in respect of this subsection

216. The view has been expressed, for example in the *Encyclopaedia of Public International Law*, that 'the principle of *non-refoulement* of refugees is now widely recognised as a general principle of international law'.<sup>137</sup> In the light of the factors mentioned above, and in view also of the evident lack of expressed objection by any State to the normative character of the principle of *non-refoulement*, we consider that *non-refoulement* must be regarded as a principle of customary international law.

C. The content of the principle of *non-refoulement* in customary international law

217. We turn now to examine the content of the principle of *non-refoulement* in customary international law. For these purposes, it will be appropriate to distinguish between the customary principle as it has developed in the two distinct contexts of refugees and of human rights more generally.

1. *In the context of refugees*

218. The content of the customary principle of *non-refoulement* in a refugee context corresponds largely to that set out above concerning the interpretation of Article 33 of the 1951 Convention. There is no need to revisit this analysis for present purposes. The reasoning in the preceding part and, in particular, the references to other international texts supporting that reasoning, will apply *mutatis mutandis* to the present part. It will suffice therefore simply to identify the main elements of the customary international law principle of *non-refoulement* in a refugee context. These are as follows:

- (a) The principle binds all States, including all subdivisions and organs thereof and other persons exercising governmental authority and will engage the responsibility of States in circumstances in which the conduct in question is attributable to the State wherever this occurs.
- (b) It precludes any act of *refoulement*, of whatever form, including non-admittance at the frontier, that would have the effect of exposing a refugee or asylum seeker to:

136 Conclusion No. 79 (XLVII) 1996, at para. (j); Conclusion No. 81 (XLVIII) 1997, at para. (i).

137 *Encyclopaedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, under the direction of Rudolf Bernhardt, North-Holland Publishing Co., Amsterdam, New York, 1985), vol. 8, p. 456.

- (i) a threat of persecution;
  - (ii) a real risk of torture or cruel, inhuman or degrading treatment or punishment; or
  - (iii) a threat to life, physical integrity, or liberty.
- (c) It prohibits *refoulement* to any territory where the refugee or asylum seeker would be at risk, including to a territory where the refugee or asylum seeker may not be at risk directly but from which they would be in danger of being subsequently removed to a territory where they would be at risk.
- (d) It is subject to exception only on grounds of overriding reasons of national security and public safety, but it is not subject to exception in circumstances in which the risk of persecution equates to or may be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment or would come within the scope of other non-derogable customary principles of human rights.
- (e) In circumstances in which the exceptions apply, they are to be construed restrictively and with caution and subject to strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

219. Reduced to its essentials, the content of the customary principle of *non-refoulement* in a refugee context may be expressed as follows:

1. No person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or to life, physical integrity, or liberty. Save as provided in paragraph 2, this principle allows of no limitation or exception.
2. Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

2. *In the context of human rights more generally*

220. As with the scope and content of the customary principle of *non-refoulement* in a refugee context, the parameters of the principle *in the context of human rights* must

also reflect the crystallization of State practice and *opinio juris*. The central objective of the exercise is to identify those elements which can be said to reflect a broad consensus across the international community.

221. The content of the principle of *non-refoulement* in a human rights context is relatively easily identified as the principle is in large measure an implied derivation from the commonly formulated prohibition of torture or cruel, inhuman or degrading treatment or punishment. Nevertheless, three elements must be distinguished:

- (a) the scope of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment;
  - (b) *non-refoulement* as a fundamental component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment; and
  - (c) the content of *non-refoulement* as a component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment.
- (a) The scope of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment

222. There is consensus that the prohibition of *torture* constitutes a rule of customary international law.<sup>138</sup> Indeed, it is widely suggested that the prohibition of

138 See, e.g., on this issue the Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filaritiga v. Pena Irala* (1980) 21 ILM 585, at pp. 595–601. [Editorial note: The case is reported at US Court of Appeals (2nd Circuit), 630 F. 2d 876 (1980).] Under the heading ‘Freedom from torture is among the fundamental human rights protected by international law’, the United States noted *inter alia*:

Every multilateral treaty dealing generally with civil and political human rights proscribes torture . . . We do not suggest that every prohibition of these treaties states a binding rule of customary international law. Where reservations have been attached by a significant number of nations to specific provisions or where disagreement with provisions is cited as the ground for a nation’s refusal to become a party, the near-unanimity required for the adoption of a rule of customary international law may be lacking. No such disagreement has been expressed about the provisions forbidding torture . . . International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no State asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use.

See pp. 595–8. The US Court of Appeals in this case addressed the matter in the following terms:

[A]lthough there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the [UN] Charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights.

See (1980) 79 ILR 169, at p. 176.

torture even constitutes a principle of *jus cogens*.<sup>139</sup> The question, for present purposes, is the scope of the customary prohibition concerning acts of this kind. Is it limited to the most egregious of such acts which come within the definition of torture or does it extend more broadly to acts amounting to cruel, inhuman or degrading treatment or punishment? The broader formulation reflects the language of Article 7 of the ICCPR, Article 3 of the European Convention on Human Rights, Article 5 of the Banjul Charter, and Article 5(2) of the American Convention on Human Rights, as well as of other instruments for the protection of human rights. A more restrictive analysis is suggested by the scope of the Torture Convention which, for the purposes of the Convention's enforcement machinery, distinguishes torture from other cruel, inhuman or degrading treatment or punishment.

223. In our view, the evidence points overwhelmingly to a broad formulation of the prohibition as including torture or cruel, inhuman or degrading treatment or punishment. With the exception of the Torture Convention, these elements all appear in human rights instruments of both a binding and a non-binding nature as features of a single prohibition.<sup>140</sup> Support for the customary status of the broader formulation is also evident from other sources, including:

- Article 5 of the Universal Declaration of Human Rights,<sup>141</sup> which provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment';

139 See, e.g., Human Rights Committee, General Comment No. 24 (52) (1994), CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, at para. 10. See also, L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Co., Helsinki, 1988), ch. 10, section G; Y. Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in *International Bill of Rights: The Covenant on Civil and Political Rights* (ed. L. Henkin, Columbia University Press, New York, 1981), at p. 122.

140 The distinction in the Torture Convention between torture, on the one hand, and cruel, inhuman or degrading treatment or punishment, on the other, is explained by the intention of the drafters, at the instance of the former Soviet Union and others, to limit the enforcement machinery of the Convention to the most severe acts only. For a discussion of the drafting process in respect of this element, see A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff, The Hague, 1999), pp. 4–8. The distinction for purposes of the Convention machinery notwithstanding, Art. 16(1) of the Convention affirms that '[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture'.

141 General Assembly Resolution 217 (III), International Bill of Human Rights, 10 Dec. 1948, at Part A. Although not a binding instrument (being a resolution of the UNGA), the Universal Declaration is widely regarded as reflecting customary international law, an appreciation implicitly endorsed by the ICJ in the *Tehran Hostages Case (United States Diplomatic and Consular Staff in Tehran)*, ICJ Reports 1980, p. 3, at para. 91. See also Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at pp. 82–4 (in particular at note 9), which refers to various UN and other commentaries endorsing the customary status of the Universal Declaration. The US *Restatement of the Foreign Relations Law of the United States* ('US Restatement') addresses the matter in the following terms: 'Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights, even if only in principle.' *Restatement of the Law Third* (1987), § 701, Reporters' Notes 2, at p. 154.

- the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the UNGA in 1975, which, noting that '[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment', condemns such acts as 'a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights';<sup>142</sup>
- Article 3 of the European Convention on Human Rights provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment';
- Article 7 of the ICCPR provides *inter alia* that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment';
- Article 5(2) of the American Convention on Human Rights provides *inter alia* that '[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment';
- Article 5 of the Banjul Charter provides *inter alia* that '[a]ll forms of exploitation and degradation of man, particularly slavery, slave trade, torture or cruel, inhuman or degrading punishment and treatment, shall be prohibited'.

224. As these provisions show, torture or cruel, inhuman or degrading treatment or punishment are commonly regarded as components of a single prohibition. While tribunals have in some cases distinguished the various components by reference to the intensity of the suffering inflicted,<sup>143</sup> in no case has there been any suggestion that there is a difference between the legal status of these components. Indeed, addressing Article 7 of the ICCPR, the Human Rights Committee has indicated expressly that it does not 'consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.<sup>144</sup>

225. The customary status of both the prohibition of torture and of cruel, inhuman or degrading treatment or punishment is also clear. The Human Rights Committee, for example, explicitly affirmed the customary status of both components in its General Comment No. 24 (52) (1994) in the context of its review of permissible reservations under the ICCPR. Thus, indicating that provisions of the ICCPR 'that represent customary international law (and *a fortiori* when they have the character

142 UNGA Resolution 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 Dec. 1975, at Arts. 1 and 2.

143 See, e.g., the Judgment of the European Court of Human Rights in *Ireland v. United Kingdom* (1978), Series A, No. 25, at para. 167.

144 Human Rights Committee, General Comment No. 20 (1992), HRI/GEN/1/Rev.1, 28 July 1994, at para. 4 (emphasis added).

of peremptory norms) may not be the subject of reservations’, the Committee went on to note that ‘[a]ccordingly, a State may not reserve the right to engage in slavery, to torture, [or] to subject persons to cruel, inhuman or degrading treatment or punishment’.<sup>145</sup> The distinct reference to torture and to cruel, inhuman or degrading treatment or punishment leaves no doubt that the Committee considered that both components are prohibited by customary international law.

226. The customary status of the prohibition of cruel, inhuman or degrading treatment or punishment, *independently of the prohibition of torture*, is also affirmed in UNGA Resolution 39/118 of 14 December 1984 on Human Rights in the Administration of Justice. Referring *inter alia* to Article 5 of the Universal Declaration, and noting the need to promote respect for the principles embodied in the Declaration, the UNGA reaffirmed *inter alia* ‘the existing prohibition under international law of every form of cruel, inhuman or degrading treatment or punishment’.<sup>146</sup> The reference here to the *existing* prohibition under international law of cruel, inhuman or degrading treatment or punishment explicitly affirms the appreciation of UN members that this prohibition is part of the existing corpus of customary international law.

227. The customary status of the prohibition of torture and of cruel, inhuman or degrading treatment or punishment is also addressed in other authoritative commentaries.<sup>147</sup> More commonly, the prohibition of cruel, inhuman or degrading treatment or punishment is simply addressed as part of the broader prohibition of torture or cruel, inhuman or degrading treatment or punishment with no doubt being raised about its customary status.

228. An examination of this issue by reference to the criteria relevant to the determination of rules of customary international law also supports the conclusion that the prohibition of cruel, inhuman or degrading treatment or punishment constitutes a principle of customary international law. Thus, in the instruments just mentioned, the prohibition of cruel, inhuman or degrading treatment or punishment is, like the prohibition of torture, evidently treated as having a fundamentally norm creating character. Over 150 States are party to one or more binding international instruments prohibiting such acts. Support for the principle in its conventional form is thus virtually uniform. Nor is there any evident dissent from the principle. While there are some instances of State practice inconsistent with the principle, such practice appears to be regarded as a breach of the law rather than as an indication of the emergence of a rule of different content.<sup>148</sup>

145 Human Rights Committee, General Comment No. 24 (52) (1994), CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, at para. 8.

146 UNGA Resolution 39/118, ‘Human Rights in the Administration of Justice’, 14 Dec. 1984, at para. 1 (emphasis added).

147 See, e.g., the US *Restatement*, at § 702(d) and Reporters’ Notes 5, at pp. 169–70.

148 See on this point the Memorandum of the US Government in the *Filartiga* case, above n. 138.

229. As all of this shows, the evidence in favour of a broad formulation of the prohibition under discussion to include torture and other cruel, inhuman or degrading treatment or punishment is overwhelming. We have no hesitation therefore in concluding that the scope of the relevant principle under customary international law is broadly formulated to include a prohibition of torture as well as of other cruel, inhuman or degrading treatment or punishment.

(b) *Non-refoulement* as a fundamental component of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment

230. As regards parties to the Torture Convention, Article 3 of that Convention prohibits *refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to torture. At present, as a matter of conventional law, this binds over 120 States. The express stipulation of this obligation attests to its central importance within the scheme of the prohibition of torture.

231. This matter was commented upon by the European Court of Human Rights in the *Soering* case in 1989 in terms which have a more general relevance.<sup>149</sup> As was there made plain, the Court was of the view that extradition of a person to a State where there was a real risk of exposure to torture or inhuman or degrading treatment or punishment was precluded by the prohibition of torture or inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights.

232. The reasoning of the Court in this case has subsequently been applied to other forms of expulsion or return in cases in which there is a risk of torture or inhuman or degrading treatment or punishment. The matter was, for example, addressed in 1997 in *Chahal v. United Kingdom*, a case involving the deportation to India of a Sikh separatist on grounds that ‘his continued presence in the United Kingdom was uncondusive to the public good for reasons of national security, including the fight against terrorism’.<sup>150</sup> In the course of its analysis leading to the conclusion that there had been a violation of Article 3 of the European Convention on Human Rights, the Court addressed the issue of expulsion in the following terms:

74. ... [I]t is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country. ...

149 *Soering*, Judgment, para. 88, quoted above at para. 205.

150 *Chahal v. United Kingdom*, 108 ILR 385, at para. 75. See also *Ahmed v. Austria*, (1997) 24 EHRR 278, at paras. 39–40.

75. The Court notes that the deportation against the first applicant was made on the ground that his continued presence in the United Kingdom was unconducive to the public good for reasons of national security, including the fight against terrorism . . .

...

79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

81. Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.<sup>151</sup>

233. As this makes plain, the expulsion or return of a person to a country where there are substantial grounds for believing that they would face a real risk of torture or inhuman or degrading treatment or punishment comes within the purview of the prohibition of such acts. This applies equally to the expulsion or return of a

151 *Chahal*, at paras. 74–5 and 79–81 (footnotes omitted). This analysis has been applied more recently in circumstances concerning the expulsion or *refoulement* of asylum seekers in *T.I. v. United Kingdom*, a case in which the applicant, a Sri Lankan national, claimed that there were substantial grounds for believing that, if removed from the United Kingdom to Germany as was proposed, he would be returned from there to Sri Lanka where he faced a real risk of treatment contrary to Art. 3 of the European Convention on Human Rights (*T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211 at 228; see above para. 206).



person to a country from which they may subsequently be expelled or returned to a third country where they would face a real risk of such treatment.

234. The conclusions of the European Court on this matter are echoed by the Human Rights Committee in General Comment No. 20 (1992) on the interpretation and application of Article 7 of the ICCPR.<sup>152</sup> The compatibility of expulsion and extradition with the terms of Article 7 of the ICCPR has arisen for consideration by the Committee in a number of cases.<sup>153</sup> While these have largely turned on an appreciation of whether particular criminal penalties, or the likelihood of particular criminal penalties being imposed, raise questions concerning the application of Article 7, the Committee has in each case affirmed that expulsion in circumstances in which there is a real risk of a violation of Article 7 in another jurisdiction comes within the purview of that Article. In *Chitai Ng v. Canada*, for example, a case concerning the extradition of the author of the communication from Canada to the United States on capital charges where he faced the possibility of the death penalty, the Committee observed as follows:

14.1 . . . [W]hat is at issue is not whether Mr Ng's rights have been or are likely to be violated by the United States, which is not a State party to the Optional Protocol, but whether by extraditing Mr Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant . . .

14.2 If a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

. . .

16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent . . .

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr Ng

152 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, extract quoted at para. 207 above.

153 E.g., Communication No. 469/1991, *Chitai Ng v. Canada*; Communication No. 539/1993, *Cox v. Canada*; and Communication No. 706/1996, *G.T. v. Australia*.

without having sought and received assurances that he would not be executed.<sup>154</sup>

235. It follows that a prohibition on expulsion or return in circumstances in which there is a real risk of torture or cruel, inhuman or degrading treatment or punishment is inherent in the prohibition of such acts.

236. The conclusions of the Human Rights Committee and the European Court of Human Rights on this matter are directly relevant to some 150 States party to one or both of the relevant conventions. While the matter has not so far been addressed directly in the context of the interpretation and application of either Article 5(2) of the American Convention on Human Rights or Article 5 of the Banjul Charter, there is no reason to believe that the organs responsible for interpreting these instruments will adopt a different approach. Indeed, the African Commission on Human and Peoples' Rights has signalled its endorsement of the underlying principle in Communication No. 97/93, *Modise v. Botswana*, concluding *inter alia* that the deportation of the applicant to no-man's land between Botswana and South Africa constituted cruel, inhuman or degrading treatment.<sup>155</sup>

237. In the light of the preceding, it is evident that the principle of *non-refoulement* is a fundamental component of the prohibition of torture, etc. in Article 7 of the ICCPR, Article 3 of the European Convention on Human Rights and, by implication, in other conventional expressions of the prohibition. As was shown in the preceding subsection, the prohibition of torture or cruel, inhuman or degrading treatment or punishment is a principle of customary international law. It follows that *non-refoulement* is a fundamental component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment.

(c) The content of *non-refoulement* as a component of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment

238. Apart from the express prohibition of *refoulement* in Article 3 of the Torture Convention, the principle of *non-refoulement* in a human rights context is an *implied* component of the prohibition of torture or cruel, inhuman or degrading treatment or punishment. The content of the principle is therefore very largely to be deduced from the jurisprudence and commentaries noted in the preceding sections of this part. As the relevant material has already been set out in some detail, the matter can be addressed briefly.

(i) *The subject to be protected*

239. As in the case of the principle in a refugee context, the focus of *non-refoulement* in a human rights context is on the individual. This flows from the

154 Communication No. 469/1991, *Chitat Ng v. Canada*, Views of the Human Rights Committee of 5 Nov. 1993.

155 Communication No. 97/1993, *Modise v. Botswana*, above n. 132.

essential character of the underlying prohibition which addresses the protection of individuals. The point is made explicitly by the Human Rights Committee in General Comment No. 20 (1992), namely: '[t]he aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect the dignity and the physical and mental integrity of the individual.'<sup>156</sup>

240. In contrast to the principle in a refugee context which is focused on refugees and asylum seekers, *non-refoulement* in a human rights context is not predicated on any given status of the individual at risk. This follows from the formulation of the underlying prohibition of torture or cruel, inhuman or degrading treatment or punishment which is aimed at protecting 'the dignity and the physical and mental integrity of the individual' regardless of either status or conduct. The issue of status emerges most clearly from the formulation of Article 3 of the Torture Convention which provides simply that no State 'shall expel, return ("*refouler*") or extradite a person . . .'. The issue of conduct was addressed expressly by the European Court of Human Rights in *Chahal v. United Kingdom*.<sup>157</sup>

(ii) *The prohibited act*

241. As in the case of the principle in a refugee context, it is evident that it is the effect of the measure of expulsion rather than its form that is material. The object of the principle is to ensure that States do not 'expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or *refoulement*'.<sup>158</sup> Any measure which has the effect of putting an individual at risk by removing them from a place of safety to a place of threat will thus come within the purview of the principle.

(iii) *The territorial dimension of non-refoulement*

242. The territorial dimension of *non-refoulement* in a human rights context similarly mirrors that in respect of refugees. Quite apart from the scope of application *ratione loci* of treaties such as the European Convention on Human Rights, the ICCPR, and the American Convention on Human Rights,<sup>159</sup> general principles of

156 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 2 (emphasis added).

157 See extract at para. 232 above.

158 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 9.

159 Art. 1 of the ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention' (emphasis added). This language is mirrored in Art. 1(1) of the ACHR, which provides *inter alia* that '[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms' (emphasis added). As already noted, the European Court of Human Rights has interpreted the concept of 'jurisdiction' to include acts which produce effects outside national boundaries and acts by which the State exercises effective control outside its national territory (see, for example, *Lotzidou*, above n. 65, at para. 66). In respect of the ICCPR, Art. 2(1) provides *inter alia* that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to

international law dictate that the responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State wherever these may occur. The relevant issue is not whether the act or omission occurs within the territory of the State, or even whether it is undertaken (or not, as the case may be) by a State official, but whether it can be said to have been carried out (or not) by or on behalf of the State or was subsequently adopted by the State. Similarly, an individual will come within the jurisdiction of a State in circumstances in which they come under the effective control of, or are affected by those acting on behalf of, that State wherever this occurs. The principle of *non-refoulement* will therefore apply in circumstances in which the act in question would be attributable to the State whether this occurs, or would occur, within the territory of the State or elsewhere.

243. As regards the place to which the individual at risk is sent or in which he or she remains, it is plain from the analysis of the European Court of Human Rights in *T.I. v. United Kingdom* that the essential question is whether, in consequence of the removal of an individual, there are substantial grounds for believing that they would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.<sup>160</sup> The principle of *non-refoulement* thus precludes not only the removal of an individual to a country where they may be at risk directly but also removal to a country from which they may be subsequently removed to a third country where they would face a real risk of torture or cruel, inhuman or degrading treatment or punishment.

(iv) *The nature of the risk*

244. The principal point of distinction between *non-refoulement* in a refugee context and in the context of human rights arises in respect of the nature of the risk. Whereas *non-refoulement* in a refugee context is predicated on a threat of persecution, the essential element of *non-refoulement* in a human rights context is a risk of torture or cruel, inhuman or degrading treatment or punishment. This element flows explicitly from the formulation of the underlying prohibition. While this amounts to a clear distinction between *non-refoulement* in a refugee context and in the context of human rights more generally, in practice the distinction is likely to be more apparent than real given the potential overlap of the two types of risk.

all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant' (emphasis added). Art. 1 of the Optional Protocol to the ICCPR provides, in respect of individual petitions to the Human Rights Committee, that '[a] State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals *subject to its jurisdiction*' (emphasis added). As already noted, the Human Rights Committee has construed the concept of 'jurisdiction' to include circumstances involving 'violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of the State or in opposition to it' (see Communication No. 52/1972, *López Burgos v. Uruguay*, above n. 64, at para. 65, quoting para. 12.3).

<sup>160</sup> See para. 206 above.

(v) *The threshold of the harm threatened*

245. As regards the threshold of the threat of torture or cruel, inhuman or degrading treatment or punishment, although the approach of the Human Rights Committee, the European Court of Human Rights, and under the Torture Convention is not identical, there is broad similarity between them. Thus, General Comment No. 20 (1992) of the Human Rights Committee provides that States ‘must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment’.<sup>161</sup> This formulation has subsequently been recast in cases such as *Chitat Ng v. Canada* to provide that States must not expose individuals ‘to a real risk’ of a violation of their rights under the ICCPR.<sup>162</sup>

246. This ‘real risk’ formulation corresponds, at least in part, to the approach adopted by the European Court of Human Rights. Thus, in *Soering, Chahal, T.I. v. United Kingdom* and others, the Court variously formulated the test in terms of a ‘real risk of exposure to’, or ‘a real risk of being subjected to’, torture, etc.<sup>163</sup> This formulation was, however, supplemented in *Chahal* and *T.I.* by a further element drawing on the formulation in Article 3(1) of the Torture Convention.<sup>164</sup> The threshold under the European Convention on Human Rights thus now appears to be one of ‘where substantial grounds have been shown for believing that [the individual] would face a real risk of being subjected to’ torture, etc.

247. The European Convention on Human Rights test thus appears more elaborate than that adopted under either the ICCPR or the Torture Convention. In practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Rights Committee, the European Court of Human Rights, and the Committee Against Torture (established under the Torture Convention)<sup>165</sup> have all indicated in one form or another that, whenever an issue of *refoulement* arises, the circumstances surrounding the case will be subjected to rigorous scrutiny.<sup>166</sup> The Committee Against Torture, in particular, has elaborated a detailed framework for the scrutiny of such claims.<sup>167</sup>

161 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 9 (emphasis added).

162 *Chitat Ng v. Canada*, at para. 14.1, as quoted in para. 234 above.

163 *Soering*, at para. 88; *Chahal*, at paras. 74 and 80; *T.I. v. United Kingdom*, at p. 228.

164 Art. 3(1) of the Torture Convention provides: ‘No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’ (emphasis added).

165 The Committee is established under Art. 17 of the Torture Convention for purposes of reviewing *inter alia* communications from individuals alleging torture or, in the context of Art. 3, a risk of torture. See further Art. 22 of the Convention.

166 See, e.g., *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211, extract at para. 206 above; *Chitat Ng v. Canada*, para. 234 above, at para. 16.1.

167 See, in particular, General Comment No. 1 (1997), 21 Nov. 1997, of the Committee Against Torture, on the implementation of Art. 3 of the Convention in the context of Art. 22. Also Communication No. 13/1993, *Mutombo v. Switzerland*, Report of 27 April 1994

248. Although it would go too far to suggest that customary international law has absorbed the scrutiny procedures adopted by bodies such as the Human Rights Committee, the European Court of Human Rights, and the Committee Against Torture, the general uniformity of principle underlying these approaches establishes procedural and other guidelines that may usefully be taken into account by tribunals in situations in which customary international law must be applied.

249. In the light of the above, the risk threshold in respect of *non-refoulement* in a human rights context may best be described as *circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment*. This reflects the fullest formulation of the threshold articulated in international practice.

(vi) *Exceptions*

250. In contrast to the position regarding refugees, the question of exceptions to *non-refoulement* in a human rights context is straightforward. No exceptions whatever are permitted. This follows both from the uniform approach to the principle in its conventional form and from the unambiguous affirmation of the point by the Human Rights Committee and the European Court of Human Rights.<sup>168</sup> There is nothing to suggest that the principle in its customary form would differ from the principle in its conventional form.

(d) *Conclusions in respect of this subsection*

251. On the basis of the preceding analysis, the salient elements of the customary international law of *non-refoulement* in a human rights context are as follows:

- (a) *Non-refoulement* is a fundamental component of the customary international law prohibition of torture or cruel, inhuman or degrading treatment or punishment.
- (b) It is focused on individuals, regardless of either status or conduct, in respect of whom substantial grounds can be shown for believing that they

(CAT/C/12/D/13/1993); Communication No. 15/1994, *Khan v. Canada*, Report of 15 Nov. 1994; Communication No. 39/1996, *Paez v. Sweden*, Report of 28 April 1997 (CAT/C/18/D/39/1996); Communication No. 28/1995, *E.A. v. Switzerland*, Report of 10 Nov. 1997; Communication No. 65/1997, *I.A.O. v. Sweden*, Report of 6 May 1998; Communication No. 94/1997, *K.N. v. Switzerland*, Report of 19 May 1998; Communication No. 90/1997, *A.L.N. v. Switzerland*, Report of 19 May 1998; Communication No. 88/1997, *Korban v. Sweden*, Report of 16 Nov. 1998; Communication No. 83/1997, *G.R.B. v. Sweden*, Report of 15 May 1998; Communication No. 112/1998, *H.D. v. Switzerland*, Report of 30 April 1999; Communication No. 103/1998, *S.M.R. and M.M.R. v. Sweden*, Report of 5 May 1999; Communication No. 106/1998, *N.P. v. Australia*, Report of 6 May 1999; Communication No. 120/1998, *Elmi v. Australia*, Report of 14 May 1999.

<sup>168</sup> See, e.g., Arts. 4(2) and 5(1), ICCPR, General Comment No. 20 (1992) and General Comment No. 24 (52)(1994); Art. 15(2) and 17 of the European Convention on Human Rights and *Chahal v. United Kingdom*, at para. 79; Art. 27 of the American Convention on Human Rights; and Art. 2(2) of the Torture Convention. The Banjul Charter makes no provision for derogations.

would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.

- (c) It precludes any measure, regardless of form, which would have the effect of putting an individual at risk by removing them from a place of safety to a place of threat.
- (d) It precludes all such measures taken by or on behalf of a State, whether the measures are taken within the territory of that State or elsewhere, in circumstances in which the measures are or would be attributable to the State.
- (e) It precludes the expulsion, return, or other transfer of an individual both to a territory where they may be at risk directly or to a territory from which they may be subsequently removed to a third territory where they would be at risk.
- (f) It is not subject to exception or limitation for any reason whatever.

252. In short, the scope and content of the customary principle of *non-refoulement* in the context of human rights may be expressed as follows.

No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

### 3. *Non-refoulement at customary law*

253. On the basis of the expressions of *non-refoulement* identified in the preceding subsections, the essential content of the principle of *non-refoulement* at customary law may be stated as follows:

- (a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.
- (b) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. Save as provided in paragraph 3, this principle allows of no limitation or exception.
- (c) Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances

in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

## Annex 2.1 Status of ratifications of key international instruments which include a *non-refoulement* component

*Note 1:* UN membership is stated as of 18 December 2000; ratification of the 1951 Convention and 1967 Protocol as of 15 February 2001; of the ECHR, ICCPR and CAT as of 7 May 2001; of the ARC and ACHR as of 4 June 2000; and of the Banjul Charter as of 1 January 2000.

*Note 2:* The 'Declaration on Territorial Asylum' (GA Res. 2132 (XXII) of 14 December 1967) was adopted unanimously at the 1,631st plenary meeting of the UNGA on the report of the Sixth Committee. All States which were members of the UN at the time may therefore be said to have supported the principles expressed therein.

**[Editorial note:** Since the preparation of this Legal Opinion in June 2001 several States have acceded to the instruments referred to in this table. As of 1 Feb. 2003, the following accessions should be noted: *1951 Convention and 1967 Protocol*, Belarus (23 Aug. 2001), Moldova (31 Jan. 2002), and Ukraine (10 June 2002 and 4 April 2002 respectively), with Saint Kitts and Nevis acceding to the 1951 Convention alone (1 Feb. 2002); *ICCPR*, Djibouti (5 Nov. 2002), Eritrea (22 Jan. 2002), Andorra (signed 5 Aug. 2002), and Nauru (signed 12 Nov. 2001); *Torture Convention*, Djibouti (5 Nov. 2002), Equatorial Guinea (8 Oct. 2002), Holy See (26 June 2002), Ireland (11 April 2002), Lesotho (12 Nov. 2001), Mongolia (24 Jan. 2002), Nigeria (28 June 2001), Saint Vincent and the Grenadines (1 Aug. 2001), Andorra (signed 5 Aug. 2002), Madagascar (signed 1 Oct. 2001), Nauru (signed 12 Nov. 2001), and San Marino (signed 18 Sept. 2002); *European Convention on Human Rights*, Armenia (26 April 2002), Azerbaijan (15 April 2002), Bosnia and Herzegovina (12 July 2002). In addition, Switzerland joined the United Nations on 10 Sept. 2002, and Timor-Leste on 27 Sept. 2002, bringing the number of UN member States to 191. Total ratifications were as follows: 1951 Convention 141; 1967 Protocol 139; ICCPR 149; CAT 132.]



## Abbreviations

1951 Convention 1967 Protocol	Geneva Convention Relating to the Status of Refugees, 1951 Protocol to the 1951 Convention Relating to the Status of Refugees, 1967
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ICCPR	International Covenant on Civil and Political Rights, 1966
ARC	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
ACHR	American Convention on Human Rights, 1969
Banjul	African Charter on Human and Peoples' Rights, 1981
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Afghanistan	19-Nov-46			24-Jan-83 <sup>a</sup>	01-Apr-87	
Albania	14-Dec-55	18-Aug-92 <sup>a</sup>	18-Aug-92 <sup>a</sup>	04-Oct-91 <sup>a</sup>	11-May-94 <sup>a</sup>	ECHR 1996
Algeria	08-Oct-62	21-Feb-63 <sup>c</sup>	08-Nov-67 <sup>a</sup>	12-Sep-89	12-Sep-89 <sup>a</sup>	Banjul 1987, ARC 1974
Andorra	28-Jul-93					ECHR 1996
Angola	01-Dec-76	23-Jun-81 <sup>a</sup>	23-Jun-81 <sup>a</sup>	10-Jan-92 <sup>a</sup>		Banjul 1990, ARC 1981
Antigua and Barbuda	11-Nov-81	07-Sep-95 <sup>a</sup>	07-Sep-95 <sup>a</sup>		19-Jul-93 <sup>a</sup>	
Argentina	24-Oct-45	15-Nov-61 <sup>a</sup>	06-Dec-67 <sup>a</sup>	08-Aug-86	24-Sep-86 <sup>*</sup>	ACHR 1984
Armenia	02-Mar-92	06-Jul-93 <sup>a</sup>	06-Jul-93 <sup>a</sup>	23-Jun-93 <sup>a</sup>	13-Sep-93	s: ECHR 2001
Australia	01-Nov-45	22-Jan-54 <sup>a</sup>	13-Dec-73 <sup>a</sup>	13-Aug-80	08-Aug-89 <sup>*</sup>	
Austria	14-Dec-55	01-Nov-54	05-Sep-73 <sup>a</sup>	10-Sep-78	29-Jul-87 <sup>*</sup>	ECHR 1958
Azerbaijan	09-Mar-92	12-Feb-93 <sup>a</sup>	12-Feb-93 <sup>a</sup>	13-Aug-92 <sup>a</sup>	16-Aug-96 <sup>a</sup>	s: ECHR 2001
Bahamas	18-Sep-73	15-Sep-93 <sup>a</sup>	15-Sep-93 <sup>a</sup>			
Bahrain	21-Sep-71				06-Mar-98 <sup>a</sup>	
Bangladesh	17-Sep-74			06-Sep-00 <sup>a</sup>	05-Oct-98 <sup>a</sup>	
Barbados	09-Dec-66			05-Jan-73 <sup>a</sup>		ACHR 1982
Belarus	24-Oct-45			12-Nov-73	13-Mar-87	
Belgium	27-Dec-45	22-Jul-53	08-Apr-69 <sup>a</sup>	21-Apr-83	25-Jun-99 <sup>*</sup>	ECHR 1955
Belize	25-Sep-81	27-Jun-90 <sup>a</sup>	27-Jun-90 <sup>a</sup>	10-Jun-96 <sup>a</sup>	17-Mar-86 <sup>a</sup>	
Benin	20-Sep-60	04-Apr-62 <sup>c</sup>	06-Jul-70 <sup>a</sup>	12-Mar-92 <sup>a</sup>	12-Mar-92 <sup>a</sup>	Banjul 1986 ARC 1973
Bhutan	21-Sep-71					
Bolivia	14-Nov-45	09-Feb-82 <sup>a</sup>	09-Feb-82 <sup>a</sup>	12-Aug-82 <sup>a</sup>	12-Apr-99	ACHR 1979
Bosnia and Herzegovina	22-May-92	01-Sep-93 <sup>c</sup>	01-Sep-93 <sup>c</sup>	01-Sep-93 <sup>c</sup>	01-Sep-93 <sup>a</sup>	
Botswana	17-Oct-66	06-Jan-69 <sup>a</sup>	06-Jan-69 <sup>a</sup>	08-Sep-00	08-Sep-00	Banjul 1986 ARC 1995
Brazil	24-Oct-45	16-Nov-60	07-Apr-72 <sup>a</sup>	24-Jan-92 <sup>a</sup>	28-Sep-89	ACHR 1992
Brunei Darussalam	21-Sep-84					
Bulgaria	14-Dec-55	12-May-93 <sup>a</sup>	12-May-93 <sup>a</sup>	21-Sep-70	16-Dec-86 <sup>*</sup>	ECHR 1992

(Cont.)

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Burkina Faso	20-Sep-60	18-Jun-80 <sup>a</sup>	18-Jun-80 <sup>a</sup>	04-Jan-99 <sup>a</sup>	04-Jan-99 <sup>a</sup>	Banjul 1984 ARC 1974
Burundi	18-Sep-62	19-Jul-63 <sup>a</sup>	15-Mar-71 <sup>a</sup>	09-May-90 <sup>a</sup>	18-Feb-93 <sup>a</sup>	Banjul 1989 ARC 1975
Cambodia	14-Dec-55	15-Oct-92 <sup>a</sup>	15-Oct-92 <sup>a</sup>	26-May-92 <sup>a</sup>	15-Oct-92 <sup>a</sup>	
Cameroon	20-Sep-60	23-Oct-61 <sup>c</sup>	19-Sep-67 <sup>a</sup>	27-Jun-84 <sup>a</sup>	19-Dec-86 <sup>a</sup>	Banjul 1989 ARC 1985
Canada	09-Nov-45	04-Jun-69 <sup>a</sup>	04-Jun-69 <sup>a</sup>	19-May-76 <sup>a</sup>	24-Jun-87 <sup>*</sup>	
Cape Verde	16-Sep-75		09-Jul-87 <sup>a</sup>	06-Aug-93 <sup>a</sup>	04-Jun-92 <sup>a</sup>	Banjul 1987 ARC 1989
Central African Republic	20-Sep-60	04-Sep-62 <sup>c</sup>	30-Aug-67 <sup>a</sup>	08-May-81 <sup>a</sup>		Banjul 1986 ARC 1970
Chad	20-Sep-60	19-Aug-81 <sup>a</sup>	19-Aug-81 <sup>a</sup>	09-Jun-95 <sup>a</sup>	09-Jun-95 <sup>a</sup>	Banjul 1986 ARC 1981
Chile	24-Oct-45	28-Jan-72 <sup>a</sup>	27-Apr-72 <sup>a</sup>	10-Feb-72	30-Sep-88	ACHR 1990
China	24-Oct-45	24-Sep-82 <sup>a</sup>	24-Sep-82 <sup>a</sup>	s: 05-Oct-98	04-Oct-88	
Colombia	05-Nov-45	10-Oct-61	04-Mar-80 <sup>a</sup>	29-Oct-69	08-Dec-87	ACHR 1973
Comoros	12-Nov-75				s: 22-Sep-00	Banjul 1986
Congo	20-Sep-60	15-Oct-62 <sup>c</sup>	10-Jul-70 <sup>a</sup>	05-Oct-83 <sup>a</sup>		Banjul 1981 ARC 1971
Congo (Republic of)						
Congo (Democratic Republic)	20-Sep-60	19-Jul-65 <sup>a</sup>	13-Jan-75 <sup>a</sup>	01-Nov-76 <sup>a</sup>	18-Mar-96	Banjul 1987 ARC 1973
Costa Rica	02-Nov-45	28-Mar-78 <sup>a</sup>	28-Mar-78 <sup>a</sup>	29-Nov-68	11-Nov-93	ACHR 1970
Côte d'Ivoire	20-Sep-60	08-Dec-61 <sup>c</sup>	16-Feb-70 <sup>a</sup>	26-Mar-92 <sup>a</sup>	18-Dec-95 <sup>a</sup>	Banjul 1992 ARC 1998
Croatia	22-May-92	12-Oct-92 <sup>c</sup>	12-Oct-92 <sup>c</sup>	12-Oct-92 <sup>c</sup>	12-Oct-92 <sup>*c</sup>	ECHR 1997
Cuba	24-Oct-45				17-May-95	
Cyprus	20-Sep-60	16-May-63 <sup>c</sup>	09-Jul-68 <sup>a</sup>	02-Apr-69	18-Jul-91 <sup>a</sup>	ECHR 1962
Czech Republic	19-Jan-93	01-Jan-93 <sup>c</sup>	01-Jan-93 <sup>c</sup>	22-Feb-93 <sup>c</sup>	01-Jan-93 <sup>*c</sup>	ECHR 1992
Denmark	24-Oct-45	04-Dec-52	29-Jan-68 <sup>a</sup>	06-Jan-72	27-May-87 <sup>*</sup>	ECHR 1953
Djibouti	20-Sep-77	09-Aug-77 <sup>c</sup>	09-Aug-77 <sup>c</sup>			Banjul 1991
Dominica	18-Dec-78	17-Feb-94 <sup>a</sup>	17-Feb-94 <sup>a</sup>	17-Jun-93 <sup>a</sup>		ACHR 1993
Dominican Republic	24-Oct-45	04-Jan-78 <sup>a</sup>	04-Jan-78 <sup>a</sup>	04-Jan-78 <sup>a</sup>	s: 04-Feb-85	ACHR 1978
Ecuador	21-Dec-45	17-Aug-55 <sup>a</sup>	06-Mar-69 <sup>a</sup>	06-Mar-69	30-Mar-88 <sup>*</sup>	ACHR 1977
Egypt	24-Oct-45	22-May-81 <sup>a</sup>	22-May-81 <sup>a</sup>	14-Jan-82	25-Jun-86 <sup>a</sup>	Banjul 1981 ARC 1980
El Salvador	24-Oct-45	28-Apr-83 <sup>a</sup>	28-Apr-83 <sup>a</sup>	30-Nov-79	17-Jun-96 <sup>a</sup>	ACHR 1978
Equatorial Guinea	12-Nov-68	07-Feb-86 <sup>a</sup>	07-Feb-86 <sup>a</sup>	25-Sep-87 <sup>a</sup>		Banjul 1986 ARC 1980
Eritrea	28-May-93					Banjul 1999
Estonia	17-Sep-91	10-Apr-97 <sup>a</sup>	10-Apr-97 <sup>a</sup>	21-Oct-91 <sup>a</sup>	21-Oct-91 <sup>a</sup>	ECHR 1996
Ethiopia	13-Nov-45	10-Nov-69 <sup>a</sup>	10-Nov-69 <sup>a</sup>	11-Jun-93 <sup>a</sup>	13-Mar-94 <sup>a</sup>	Banjul 1998 ARC 1973
Fiji	13-Oct-70	12-Jun-72 <sup>c</sup>	12-Jun-72 <sup>c</sup>			
Finland	14-Dec-55	10-Oct-68 <sup>a</sup>	10-Oct-68 <sup>a</sup>	19-Aug-75	30-Aug-89 <sup>*</sup>	ECHR 1990
France	24-Oct-45	23-Jun-54	03-Feb-71 <sup>a</sup>	04-Nov-80 <sup>a</sup>	18-Feb-86 <sup>*</sup>	ECHR 1974
Gabon	20-Sep-60	27-Apr-64 <sup>a</sup>	28-Aug-73 <sup>a</sup>	21-Jan-83 <sup>a</sup>	08-Sep-00	Banjul 1986 ARC 1986
Gambia	21-Sep-65	07-Sep-66 <sup>c</sup>	29-Sep-67 <sup>a</sup>	22-Mar-79 <sup>a</sup>	s: 23-Oct-85	Banjul 1983 ARC 1980
Georgia	31-Jul-92	09-Aug-99 <sup>a</sup>	09-Aug-99 <sup>a</sup>	03-May-94 <sup>a</sup>	26-Oct-94 <sup>a</sup>	ECHR 1999
Germany	18-Sep-73	01-Dec-53	05-Nov-69 <sup>a</sup>	17-Dec-73	01-Oct-90	ECHR 1953
Ghana	08-Mar-57	18-Mar-63 <sup>a</sup>	30-Oct-68 <sup>a</sup>	07-Sep-00	07-Sep-00	Banjul 1989 ARC 1975
Greece	24-Oct-45	05-Apr-60	07-Aug-68 <sup>a</sup>	05-May-97 <sup>a</sup>	06-Oct-88 <sup>*</sup>	ECHR 1974
Grenada	17-Sep-74			06-Sep-91 <sup>a</sup>		ACHR 1978
Guatemala	21-Nov-45	22-Sep-83 <sup>a</sup>	22-Sep-83 <sup>a</sup>	06-May-92 <sup>a</sup>	05-Jan-90 <sup>a</sup>	ACHR 1978

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Guinea	12-Dec-58	28-Dec-65 <sup>c</sup>	16-May-68 <sup>a</sup>	24-Jan-78	10-Oct-89	Banjul 1982 ARC 1972
Guinea-Bissau	17-Sep-74	11-Feb-76 <sup>a</sup>	11-Feb-76 <sup>a</sup>	s: 12-Sep-00	s: 12-Sep-00	Banjul 1986 ARC 1989
Guyana	20-Sep-66			15-Feb-77	19-May-88	
Haiti	24-Oct-45	25-Sep-84 <sup>a</sup>	25-Sep-84 <sup>a</sup>	06-Feb-91 <sup>a</sup>		ACHR 1977
Honduras	17-Dec-45	23-Mar-92 <sup>a</sup>	23-Mar-92 <sup>a</sup>	25-Aug-97	05-Dec-96 <sup>a</sup>	ACHR 1977
Hungary	14-Dec-55	14-Mar-89 <sup>a</sup>	14-Mar-89 <sup>a</sup>	17-Jan-74	15-Apr-87 <sup>a</sup>	ECHR 1992
Iceland	19-Nov-46	30-Nov-55 <sup>a</sup>	26-Apr-68 <sup>a</sup>	22-Aug-79	23-Oct-96 <sup>*</sup>	ECHR 1953
India	30-Oct-45			10-Apr-79 <sup>a</sup>	s: 14-Oct-97	
Indonesia	28-Sep-50				28-Oct-98	
Iran (Islamic Republic of)	24-Oct-45	28-Jul-76 <sup>a</sup>	28-Jul-76 <sup>a</sup>	24-Jun-75		
Iraq	21-Dec-45			25-Jan-71		
Ireland	14-Dec-55	29-Nov-56 <sup>a</sup>	06-Nov-68 <sup>a</sup>	08-Dec-89	s: 28-Sep-92	ECHR 1953
Israel	11-May-49	01-Oct-54	14-Jun-68 <sup>a</sup>	03-Oct-91	03-Oct-91	
Italy	14-Dec-55	15-Nov-54	26-Jan-72 <sup>a</sup>	15-Sep-78	12-Jan-89 <sup>*</sup>	ECHR 1955
Jamaica	18-Sep-62	30-Jul-64 <sup>c</sup>	30-Oct-80 <sup>a</sup>	03-Oct-75		ACHR 1978
Japan	18-Dec-56	03-Oct-81 <sup>a</sup>	01-Jan-82 <sup>a</sup>	21-Jun-79	29-Jun-99 <sup>a</sup>	
Jordan	14-Dec-55			28-May-75	13-Nov-91	
Kazakhstan	02-Mar-92	15-Jan-99 <sup>a</sup>	15-Jan-99 <sup>a</sup>		26-Aug-98 <sup>a</sup>	
Kenya	16-Dec-63	16-May-66 <sup>a</sup>	13-Nov-81 <sup>a</sup>	01-May-72 <sup>a</sup>	21-Feb-97 <sup>a</sup>	Banjul 1992 ARC 1992
Kiribati	14-Sep-99					
Korea (Democratic People's Republic of)	17-Sep-91			14-Sep-81 <sup>a</sup>		
Korea (Republic of)	17-Sep-91	03-Dec-92 <sup>a</sup>	03-Dec-92 <sup>a</sup>	10-Apr-90 <sup>a</sup>	09-Jan-95 <sup>a</sup>	
Kuwait	14-May-63			21-May-96 <sup>a</sup>	08-Mar-96 <sup>a</sup>	
Kyrgyzstan	02-Mar-92	08-Oct-96 <sup>a</sup>	08-Oct-96 <sup>a</sup>	07-Oct-94 <sup>a</sup>	05-Sep-97 <sup>a</sup>	
Lao People's Democratic Republic	14-Dec-55			s: 07-Dec-00		
Latvia	17-Sep-91	31-Jul-97 <sup>a</sup>	31-Jul-97 <sup>a</sup>	14-Apr-92 <sup>a</sup>	14-Apr-92 <sup>a</sup>	ECHR 1997
Lebanon	24-Oct-45			03-Nov-72 <sup>a</sup>	05-Oct-00 <sup>a</sup>	
Lesotho	17-Oct-66	14-May-81 <sup>a</sup>	14-May-81 <sup>a</sup>	09-Sep-92 <sup>a</sup>		Banjul 1992 ARC 1988
Liberia	02-Nov-45	15-Oct-64 <sup>a</sup>	27-Feb-80 <sup>a</sup>	s: 18-Apr-67		Banjul 1982 ARC 1971
Libyan Arab Jamahiriya	14-Dec-55			15-May-70 <sup>a</sup>	16-May-89 <sup>a</sup>	Banjul 1987 ARC 1981
Liechtenstein	18-Sep-90	08-Mar-57	20-May-68 <sup>a</sup>	10-Dec-98 <sup>a</sup>	02-Nov-90 <sup>*</sup>	ECHR 1982
Lithuania	17-Sep-91	28-Apr-97 <sup>a</sup>	28-Apr-97	20-Nov-91 <sup>a</sup>	01-Feb-96	ECHR 1995
Luxembourg	24-Oct-45	23-Jul-53	22-Apr-71 <sup>a</sup>	18-Aug-83	29-Sep-87 <sup>*</sup>	ECHR 1953
Macedonia (Former Yugoslav Republic of)	08-Apr-93	18-Jan-94 <sup>c</sup>	18-Jan-94 <sup>c</sup>	18-Jan-94 <sup>c</sup>	12-Dec-94 <sup>c</sup>	ECHR 1997
Madagascar	20-Sep-60	18-Dec-67 <sup>a</sup>		21-Jun-71		Banjul 1992 s: ARC 1969
Malawi	01-Dec-64	10-Dec-87 <sup>a</sup>	10-Dec-87 <sup>a</sup>	22-Dec-93 <sup>a</sup>	11-Jun-96 <sup>a</sup>	Banjul 1990 ARC 1987
Malaysia	17-Sep-57					
Maldives	21-Sep-65					
Mali	28-Sep-60	02-Feb-73 <sup>c</sup>	02-Feb-73 <sup>a</sup>	16-Jul-74 <sup>a</sup>	26-Feb-99 <sup>a</sup>	Banjul 1981 ARC 1981

(Cont.)

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Malta	01-Dec-64	17-Jun-71 <sup>a</sup>	15-Sep-71 <sup>a</sup>	13-Sep-90 <sup>a</sup>	13-Sep-90 <sup>a</sup>	ECHR 1967
Marshall Islands	17-Sep-91					
Mauritania	07-Oct-61	05-May-87 <sup>a</sup>	05-May-87 <sup>a</sup>			Banjul 1986 ARC 1972
Mauritius	24-Apr-68			12-Dec-73 <sup>a</sup>	09-Dec-92 <sup>a</sup>	Banjul 1992 s: ARC 1969
Mexico	07-Nov-45	07-Jun-00 <sup>a</sup>	07-Jun-00 <sup>a</sup>	23-Mar-81 <sup>a</sup>	23-Jan-86	ACHR 1982
Micronesia (Federated States of)	17-Sep-91					
Moldova	02-Mar-92			26-Jan-93 <sup>a</sup>	28-Nov-95	ECHR 1997
Monaco	28-May-93	18-May-54		28-Aug-97	06-Dec-91 <sup>*,a</sup>	
Mongolia	27-Oct-61			18-Nov-74		
Morocco	12-Nov-56	07-Nov-56 <sup>c</sup>	20-Apr-71 <sup>a</sup>	03-May-79	21-Jun-93	
Mozambique	16-Sep-75	16-Dec-83 <sup>a</sup>	01-May-89 <sup>a</sup>	21-Jul-93 <sup>a</sup>	14-Sep-99 <sup>a</sup>	Banjul 1990 ARC 1989
Myanmar	19-Apr-48					
Namibia	23-Apr-90	17-Feb-95 <sup>a</sup>		28-Nov-94 <sup>a</sup>	28-Nov-94 <sup>a</sup>	Banjul 1992
Nauru	14-Sep-99					
Nepal	14-Dec-55			14-May-91 <sup>a</sup>	14-May-91 <sup>a</sup>	
Netherlands	10-Dec-45	03-May-56	29-Nov-68 <sup>a</sup>	11-Dec-78	21-Dec-88 <sup>*</sup>	ECHR 1954
New Zealand	24-Oct-45	30-Jun-60 <sup>a</sup>	06-Aug-73 <sup>a</sup>	28-Dec-78	10-Dec-89 <sup>*</sup>	
Nicaragua	24-Oct-45	28-Mar-80 <sup>a</sup>	28-Mar-80 <sup>a</sup>	12-Mar-80 <sup>a</sup>	s: 15-Apr-85	ACHR 1979
Niger	20-Sep-60	25-Aug-61 <sup>c</sup>	02-Feb-70 <sup>a</sup>	07-Mar-86 <sup>a</sup>	05-Oct-98 <sup>a</sup>	Banjul 1986 ARC 1971
Nigeria	07-Oct-60	23-Oct-67 <sup>a</sup>	02-May-68 <sup>a</sup>	29-Jul-93 <sup>a</sup>	s: 28-Jul-88	Banjul 1983 ARC 1986
Norway	27-Nov-45	23-Mar-53	28-Nov-67 <sup>a</sup>	13-Sep-72	09-Jul-86 <sup>*</sup>	ECHR 1952
Oman	07-Oct-71					
Pakistan	30-Sep-47					
Palau	15-Dec-94					
Panama	13-Nov-45	02-Aug-78 <sup>a</sup>	02-Aug-78 <sup>a</sup>	08-Mar-77	24-Aug-87	ACHR 1978
Papua New Guinea	10-Oct-75	17-Jul-86 <sup>a</sup>	17-Jul-86 <sup>a</sup>			
Paraguay	24-Oct-45	01-Apr-70 <sup>a</sup>	01-Apr-70 <sup>a</sup>	10-Jun-92	12-Mar-90	ACHR 1989
Peru	31-Oct-45	21-Dec-64 <sup>a</sup>	15-Sep-83 <sup>a</sup>	28-Apr-78	07-Jul-88	ACHR 1978
Philippines	24-Oct-45	22-Jul-81 <sup>a</sup>	22-Jul-81 <sup>a</sup>	23-Oct-86	18-Jun-86 <sup>a</sup>	
Poland	24-Oct-45	27-Sep-91 <sup>a</sup>	27-Sep-91 <sup>a</sup>	18-Mar-77	26-Jul-89 <sup>*</sup>	ECHR 1993
Portugal	14-Dec-55	22-Dec-60 <sup>a</sup>	13-Jul-76 <sup>a</sup>	15-Jun-78	09-Feb-89 <sup>*</sup>	ECHR 1978
Qatar	21-Sep-71				11-Jan-00 <sup>a</sup>	
Romania	14-Dec-55	07-Aug-91 <sup>a</sup>	07-Aug-91 <sup>a</sup>	09-Dec-74	18-Dec-90 <sup>a</sup>	ECHR 1993
Russian Federation	24-Oct-45	02-Feb-93 <sup>a</sup>	02-Feb-93 <sup>a</sup>	16-Oct-73	03-Mar-87 <sup>*</sup>	ECHR 1998
Rwanda	18-Sep-62	03-Jan-80 <sup>a</sup>	03-Jan-80 <sup>a</sup>	16-Apr-75 <sup>a</sup>		Banjul 1981 ARC 1979
Saint Kitts and Nevis	23-Sep-83					
Saint Lucia	18-Sep-79					
Saint Vincent and the Grenadines	16-Sep-80	03-Nov-93 <sup>a</sup>		09-Nov-81 <sup>a</sup>		
Samoa	15-Dec-76	21-Sep-88 <sup>a</sup>	29-Nov-94 <sup>a</sup>			
San Marino	02-Mar-92			18-Oct-85 <sup>a</sup>		ECHR 1989
São Tomé and Príncipe	16-Sep-75	01-Feb-78 <sup>a</sup>	01-Feb-78 <sup>a</sup>	s: 31-Oct-95	s: 06-Sep-00	Banjul 1986
Saudi Arabia	24-Oct-45				23-Sep-97 <sup>a</sup>	
Senegal	28-Sep-60	02-May-63 <sup>a</sup>	03-Oct-67 <sup>a</sup>	13-Feb-78	21-Aug-86 <sup>*</sup>	Banjul 1981 ARC 1971

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Seychelles	21-Sep-76	23-Apr-80 <sup>a</sup>	23-Apr-80 <sup>a</sup>	05-May-92 <sup>a</sup>	05-May-92 <sup>a</sup>	Banjul 1992 ARC 1980
Sierra Leone	27-Sep-61	22-May-81 <sup>a</sup>	22-May-81 <sup>a</sup>	23-Aug-96 <sup>a</sup>	25-Apr-01	Banjul 1981 ARC 1987
Singapore	21-Sep-65					
Slovakia	19-Jan-93	04-Feb-93 <sup>c</sup>	04-Feb-93 <sup>c</sup>	28-May-93 <sup>c</sup>	28-May-93 <sup>*c</sup>	ECHR 1992
Slovenia	22-May-92	06-Jul-92 <sup>c</sup>	06-Jul-92 <sup>c</sup>	06-Jul-92 <sup>c</sup>	16-Jul-93 <sup>*a</sup>	ECHR 1994
Solomon Islands	19-Sep-78	28-Feb-95 <sup>a</sup>	12-Apr-95 <sup>a</sup>			
Somalia	20-Sep-60	10-Oct-78 <sup>a</sup>	10-Oct-78 <sup>a</sup>	24-Jan-90 <sup>a</sup>	24-Jan-90 <sup>a</sup>	Banjul 1982 s: ARC 1969
South Africa	07-Nov-45	12-Jan-96 <sup>a</sup>	12-Jan-96 <sup>a</sup>	10-Dec-98	10-Dec-98 <sup>*</sup>	Banjul 1996 ARC 1995
Spain	14-Dec-55	14-Aug-78 <sup>a</sup>	14-Aug-78 <sup>a</sup>	27-Apr-77	21-Oct-87 <sup>*</sup>	ECHR 1979
Sri Lanka	14-Dec-55			11-Jun-80	03-Jan-94 <sup>a</sup>	
Sudan	12-Nov-56	22-Feb-74 <sup>a</sup>	23-May-74 <sup>a</sup>	18-Mar-76 <sup>a</sup>	s: 04-Jun-86	Banjul 1982 ARC 1972
Suriname	04-Dec-75	29-Nov-78 <sup>c</sup>	29-Nov-78 <sup>c</sup>	28-Dec-76 <sup>a</sup>		ACHR 1987
Swaziland	24-Sep-68	14-Feb-00 <sup>a</sup>	28-Jan-69 <sup>a</sup>			Banjul 1995 ARC 1989
Sweden	19-Nov-46	26-Oct-54	04-Oct-67 <sup>a</sup>	06-Dec-71	08-Jan-86 <sup>*</sup>	ECHR 1952
Syrian Arab Republic	24-Oct-45			21-Apr-69 <sup>a</sup>		
Tajikistan	02-Mar-92	07-Dec-93 <sup>a</sup>	07-Dec-93 <sup>a</sup>	04-Jan-99 <sup>a</sup>	11-Jan-95 <sup>a</sup>	
Tanzania	14-Dec-61	12-May-64 <sup>a</sup>	04-Sep-68 <sup>a</sup>	11-Jun-76 <sup>a</sup>		Banjul 1982 ARC 1975
Thailand	16-Dec-46			29-Oct-96 <sup>a</sup>		
Togo	20-Sep-60	27-Feb-62 <sup>c</sup>	01-Dec-69 <sup>a</sup>	24-May-84 <sup>a</sup>	18-Nov-87 <sup>*</sup>	Banjul 1982 ARC 1970
Tonga	14-Sep-99					
Trinidad and Tobago	18-Sep-62	10-Nov-00 <sup>a</sup>	10-Nov-00 <sup>a</sup>	21-Dec-78 <sup>a</sup>		
Tunisia	12-Nov-56	24-Oct-57 <sup>c</sup>	16-Oct-68 <sup>a</sup>	18-Mar-69	23-Sep-88 <sup>*</sup>	Banjul 1983 ARC 1989
Turkey	24-Oct-45	30-Mar-62	31-Jul-68 <sup>a</sup>	s: 15-Aug-00	02-Aug-88 <sup>*</sup>	ECHR 1950
Turkmenistan	02-Mar-92	02-Mar-98 <sup>a</sup>	02-Mar-98	01-May-97 <sup>a</sup>	25-Jun-99 <sup>a</sup>	
Tuvalu	05-Sep-00	07-Mar-86 <sup>c</sup>	07-Mar-86 <sup>c</sup>			
Uganda	25-Oct-62	27-Sep-76 <sup>a</sup>	27-Sep-76 <sup>a</sup>	21-Jun-95 <sup>a</sup>	03-Nov-86 <sup>a</sup>	Banjul 1986 ARC 1987
Ukraine	24-Oct-45			12-Nov-73	24-Feb-87	ECHR 1997
United Arab Emirates	09-Dec-71					
United Kingdom of Great Britain & Northern Ireland	24-Oct-45	11-Mar-54	04-Sep-68 <sup>a</sup>	20-May-76	08-Dec-88	ECHR 1951
United States of America	24-Oct-45		01-Nov-68 <sup>a</sup>	08-Jun-92	21-Oct-94	s: ACHR 1977
Uruguay	18-Dec-45	22-Sep-70 <sup>a</sup>	22-Sep-70 <sup>a</sup>	01-Apr-70	24-Oct-86 <sup>*</sup>	ACHR 1985
Uzbekistan	02-Mar-92			28-Sep-95 <sup>a</sup>	28-Sep-95 <sup>a</sup>	
Vanuatu	15-Sep-81					
Venezuela	15-Nov-45		19-Sep-86 <sup>a</sup>	10-May-78	29-Jul-91 <sup>*</sup>	ACHR 1977
Viet Nam	20-Sep-77			24-Sep-82 <sup>a</sup>		
Yemen	30-Sep-47	18-Jan-80 <sup>a</sup>	18-Jan-80 <sup>a</sup>	09-Feb-87 <sup>a</sup>	05-Nov-91 <sup>a</sup>	
Yugoslavia	01-Nov-00	15-Dec-59	15-Jan-68 <sup>a</sup>	02-Jun-71	10-Sep-91 <sup>*</sup>	
Zambia	01-Dec-64	24-Sep-69 <sup>c</sup>	24-Sep-69 <sup>a</sup>	10-Apr-84 <sup>a</sup>	07-Oct-98 <sup>a</sup>	Banjul 1983 ARC 1973
Zimbabwe	25-Aug-80	25-Aug-81 <sup>a</sup>	25-Aug-81 <sup>a</sup>	13-May-91 <sup>a</sup>		Banjul 1986 ARC 1985

(Cont.)

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Non-members of the UN						
Holy See		15-Mar-56	08-Jun-67 <sup>a</sup>			
Switzerland		21-Jan-55	20-May-68 <sup>a</sup>	18-Jun-92 <sup>a</sup>	02-Dec-86*	ECHR 1974
<b>Total (191)</b>	<b>189</b>	<b>137</b>	<b>136</b>	<b>147</b>	<b>124</b>	
<b>Signatories</b>				<b>5</b>	<b>10</b>	

*Notes*<sup>a</sup> Accession<sup>c</sup> Succession

s: Indicates that the State has signed but not ratified the instrument.

\* Indicates that the party has recognized the competence to receive and process individual communications of the Committee Against Torture under Article 22 of the CAT (total 41 States Parties).

[**Editorial note:** Accession dates for Yugoslavia refer to the former Yugoslavia. The Federal Republic of Yugoslavia formally succeeded to the 1951 Convention and 1967 Protocol, the ICCPR, and the CAT on 12 March 2001, and renamed itself Serbia and Montenegro on 4 Feb. 2003.]

The following States are not party to any of the listed agreements

State	Date of UN membership
Bhutan	(21-Sep-71)
Brunei Darussalam	(21-Sep-84)
Kiribati	(14-Sep-99)
Lao People's Democratic Republic	(14-Dec-55)
Malaysia	(17-Sep-57)
Maldives	(21-Sep-65)
Marshall Islands	(17-Sep-91)
Micronesia (Federated States of)	(17-Sep-91)
Myanmar	(19-Apr-48)
Nauru	(14-Sep-99)
Oman	(07-Oct-71)
Pakistan	(30-Sep-47)
Palau	(15-Dec-94)
Saint Kitts and Nevis	(23-Sep-83)
Saint Lucia	(18-Sep-79)
Singapore	(21-Sep-65)
Tonga	(14-Sep-99)
United Arab Emirates	(09-Dec-71)
Vanuatu	(15-Sep-81)

## Annex 2.2 Constitutional and legislative provisions importing the principle of *non-refoulement* into municipal law

The table identifies constitutional and/or legislative provisions that import the principle of *non-refoulement* into municipal law either directly, through the express incorporation of the principle in some or other form, or indirectly, by way of the application of treaties in the municipal sphere. The principal treaties which include a *non-refoulement* component to which the State concerned is a party are listed in column two of the table.

While every effort has been made to verify the accuracy and currency of the municipal provisions cited, this has not always been possible. The provisions referred to should not be taken as excluding the application of other municipal measures that may also be relevant to the application of the principle of *non-refoulement* in the municipal sphere.

**[Editorial note:** For accessions to these instruments since the preparation of this Legal Opinion *see* Editorial note at start of Annex 2.1.]

### Abbreviations

ACHR	American Convention on Human Rights, 1969
ARC	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
Banjul	African Charter on Human and Peoples' Rights, 1981
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ICCPR	International Covenant on Civil and Political Rights, 1966
P	Protocol to the Convention Relating to the Status of Refugees, 1967
RC	Convention Relating to the Status of Refugees, 1951

State	UN member	Treaties	Constitutional and/or legislative provisions
Afghanistan	19-Nov-46	CAT, ICCPR	
Albania	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1976) Art. 5; Law on Asylum (1998) Art. 7
Algeria	08-Oct-62	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1996) s. 123; Décret No. 1963-274
Andorra	28-Jul-93	ECHR	Constitution (1993) Art. 3(3), (4)

(Cont.)

State	UN member	Treaties	Constitutional and/or legislative provisions
Angola	01-Dec-76	RC and P, Banjul, ARC, ICCPR	Law on the Amendment of the Constitution, No. 23 (1992) Art. 21(3), Art. 26; Law No. 8 (1990) Art. 4, Art. 21
Antigua and Barbuda	11-Nov-81	RC and P, CAT	
Argentina	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Constitution (1994) Art. 31; Decreto No. 1023 (1994) Art. 171
Armenia	02-Mar-92	RC and P, CAT, ICCPR	Law on Refugees (1999) Art. 19
Australia	01-Nov-45	RC and P, CAT, ICCPR	Migration Act (1958) s. 36
Austria	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Aliens Act (1997) Art. 57(1), (2); Asylum Act (1997) Art. 21
Azerbaijan	09-Mar-92	RC and P, CAT, ICCPR	Constitution (1995) Arts. 69, 70
Bahamas	18-Sep-73	RC and P	
Bahrain	21-Sep-71	CAT	Constitution (1973) Art. 37
Bangladesh	17-Sep-74	CAT, ICCPR	
Barbados	09-Dec-66	ACHR, ICCPR	
Belarus	24-Oct-45	CAT, ICCPR	Constitution (1994) Art. 8; Law on Aliens (1999) Art. 29; Law on Refugees (1995) Arts. 8, 15, 17
Belgium	27-Dec-45	RC and P, ECHR, CAT, ICCPR	Loi sur l'accès des étrangers (1980) Arts. 7, 56
Belize	25-Sep-81	RC and P, CAT, ICCPR	Refugees Act (1991) Arts. 3, 14
Benin	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1990) Art. 147; Ordonnance No. 1975-41 Art. 4
Bhutan	21-Sep-71		
Bolivia	14-Nov-45	RC and P, ACHR, CAT, ICCPR	Decreto Supremo No. 19640 (1983) Art. 5
Bosnia and Herzegovina	22-May-92	RC and P, CAT, ICCPR	Constitution (1994) Ch. VII Art. 3, Annex; Law on Immigration and Asylum (1999) Art. 34
Botswana	17-Oct-66	RC and P, Banjul, ARC, CAT, ICCPR	Refugees Act (1968) s. 9(1)
Brazil	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Lei No. 9.474 (1997) Arts. 36, 37
Brunei Darussalam	21-Sep-84		
Bulgaria	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1991) Art. 5; Law on Refugees (1999) s. 6
Burkina Faso	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Décret No. 1994-055/PRES/REX Art. 11; Zatu No. AN V-0028/FP/PRES (1988) Art. 4
Burundi	18-Sep-62	RC and P, Banjul, ARC, CAT, ICCPR	
Cambodia	14-Dec-55	RC and P, CAT, ICCPR	Law on Immigration (1994) Art. 3
Cameroon	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1996) Art. 45
Canada	09-Nov-45	RC and P, CAT, ICCPR	Immigration Act (1976) s. 53
Cape Verde	16-Sep-75	P, Banjul, ARC, CAT, ICCPR	Constitution (1992) Arts. 7, 11
Central African Republic	20-Sep-60	RC and P, Banjul, ARC, ICCPR	Constitution (1990) Art. 69
Chad	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	
Chile	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Decreto-Ley No. 1094 (1975) Art. 39
China	24-Oct-45	RC and P, CAT	Civil Law (1986) Art. 142
Colombia	05-Nov-45	RC and P, ACHR, CAT, ICCPR	Constitution (1991) Art. 93; Decreto No. 1598 (1995) Art. 17
Comoros	12-Nov-75	Banjul	
Congo (Republic of)	20-Sep-60	RC and P, Banjul, ARC, ICCPR	Acte Fondamentale (1997) Art. 81; Décret No. 1978-266 Art. 4
Congo (Democratic Republic)	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Ordonnance-loi No. 1983-033 Art. 2



State	UN member	Treaties	Constitutional and/or legislative provisions
Costa Rica	02-Nov-45	RC and P, ACHR, CAT, ICCPR	Ley general de migración y extranjería (1986) Art. 64; Decreto ejecutivo No. 14845-G (1983) Arts. 17, 18
Côte d'Ivoire	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	
Croatia	22-May-92	RC and P, ECHR, CAT, ICCPR	Constitutional Law of Human Rights and Freedoms (1992) Art. 1, 2(m); Constitution (1990) Arts. 33, 134
Cuba	24-Oct-45	CAT	
Cyprus	20-Sep-60	RC and P, ECHR, CAT, ICCPR	Constitution (1960) Arts. 32, 169
Czech Republic	19-Jan-93	RC and P, ECHR, CAT, ICCPR	Act No. 325 on Asylum ... (1999) s. 91
Denmark	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Aliens Act (1997) Arts. 31, 48a
Djibouti	20-Sep-77	RC and P, Banjul	Ordonnance No. 77053/P. R. /A. E (1977) Art. 4
Dominica	18-Dec-78	RC and P, ACHR, ICCPR	
Dominican Republic	24-Oct-45	RC and P, ACHR, ICCPR	Decreto presidencial No. 2330 (1984) Arts. 12, 13
Ecuador	21-Dec-45	RC and P, ACHR, CAT, ICCPR	Decreto No. 3301 (1992) Arts. 27, 34
Egypt	24-Oct-45	RC and P, Banjul, ARC, CAT, ICCPR	
El Salvador	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Constitution (1983) Art. 144
Equatorial Guinea	12-Nov-68	RC and P, Banjul, ARC, ICCPR	Fundamental Law Art. 18
Eritrea	28-May-93	Banjul	
Estonia	17-Sep-91	RC and P, ECHR, CAT, ICCPR	Law on Refugees (1997) Arts. 7, 21
Ethiopia	13-Nov-45	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1995) Art. 9
Fiji	13-Oct-70	RC and P	Constitution Amendment Act (1997) Arts. 34(5), 43
Finland	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1919, as amended 1995) s. 7; Aliens' Act (1991) Arts. 38, 41
France	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Constitution (1958) Art. 55; Ordonnance No. 1945-2658 Art. 27bis
Gabon	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Ordonnance No. 64/1976 Art. 2
Gambia	21-Sep-65	RC and P, Banjul, ARC, ICCPR	
Georgia	31-Jul-92	RC and P, ECHR, CAT, ICCPR	Law on Refugees (1998) Art. 82
Germany	18-Sep-73	RC and P, ECHR, CAT, ICCPR	Basic Law (1949, as amended 1998) Art. 25; Asylum Procedure Act (1992) s. 2; Aliens Act (1991) Arts. 48, 51, 53(1), 53(6)
Ghana	08-Mar-57	RC and P, Banjul, ARC, CAT, ICCPR	Refugee Law (1992) Arts. 1, 11
Greece	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Presidential Decree No. 61 (1999) Art. 1; Inter-Ministerial Decree No. 4803/7A (1992) Art. 7; Law No. 1975 (1991) Art. 24
Grenada	17-Sep-74	ACHR, ICCPR	
Guatemala	21-Nov-45	RC and P, ACHR, CAT, ICCPR	Constitution (1985) Arts. 27, 46; Ley No. 22 (1986) Art. 26
Guinea	12-Dec-58	RC and P, Banjul, ARC, CAT, ICCPR	
Guinea-Bissau	17-Sep-74	RC and P, Banjul, ARC	
Guyana	20-Sep-66	CAT, ICCPR	
Haiti	24-Oct-45	RC and P, ACHR, ICCPR	Constitution (1987) Art. 276-2
Honduras	17-Dec-45	RC and P, ACHR, CAT, ICCPR	Constitution (1982) Art. 18
Hungary	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1990) Art. 7; Act LXXXVI (1993) s. 32, as amended by Act CXXXIX (1997) Art. 61
Iceland	19-Nov-46	RC and P, ECHR, CAT, ICCPR	

(Cont.)

State	UN member	Treaties	Constitutional and/or legislative provisions
India	30-Oct-45	ICCPR	
Indonesia	28-Sep-50	CAT	Circular Letter of the Prime Minister No. 11/R. I/1956 Art. 1
Iran (Islamic Republic of)	24-Oct-45	RC and P, ICCPR	Ordinance Relating to Refugees (1963) Art. 12
Iraq	21-Dec-45	ICCPR	Loi sur les réfugiés politiques No. 51 (1971), Art. 4
Ireland	14-Dec-55	RC and P, ECHR, ICCPR	Immigration Act (1999) s. 3; Refugee Act (1996) Art. 5
Israel	11-May-49	RC and P, CAT, ICCPR	
Italy	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1947) Art. 10; Decree Law No. 416 (1989) Art. 7
Jamaica	18-Sep-62	RC and P, ACHR, ICCPR	
Japan	18-Dec-56	RC and P, CAT, ICCPR	Immigration, Control and Refugee Recognition Act (1951) Art. 53
Jordan	14-Dec-55	CAT, ICCPR	
Kazakhstan	02-Mar-92	RC and P, CAT	Constitution (1995) Arts. 4, 12(4); Presidential Decree No. 3419; Presidential Decree, 15 July 1996
Kenya	16-Dec-63	RC and P, Banjul, ARC, CAT, ICCPR	
Kiribati	14-Sep-99		
Korea (Democratic People's Republic of)	17-Sep-91	ICCPR	
Korea (Republic of)	17-Sep-91	RC and P, CAT, ICCPR	
Kuwait	14-May-63	CAT, ICCPR	
Kyrgyzstan	02-Mar-92	RC and P, CAT, ICCPR	Constitution (1996) Arts. 12, 14, 16; Resolution No. 340 (1996) s. 22
Lao People's Democratic Republic	14-Dec-55		
Latvia	17-Sep-91	RC and P, ECHR, CAT, ICCPR	Law on Asylum Seekers and Refugees (1998) Arts. 22(2), 30; Law on the Entry and Residence of ... Stateless Persons (1992) Art. 60; Regulations on the Procedure of Temporary Residence for Persons Who Have Been Detained for Illegal Residence (1992) s. 6.3
Lebanon	24-Oct-45	CAT, ICCPR	Loi réglementant l'entrée et le séjour des étrangers au Liban (1962) Art. 31
Lesotho	17-Oct-66	RC and P, Banjul, ARC, ICCPR	Refugee Act (1983) Arts. 11, 12, 13
Liberia	02-Nov-45	RC and P, Banjul, ARC	Refugee Act (1993) ss. 12(1), 13
Libyan Arab Jamahiriya	14-Dec-55	Banjul, ARC, CAT, ICCPR	Constitution (1951) Art. 191
Liechtenstein	18-Sep-90	RC and P, ECHR, CAT, ICCPR	Constitution (1862) Art. 31
Lithuania	17-Sep-91	RC and P, ECHR, CAT, ICCPR	Law on Refugee Status (1995) Art. 9
Luxembourg	24-Oct-45	RC and P, ECHR, CAT, ICCPR	
Macedonia (Former Yugoslav Republic of)	08-Apr-93	RC and P, ECHR, CAT, ICCPR	Constitution (1992) Art. 118; Act on Movement and Residence of Aliens (1992) Art. 39
Madagascar	20-Sep-60	RC, Banjul, ICCPR	Décret No. 1994-652 Art. 38; Décret No. 1962-006 Art. 2; Loi No. 1962-00 Arts. 1, 2
Malawi	01-Dec-64	RC and P, Banjul, ARC, CAT, ICCPR	Refugee Act (1989) Art. 10
Malaysia	17-Sep-57		
Maldives	21-Sep-65		
Mali	28-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1992) Art. 116; Loi No. 1998-40 Arts. 8, 9, 10
Malta	01-Dec-64	RC and P, ECHR, CAT, ICCPR	

State	UN member	Treaties	Constitutional and/or legislative provisions
Marshall Islands	17-Sep-91		
Mauritania	07-Oct-61	RC and P, Banjul, ARC	Constitution (1991) Art. 80
Mauritius	24-Apr-68	Banjul, CAT, ICCPR	
Mexico	07-Nov-45	RC and P, ACHR, CAT, ICCPR	Ley General de Polación (1974) Art. 42(VI)
Micronesia (Federated States of)	17-Sep-91		
Moldova	02-Mar-92	ECHR, CAT, ICCPR	Law on Legal Status of Foreign Citizens and Apatrides (1994, as amended 1999) Arts. 29, 32
Monaco	28-May-93	RC, CAT, ICCPR	
Mongolia	27-Oct-61	ICCPR	Constitution (1992) Art. 10, 18
Morocco	12-Nov-56	RC and P, CAT, ICCPR	Décret No. 2-57-1256 du 2 safar 1377 (1957) Art. 1, 5
Mozambique	16-Sep-75	RC and P, Banjul, ARC, CAT, ICCPR	Refugee Act (1991) Arts. 13, 14
Myanmar	19-Apr-48		
Namibia	23-Apr-90	RC, Banjul, CAT, ICCPR	Constitution (1990) Art. 144; Refugees (Recognition and Control) Act (1999) Art. 26
Nauru	14-Sep-99		
Nepal	14-Dec-55	CAT, ICCPR	Nepal Treaty Act (1990) Art. 9
Netherlands	10-Dec-45	RC and P, ECHR, CAT, ICCPR	Constitution (1995) s. 93
New Zealand	24-Oct-45	RC and P, CAT, ICCPR	Crimes of Torture Act (1989); Immigration Act (1987) s. 129(X)
Nicaragua	24-Oct-45	RC and P, ACHR, ICCPR	Constitution (1995) Art. 42
Niger	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	
Nigeria	07-Oct-60	RC and P, Banjul, ARC, ICCPR	National Commission for Refugees, etc. Decree (1989) Art. 1
Norway	27-Nov-45	RC and P, ECHR, CAT, ICCPR	Immigration Act (1991) ss. 4, 15, 16
Oman	07-Oct-71		
Pakistan	30-Sep-47		
Palau	15-Dec-94		
Panama	13-Nov-45	RC and P, ACHR, CAT, ICCPR	Decreto Ejecutivo No. 23 (1998) Arts. 53, 73
Papua New Guinea	10-Oct-75	RC and P	
Paraguay	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Ley No. 470 (1975) Art. 141
Peru	31-Oct-45	RC and P, ACHR, CAT, ICCPR	Constitution (1993) Art. 36 Decreto presidencial No. 1 (1985) Arts. 1, 2
Philippines	24-Oct-45	RC and P, CAT, ICCPR	
Poland	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Constitution (1997) s. 56, 91; Act on Aliens (1997) s. 53
Portugal	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1976) Art. 8; Law No. 15 (1998) Arts. 1, 6; Decree-law No. 59 (1993) Arts. 67, 72
Qatar	21-Sep-71	CAT	
Romania	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1991) Arts. 11, 18; Ordinance on the Status and Regime of Refugees (2000) Art. 23(m)
Russian Federation	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Constitution (1993) Arts. 15(4), 63; Law on Amendments and Additions to the Law on Refugees (1997) Arts. 10(1), 12(4); Law on Refugees (1997) Arts. 8, 18
Rwanda	18-Sep-62	RC and P, Banjul, ARC, ICCPR	Loi sur les conditions d'entrée et de séjour des étrangers (1963) Art. 1

(Cont.)

State	UN member	Treaties	Constitutional and/or legislative provisions
Saint Kitts and Nevis	23-Sep-83		
Saint Lucia	18-Sep-79		
Saint Vincent and the Grenadines	16-Sep-80	RC, ICCPR	
Samoa	15-Dec-76	RC and P	
San Marino	02-Mar-92	ICCPR, ECHR	
São Tomé and Príncipe	16-Sep-75	RC and P, Banjul	
Saudi Arabia	24-Oct-45	CAT	
Senegal	28-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Décret No. 1978-484 Arts. 3, 4, 5, 6
Seychelles	21-Sep-76	RC and P, Banjul, ARC, CAT, ICCPR	
Sierra Leone	27-Sep-61	RC and P, Banjul, ARC, CAT, ICCPR	Non-Citizens (Registration, Immigration and Expulsion) Act (1965) Art. 4(f)
Singapore	21-Sep-65		
Slovakia	19-Jan-93	RC and P, ECHR, CAT, ICCPR	Constitution (1992) Arts. 11, 153; Act No. 283 (1995) Art. 4; Law on Stay of Foreigners (1995) Art. 15
Slovenia	22-May-92	RC and P, ECHR, CAT, ICCPR	Constitution (1991) Arts. 8, 153; Law on Asylum (1999) Arts. 1, 6, 7; Aliens Act (1999) Art. 51; Foreigners Act (1991) Art. 33
Solomon Islands	19-Sep-78	RC and P	
Somalia	20-Sep-60	RC and P, Banjul, CAT, ICCPR	Presidential Decree No. 25 (1984) Art. 6(3)
South Africa	07-Nov-45	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1996) ss. 231, 232; Refugees Act (1998) Arts. 2, 28
Spain	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1978) Art. 96; Constitutional Law on the Rights and Freedoms of Aliens in Spain ... (2000); Art. 3 Real decreto 203 (1995) Art. 12; Ley 5 (1984) Art. 19
Sri Lanka	14-Dec-55	CAT, ICCPR	
Sudan	12-Nov-56	RC and P, Banjul, ARC, ICCPR	Regulation of Asylum Act (1974) Arts. 6, 7
Suriname	04-Dec-75	RC and P, ACHR, ICCPR	Aliens Act (1991) Arts. 8, 16(3)
Swaziland	24-Sep-68	RC and P, Banjul, ARC	Refugees Control Order (1978) Art. 10(4)
Sweden	19-Nov-46	RC and P, ECHR, CAT, ICCPR	Aliens Act (1989) 529 Ch. 8(1)
Syrian Arab Republic	24-Oct-45	ICCPR	Legislative Decree No. 29, Entry and Exit of Aliens (1970) Art. 29(E)
Tajikistan	02-Mar-92	RC and P, CAT, ICCPR	Law on Refugees (1994) Art. 10
Tanzania	14-Dec-61	RC and P, Banjul, ARC, ICCPR	Refugees Act (1998) Art. 28(4)
Thailand	16-Dec-46	ICCPR	
Togo	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1992) Art. 140
Tonga	14-Sep-99		
Trinidad and Tobago	18-Sep-62	RC and P, ICCPR	
Tunisia	12-Nov-56	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1959) Art. 32
Turkey	24-Oct-45	RC and P, ECHR, CAT	Constitution (1982) Art. 90
Turkmenistan	02-Mar-92	RC and P, CAT, ICCPR	Law on Refugees (1997) Arts. 2, 3
Tuvalu	05-Sep-00	RC and P	
Uganda	25-Oct-62	RC and P, Banjul, ARC, CAT, ICCPR	Control of Alien Refugees Act (1960) Arts. 6, 20(3)
Ukraine	24-Oct-45	ECHR, CAT, ICCPR	Constitution (1996) Arts. 9, 26; Law No. 38118-XII (1994) Art. 14
United Arab Emirates	09-Dec-71		

State	UN member	Treaties	Constitutional and/or legislative provisions
United Kingdom of Great Britain and Northern Ireland	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Immigration and Asylum Act (1999) ss. 11, 12, 15, 71; Immigration Rules (1994) s. 329
United States of America	24-Oct-45	P, CAT, ICCPR	Immigration and Nationality Act (1952, as amended in 1965 and 1999) s. 1231(b)(3); US Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture (1998)
Uruguay	18-Dec-45	RC and P, ACHR, CAT, ICCPR	Decreto legislativo sobre refugiados políticos (1956) Art. 4; Ley 13.777 (1969), Estatuto de los Refugiados Constitution (1992) Art. 23
Uzbekistan	02-Mar-92	CAT, ICCPR	
Vanuatu	15-Sep-81		
Venezuela	15-Nov-45	P, ACHR, CAT, ICCPR	Constitution (1961) Art. 116
Viet Nam	20-Sep-77	ICCPR	Ordinance on Entry ... of Foreigners ... (1992) Art. 2(1), (3)
Yemen	30-Sep-47	RC and P, CAT, ICCPR	Law No. 47 (1991) s. 38(5)
Yugoslavia	01-Nov-00	RC and P, CAT, ICCPR	Constitution (1992) Arts. 16, 66
Zambia	01-Dec-64	RC and P, Banjul, ARC, CAT, ICCPR	Refugee (Contract) Act (1970) Arts. 10(4), 11(2)
Zimbabwe	25-Aug-80	RC and P, Banjul, ARC, ICCPR	Refugee Act (1983) Art. 13
Non-members of the UN			
Holy See		RC and P	
Switzerland		RC and P, ECHR, CAT, ICCPR	Constitution (1999) Art. 25(2), (3); Loi sur l'asile (1998) Art. 5
<b>Total (191)</b>	<b>189</b>	<b>170*</b>	<b>125**</b>

*Notes*

\* The number of States party to at least one of the treaties including a *non-refoulement* component.

\*\* The number of States that have constitutional and/or legislative provisions that import the principle of *non-refoulement* into municipal law either directly or by way of the application of one or more treaties to which the State is a party.

## 2.2 Summary Conclusions: the principle of *non-refoulement*

*Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 July 2001*



The first day of the Cambridge expert roundtable addressed the question of the scope and content of the principle of *non-refoulement*. The discussion was based on a joint legal opinion by Sir Elihu Lauterpacht and Daniel Bethlehem of the Lauterpacht Research Centre for International Law, which was largely endorsed.<sup>1</sup>

The discussion focused on those aspects of the legal opinion which were considered deserving of particular comment or in need of clarification. The paragraphs below, while not representing the individual views of each participant, reflect broadly the consensus emerging from the discussion. The general appreciation of the meeting was:

1. *Non-refoulement* is a principle of customary international law.
2. Refugee law is a dynamic body of law, informed by the broad object and purpose of the 1951 Refugee Convention and its 1967 Protocol, as well as by developments in related areas of international law, such as human rights law and international humanitarian law.
3. Article 33 applies to refugees irrespective of their formal recognition and to asylum seekers. In the case of asylum seekers, this applies up to the point that their status is finally determined in a fair procedure.
4. The principle of *non-refoulement* embodied in Article 33 encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of

<sup>1</sup> **Editorial note:** As for the 10 July 2001 roundtable meeting on supervisory responsibility, participants comprised thirty-five experts from some fifteen countries, drawn from governments, non-governmental organizations (NGOs), academia, the judiciary, and legal profession. They were provided with written contributions by Eamonn Cahill, barrister, Dublin, Ireland, and by Friedrich Löper, Ministry of the Interior, Federal Republic of Germany. The morning session was chaired by Sir Elihu Lauterpacht, Lauterpacht Research Centre for International Law, and the afternoon session by Dame Rosalyn Higgins, Judge of the International Court of Justice.

persecution, including interception, rejection at the frontier, or indirect *refoulement*.

5. The principle of *non-refoulement* applies in situations of mass influx. The particular issues arising in situations of mass influx need to be addressed through creative measures.
6. The attribution to the State of conduct amounting to *refoulement* is determined by the principles of the law on State responsibility. The international legal responsibility to act in conformity with international obligations wherever they may arise is the overriding consideration.
7. There is a trend against exceptions to basic human rights principles. This was acknowledged as important for the purposes of the interpretation of Article 33(2). Exceptions must be interpreted very restrictively, subject to due process safeguards, and as a measure of last resort. In cases of torture, no exceptions are permitted to the prohibition against *refoulement*.

## 2.3 List of participants

*Expert roundtable, Cambridge, United Kingdom, 9–10 July 2001  
(Article 33, Article 35)*

Philip Alston, European University Institute, Florence, Italy  
Evelyn Ankumah, Africa Legal Aid, Ghana and the Netherlands  
Daniel Bethlehem, Barrister, Cambridge and London, United Kingdom  
Chaloka Beyani, London School of Economics, London, United Kingdom  
Ricardo Camara, Government of Mexico  
Yoram Dinstein, Tel Aviv University, Israel; Max Planck Institute, Heidelberg, Germany  
Andrew Drzemczewski, Council of Europe, Strasbourg, France  
Mohamed Nour Farahat, Arab Organization for Human Rights, Cairo, Egypt  
Guy S. Goodwin-Gill, University of Oxford, United Kingdom  
Arthur Helton, Council on Foreign Relations, New York, United States  
Dame Rosalyn Higgins, International Court of Justice, The Hague, the Netherlands  
G. M. H. Hoogvliet, Attorney, the Netherlands  
Ivor C. Jackson, United Kingdom (and Geneva, Switzerland)  
Walter Kälin, University of Berne, Switzerland  
Harold Koh, Yale University Law School, United States  
Sir Elihu Lauterpacht, University of Cambridge, United Kingdom  
Jean-Philippe Lavoyer, International Committee of the Red Cross, Geneva, Switzerland  
Leanne Macmillan, Amnesty International, International Secretariat, London, United Kingdom  
Caroline Mchome, Government of Tanzania  
Sadikh Niass, West African NGOs for Refugees and Internally Displaced Persons (WARIPNET), Senegal  
Anne-Grethe Nielsen, Government of Switzerland  
Eugen Osmochescu, State University of Moldova, Chisinau, Republic of Moldova  
Bonaventure Rutinwa, University of Dar-es-Salaam, Tanzania  
Jorge Santistevan, former Ombudsman; Andean Commission of Jurists, Peru  
Sir Stephen Sedley, Royal Courts of Justice, London, United Kingdom  
Andre Surena, Government of the United States



Vigdis Vevstad, Government of Norway

Iain Walsh, Government of the United Kingdom

For UNHCR, Erika Feller, Kate Jastram, Philippe Leclerc, Frances Nicholson, and  
Volker Türk

Institutional affiliation given for identification purposes only.



### 3.1 Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection

GUY S. GOODWIN-GILL\*

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\* This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on Art. 31 of the 1951 Convention Relating to the Status of Refugees organized as part of the Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention. The paper benefited from the discussions held at the expert roundtable in Geneva, Switzerland, on 8–9 Nov. 2001. The author has also greatly benefited from the assistance of Walpurga Englbrecht in producing the final text.

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## **I.       Article 31: refugees unlawfully in the country of refuge**

### **A.       Introduction**

Article 31 of the 1951 Convention Relating to the Status of Refugees<sup>1</sup> provides as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

<sup>1</sup> 189 UNTS 150; and, for the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees, 606 UNTS 267.

Despite this provision, asylum seekers are placed in detention facilities throughout Europe, North America, and Australia, owing to their illegal entry or presence. In its July 2000 review of reception standards for asylum seekers in the European Union, UNHCR found several different types of detention in operation, including detention at border points or in airport transit areas, and that the grounds for detention also vary.<sup>2</sup> For example, refugees and asylum seekers may be detained at the ‘pre-admission’ phase, because of false documents or lack of proper documentation, or they may be held in anticipation of deportation or transfer to a ‘safe third country’, for example, under the provisions of the Dublin Convention.<sup>3</sup> Several countries have no limit on the maximum period of detention, including Denmark, Finland, the Netherlands, and the United Kingdom, while others provide maximum periods and require release if no decision on admission or removal has been taken.

Increasingly, the practice among receiving countries is to set up special detention or holding centres, for example, in Austria, Belgium, Denmark, France, Germany, Greece, the Netherlands, Spain, Sweden, the United Kingdom, and the United States; such facilities may be open, semi-open, or closed. Because of demand, many States also employ regular prisons for the purposes of immigration-related detention; in such cases, asylum seekers are generally subject to the same regime as other prisoners and are not segregated from criminals or other offenders.

The 1951 Convention establishes a regime of rights and responsibilities for refugees. In most cases, only if an individual’s claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for ‘illegal’ entry), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention.

To impose penalties without regard to the merits of an individual’s claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.<sup>4</sup>

2 UNHCR, *Reception Standards for Asylum Seekers in the European Union* (Geneva, July 2000).

3 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community (Dublin Convention), OJ 1990 L254, 19 Aug. 1997.

4 This duty is recognized in Art. 2(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (‘Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .’); in Art. 1 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS No. 5 (‘The . . . Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’); and in Art. 1 of the 1969 American Convention on Human Rights or ‘Pact of San

Such a practice is also wasteful of national resources and an example of bad management. Where the penalty imposed is detention, it imposes significant costs on the receiving State, and inevitably increases delay in national systems, whether at the level of refugee determination or immigration control.

Nevertheless, increasing demands for control measures over the movements of people have led even to refugees recognized after ‘unauthorized’ arrival being accorded lesser rights, contrary to the terms of the 1951 Convention and the 1967 Protocol, while elsewhere refugees and asylum seekers are commonly fined or imprisoned.

## B. Problems arising and scope of the paper

In this time of uncertainty, when security concerns are once more high on the agenda and many States seem unable effectively to manage their refugee determination systems effectively and efficaciously, the terms of Article 31 of the 1951 Convention call for close examination and analysis. Sections II–V of this paper therefore review mainly the central issues arising out of or relating to Article 31(1), with particular reference to the scope of protection (who benefits), the conditions of entitlement (‘coming directly’, ‘without delay’, ‘good cause’), and the precise nature of the immunity (‘penalties’). Sections VI and VII examine Article 31(2), with particular reference to restrictions on freedom of movement and the issue of detention (both generally, and in regard to the ‘necessary’ measures which may be imposed under that provision).

## II. Article 31: the origins of the text

The Vienna Convention on the Law of Treaties confirms the principle of general international law, that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.<sup>5</sup> In the case of the 1951 Convention, this means interpretation by reference to the object and purpose of extending the

José, Costa Rica’, Organization of American States (OAS) Treaty Series No. 35 (‘The . . . Parties . . . undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction [their] free and full exercise . . .’). This duty is clearly linked to the matching duty to provide a remedy to those whose rights are infringed, or threatened with violation (Art. 14(1) of the ICCPR; Art. 13 of the European Convention on Human Rights; Art. 25 of the American Convention on Human Rights).

<sup>5</sup> 1969 Vienna Convention on the Law of Treaties, UN doc. A/CONF.39/27, Art. 31(1); G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996), pp. 366–8.

protection of the international community to refugees, and assuring to ‘refugees the widest possible exercise of . . . fundamental rights and freedoms’, as stated in the preamble. Article 32 of the Vienna Convention provides further:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Article 33 of the Vienna Convention clarifies the interpretation of treaties authenticated in two or more languages. The 1951 Convention stipulates in its concluding paragraph that the English and the French texts are equally applicable. In cases where the French and the English texts disclose a difference of meaning, which the application of Articles 31 and 32 of the Vienna Convention does not remove, Article 33(4) states that ‘the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted’.<sup>6</sup>

As is shown below, the *travaux préparatoires* confirm the ‘ordinary meaning’ of Article 31(1) of the 1951 Convention, as applying to refugees who enter or are present without authorization, whether they have come directly from their country of origin, or from any other territory in which their life or freedom was threatened, provided they show good cause for such entry or presence.

So far as the references in Article 31(1) to refugees who ‘come directly’ and show ‘good cause’ may be ambiguous, the *travaux préparatoires* illustrate that these terms were not intended to deny protection to persons in analogous situations. On the contrary, the drafting history of Article 31(1) shows clearly only a small move from an ‘open’ provision on immunity (benefiting the refugee who presents him- or herself without delay and shows ‘good cause’), to one of slightly more limited scope, incorporating references to refugees ‘coming directly from a territory where their life or freedom was threatened’. Moreover, the drafting history shows clearly that this revision was intended specifically to meet one particular concern of the French delegation.

The term ‘penalties’ in Article 31(1) was not extensively discussed during the preparatory work of the treaty. ‘Penalties’ are sometimes interpreted only as ‘criminal penalties’ by relying on the French term ‘*sanctions pénales*’. The broader view of the term ‘penalties’ takes into account the object and purpose of the treaty, as well as the interpretation of the term ‘penalties’ incorporated in other human rights treaties.<sup>7</sup>

6 See Vienna Convention, Art. 33(4).

7 See below, section II.C.

## A. The Ad Hoc Committee

A proposal to exempt illegally entering refugees from penalties was first included in the draft convention prepared by the 1950 Ad Hoc Committee on Statelessness and Related Problems, meeting at Lake Success, New York, in February 1950.<sup>8</sup> The relevant part of what was then draft Article 24 provided as follows:

1. The High Contracting Parties undertake not to impose penalties, on account of their illegal entry or residence, on refugees who enter or who are present in their territory without prior or legal authorization, and who present themselves without delay to the authorities and show good cause for their illegal entry.<sup>9</sup>

The text was further refined during later meetings, emerging as draft Article 26:

1. The Contracting States shall not impose penalties, on account of his illegal entry or presence, on a refugee who enters or who is present in their territory without authorization, and who presents himself without delay to the authorities and shows good cause for his illegal entry or presence.<sup>10</sup>

As was commented at the time: ‘A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.’<sup>11</sup>

The Committee reconvened in August 1950 (renamed the Ad Hoc Committee on Refugees and Stateless Persons). No changes were made in the text, although the Committee noted ‘that in some countries freedom from penalties on account of illegal entry is also extended to those who give assistance to such refugees for honourable reasons’.<sup>12</sup> During this meeting, Australia called for a clarification of the term ‘penalties’, but, apart from suggestions by the French and Belgium representatives that penalties mentioned in the Article should be confined to judicial penalties only, no further clarification was provided.<sup>13</sup> The draft text was thereafter

8 Belgium and the USA, ‘Proposed Text for Article 24 of the Draft Convention Relating to the Status of Refugees’, UN doc. E/AC.32/L.25, 2 Feb. 1950; ‘Decisions of the Committee on Statelessness and Related Problems Taken at the Meetings of 2 February 1950’, UN doc. E/AC.32.L.26, 2 Feb. 1950.

9 ‘Decisions of the Committee on Statelessness and Related Problems Taken at the Meetings of 3 February 1950’, UN doc. E/AC.32.L.26, 3 Feb. 1950.

10 ‘Draft Convention Relating to the Status of Refugees, Decisions of the Working Group Taken on 9 February 1950’, UN doc. E/AC.32/L.32, 9 Feb. 1950.

11 Draft Report of the Ad Hoc Committee on Statelessness and Related Problems, ‘Proposed Draft Convention Relating to the Status of Refugees’, UN doc. E/AC.32.L.38, 15 Feb. 1950, Annex I (draft Art. 26); Annex II (comments, p. 57).

12 ‘Draft Report of the Ad Hoc Committee on Refugees and Stateless Persons’, UN doc. E/AC.32.L.43, 24 Aug. 1950, p. 9; cf. the Swiss legislation, at section III.A.1 below.

13 ‘Summary Record of the Fortieth Meeting of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session’, UN doc. E/AC.32/SR.40, 27 Sept. 1950, p. 5.



considered by the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which met in Geneva in July 1951.

## B. Discussions at the 1951 Conference

Since Article 26 (Article 31 to be) ‘trespassed’ on the delicate ‘sovereign’ areas of admission and asylum, France was concerned during the 1951 Geneva Conference that it should not allow those who had already ‘*found asylum* . . . to move freely from one country to another without having to comply with frontier formalities’.<sup>14</sup> In clarifying his country’s position, the French delegate gave the example of ‘a refugee who, having found asylum in France, tried to make his way unlawfully into Belgium. It was obviously impossible for the Belgian Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time.’<sup>15</sup>

The essential question between France and other participating States was whether the requirement that the refugee should show ‘good cause’ for entering or being present illegally was adequate (as the United Kingdom representative, Mr Hoare, argued) or whether more explicit wording was required, as suggested by the French delegate:

[I]t was often difficult to define the reasons which could be regarded as constituting good cause for the illegal entry into, or presence in, the territory of a State of refuge. But it was precisely on account of that difficulty that it was necessary to make the wording of paragraph 1 more explicit . . . To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience.<sup>16</sup>

Other countries, however, recognized that refugees might well have good cause for leaving any first country of refuge. Denmark cited the example of ‘a Hungarian refugee living in Germany [who might] without actually being persecuted, feel obliged to seek refuge in another country’, and later that of ‘a Polish refugee living in Czechoslovakia, whose life or liberty was threatened in that country and who proceeded to another’. It proposed that France’s suggested amendment (limiting the benefit of immunity to those arriving directly from their country of origin) be

14 ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records’, UN doc. A/CONF.2/SR.13, (M. Colemar, France).

15 ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records’, UN doc. A/CONF.2/SR.13 (M. Colemar, France).

16 ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records’, UN doc. A/CONF.2/SR.14 (M. Colemar, France).

replaced by a reference to arrival from any territory in which the refugee's life or freedom was threatened.<sup>17</sup>

During the course of the debate, the United Nations High Commissioner for Refugees, Dr Van Heuven Goedhart, expressed his concern about 'necessary transit' and the difficulties facing a refugee arriving in an ungenerous country. He recalled that he himself had fled the Netherlands in 1944 on account of persecution, had hidden for five days in Belgium and then, because he was also at risk there, had been helped by the Resistance to France, thence to Spain and finally to safety in Gibraltar. It would be unfortunate, he said, if refugees in similar circumstances were penalized for not having proceeded directly to the final country of asylum.<sup>18</sup>

The United Kingdom representative, Mr Hoare, said that fleeing persecution was itself good cause for illegal entry, but there could be other good causes. The French suggested that their proposed amendment be changed so as to exclude refugees, 'having been unable to find even temporary asylum in a country other than the one in which . . . life or freedom would be threatened'. This was opposed by the UK representative on practical grounds (it would impose on the refugee the impossible burden of proving a negative); and by the Belgian representative on language and drafting grounds (it would exclude from the benefit of the provision any refugee who had managed to find a few days' asylum in any country through which he had passed).<sup>19</sup>

Although draft Article 26(1) was initially adopted on the basis of the French amendment as modified by the Belgian proposal, the text as a whole was debated again on the final day of the Conference. The High Commissioner reiterated the UK's objection, while the specific focus of the French position is evident in the following comment of M. Rochefort:

The fact that was causing him concern was that there were large numbers of refugees living in countries bordering on France. If they crossed the French frontier without their lives being in danger, the French Government would be entitled to impose penalties and to send them back to the frontier.<sup>20</sup>

17 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.13, p. 15; UN doc. A/CONF.2/SR.35, p. 18. Conventions such as those concluded at Dublin (above n. 3) and Schengen (1990 Schengen Convention Applying the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at Their Common Border, 30 ILM 84 (1991)), as well as new political and territorial arrangements emerging in Europe, also raise important questions regarding the territorial scope and application of the 1951 Convention and the 1967 Protocol, including the place of Art. 31 in a 'Europe without internal frontiers'; these issues cannot be addressed in the present paper.

18 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.14, p. 4.

19 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.14, pp. 10–11 and 13.

20 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.35 (M. Rochefort, France).

In the event, the requirement that the refugee should benefit from immunity only if able to prove that he or she had been unable to find even temporary asylum was dropped in favour of the present language in Article 31(1):

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article 31 thus includes threats to life or freedom as possible reasons for illegal entry or presence; specifically refrains from linking such threats to the refugee's country of origin; and recognizes that refugees may have 'good cause' for illegal entry other than persecution in their country of origin.

### C. The meaning of terms: some preliminary views

The benefit of immunity from penalties for illegal entry extends to *refugees*, 'coming directly from a territory where their life or freedom was threatened . . . provided they present themselves without delay . . . and show good cause for their illegal entry or presence'.

Although expressed in terms of the 'refugee', this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or, in the words of the court in *Adimi*,<sup>21</sup> to 'presumptive refugees'. This necessary interpretation, which takes account also of the declaratory nature of refugee status,<sup>22</sup> has obvious implications, not only for the general issue of immunity, but also for the moment at which proceedings might be commenced or penalties imposed. If Article 31 is to be effectively implemented, clear legislative or administrative action is required to ensure that such proceedings are not begun or, where they are instituted, to ensure that no penalties are in fact imposed for cases falling within Article 31(1). As shown below, many States do not make adequate legislative or administrative provision to ensure delay or postponement in the application of enforcement measures.

21 See section III.B.1 below.

22 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), para. 28:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

Refugees are not required to have come ‘directly’ from their country of origin. The intention, reflected in the practice of some States, appears to be that, for Article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of ‘good cause’ for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.

The term ‘penalties’ is not defined in Article 31 and the question arises whether the term used in this context should only comprise criminal penalties, or whether it should also include administrative penalties (for example, administrative detention). Some argue that the drafters appear to have had in mind measures such as prosecution, fine, and imprisonment, basing this narrow interpretation also on the French version of Article 31(1) which refers to ‘*sanctions pénales*’ and on case law.<sup>23</sup>

By contrast, the English version only uses the term ‘penalties’, which allows a wider interpretation. As stated above at the beginning of this section, where the French and the English texts of a convention disclose a different meaning which the application of Articles 31 and 32 of the 1969 Vienna Convention does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. In seeking the most appropriate interpretation, the deliberations of the Human Rights Committee or scholars relating to the interpretation of the term ‘penalty’ in Article 15(1) of the ICCPR can also be of assistance. The Human Rights Committee notes, in a case concerning Canada,

that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system or law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning. The parties have made extensive submissions, in particular as regards the meaning of the word ‘penalty’ and as regards relevant Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word ‘penalty’ in Canadian law is not, as such, decisive. Whether the word ‘penalty’ in article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, ‘criminal’ and ‘administrative’, under the Covenant, must

23 See, e.g., *R. v. Secretary of State for the Home Department, ex parte Makoyi*, English High Court (Queen’s Bench Division), No. CO/2372/91, 21 Nov. 1991, unreported, where it was noted that ‘a penalty, on the face of it, would appear to involve a criminal sanction . . . [T]he word “penalty” in Article 31 is not apt to cover detention such as exists in the present situation.’

depend on other factors. Apart from the text of article 15(1), regard must be had, *inter alia*, to its object and purpose.<sup>24</sup>

Nowak, in his commentary on the ICCPR, refers to the term ‘criminal offence’ in Article 14 of the ICCPR.<sup>25</sup> He argues that ‘every sanction that has not only a preventive but also a retributive and/or deterrent character is . . . to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it’.<sup>26</sup>

Taking the above approach into account, Article 31(1) of the 1951 Convention, and in particular the term ‘penalty’, could be interpreted as follows: the object and purpose of the protection envisaged by Article 31(1) of the 1951 Convention is the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining this term will not be appropriate, for otherwise the fundamental protection intended may be circumvented and the refugee’s rights withdrawn at discretion.

Given the growing practice in some countries of setting up detention or holding centres for those deemed to have moved in an ‘irregular’ fashion,<sup>27</sup> the question whether such practices amount to a ‘penalty’ merits examination, taking into account both the discussions on ‘detention’ at the time this provision was drafted and the terms of Article 31(2). In this context, it is important to recall that it is always possible that some refugees will have justification for undocumented onward travel, if for instance they face threats or insecurity in the first country of refuge. Where Article 31 applies, the indefinite detention of such persons can constitute an unnecessary restriction, contrary to Article 31(2). The Conference records indicate that, apart from a few days for investigation,<sup>28</sup> further detention would be necessary only in cases involving threats to security or a great or sudden influx. Thus, although ‘penalties’ might not exclude eventual expulsion, prolonged detention of a refugee directly fleeing persecution in the country of origin, or of a refugee with good cause to leave another territory where life or freedom was threatened, requires justification under Article 31(2), or exceptionally on the basis of provisional measures on national security grounds under Article 9. Even where Article 31 does not apply, general principles of law suggest certain inherent limitations on

24 *Van Duzen v. Canada*, Communication No. 50/1979, UN doc. CCPR/C/15/D/50/1979, 7 April 1982, para. 10.2.

25 For further analysis of the meaning of ‘penalty’, see, T. Opsahl and A. de Zayas, ‘The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights’, *Canadian Human Rights Yearbook*, 1983, p. 237.

26 M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Engel Verlag, Kehl am Rhein, Strasbourg, Arlington, 1993), p. 278.

27 See Executive Committee, Conclusion No. 58 (XL) 1989; and section III.E. below.

28 On detention for ‘a few days’ to verify identity, etc., see generally UN docs. A/CONF.2/SR.13, pp. 13–15; SR.14, pp. 4 and 10–11; and SR.35, pp. 11–13, 15–16 and 19.

the duration and circumstances of detention.<sup>29</sup> In brief, while administrative detention is allowed under Article 31(2), it is equivalent, from the perspective of international law, to a penal sanction whenever basic safeguards are lacking (review, excessive duration, etc.). In this context, the distinction between criminal and administrative sanctions becomes irrelevant. It is necessary to look beyond the notion of criminal sanction and examine whether the measure is reasonable and necessary, or arbitrary and discriminatory, or in breach of human rights law.

At the 1951 Conference, several representatives considered that the undertaking not to impose penalties did not exclude the possibility of eventual resort to expulsion,<sup>30</sup> although in practice this power is clearly circumscribed by the principle of *non-refoulement*. Article 31 does not require that refugees be permitted to remain indefinitely, and subparagraph 2 makes it clear that States may impose ‘necessary’ restrictions on movement, for example, in special circumstances such as a large influx. Such measures may also come within Article 9 concerning situations of war or other grave exceptional circumstances, and are an exception to the freedom of movement required by Article 26. In such cases, in accordance with general principles of interpretation, restrictions should be narrowly interpreted. In the case of the refugee, they should only be applied until his or her status in the country of refuge is regularized or admission obtained into another country.

Some of the broader issues raised by detention are examined more fully in Section VI below.

The meaning of ‘illegal entry or presence’ has not generally raised any difficult issue of interpretation. The former would include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception, clandestine entry (for example, as a stowaway), and entry into State territory with the assistance of smugglers or traffickers. The precise method of entry may nevertheless have certain consequences in practice for the refugee or asylum seeker. ‘Illegal presence’ would cover lawful arrival and remaining, for instance, after the elapse of a short, permitted period of stay.

The notion of ‘good cause’ has also not been the source of difficulty; being a refugee with a well-founded fear of persecution is generally accepted as a sufficient good cause, although this criterion is also considered relevant to assessing the validity of the reason why a refugee or asylum seeker might choose to move beyond the first country of refuge or transit.

29 See e.g., Art. 32 of the 1951 Convention, limiting the circumstances in which lawfully resident refugees may be expelled to cases of national security or public order. It requires decisions in accordance with due process of law, and some form of appeal. Due process today includes, as a minimum, knowledge of the case against one, an opportunity to be heard, and a right of appeal or review. Moreover, refugees under order of expulsion are to be allowed a reasonable period within which to seek legal entry into another country, though States retain discretion in the interim to apply ‘such internal measures as they may deem necessary’.

30 UN doc. A/CONF.2/SR.13, pp. 12–14 (Canada, UK); cf. Art. 5 of the 1954 Caracas Convention on Territorial Asylum, OAS Treaty Series No. 19.

### III. Incorporation of the principle in national law

The principle of immunity from penalties for refugees entering or present without authorization is confirmed in the national legislation and case law of many States party to the 1951 Convention or the 1967 Protocol, by the jurisprudence of the European Court of Human Rights, and in the practice of States at large.

#### A. National legislation

Examples of legislation on this issue from a range of different countries follow.<sup>31</sup>

##### 1. *Switzerland*

Particularly striking in the field of national legislation is Swiss law, which extends immunity from penalization also to those who assist refugees entering illegally. Article 23(3) of the Federal Law Concerning the Stay and Establishment of Foreigners reads:

Whoever takes refuge in Switzerland is not punishable if the manner and the seriousness of the persecution to which he is exposed justifies illegal crossing of the frontier; whoever assists him is equally not punishable if his motives are honourable.<sup>32</sup>

##### 2. *United Kingdom*

The United Kingdom's approach, adopted after the decision in *Adimi*,<sup>33</sup> is more limited. Section 31 of the Immigration and Asylum Act 1999 reads:

(1) It is a defence for a refugee charged with an offence to which this section [concerning, among others, deception to gain entry, assisting illegal entry] applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—

31 The legislation cited hereunder is based on primary sources and/or is published (in translation where appropriate) in UNHCR/Centre for Documentation and Research, *RefWorld* (CD-ROM, 8th edn, July 1999). For further details, see Annex 3.1.

32 *Loi fédérale du 26 mars 1931 sur le séjour et l'établissement des étrangers*. The original French text reads: 'Celui qui se réfugie en Suisse n'est pas punissable si le genre et la gravité des poursuites auxquelles il est exposé justifient le passage illégal de la frontière; celui qui lui prête assistance n'est également pas punissable si ses mobiles sont honorables.' New formulation according to ch. I of the Federal Law of 9 Oct. 1987, in force since 1 March 1988 (RO 1988 332 333; FF 1986 III 233); cf. developments regarding the use of smugglers, text at n. 61 below.

33 See further section III.B.1 below.

- (a) presented himself to the authorities in the United Kingdom without delay;
- (b) showed good cause for his illegal entry or presence; and
- (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.

...

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) 'Refugee' has the same meaning as it has for the purposes of the Refugee Convention.

(7) If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is . . .

### 3. *United States*

The law of the United States is also clear. A refugee fulfilling the requirements set out in Article 31(1) of the 1951 Convention should not be charged in relation to document fraud committed at the time of entry:

(j) Declination to file charges for document fraud committed by refugees at the time of entry. The [Immigration and Naturalization] Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence . . .<sup>34</sup>

### 4. *Belize*

The Refugees Act 1991 stipulates that refugees should not be penalized for their illegal entry. Section 10(1) of the Act provides:

<sup>34</sup> 8 Code of Federal Regulations (CFR), part 270, Penalties for Document Fraud, section 270.2, Enforcement procedures, 8 USC 1101, 1103, and 1324c.



Notwithstanding the provisions of the Immigration Act, a person or any member of his family shall be deemed not to have committed the offence of illegal entry under that Act or any regulations made thereunder: (a) if such person applies in terms of Section 8 for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or (b) if such person has become a recognised refugee.

## 5. *Finland*

As in Switzerland, Finnish legislation takes into account the motives of the perpetrator and the conditions affecting the security of the person in his country of origin or country of habitual residence when determining whether organized illegal entry should be penalized. The 1991 Aliens Act reads:

Whosoever in order to obtain financial benefit for himself or another (1) brings or attempts to bring an alien into Finland, aware that the said alien lacks the passport, visa or residence permit required for entry, (2) arranges or provides transport for the alien referred to in the subparagraph above to Finland or (3) surrenders to another person a false or counterfeit passport, visa or residence permit for use in conjunction with entry, shall be fined or sentenced to imprisonment for a maximum of two years for arrangement of illegal entry. A charge of arranging illegal entry need not be brought or punishment put into effect if the act may be pardonable; particular attention must be given to the motives of the perpetrator and to the conditions affecting the security of the alien in his country of origin or country of habitual residence.<sup>35</sup>

## 6. *Ghana*

The Refugee Act 1992 (PNDCL 3305D) contains a specific provision, exempting refugees from being penalized for illegal entry or presence. Section 2 of the Act provides:

Notwithstanding any provision of the Aliens Act, 1953 (Act 160) but subject to the provisions of this Law, a person claiming to be a refugee within the meaning of this Law, who illegally enters Ghana or is illegally present in Ghana shall not: (a) be declared a prohibited immigrant; (b) be detained; or (c) be imprisoned or penalised in any other manner merely by reason of his illegal entry or presence pending the determination of his application for a refugee status.

<sup>35</sup> See Aliens Act (378/91), 22 Feb. 1991, as amended, Art. 64b (28.6.1993/639) Arranging of Illegal Entry.

## 7. *Lesotho*

The Refugee Act 1983 is another example of national legislation where refugees are not penalized for their illegal entry or presence. Section 9 of the Act provides:

(1) Subject to Section 7, and notwithstanding anything contained in the Aliens Control Act, 1966, a person claiming to be a refugee within the meaning of Section 3(1), who has illegally entered or is illegally present in Lesotho shall not, (a) be declared a prohibited immigrant; (b) be detained; or (c) be imprisoned or penalised in any other way, only by reason of his illegal entry or presence pending the determination of his application for recognition as a refugee under Section 7.

(2) A person to whom sub-section (1) applies shall report to the nearest immigration officer or other authorised officer within fourteen days from the date of his entry and may apply for recognition as a refugee: Provided that where a person is illegally present in the country by reason of expiry of his visa, he shall not be denied the opportunity to apply for recognition of his refugee status merely on the grounds of his illegal presence.

(3) Where a person to whom this section applies, (a) fails to report to the nearest authorised officer in accordance with sub-section (2); and (b) is subsequently recognized as a refugee, his presence in Lesotho shall be lawful, unless there are grounds to warrant his expulsion pursuant to Section 12.

(4) Where an application made under sub-section (2) is rejected, the applicant shall be granted reasonable time in which to seek legal admission to another country.<sup>36</sup>

## 8. *Malawi*

The Refugee Act 1989 in Malawi exempts a refugee from penalization for illegal entry or presence provided he or she presents him- or herself within twenty-four hours of his or her entry or within such longer period as the competent officer may consider acceptable in the circumstances. Section 10(4) of the Act provides:

A person who has illegally entered Malawi for the purpose of seeking asylum as a refugee shall present himself to a competent officer within twenty-four hours of his entry or within such longer period as the competent officer may consider acceptable in the circumstances and such person shall not be detained, imprisoned, declared a prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

<sup>36</sup> Lesotho, Refugee Act 1983, Gazette No. 58, Supplement No. 6, 9 Dec. 1983.

## 9. *Mozambique*

Article 11 of the Refugee Act 1991 stipulates that criminal or administrative proceedings related to illegal entry shall be suspended immediately upon submission of a refugee claim:

1. Where any criminal or administrative offence directly connected with illegal entry into the Republic of Mozambique has been committed by the petitioner and his family members and has given rise to criminal or administrative proceedings, any such proceedings shall be suspended immediately upon the submission of the petition.

2. If the ruling is in favour of the grant of asylum, the suspended proceedings shall be filed, provided that the offence or offences committed were determined by the same facts as those which warranted the grant of the petition for asylum.<sup>37</sup>

## B. National case law

The principle of immunity from penalty and the protected status of the refugee and asylum seeker have been upheld in a number of municipal court decisions.<sup>38</sup>

For instance, in *Alimas Khaboka v. Secretary of State for the Home Department*,<sup>39</sup> the English Court of Appeal, while finding for the Secretary of State in regard to the appellant's removal to France, considered that the term 'refugee' includes an asylum seeker whose application has not yet been determined, and who is subject to the limitations laid down in Article 31 of the 1951 Convention.

In *R. v. Uxbridge Magistrates' Court and Another, ex parte Adimi*,<sup>40</sup> the Divisional Court in the United Kingdom observed: 'That article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. Nor is it disputed that article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.'

The Regional Superior Court (*Landesgericht*) in Münster, Federal Republic of Germany,<sup>41</sup> found that an asylum seeker who entered illegally and who presented himself to the authorities one week after arrival after looking for advice on the asylum procedure, was not to be penalized for illegal entry. The court observed that

37 Mozambique, Act No. 21/91, 31 Dec. 1991 (Refugee Act).

38 The decisions cited hereunder include many reported in UNHCR/Centre for Documentation and Research, *RefWorld* (CD-ROM, 8th edn, July 1999).

39 [1993] Imm AR 484.

40 [1999] Imm AR 560. A fuller account of this case appears in section III.B.1 below.

41 Nos. 39 Js 688/86 (108/88), LG Münster, 20 Dec. 1988. An appeal by the Public Prosecutor was rejected on 3 May 1989 by the Appeals Court (*Oberlandesgericht*) in Hamm.

there is no general time limit for determining what constitutes ‘without delay’, which should be considered on a case-by-case basis.

The *Oberlandesgericht* Celle<sup>42</sup> and the *Landesgericht* Münster,<sup>43</sup> among others, found that refugees can claim exemption from penalties for illegal entry, even if they have passed through a third State on their way to Germany from the State of persecution.

On 14 January 2000, the *Oberste Landesgericht* of Bavaria held that Article 31 of the 1951 Convention does not apply where the asylum seeker has benefited from the help of a smuggler (*Schleuser*).<sup>44</sup> Such an interpretation finds no support, in the words of Article 31, or the *travaux préparatoires*<sup>45</sup> or in the practice of States.<sup>46</sup> In addition to directly violating Article 31 of the 1951 Convention, this interpretation also contravenes the letter and the spirit of Article 5 of the Protocol Against the Smuggling of Migrants by Land, Air and Sea. This reads: ‘Migrants shall not become liable to criminal proceedings under this Protocol for the fact of having been the object of [smuggling].’<sup>47</sup>

In the case of *Shimon Akram and Others*, the Court of First Instance (Criminal Cases) in Mytilini, Greece,<sup>48</sup> found the defendants – Iraqi citizens of the Catholic faith – to be innocent of the crime of illegal entry. Referring to Article 31 of the 1951 Convention, among others, the Court concluded that refugee status precludes the imposition of penalties on asylum seekers for illegal entry.<sup>49</sup>

The Swiss Federal Court<sup>50</sup> confirms the above interpretations, and specifically that ‘good cause’ is not about being at risk in a particular country, but much more about the illegality of entry. In particular, the Court held that Article 31(1) of the 1951 Convention applies even where an asylum seeker has had the opportunity to file an asylum claim at the border but did not do so because he or she was afraid of not being allowed entry. The case involved the illegal entry of an Afghan refugee into Switzerland from Italy with a false Singaporean passport. The Federal Court said:

42 Decision of 13 Jan. 1987 (1 Ss 545/86), NvwZ 1987, 533 (ZaöRV) 48 [1988], 741.

43 See above n. 41.

44 Decision No. 230/99, *Bayerisches Oberstes Landesgericht*, 14 Jan. 2000. According to UNHCR Germany, the Federal Ministry of Justice considers that the use of a smuggler raised doubt as to whether the asylum seeker could be said to have come ‘directly’ from the State in which he or she feared persecution.

45 See section II.A–II.C.      46 See section III.D.

47 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime, UN doc. A/55/383, Nov. 2000.

48 *Shimon Akram and Others*, No. 585/1993, Court of First Instance (Criminal Cases), in Mytilini (*Aftofo ro Trimeles Plimeliodieio Mytilinis*), 1993.

49 See also, Decision No. 233/1993 of another Greek court, the Court of First Instance (Criminal Cases), Chios (*Aftofo ro Trimeles Plimeliodieio Chiou*).

50 Federal Cassation Court (*Bundesgericht, Kassationshof*), judgment of 17 March 1999, reported in *Asyl* 2/99, 21–3.

A refugee has good cause for illegal entry especially when he has serious reason to fear that, in the event of a regular application for asylum at the Swiss frontier, he would not be permitted to enter Switzerland, because the conditions laid down in Article 13c of the Asylum Law and Article 4 of the Asylum Procedure Law are not met. ‘Good cause’ is thus to be recognized in regard to the alien who, if he is considered as a refugee, enters Switzerland illegally with such well-founded apprehension, in order to be able to make an asylum application inland.<sup>51</sup>

### 1. *The judgment in Adimi*

The decision of the Divisional Court in the United Kingdom case of *R. v. Uxbridge Magistrates’ Court and Another, ex parte Adimi*<sup>52</sup> is one of the most thorough examinations of the scope of Article 31 and the protection due. Simon Brown LJ observed that the need for Article 31 had by no means diminished since it was drafted: ‘The combined effect of visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.’ The question was when should it apply. Simon Brown LJ identified the broad intended purpose as being ‘to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law’, adding that it applied as much to refugees as to ‘presumptive refugees’, and as much to those using false documents, as to those entering clandestinely.

The Court examined the three qualifying conditions, taking account first of the government’s argument that Article 31 allows the refugee no element of choice as to where he or she might claim asylum, and that only ‘considerations of continuing safety’ would justify impunity for onward travel. Simon Brown LJ rejected this argument, and found in favour of ‘some element of choice’:

[A]ny merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and . . . the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to

51 Translation by the writer. The original text reads:

Triftige Gründe für die illegale Einreise hat ein Flüchtling namentlich dann, wenn er ernsthaft befürchten muss, dass er im Falle der ordnungsgemässen Einreichung eines Asylgesuchs an der Schweizer Grenze keine Bewilligung zur Einreise in die Schweiz erhält, weil die in Art. 13c AsylG und Art 4 AsylV 1 genannten Voraussetzungen nicht erfüllt sind. Dem Ausländer, der in dieser begründeten Sorge illegal in die Schweiz einreist, um sein Asylgesuch im Inland . . . einreichen zu können, sind, wenn er als Flüchtling zu betrachten ist, triftige Gründe zuzubilligen.

52 Above n. 40.

acquire the means of travelling on), and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing.

Newman J also considered that, given the ‘distinctive and differing state responses to requests for asylum’, there was a ‘rational basis for exercising choice where to seek asylum’. The Court relied here also on UNHCR’s Guidelines on Detention,<sup>53</sup> as it did in considering what was meant by the requirement that the refugee present him- or herself without delay. Again, Simon Brown LJ rejected the government’s argument that some sort of ‘voluntary exonerating act’ was required of the asylum seeker, such as to claim asylum immediately on arrival. It was enough, in the view of the judge, that the claimant had intended to claim asylum within a short time of arrival.

Such a pragmatic approach to the moment of claim was also adopted in a parallel jurisdiction, namely, in regard to appeals by asylum seekers for ‘income support’ (a UK social security benefit). Under United Kingdom law, entitlement to a certain level of income support depends upon the asylum seeker making a claim for asylum ‘on his arrival’ in the United Kingdom. In a November 1999 case, the Social Security Commissioner expressed the view that ‘a more precise term’ had not been employed in the regulations, precisely to allow a measure of flexibility, and that the question whether asylum was claimed before or after clearing immigration control was not determinative.<sup>54</sup> The Commissioner took account of and was guided by the decision of the Divisional Court in *Adimi*. He also inclined to accept the argument that ‘any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds’.<sup>55</sup>

On the third requirement of ‘good cause’, all parties in the *Adimi* case agreed that it had only a limited role to play, and that it would be satisfied by a genuine refugee showing that he or she was reasonably travelling on false papers.

The Court also looked at the administrative processes by which prosecutions are brought. It found that no consideration was given at any time to the refugee elements, but only to the evidential test of realistic prospect of conviction; the ‘public interest’ offered no defence to prosecution, but rather the contrary. Simon Brown LJ also had no doubt that a conviction constituted a penalty within the meaning of Article 31, which could not be remedied by granting an absolute discharge.

53 UNHCR, ‘Revised Guidelines on the Detention of Asylum-Seekers’, Feb. 1999.

54 Decision of the Social Security Commissioner in Case No. CIS 4439/98, 25 Nov. 1999, Commissioner Rowland, paras. 10 and 18.

55 *Ibid.*, para. 16. A more restrictive interpretation was applied in *R. v. Secretary of State for the Home Department, ex parte Virk*, English High Court of Justice (Queen’s Bench Division), [1995] EWJ 707, 18 Aug. 1995, para. 26, according to which it was argued that the word ‘penalty’ cannot encompass a restriction on obtaining employment.

### C. European Court of Human Rights

The European Court of Human Rights expressly took Article 31 of the 1951 Convention into account in its decision in *Amuur v. France*, when it also considered the general issue of detention:

41. . . . The Court . . . is aware of the difficulties involved in the reception of asylum seekers at most large European airports and in the processing of their applications . . . Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the [European] Convention, including Article 5 . . .

. . .

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. *Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions.*

Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.

Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. *Above all, such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status . . .*

. . .

50. . . . In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. *Quality in this sense implies that where a national law authorises deprivation of liberty – especially in respect of a foreign asylum seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.*

*These characteristics are of fundamental importance with regard to asylum seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies . . .*

...

54. The French legal rules in force at the time, as applied in the present case, did not sufficiently guarantee the applicants' right to liberty.<sup>56</sup>

In view of the internationally recognized immunity from penalty to which persons falling within the scope of Article 31 of the 1951 Convention are entitled, to institute criminal proceedings without regard to their claim to refugee status and/or without allowing an opportunity to make such a claim may be considered to violate human rights.<sup>57</sup> As a matter of principle, also, it would follow that a carrier should not be penalized for bringing in an 'undocumented' passenger, where that person is subsequently determined to be in need of international protection.

Notwithstanding the formal provisions of the legislation and individual court rulings, the *practice* of States and national administrations does not always conform with the obligations accepted under Article 31.

#### D. State practice

This paper has benefited from two studies in areas relating to the subject of illegal entry: a study by UNHCR on the safeguards for asylum seekers and refugees in the context of irregular migration in Europe;<sup>58</sup> and a draft report by the Lawyers Committee for Human Rights on States' procedures and practices relating to the detention of asylum seekers.<sup>59</sup>

A total of forty-one countries were reviewed in the two surveys, from different but complementary perspectives. The UNHCR study looked at practice in thirty-one countries: Armenia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Macedonia, Moldova, the Netherlands, Norway, Poland, Romania, the Russian Federation, the Slovak Republic, Slovenia, Spain, Switzerland, Turkey, Ukraine, and the United Kingdom. The Lawyers Committee examined practice in thirty-three countries: Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Lithuania, Luxembourg, Malaysia, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, the

56 *Amuur v. France*, European Court of Human Rights, Decision No. 17/1995/523/609, 1996, 24 EHRR, 1996, p. 533 (emphasis added).

57 European Convention on Human Rights, Arts. 6 and 13.

58 UNHCR, *Safeguards for Asylum Seekers and Refugees in the Context of Irregular Migration into and within Europe – A Survey of the Law and Practice of 31 European States* (June 2001).

59 Lawyers Committee for Human Rights, *Preliminary Review of States' Procedures and Practices Relating to Detention of Asylum Seekers* (20 Sept. 2001).



Slovak Republic, South Africa, Spain, Sweden, Switzerland, Thailand, the United Kingdom, and the United States.

The UNHCR study considered, among others, the following issues: (1) the formal exemption of asylum seekers and refugees from sanctions for illegal entry and/or presence; (2) the application in practice of such sanctions; (3) suspension of proceedings for illegal entry or presence in the case of refugees and asylum seekers; (4) practice in relation specifically to the use of false documents, including non-admission to the asylum procedure and the presumption of a manifestly unfounded claim; (5) trafficking and smuggling; and (6) detention.

The Lawyers Committee for Human Rights review considered aspects of detention policy and practice, including: (1) the availability of independent review; (2) limits on the permissible period of detention; (3) the availability of periodic review, either substantive or legal; (4) the availability of legal aid; and (5) the uses of alternatives to detention.

Each study provides evidence of wide variations in the practice of States, notwithstanding their common acceptance, for the most part, of the standards laid down in the 1951 Convention and the 1967 Protocol and in other relevant human rights instruments. The variations extend to different interpretations of international criteria, different approaches to the incorporation of international obligations into national law and practice, and different policy goals in the processes of refugee determination and migration management.

For example, the UNHCR study found that some 61 per cent (nineteen out of thirty-one) of the States examined made legislative provision for the exemption of refugees and asylum seekers from penalties for illegal entry or presence. When actual practice is taken into account, however, some two-thirds of the States reviewed do, either generally or from time to time, apply sanctions to asylum seekers. Thirty-five per cent indicated that they will suspend proceedings if the individual applies for asylum; and 13 per cent will suspend penalties, but not proceedings.

Of States reviewed, 19 per cent also provide a legislative exemption for refugees and asylum seekers for the use of false documents (at least where such documents are used at the time of entry); a further 29 per cent in practice do not apply sanctions. Only one State appeared to exclude an asylum seeker from the refugee determination process because of use of false documents, but some 16 per cent of States in practice considered that such use triggered treatment of the application as manifestly unfounded.

Only 29 per cent of States distinguish between trafficking and smuggling, following the terms of the two Protocols to the UN Convention on Transnational Organized Crime.<sup>60</sup> In 45 per cent of States, however, both traffickers and smugglers may be prosecuted for assisting or facilitating illegal entry, among other offences; the penalties imposed may reflect the circumstances of the offence, and

60 See above n. 47 and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, Nov. 2000, UN doc. A/55/383.

whether it was committed for financial gain. The same number of States also provide for the prosecution of the ‘victims’ of these practices, although the penalties tend to be lighter.

Most States have legislation permitting detention, but its application varies considerably. Detention is sometimes automatic pending a decision on the admissibility of the asylum application, but can also be imposed because of illegal entry or presence. Periods of detention also vary from forty-eight hours to eighteen months, and judicial review may or may not be available.

The preliminary version of the study prepared by the Lawyers Committee for Human Rights also presents a picture of difference. Of the thirty-three States reviewed, some seventeen provided for independent review of detention decisions, while ten did not (totals less than the sum of States reviewed are due to incomplete information). Twenty States established a maximum length of detention, while twelve had no such limit. Twelve States made provision for periodic review of detention, either substantive or legal, but another twelve made no such provision. Legal aid was available in five States, or on a limited basis in a further seventeen, but not at all in ten States. Finally, most States (twenty-nine) provided opportunities for detention alternatives.

### 1.      *Australia*

In recent years, Australia has introduced a variety of measures in its attempts to manage, or stop, the arrival of asylum seekers on its territory. In 1992, it introduced ‘mandatory and non-reviewable detention’ on the day before the Federal Court was due to hear an application to release a group of asylum seekers from detention. Further restrictions on judicial review of Department of Immigration decisions have been added over the years. The Human Rights Committee found that the policy and practice of mandatory and non-reviewable detention was arbitrary and a breach of Article 9 of the International Covenant on Civil and Political Rights.<sup>61</sup> The Australian Human Rights and Equal Opportunity Commission reached a similar conclusion in 1998.<sup>62</sup>

61 See further section VI.B.2 below.

62 Human Rights and Equal Opportunity Commission, ‘Those who’ve Come Across the Seas: Detention of Unauthorised Arrivals’, Sydney, May 1998, available on <http://www.hreoc.gov.au/pdf/human.rights/asylum.seekers/h5.2.2.pdf>. In 2002, the UN Working Group on Arbitrary Detention visited Australia at the invitation of the Australian Government. For the findings, see Report of the UN Working Group on Arbitrary Detention, Un doc.E/CN.4/2003/8/Add. The chair of the Working Group expressed concerns relating to the detention of children and vulnerable groups, drew attention to the relationship between the legal conditions of detention and the collective depression syndrome in some detention centres, the implications of detention being managed by a private security company, including the legal basis authorizing the private company to lay down rules and regulations, as well as the legal status of so-called ‘unlawful non-citizens’ held in State prisons, in particular, those labelled high-risk detainees, who are transferred to State prisons without any decision by a judge.

One of the more far-reaching changes, announced in October 1999, was the introduction of ‘temporary protection visas’ for unauthorized (that is, spontaneous) arrivals who are successful in their applications for refugee status in Australia. They will no longer be granted permanent residence, but will be granted a three-year temporary entry visa, after which they will be required to reapply for refugee status. Under amendments in September 2001, unauthorized (spontaneous) arrivals who have spent at least seven days in a country where they could have sought and obtained effective protection will never become entitled to apply for a permanent protection visa.<sup>63</sup>

Although there is no obligation upon the State of refuge to grant permanent residence (and doing so for so long, countries such as Canada and Australia were ahead of the rest of the world), the new visa class will enjoy a significantly lower range of benefits and entitlements. As noted above, in the United Kingdom it has been held that ‘any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds’.<sup>64</sup> Holders of temporary protection visas will not be eligible for many social programmes, will not be permitted family reunion, and will have no automatic right of return, should they need to travel abroad. Not only do these recognized refugees appear to be penalized by reason of their illegal entry, contrary to Article 31 in many cases, but they would also appear to be denied many of the other rights due under the 1951 Convention, such as a Convention travel document under Article 28 and the enjoyment of Convention rights on a non-discriminatory basis. No objective justification on administrative grounds seems to have been advanced.<sup>65</sup>

## 2. *Belgium*

In Belgium, at the admissibility stage, an asylum seeker who arrives without necessary documentation may be detained at a specified location at the border for two

63 Migration Amendment Regulations 1999 (No. 12) (Statutory Rules 1999 No. 243); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001. See also, Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheets Nos. 64, 65, and 68, on temporary protection visas, new humanitarian visa system, and temporary protection visa holders applying for further protection, respectively, available on <http://www.immi.gov.au/facts/index.htm#humanitarian>; US Committee for Refugees, *Sea Change: Australia's New Approach to Asylum Seekers* (Feb. 2002), p. 7, available on <http://www.refugees.org/pub/australia2.cfm>; M. Crick and B. Saul, *Future Seekers: Refugees and the Law in Australia* (Federation Press, Sydney, 2002), pp. 99–116.

64 See Decision of the Social Security Commissioner, above n. 54, para. 16.

65 The applicability of Art. 31 was not considered by the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v. Vadarlis*, *Human Rights and Equal Opportunity Commission and Amnesty International*, [2001] FCA 1329, 18 Sept. 2001, which arose out of the rescue by the Norwegian-registered vessel, the *MV Tampa*, of some 433 asylum seekers in distress at sea. The Court’s approach to detention is examined below.

months;<sup>66</sup> the average length of detention is fourteen days. There is a special detention centre at Zaventem airport for persons without the necessary documentation for entry into Belgium, or the country of destination, or funds for their intended stay in Belgium. Upon applying for asylum, however, persons are transferred to the detention centre. Detention may also be ordered so as to transfer an asylum seeker to the State responsible under the Dublin Convention; such detention period must not exceed two months (Article 51/5, paragraph 3 of the Aliens Act). Where an asylum seeker cannot be transferred for any reason, he or she may be detained until deported (Article 7, paragraph 3 of the Aliens Act). The initial two-month period can be prolonged by the Minister of the Interior or his or her delegate for additional one-month periods, up to five months, if the necessary steps for removal are initiated within seven days of detention; these steps are pursued with due diligence; and timely removal is foreseen. If detention must be prolonged beyond five months due to public order or national security considerations, then detention can be extended on a month-to-month basis. The total detention period cannot exceed eight months. Thereafter, the detainee must be released.

An undocumented asylum seeker who has already entered Belgium, or who requested asylum after authorization to remain expired, and whose asylum request is denied during the admissibility stage by the Aliens Office and is likely to be rejected on appeal, may be detained. Under Article 74/6 of the Aliens Act, the asylum seeker may be detained at a specified location in order to ensure his or her effective expulsion. The measure can be upheld until the asylum seeker's application is determined to be admissible by the General Commission for Refugees and Stateless Persons, or for an initial two-month period. Approximately forty to fifty such asylum seekers are detained each month. Several provisions of the Aliens Act also provide for detention of asylum seekers for reasons of public order or national security (Articles 63/5 paragraph 3, Article 52*bis*, and Article 54 paragraph 2).

### 3.      *France*

In France, asylum seekers are generally not detained solely on the basis of their application for asylum. There are two exceptions to this rule, but in both cases the detention period is short. The first exception relates to asylum seekers in the 'waiting zones', who are subject to the admissibility procedure. The second exception is *rétention administrative*, which applies to asylum applicants who have entered the territory and whose claims are considered abusive by the *Préfecture* responsible for granting temporary residence. UNHCR does not have right of access to the detention centres for *rétention administrative*, but UNHCR and certain NGOs do have access to the 'waiting zones'.

<sup>66</sup> Law of 15 Dec. 1980 on Access to Territory, Stay, Establishment and Removal of Aliens (*loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*) (Aliens Act), consolidated to 1999, Art. 74/5.

#### 4. *Germany*

In Germany, asylum seekers are generally not subject to detention prior to a decision on their application, with the following exceptions. Those who arrive at major airports may be subject to the airport procedure, during which they may be restricted to the closed facility at the airport for a maximum of nineteen days before final rejection of their claim as manifestly unfounded. Under German law, this detention is not considered to constitute a deprivation of liberty.<sup>67</sup> Asylum seekers rejected in the airport procedure who cannot be removed may, however, spend months in the closed centre, pending discretionary entry or removal.

The accelerated procedure (section 18a of the Asylum Procedure Act) applies to persons arriving by air from so-called 'safe' countries of origin or without a valid passport. Such persons are held in special facilities at the airports and their applications decided in a speedy procedure before entry to German territory is permitted. The accelerated airport procedure is conducted at the airports in Frankfurt, Munich, Berlin, Düsseldorf, and Hamburg, with the majority arriving in Frankfurt. Asylum seekers are allowed to enter the country and the regular procedure if the Federal Office for the Recognition of Foreign Refugees concludes that it cannot decide the case within a short period of time, or has not taken a decision on the asylum application within two days of its being filed, or if the court has not taken a decision on an appeal within a period of two weeks.

As a result of the decision of the Federal Constitutional Court of 14 May 1996, asylum seekers at the airport must be provided with free legal counselling. The Court did not consider, however, that holding asylum seekers in closed facilities in the transit zone amounted to either detention or a limitation of freedom, as the individuals were free at any time to leave, for example, to return to their country of origin. If an asylum claim is rejected and the claimant is ordered to be removed, then any further confinement, including in the transit zone, must be ordered judicially, in order to ensure compliance with Article 5 of the European Convention on Human Rights. In practice, most asylum seekers prefer to remain in the transit zone instead of being sent to prison and therefore sign a form to this effect. The number of long-term stays in the transit zones continues to increase.

#### 5. *Other European States (Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden, and the United Kingdom)*

In Greece, according to the penal law as amended by Law No. 2408/1996 and Law No. 2521/1997, criminal courts may not order the deportation of an alien sentenced to imprisonment, if this is contrary to the provisions of international agreements to which Greece is a party. In practice, however, the courts continue to order the

<sup>67</sup> See German Federal Constitutional Court, Decision of 14 May 1996, 2 BvR 1938/93 and 2 BvR 2315/93.

deportation of irregular migrants convicted of illegal entry or stay, without regard to their status.

In Italy, the law at present does not provide for the detention or restriction of freedom of movement of asylum seekers who are admitted to the procedure. Draft legislation proposes to introduce restrictions on movement during a new ‘pre-screening stage’ for ‘manifestly unfounded’ applications, which may last for up to two days. Illegal migrants may be detained in ‘temporary holding centres’ or in a special zone at the airport for the purpose of verification of identity, and completion of expulsion formalities.

Persons in transit at Luxembourg airport are detained if they have either false documentation or no documentation at all. Detention may also be employed, in exceptional circumstances, to facilitate the transfer of the asylum seeker to the State responsible under the Dublin Convention for assessing the claim. An initial period of one month can be extended, on the authority of the Minister of Justice, for additional one-month periods, but the maximum period is three months. Thereafter, the person must be released. An appeal against the detention measure may also be submitted to the Administrative Tribunal within one month of the notification of the detention decision, and thereafter to the Administrative Court.

In the Netherlands, according to Article 7(a) of the Aliens Act, aliens who arrive by air or sea without proper documentation and who are refused entry to the territory may be detained, pending removal. If the application is declared ‘manifestly unfounded’ or inadmissible and the asylum seeker is detained pending removal, he or she can appeal to the District Court. As there is no automatic suspensive effect, a request for a provisional ruling against expulsion must also be made. Time limits apply to such appeals, and the detained asylum seeker should be heard by the Court within two weeks, with a decision to be given within an additional two weeks.

The Court will also be notified if an asylum seeker has been in detention for over four weeks without making an appeal. If deportation is impossible, the detention measures will probably be considered unfounded and the asylum seeker will be released. If, within four weeks, it is decided that the asylum application is inadmissible or ‘manifestly unfounded’, Article 18(b) of the Aliens Act permits detention in order to secure removal. If the decision is not made within four weeks, the person can be detained under Article 26.

In Spain, according to Article 4.1 of Law No. 9/94, the illegal entry of an asylum seeker will not be penalized when the person concerned meets the criteria for recognition of refugee status, provided he or she appears before the competent authorities without delay. The legislation also permits, however, the detention of aliens entering illegally for a maximum period of seventy-two hours without judicial authority. This can be extended to forty days by the court. Administrative detention with judicial supervision guarantees access to the judicial system (Article 24 of the Spanish Constitution), and the alien in administrative detention is kept in an ‘alien internment’ centre, not in a penal institution.

An alien detained on grounds of illegal entry or stay who files an application for asylum will remain in detention while the admissibility of the claim is determined within a 60-day time limit (Article 17(2) of the Implementing Decree; in practice, asylum claims by applicants in detention centres are processed urgently). If an asylum seeker is subsequently admitted to the refugee status determination procedure, he or she will be released.

In Sweden, asylum seekers may be detained if their identity or nationality is in doubt or if they are likely to be rejected and the authorities fear they may evade implementation of a deportation order. Although detention orders are regularly reviewed by the administrative courts, there is no maximum period and individuals often tend to be detained indefinitely, sometimes for up to one year or more. Rejected asylum seekers, whose deportation orders cannot be implemented because of the conditions in their country of origin, can also face lengthy detention. Most asylum seekers are housed in purpose-built detention facilities, although some may be detained in regular prisons, remand prisons, or police cells.

In the United Kingdom, between 1 and 1.5 per cent of the total number of persons seeking asylum are detained at any given time.<sup>68</sup> The Working Group expressed its concern that detention appeared to depend on the availability of space, rather than the elements of the applicant's case.

United Kingdom law was amended following the decision of the Divisional Court in the case of *Adimi*.<sup>69</sup> Section 28 of the Immigration and Asylum Act 1999 creates the offence of 'deception' by non-citizens, including asylum seekers, who try to enter the country with false documents; the offence is punishable with up to two years' imprisonment and/or a fine. Section 31 provides a defence based on Article 31 of the 1951 Convention, within certain limitations.<sup>70</sup>

## 6. *United States*

Asylum seekers arriving in the United States without proper documents are now subject to 1996 legislation which makes provision for 'expedited removal'. The relevant provisions, which came into effect on 1 April 1997, permit the immediate removal of non-citizens arriving at ports of entry with false or no documents. If they express a desire to apply for asylum or a fear of persecution in their home countries, they will be detained and referred for an interview with an asylum officer to determine whether they have a 'credible fear' of persecution. If they are found to have a 'credible fear', they are scheduled for an immigration court hearing and are theoretically eligible for release from detention. A 'credible fear' is defined as a 'significant possibility' that the individual would qualify for asylum in the United States.

68 See 'Report of the Working Group on Arbitrary Detention', UN doc. E/CN.4/1999/63/Add.3, 18 Dec. 1998.

69 See section III.B.1 above.      70 See section III.A.2 above.

If they receive a negative credible fear determination, they may request a review by an immigration judge which must be conducted whenever possible within twenty-four hours and in no case no later than seven days after the initial negative credible fear determination by the asylum officer. No further review is available. Under earlier legislation, individuals seeking entry at border points were placed in exclusion proceedings and had access to a hearing before an immigration judge, an appeal to the Board of Immigration Appeals and to the federal district.

In practice, and depending on the availability of detention space and the equities in individual cases, some asylum seekers are released pending their removal hearings and final decisions. This includes asylum seekers who have been placed in expedited removal and have been found to have a 'credible fear' of persecution.<sup>71</sup>

#### E.      Decisions and recommendations of the UNHCR Executive Committee

The Executive Committee of the Programme of the United Nations High Commissioner for Refugees has addressed the phenomenon of 'irregular' movements of refugees and asylum seekers on at least two occasions. On each occasion, while expressing concern in regard to such movements, participating States have acknowledged that refugees may have justifiable reasons for such action. Executive Committee Conclusion No. 15 (XXX) 1979, entitled 'Refugees without an asylum country', includes the following provision:

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.<sup>72</sup>

Executive Committee Conclusion No. 58 (XL) 1989, entitled 'The problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection', reads:

(f) Where refugees and asylum-seekers . . . move in an irregular manner from a country where they have already found protection, they may be returned to that country if (i) they are protected there against *refoulement* and (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them . . .

71 See generally, Lawyers Committee for Human Rights, 'Is This America? The Denial of Due Process to Asylum Seekers in the United States', Oct. 2000.

72 UNHCR, 'Report of the 30th Session of the Executive Committee', UN doc. A/AC.96/572, para. 72(2) (k).



(g) *It is recognized that there may be exceptional cases in which a refugee or asylum-seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favourable consideration by the authorities of the State where he requests asylum . . .*

...

(i) *It is recognized that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified . . .*<sup>73</sup>

In addition, Executive Committee Conclusion No. 22 (XXXII) 1981, entitled 'Protection of asylum seekers in situations of large-scale influx', clearly reaffirms the standards set out in Article 31, as follows:

B. Treatment of asylum-seekers who have been temporarily admitted to country pending arrangements for a durable solution

1. Article 31 of the 1951 United Nations Convention relating to the Status of Refugees contains provisions regarding the treatment of refugees who have entered a country without authorization and whose situation in that country has not yet been regularized. The standards defined in this Article do not, however, cover all aspects of the treatment of asylum-seekers in large-scale influx situations.

2. It is therefore essential that asylum-seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards:

(a) they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order;

...

(h) family unity should be respected . . .<sup>74</sup>

#### **IV. International standards and State responsibility**

States party to the 1951 Convention and the 1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain

73 UNHCR, 'Report of the 40th Session of the Executive Committee', UN doc. A/AC.96/737, p. 23 (emphasis added).

74 UNHCR, 'Report of the 32nd Session of the Executive Committee', UN doc. A/AC.96/601, para. 57(2).

rights including the benefit of a non-discriminatory application of the Convention and the Protocol (Article 3), non-penalization in case of illegal entry or presence (Article 31), and *non-refoulement* (Article 33: non-return, including non-rejection at the frontier, to a territory in which the refugee's life or freedom would be threatened for reasons set out in Article 1).

States ratifying the 1951 Convention and/or the 1967 Protocol necessarily undertake to implement those instruments in good faith (the principle of *pacta sunt servanda*).<sup>75</sup> The choice of means in implementing most of the provisions is left to the States themselves; they may select legislative incorporation, administrative regulation, informal and ad hoc procedures, or a combination thereof. In no case will mere formal compliance itself suffice to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.<sup>76</sup>

In circumstances in which a breach of duty is said to arise by reason of a general policy, the question will be whether, 'in the given case the *system* of administration has produced a result which is compatible with the pertinent principle or standard of international law'. Thus, responsibility may result in the case of 'a radical failure on the part of the legal system to provide a guarantee or service as required by the relevant standard'.<sup>77</sup>

The responsibility of States party to the 1951 Convention and the 1967 Protocol to treat persons entering or seeking to enter their territory irregularly in accordance with Article 31(1) of the 1951 Convention, and specifically to take account of their claim to be a refugee entitled to its benefit, may be engaged either by a voluntary act of the individual in making a claim for asylum/refugee status, or by an act of the State, for example, in asserting jurisdiction over the individual with a view to enforcing immigration-related measures of control (such as removal or refusal of entry), or instituting immigration-related criminal proceedings (such as prosecution for the use of false travel documents).<sup>78</sup>

Although States may and do agree on the allocation of responsibility to determine claims, at the present stage of legal development, no duty is imposed on the asylum seeker travelling irregularly or with false travel documents to lodge an asylum application at any particular stage of the flight from danger.

If a State initiates action within its territory, for example, to deal generally or internationally with the use of false travel documents, then that State, rather than

75 1969 Vienna Convention, 1155 UNTS 331; I. Brownlie, *Basic Documents in International Law* (5th edn, Clarendon Press, Oxford, 2002), p. 270.

76 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996), pp. 230–41.

77 I. Brownlie, *System of the Law of Nations. State Responsibility (Part 1)* (Clarendon Press, Oxford, 1983), p. 150.

78 For a detailed assessment of the scope of State responsibility in asylum matters, see also the Legal Opinion on the scope and content of the principle of *non-refoulement* by Sir E. Lauterpacht and D. Bethlehem in Part 2.1 of this book.

the State of intended destination assumes the responsibility of ensuring that the refugee/asylum seeker benefits at least from those provisions of the 1951 Convention, such as Articles 31 and 33, or of applicable international human rights instruments, such as Articles 3, 6, and 13 of the European Convention on Human Rights, which are not dependent upon lawful presence or residence.

The above review shows that many States party to the 1951 Convention have no legislative provision implementing the obligations accepted under Article 31 of the 1951 Convention. Instead, compliance is left to be achieved through the (it is hoped) judicious use of executive discretion.

In many instances, States also appear to have a general policy of prosecuting users of false travel documentation without regard to the circumstances of individual cases, and without allowing an opportunity for any claim for refugee status or asylum to be considered by the responsible central authority.

A general policy and/or practice of prosecuting users of false travel documentation without regard to the circumstances of individual cases, and without allowing an opportunity for any claim for refugee status or asylum to be considered by the responsible central authority before prosecution, is a breach of Article 31 of the 1951 Convention. The intervention and exercise of jurisdiction over such asylum seekers thereafter engages the responsibility of that State to treat them in accordance with the said Article 31(1).

In brief, therefore, Article 31(1) of the 1951 Convention should be interpreted as follows:

1. 'directly' should not be strictly or literally construed, but depends rather on the facts of the case, including the question of risk at various stages of the journey;
2. 'good cause' is equally a matter of fact, and may be constituted by apprehension on the part of the refugee or asylum seeker, lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party; and
3. 'without delay' is a matter of fact and degree as well; it depends on the circumstances of the case, including the availability of advice, and whether the State asserting jurisdiction over the refugee or asylum seeker is in effect a transit country.<sup>79</sup>

The refusal of the authorities to consider the merits of claims or their inability so to do by reason of a general policy on prosecutions will almost inevitably lead the State into a breach of its international obligations.

79 See also, UNHCR, 'Revised Guidelines', above n. 53. Given the special situation of asylum seekers, a time limit cannot be mechanically applied or associated with the expression. In particular, the asylum seeker may be suffering from the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another.

## V. Conclusions regarding Article 31(1)

In summary, the following conclusions regarding Article 31(1) can be drawn:

1. States party to the 1951 Convention and the 1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain rights. They necessarily undertake to implement those instruments in good faith.
2. States have a choice of means in implementing certain Convention provisions, such as Article 31, and may elect to use legislative incorporation, administrative regulation, informal and ad hoc procedures, or a combination thereof. Mere formal compliance is not in itself sufficient to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.
3. Particular attention needs to be paid to situations where the system of administration may produce results incompatible with the applicable principle or standard of international law.
4. Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries. The mere fact of UNHCR being operational in a certain country cannot be decisive as to the availability of effective protection in that country.<sup>80</sup> The real question is whether effective protection is available for that individual in that country. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country.
5. To come directly from the country in which the claimant has a well-founded fear of persecution is recognized in itself as 'good cause' for illegal entry. To 'come directly' from such a country via another country or countries in which he or she is at risk or in which generally effective protection is not available, is also accepted as 'good cause' for illegal entry. Other factual circumstances, such as close family links in the country of refuge, may also constitute 'good cause'. The criterion of 'good cause' is flexible enough to allow the elements of individual cases to be taken into account.

<sup>80</sup> 'Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees', 8–9 Nov. 2001, para. 10(c).

6. 'Without delay' is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.
7. Although expressed in terms of the 'refugee', Article 31(1) applies also to asylum seekers and 'presumptive refugees'; consequently, such persons are *prima facie* entitled to receive the provisional benefit of the 'no penalties obligation' in Article 31(1) until they are found not to be in need of international protection in a final decision following a fair procedure.
8. The practice of States as evidenced in their laws and in the decisions of tribunals and courts confirms this interpretation of the 1951 Convention. States have also formally acknowledged both that refugees will often have good reason for moving on from countries of first refuge,<sup>81</sup> and that circumstances may oblige them to use false documents.
9. The term 'penalties' is not defined in Article 31. It includes but is not necessarily limited to prosecution, fine, and imprisonment.
10. Provisional detention is permitted if necessary for and limited to the purposes of preliminary investigation. While administrative detention is allowed under Article 31(2), it is equivalent, from the perspective of international law, to a penal sanction whenever basic safeguards are lacking (review, excessive duration, etc.).
11. Article 31(1) of the 1951 Convention obliges States Parties specifically to take account of any claim to be a refugee entitled to its benefit. This responsibility can be engaged by a voluntary act of the individual in making a claim for asylum/refugee status. It may also be engaged by an act of the State, for example, in asserting jurisdiction over the individual with a view to implementing immigration-related measures of control (such as removal or refusal of entry), or instituting immigration-related criminal proceedings (such as prosecution for the use of false travel documents).
12. Where a State leaves compliance with international obligations within the realm of executive discretion, a policy and practice inconsistent with those obligations involves the international responsibility of the State. The policy of prosecuting or otherwise penalizing illegal entrants, those present illegally, or those who use false travel documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's claim, amount to a breach of a State's obligations in international law.
13. As a matter of principle, it should also follow that a carrier should not be penalized for bringing in an 'undocumented' passenger, where that person is subsequently determined to be in need of international protection.

81 See Executive Committee, Conclusion No. 58, para. g, section III.E above.

## VI. Restrictions on freedom of movement under Article 31(2), including detention

Several thousand refugees and asylum seekers are currently detained throughout the world<sup>82</sup> or their freedom of movement is restricted. Refugees and asylum seekers can find themselves used for political or military purposes and confined in border camps or isolated from international access in ‘settlements’ for extended periods in conditions of hardship and danger. Some are detained as illegal immigrants, and some among them will be able to obtain their release, once they have shown the bona fide character of their asylum claim, or if they can provide sufficient financial or other guarantees. In other cases, however, indefinite and unreviewable detention may follow, irrespective of the well-foundedness of the claim or the fact that illegal entry and presence are due exclusively to the necessity to find refuge.

Detention and other restrictions on the freedom of movement of refugees and asylum seekers continue to raise fundamental protection and human rights questions, both for UNHCR and the international community of States at large. In the practice of States, some of which is summarized in this paper, detention is seen as a necessary response to actual or perceived abuses of the asylum process, or to similar threats to the security of the State and the welfare of the community. The practice of detaining refugees and asylum seekers also tends to mirror restrictive tendencies towards refugees, which themselves reflect elements of xenophobia. Often, too, it may result from lacunae in refugee law at the international and national level, such as the absence of rules governing responsibility for determining asylum claims, or a failure to incorporate rules and standards accepted by treaty.

For present purposes, the word ‘detention’ is employed to signify confinement in prison, closed camp, or other restricted area, such as a ‘reception’ or ‘holding’ centre.<sup>83</sup> There is a qualitative difference between detention and other restrictions on freedom of movement, even if only a matter of degree and intensity,<sup>84</sup> and many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint, for example, through the use of guarantors, security deposits or bonds, reporting requirements, or open reception

82 As long ago as 1977, the Executive Committee expressed its preoccupation with the fact that refugees had been subject to ‘unjustified and unduly prolonged measures of detention’, ‘Report of the 28th Session (1977)’, UN doc. A/AC.96/549, para. 53.5.

83 Cf. *Shokuh v. The Netherlands, Hoge Raad der Nederlanden* (Netherlands Supreme Court), 9 Dec. 1988, in which the court held further to Art. 5 of the European Convention on Human Rights that an alien who is not allowed to remain but is nevertheless on Netherlands territory may only be detained as provided by law, and that holding in the transit zone of an airport constitutes deprivation of liberty within the meaning of that Article: *Revue du droit des étrangers* (RDDE), No. 52, Jan.–Feb. 1989, p. 16.

84 See section III.C above, European Court of Human Rights, citing para. 43 of the judgment of the European Court of Human Rights in *Amuur v. France*.

centres whereby the asylum seeker's movement is restricted to within the bounds of the district in which the centre is located or where absence of more than twenty-four hours must be approved.<sup>85</sup>

In a number of countries facing a mass influx, refugees who have been formally admitted are accommodated in 'settlements' or 'designated areas'. Such arrangements are frequently made in order to provide solutions for rural refugees. Assignment to such settlements is normally accompanied by various restrictions on freedom of movement. Refugees who disregard such restrictions and leave the camp or settlement are often liable to penalties, including detention, or may be refused readmission and be denied any assistance.

#### A. The scope of protection under the 1951 Convention and generally

The 1951 Convention recognizes that, in certain circumstances, States may impose restrictions on freedom of movement; these provisions very much reflect the circumstances prevailing when the treaty was drafted. Article 8 of the 1951 Convention attempts to secure exemption for refugees from exceptional measures which might affect them by reason merely of their nationality, but many States have made reservations to this Article, of which some exclude entirely any obligation, some accept the Article as a recommendation only, while others expressly retain the right to take measures based on nationality in the interests of national security.

Article 9 of the 1951 Convention was drafted specifically to cover situations of war or other grave and exceptional emergency, and reflected the difficulty faced by some States during the Second World War in distinguishing clearly and promptly between refugees and enemy nationals. This provision thus maintains the right of States to take 'provisional measures' against a particular person, 'pending a determination . . . that that person is in fact a refugee *and* that the continuance of such measures is necessary . . . in the interests of national security' (emphasis added).

Article 26 of the 1951 Convention prescribes such freedom of movement for refugees as is accorded to aliens generally in the same circumstances. Eight States have made reservations, six of which expressly retain the right to designate places of residence, either generally or on grounds of national security, public order (*ordre public*), or the public interest. Several African countries have accepted Article 26, provided refugees do not choose to reside in a region bordering their country of origin; and that they refrain in any event, when exercising their right to move freely, from any activity or incursion of a subversive nature with respect to the country of which they are nationals. These reservations are reiterated in Articles II(6) and III

<sup>85</sup> See Lawyers Committee for Human Rights, *Preliminary Review*, above n. 59. Refugees would be free to come and go during the day, although there could be curfews overnight.

of the 1969 OAU Refugee Convention,<sup>86</sup> and are reflected also in Articles 7 and 8 of the 1954 Caracas Convention on Territorial Asylum.<sup>87</sup>

Article 31(1) of the 1951 Convention has been examined above. One implication of this provision is that, like the landing of those shipwrecked at sea or otherwise victims of *force majeure*, the entry of refugees in flight from persecution ought not to be construed as an unlawful act. States retain considerable discretion, however, as to the measures to be applied pending determination of status, and in relation to the treatment of those who, for whatever reason, are considered not to fall within the terms of the Article.

That States have the competence to detain non-nationals pending removal or pending decisions on their entry is confirmed in judicial decisions and the practice of States.<sup>88</sup> From the international law perspective, however, the issue is whether, in the case of refugees and asylum seekers, the power has been exercised lawfully, in light of the standards governing its exercise and duration.

The 1951 Convention explicitly acknowledges that States retain the power to limit the freedom of movement of refugees, for example, in exceptional circumstances, in the interests of national security, or if necessary after illegal entry. Article 31's non-penalization provision applies in some but not all cases, but Article 31(2) implies that, after any permissible initial period of detention, States may only impose restrictions on movement which are 'necessary', for example, on security grounds or in the special circumstances of a mass influx, although restrictions are generally to be applied only until status is regularized or admission obtained into another country.

Although State practice recognizes the power to detain in the immigration context, human rights treaties affirm that no one shall be subject to *arbitrary* arrest or detention.<sup>89</sup> The first line of protection thus requires that all detention must be in accordance with and authorized by law; the second, that detention should be reviewed as to its legality and necessity, according to the standard of what is reasonable and necessary in a democratic society. 'Arbitrary' embraces not only what is illegal, but also what is unjust.<sup>90</sup>

86 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45.

87 See above n. 30.

88 See, e.g., *Attorney-General for Canada v. Cain*, Judicial Committee of the Privy Council, [1906] AC 542 (PC); *Shaughnessy v. United States, ex rel. Mezei*, US Supreme Court, 345 US 206 (1953); and Art. 5 of the European Convention on Human Rights.

89 See, e.g., Art. 9 of the ICCPR; Art. 5 of the European Convention on Human Rights; Art. 2 of the Protocol No. 4 to the European Convention on Human Rights, ETS No. 46; Art. 7 of the American Convention on Human Rights; Art. 6 of the 1981 African Charter on Human and Peoples' Rights, 21 ILM, 1982, 58; also Art. 5 of the 1985 UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, UNGA Res. 40/144, 13 Dec. 1985, Annex.

90 This interpretation was adopted in the work of the Commission on Human Rights on the right of everyone to be free from arbitrary arrest, detention and exile; see UN doc. E/CN.4/826/Rev.1,



Article 12 of the ICCPR applies to any person lawfully within a territory, but the interpretation of the term ‘necessary’ is also of relevance for the application of Article 31(2) of the 1951 Convention. Article 12(3) of the ICCPR stipulates that freedom of movement ‘shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant’. As Manfred Nowak remarks in his commentary to the ICCPR, the requirement of ‘necessity’ is subject to objective criteria, the decisive criterion for evaluating whether this standard has been observed in a given case being proportionality. Every restriction thus requires a precise balancing between the right to freedom of movement and those interests to be protected by the restriction. Consequently, a restriction is ‘necessary’ when its severity and intensity are proportional to one of the purposes listed in this Article and when it is related to one of these purposes.<sup>91</sup>

The *conditions* of detention may also put in question a State’s compliance with generally accepted standards of treatment, including the prohibition on cruel, inhuman or degrading treatment, the special protection due to the family and to children,<sup>92</sup> and the general recognition given to basic procedural rights and guarantees.<sup>93</sup>

Detention will often deprive the asylum seeker of an opportunity to present his or her case, or to have the assistance of counsel; this is especially likely where asylum seekers are held in remote locations, as is the case in Australia and often in the United States. Detention is also expensive; for example, it was estimated in 1999 that the costs of detaining some 24,000 individuals (asylum seekers and other immigrants) in the United States in 2001 would be over US\$500 million.<sup>94</sup> Absent or inadequate representation can entail further costs for the host State; poor decisions are more likely to be overturned on appeal, while the process of case

paras. 23–30. See now the work of the Commission on Human Rights Working Group on Arbitrary Detention described below.

91 Nowak, *CCPR Commentary*, above n. 26, p. 211.

92 See *D.D. and D.N. v. Etat belge, Ministre de l’interieur et Ministre de la santé publique, de l’environnement et de l’intégration sociale*, Tribunal civil (Réf.) Bruxelles, 25 Nov. 1993, No. 56.865, in which the court found the detention of an asylum seeker and her newborn baby to be inhuman and degrading, contrary to Arts. 3 and 8 of the European Convention on Human Rights, RDDE, No. 76, Nov.–Dec. 1993, p. 604. See also, 1989 Convention on the Rights of the Child, UNGA Res. 44/25, 20 Dec. 1989.

93 Cf. *United States Diplomatic and Consular Staff in Tehran*, where the International Court of Justice observed that, ‘[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights’: ICJ Reports 1980, p. 3 at p. 42, para. 91.

94 Lawyers Committee for Human Rights, ‘Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act’, Aug. 1999, pp. 1 and 15, at <http://www.lchr.org/refugee/behindbars.htm>.

management is often needlessly prolonged by unreliable procedures at the front end.<sup>95</sup>

## B. International standards

### 1. *Executive Committee/UNHCR*

The detention of refugees and asylum seekers was fully considered by the UNHCR Executive Committee at its 37th session in 1986. The sessional Working Group reached consensus, and its report and conclusions were presented to and adopted by the Executive Committee.<sup>96</sup> Although not as progressive as some had hoped,<sup>97</sup> and by no means as committed to detention as exception, which had been UNHCR's goal, the Conclusions nevertheless accept the principle that 'detention should normally be avoided'. The Executive Committee also adopted the language of 'conditional justification', recognizing that

*[i]f necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.*<sup>98</sup>

It noted that 'fair and expeditious procedures' for determining refugee status are an important protection against prolonged detention; and that 'detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review'. The linkage between deprivation of liberty and an identifiable (and lawful) object and purpose also seek to keep the practice under the rule of law.

95 See also Amnesty International, 'United States of America: Lost in the Labyrinth: Detention of Asylum-Seekers', Report, AMR51/51/99, Sept. 1999; this report identifies numerous problem areas in current US law and practice, including inconsistent application, failure to distinguish between asylum seekers and other migrants, and inappropriate detention facilities.

96 'Report of the 37th Session (1986)', UN doc. A/AC.96/688, para. 128.

97 See L. Takkenberg, 'Detention and Other Restrictions of the Freedom of Movement of Refugees and Asylum Seekers: The European Perspective', in *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (ed. J. Bhabha and G. Coll, Federal Publications, Washington DC, 1992), pp. 178 and 180–4.

98 Executive Committee Conclusion No. 44 (XXXVII) 1986, para. b (emphasis added). In 1981, the Executive Committee, acting on the recommendations of the Sub-Committee of the Whole on International Protection, adopted a series of conclusions on the protection of asylum seekers in situations of mass influx, 'Report of the 32nd Session', UN doc. A/AC.96/601, para. 57. These embody some sixteen 'basic human standards', geared in particular to the objective of attaining a lasting solution to the plight of those admitted.

In 1998, the UNHCR Executive Committee stated that it

[d]eploras that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.<sup>99</sup>

The following year, UNHCR issued its revised 'Guidelines on the Detention of Asylum-Seekers', which reaffirm that, 'as a general principle, asylum-seekers should not be detained', and that 'the use of detention is, in many instances, contrary to the norms and principles of international law'.<sup>100</sup> UNHCR emphasized the principles endorsed by the Executive Committee (and 'reiterated' also by the UN General Assembly in Resolution 44/147, 15 December 1989) that, while detention may be used in exceptional circumstances, consideration should always be given first to all possible alternatives, including reporting and residence requirements, guarantors, bail, and the use of open centres.<sup>101</sup> Thereafter, detention should be used only if it is reasonable and proportional and, above all, *necessary*, to verify identity, to determine the elements on which the asylum claim is based, in cases of destruction of documents or use of false documents with intent to mislead, or to protect national security and public order. The use of detention for the purposes of deterrence is therefore impermissible.<sup>102</sup>

When detained, asylum seekers should benefit from fundamental procedural safeguards, including: prompt and full advice of the detention decision and the reasons for it, in a language and in terms which they understand; advice of the right to counsel and free legal assistance, wherever possible; automatic review of the detention decision by a judicial or administrative authority, and periodic reviews thereafter of the continuing necessity, if any, of the detention; an opportunity to challenge the necessity of detention; and the right to contact and to communicate with UNHCR or other local refugee bodies and an advocate. In no case should detention

99 Executive Committee, Conclusion No. 85 on International Protection (XLIX) 1998.

100 UNHCR, 'Revised Guidelines', above n. 53.

101 Ibid., Guideline 4: Alternatives to Detention. See also, Amnesty International, 'Alternatives to Mandatory Detention – Refugee Factsheet', July 2001, which points out that alternative models of detention aim to: (1) lower the curbs on personal liberty of asylum seekers; (2) limit the duration in detention; (3) ensure support services to respond to the special needs of asylum seekers; and (4) train government and detention system staff to recognize the problems that asylum seekers face.

102 See A. C. Helton, 'The Detention of Refugees and Asylum-Seekers: A Misguided Threat to Refugee Protection', in *Refugees and International Relations* (eds. G. Loescher and L. Monahan, Oxford University Press, 1989), p. 135 at p. 137: 'Detention for purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile.'

constitute an obstacle to the effective pursuit of an application for asylum or refugee status.

The UNHCR Guidelines also draw on general international law in regard to the treatment to be accorded to minors, other vulnerable groups, and women, and to the conditions of detention, which should be humane and respectful of the inherent dignity of the person.<sup>103</sup>

As indicated above, comparatively few States have taken any formal steps to incorporate the exemption from penalties required by Article 31 of the 1951 Convention. Even where legislative provisions exist, however, refugees and asylum seekers can still face loss of liberty. They are subject to the same law as is applied to non-nationals generally, and are thus exposed to prosecution, punishment, and/or detention, on account of illegal entry, entry without documents, or entry with falsified documents. Detention may also be used where the applicant for asylum is considered likely to abscond or is viewed as a danger to the public or national security. In some countries, particularly at certain times of national or international tension, a claim to refugee status may make the applicant politically suspect; in others, racial origin, religious conviction, or fear of political problems with neighbouring States may be used to justify restrictions on liberty.

Where some review of detention is available, the actual powers of the reviewing authority, court, or tribunal may be limited to confirming that the detention is formally lawful, either under the general law or by the terms of emergency legislation. Recourse to appeals and access to legal counsel, even if available in theory, are often inhibited by costs. Release on bail, parole, or guarantee is sometimes available, but is often conditional on unrealistic guarantees, or eligibility for resettlement elsewhere. Despite the terms of Article 35 of the 1951 Convention, under which States Parties undertake to cooperate with UNHCR, only a few countries have any regular procedure for informing the local UNHCR office of cases of detained refugees and asylum seekers.

## 2. *Further development of international standards*

In its decision in *A. v. Australia* in 1997, the Human Rights Committee set out some of the elements which it considered essential to avoid arbitrary detention.<sup>104</sup> In particular, it emphasized that every detention decision should be open to *periodic review*,

103 On the detention of refugees and asylum seekers in South Africa, see Human Rights Watch/Africa, 'The Human Rights of Undocumented Migrants, Asylum Seekers and Refugees in South Africa', Submission to the Green Paper Task Group, 11 April 1997, pp. 6–8; on migratory pressures, problems, and responses, see 'Report by Mr Glele-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance', UN doc. E/CN.4/1999/15/Add.1, 27 Jan. 1999.

104 *A. v. Australia*, Communication No. 560/1993, Human Rights Committee, 3 April 1997.

so that the *justifying grounds* can be assessed.<sup>105</sup> Detention should not continue beyond the period for which it can be objectively justified. The Committee noted that:

the fact of *illegal entry* may indicate a *need for investigation* and there may be other factors particular to the individual, such as the *likelihood of absconding* and *lack of cooperation*, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.<sup>106</sup>

The Committee also stressed the importance of *effective*, not merely formal review, and that:

[b]y stipulating that the court must have the power to order release ‘if the detention is *not lawful*’, article 9, paragraph 4, [of the ICCPR] requires that the court be empowered to order release, if the detention is *incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant*.<sup>107</sup>

The Commission on Human Rights has had the question of detention under review for some years.<sup>108</sup> A Working Group on Arbitrary Detention was established by Resolution 1991/42, and its mandate revised by Resolution 1997/50. Its role now is to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by local courts in conformity with domestic law, with the standards set forth in the Universal Declaration of Human Rights<sup>109</sup> and with the relevant international instruments accepted by the States concerned. This same resolution directed the Working Group to give attention to the situation of immigrants and asylum seekers ‘who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy’.<sup>110</sup>

105 Cf. *R. v. Special Adjudicator, ex parte B.*, Divisional Court, United Kingdom, 17 Sept. 1997, in which the court took account of a change in the circumstances relating to a detained asylum seeker, which swung the balance in favour of release. The Court found that the Secretary of State had failed to follow his own policy, and that continued detention was unjustified, unlawful, and irrational.

106 *A. v. Australia*, above n. 104, para. 9.4 (emphasis added).

107 *Ibid.*, para. 9.5 (emphasis added).

108 The prohibition on the arbitrary arrest or detention of non-nationals has been re-affirmed in Art. 5 of the 1985 UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, above n. 89. See also the ‘UN Standard Minimum Rules for the Treatment of Prisoners’, Economic and Social Council Res. 663 C (XXIV), 31 July 1957 and 2076 (LXII), 13 May 1977; the ‘Code of Conduct of Law Enforcement Officials’, UNGA Res. 34/169, 17 Dec. 1979; and the ‘Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, UNGA Res. 37/194, 18 Dec. 1982, all available on <http://www.unhchr.ch/html/intlinst.htm>.

109 UNGA Res. 217 A (III), 10 Dec. 1948.

110 Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997. See also, ‘Report of the Working Group’, UN docs. E/CN.4/1998/44, 19 Dec. 1997; E/CN.4/RES/1998/41, 17 April 1998.

In December 1998, the Working Group set out criteria for determining whether or not custody is arbitrary,<sup>111</sup> and in the following year it adopted Deliberation No. 5, developing those guidelines.<sup>112</sup> The Working Group has approached the notion of 'arbitrary' as involving detention which cannot be linked to any legal basis, which is based on facts related to the exercise by the person concerned of his or her fundamental human rights, and which is further based on or characterized by the non-observance of international standards, for example, in relation to due process or the conditions of treatment. The Working Group has also paid particular attention to the need for guarantees as to the competence, impartiality and independence of the 'judicial or other authority' ordering or reviewing both the lawfulness and the necessity of detention.

In principle, therefore, the power of the State to detain must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. In the context of migration management and refugee status determination, indefinite detention as part of a programme of 'humane deterrence' has proven generally inhumane and of little deterrent value.

International law also governs the conditions of detention, and minimum standards have been recommended by the Executive Committee and UNHCR.<sup>113</sup>

Limitations on rights must not only be prescribed by law (the first line of defence against arbitrary treatment), but must only be such as are *necessary in a democratic society*, to protect national security, public order, and the rights and freedoms of others.

Not only must legality be confirmed, but the particular situation of the individual must also be examined in the light of such claim or right as he or she may have. This means determining whether the objective of deterrence is met or promoted by individual measures of detention, or by policies consigning particular groups to deprivation of liberty, or by *a priori* denying their cases consideration on the merits. It means determining whether detention is in fact necessary, for example, to implement deportation or removal, or to protect national security, or to prevent absconding.

The balance of interests can require that alternatives to detention be fully explored, such as fair, efficient, and expeditious procedures for the resolution of claims. In certain situations, it is also the responsibility of the international

111 'Report of the Working Group', UN doc. E/CN.4/1999/63, 18 Dec. 1999, para. 69 (fourteen guarantees).

112 UN doc. E/CN.4/2000/4, 28 Dec. 1999, Annex, relating to the situation of immigrants and asylum seekers and guarantees concerning persons held in custody. The Declaration has been noted by the Commission on Human Rights in Resolutions 2001/40, 23 April 2001 and 2000/36, 20 April 2000.

113 See Executive Committee, Conclusion No. 22 (XXXII) 1981, 'Protection of Asylum Seekers in Situations of Large-Scale Influx'; UNHCR, 'Revised Guidelines', above n. 53, Guideline 10, 'Conditions of Detention'. See also Human Rights and Equal Opportunity Commission, Australia, 'Immigration Detention Guidelines', March 2000; European Council on Refugees and Exiles, 'Position Paper on the Detention of Asylum Seekers', April 1996, available on <http://www.ecre.org/positions/detain.shtml>.

community of States, working together with UNHCR, to contribute to the solution of refugee problems thereby removing any basis for continued detention.

Limitations in respect of detention need not mean that States are therefore powerless to manage population movements, but the possibilities for international cooperation in this field remain relatively unexplored. Repressive measures concentrated on refugees and asylum seekers are generally inappropriate, however, and experience shows that they do not achieve objectives, such as the deterrence of arrivals. They are, moreover, highly likely to violate fundamental human rights; where refugee movements are involved, repressive measures concentrated on individuals contribute little if anything to the ultimate objective, which is solutions.

### C. Incorporation or adoption of standards in national law

Implementation of the international standards described above depends on a number of variables, including the method of ‘reception’ of international law locally, the extent to which national constitutional principles may incorporate, reflect, or improve on the rules and standards of international law, the existence and terms of any implementing legislation, and the operation of policy at the executive level. Even in the absence of implementing legislation or adoption, many judgments confirm the importance and applicability of certain basic standards in the application of Article 31 of the 1951 Convention, and also in the regulation of the State’s power to detain.

For example, in *Zadvydas v. Immigration and Naturalization Service*,<sup>114</sup> the United States Supreme Court laid down the principle that the detention of a non-citizen in an immigration and control context should be limited to a period reasonably necessary to bring about the person’s removal from the country, and that indefinite detention was not permitted. The Court noted that a ‘reasonable time’ was to be measured primarily in terms of the US statute’s purpose of assuring the non-citizen’s presence at the moment of removal. If removal is not reasonably foreseeable, and if the individual concerned shows good reason to believe that there is no significant likelihood that it will happen, then it falls to the government to rebut the presumption. The Court suggested that six months would be an appropriately reasonable time in many circumstances. The Court also stressed that the ‘liberty-interest’ of non-citizens was *not* diminished by their lack of a legal right to live freely in the country, for there was a choice between imprisonment, on the one hand, and supervision under release conditions, on the other. In United States constitutional terms, that liberty interest was strong enough to raise a serious constitutional problem with the notion of indefinite detention.

114 US Supreme Court, Case No. 99-7791, 28 June 2001.

In New Zealand, the High Court has addressed the question of the detention of asylum seekers in relation to a 2001 instruction providing for the detention of all unauthorized arrivals. It took the view that in order to conform to Article 31(2), powers to detain refugees must be constrained by what is ‘necessary’, as set out in that paragraph.<sup>115</sup> Baragwanath J defined such necessity as ‘the minimum required, on the facts as they appear to the immigration officer: (1) to allow the Refugee Status Branch to be able to perform their functions; (2) to avoid real risk of criminal offending; (3) to avoid real risk of absconding’. He emphasized, however, that the Refugee Status Branch was required ‘to act in a manner that is consistent with New Zealand’s obligations under the Refugee Convention’ and noted that it ‘would therefore be unusual that detention, which by Article 31.2 must be limited to what is “necessary”, could be “necessary” to facilitate the work of the Refugee Status Branch’.<sup>116</sup> Discretion to detain, he added, ‘is not exercised once and for all but is “iterative”: if the decision is to detain, that decision must be kept under constant review with the necessity test continuously reapplied as evidence emerges’.<sup>117</sup>

In *Minister for Immigration and Multicultural Affairs v. Vadarlis*,<sup>118</sup> however, a majority of the Federal Court of Australia held that actions of the Australian Government did not amount to detention, such as to attract the remedy of habeas corpus and an obligation to land the persons concerned on the Australian mainland. The case arose out of the rescue by the Norwegian-registered vessel, the *MV Tampa*, of some 433 asylum seekers in distress at sea. The rescue was carried out at the request of the Australian coastguard, but admission to the Australian territory of Christmas Island and disembarkation of those rescued were refused. The vessel entered Australian territorial waters and refused to leave because of the condition of the passengers and safety concerns. The Australian Government sent troops to take control of the ship and its passengers, and a deal was subsequently struck with Nauru and New Zealand, which undertook to receive those rescued and to determine whether all or any of them were entitled to refugee status.

Applications were filed claiming, among others, that those rescued were being unlawfully detained by the government, and seeking writs of habeas corpus. The writs were granted, release was ordered to the mainland, and the Minister appealed. On appeal, French J held that there was no ‘restraint’ attributable to the Australian Government that might be subject to habeas corpus. The actions of the Government had been incidental to preventing the rescued from landing on Australian territory, ‘where they had no right to go’.

115 *Refugee Council of New Zealand Inc. and the Human Rights Foundation of Aotearoa New Zealand Inc. and D. v. Attorney-General*, Case No. M1881-AS01, interim judgment of 31 May 2002 and supplementary judgment of 27 June 2002.

116 *Ibid.*, supplementary judgment, paras. 125–6.

117 *Ibid.*, supplementary judgment, para. 203.

118 See above n. 65.



213. . . . Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth. The presence of . . . troops . . . did not itself or in combination with other factors constitute a detention. It was incidental to the objective of preventing a landing and maintaining as well the security of the ship. It also served the incidental purpose of providing medicine and food to the rescuees. The Nauru/NZ arrangements of themselves provided the only practical exit from the situation. Those arrangements did not constitute a restraint upon freedom attributable to the Commonwealth given the fact that the Captain of the *Tampa* would not sail out of Australia while the rescuees were on board.

Chief Justice Black dissented. On the issue of detention, Black CJ drew on authority to show that ‘actual detention and complete loss of freedom’ is not necessary to found the issue of the writ of habeas corpus (paragraph 69). Furthermore, whether a detainee had a right to enter was not relevant to the issue, which was to be answered in light of whether there were reasonable means of egress open to the rescued people such that detention should not be held to exist (paragraph 79). In his opinion, ‘viewed as a practical, realistic matter, the rescued people were unable to leave the ship that rescued them’ (paragraph 80). Moreover, whether the Australian Government was liable required taking account of the fact that ‘the Commonwealth acted within a factual framework that involved the known intention of the captain of the *MV Tampa* to proceed to Christmas Island . . . and his view that he would not take his ship out of Australian waters while the rescued people were on board’.

From an international law perspective, the ship and its crew and passengers were within the jurisdiction of Australia and under the control of agents of the State. The only factor which effectively brought about the end of such control was the offer by Nauru and New Zealand to disembark those rescued, and its subsequent implementation. Absent this or another international solution, those rescued would have likely remained in the custody of the Australian State.

## VII. Conclusions regarding Article 31(2)

In summary, the following conclusions regarding Article 31(2) can be drawn:

1. Article 14 of the Universal Declaration of Human Rights declares the right of everyone to seek asylum from persecution, and the fundamental principle of *non-refoulement* requires that States not return refugees to territories where their lives or freedom may be endangered. Yet between asylum and *non-refoulement* stands a continuing practice in many parts of the world of imposing restrictions on the freedom of movement of refugees

and asylum seekers, often indefinitely and without regard to their special situation or to the need to find durable solutions to their plight.

2. For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied administratively, and those ordered or applied judicially. The power of the State to impose a restriction, including detention, must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means.
3. The purpose of restrictions on freedom of movement in the refugee context may differ, depending on whether States face a mass influx or are dealing with asylum seekers in individual asylum systems. Restrictions on movement must not be imposed unlawfully and arbitrarily, but should be necessary and be applied only on an individual basis on grounds prescribed by law and in accordance with international human rights law.
4. The detention of refugees and asylum seekers is an exceptional measure; as such, it should be applied on an individual basis, where it has been determined by the appropriate authority to be necessary in light of the circumstances of the case, on the basis of criteria established by law, in accordance with international refugee and human rights law.
5. Entry in search of refuge and protection should not be considered an unlawful act; refugees ought not to be penalized solely by reason of such entry, or because, in need of refuge and protection, they remain illegally in a country.
6. There is a qualitative difference between detention and other restrictions on freedom of movement, even if only a matter of degree and intensity, and many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint.
7. The balance of interests requires that alternatives to detention should always be fully explored, such as fair, efficient, and expeditious procedures for the resolution of claims. In certain situations, it is also the responsibility of the international community of States, working together with UNHCR, to contribute to the solution of refugee problems, thereby removing any basis for continued detention.
8. In addition, mechanisms including reporting and residency requirements, the provision of a guarantor or security deposits or bonds, community supervision, or open centres with hostel-like accommodation already in use in many States, should be more fully explored, including with the involvement of civil society.
9. Taking account of the principle of the best interests of the child, States should not generally detain asylum-seeking children, since it affects them both emotionally and developmentally. Appropriate alternatives to detention such as guarantor requirements, supervised group accommodation,

or quality extra-familial care services through fostering or residential care arrangements, should be fully explored.

10. Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and of establishing their claim to asylum should be minimized. In particular, detention should not be extended for the purposes of punishment, or maintained where refugee status procedures are protracted.
11. Apart from such initial periods of detention, refugees and asylum seekers should not be detained unless *necessary* for the reasons outlined in Executive Committee Conclusion No. 44, in particular for the protection of national security and public order (e.g. risk of absconding).
12. The rules and standards of international law and the responsibilities of the State apply also within airports and other international or transit zones.
13. Procedures for the determination of asylum or refugee status, or for determining that effective protection already exists, are an important element in ensuring that refugees are not subject to arbitrary detention. States should use their best endeavours to provide fair and expeditious procedures, and should ensure that the principle of *non-refoulement* is scrupulously observed.
14. In all cases, detained refugees and asylum seekers should be able to obtain review of the legality and the necessity of detention. They should be advised of their legal rights, have access to counsel and to national courts and tribunals, and be enabled to contact UNHCR. Appropriate procedures should be instituted to ensure that UNHCR is advised of all cases of detained refugees. Provisional liberty, parole, or release on bail or other guarantees should be available, without discrimination by reason of a detainee's status as refugee or asylum seeker.
15. Any detention should be limited to a period reasonably necessary to bring about the purpose for which the refugee or asylum seeker has been detained, taking into account the State's international legal obligations in regard to standards of treatment, including the prohibition on cruel, inhuman or degrading treatment, the special protection due to the family and to children (e.g. under the Convention on the Rights of the Child), and the general recognition given to basic procedural rights and guarantees.
16. In no case should refugees or asylum seekers be detained for any reason of deterrence.
17. Refugees and asylum seekers should not be detained on the ground of their national, ethnic, racial, or religious origins.
18. States should ensure that refugees and asylum seekers who are lawfully detained are treated in accordance with international standards. They should also not be located in areas or facilities where their physical safety and well-being are endangered; the use of prisons should be

avoided. Civil society should be involved in monitoring the conditions of detention.

19. Minors, women, stateless persons, and other vulnerable groups of refugees and asylum seekers should benefit from the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers. Families and children, in particular, should be treated in accordance with international standards, and children under eighteen ought never to be detained. Families should in principle not be detained; where this is the case, they should not be separated.
20. Detention is never a solution to the movements of refugees and asylum seekers. It is the responsibility of States and of UNHCR to find permanent solutions to the problems of refugees; the achievement of this goal requires cooperation between States and a readiness to share the responsibilities.

### Annex 3.1 Incorporation of Article 31 of the 1951 Convention into municipal law: selected legislation<sup>119</sup>

#### 1. Austria

##### **Federal Law Concerning the Granting of Asylum (1997 Asylum Act)**

Date of entry into force: 1 January 1998

Section 3: Entry and residence of aliens seeking protection

Article 17: Entry

(1) Aliens arriving via an airport or arriving directly (Article 31 of the Geneva Convention on Refugees) from their country of origin who file an asylum application or an asylum extension application at the time of the border control carried out at a frontier crossing point shall be brought before the Federal Asylum Agency unless they possess authorization to reside or their application is to be rejected by reason of *res judicata*.

(2) Aliens who otherwise file an asylum application or an asylum extension application at the time of a border control carried out at a frontier crossing point shall (unless their entry is permissible under Section 2 of the Aliens Act) be refused entry and informed that they have the possibility either of seeking protection from persecution in the country in which they are currently resident or of filing an application for asylum with the competent Austrian diplomatic or consular authority. If, however, such aliens request that their application for asylum be filed at the

<sup>119</sup> Sources: UNHCR *RefWorld* (CD-ROM, 8th edn, 1999); and other primary sources.

frontier, they shall be notified that in such event the asylum authorities will be involved in the decision concerning their entry and that they will be required to await the decision abroad. For the purpose of making an asylum application in such cases, they shall be provided by the border control authority with an application form and questionnaire drawn up in a language understandable to them (Article 16, paragraph (2)).

(3) Aliens who subsequently file an application for asylum with the border control authority by means of an application form and questionnaire shall be furnished with a certification of their application, which shall be worded in such a way that it can be used in the country in which they currently reside as proof of the decision which is still pending concerning their entry. Moreover, the border control authority shall make a written record of the content of the documents submitted to it and shall notify the alien of the date fixed for the final border control. The asylum application shall be forwarded to the Federal Asylum Agency without delay.

(4) Aliens who have filed an application for asylum in accordance with paragraph (3) above shall be permitted to enter Austria if the Federal Asylum Agency has informed the border control authorities that it is not unlikely that they will be granted asylum, in particular owing to the fact that their application is not to be rejected as being inadmissible or dismissed as being manifestly unfounded. If these requirements are not met, the border control authority shall notify the asylum seeker accordingly and shall inform him that he may request that his case be re-examined by the independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*); in such event, the Federal Asylum Review Board shall take the final decision concerning the asylum seeker's entry. If the asylum seeker's entry is not permitted, he shall be denied admittance.

(5) Decisions pursuant to paragraph (4) above shall be rendered within five working days following submission of the asylum application. Aliens who file an application for asylum may be denied admittance only after the matter has been dealt with by the Federal Asylum Agency, unless it is clear that their application is to be rejected by reason of *res judicata*.

...

#### Article 19: Provisional right of residence

(1) Asylum seekers who are in the federal territory, even if in connection with their appearance before the Federal Asylum Agency after arriving via an airport or after arriving directly from their country of origin (Article 17, paragraph (1)), shall be provisionally entitled to reside unless their application is to be rejected by reason of *res judicata*. Asylum seekers brought before the Federal Asylum Agency may, however, be required, as an expulsion security measure, to remain at a specific place in the border control area or within the area of the Federal Asylum Agency during the week following the border control; such asylum seekers shall nevertheless be entitled to leave the country at any time.

## 2.      **Belize**

### **Refugees Act, 1991**

Date of entry into force: 24 August 1991 [official text]

#### 10. Saving in respect of illegal entry by refugees

(1) Notwithstanding the provisions of the Immigration Act, a person or any member of his family shall be deemed not to have committed the offence of illegal entry under that Act or any regulations made thereunder:

- (a) if such person applies in terms of Section 8 for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or
- (b) if such person has become a recognised refugee.

(2) An immigration officer or a police officer who is apprised of facts indicating that a person in Belize may be eligible, and intends to apply, for recognition of his status as a refugee pursuant to Section 8 shall refer that person to the Refugees Office.

## 3.      **Canada**

### **Immigration and Refugee Protection Act**

Royal Assent: 1 November 2001<sup>120</sup>

#### Division 6: Detention and release

##### Immigration Division

54. The Immigration Division is the competent Division of the Board with respect to the review of reasons for detention under this Division.

##### Arrest and detention with warrant

55. (1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,

- (a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an

<sup>120</sup> Full text available on <http://www.parl.gc.ca/PDF/37/1/parlbus/chambus/house/bills/government/C-11.4.pdf>.

admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or

- (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

(3) A permanent resident or a foreign national may, on entry into Canada, be detained if an officer,

- (a) considers it necessary to do so in order for the examination to be completed; or
- (b) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights.

(4) If a permanent resident or a foreign national is taken into detention, an officer shall without delay give notice to the Immigration Division.

#### Release – Officer

56. An officer may order the release from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

#### Review of detention

57. (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

(3) In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.

#### Release – Immigration Division

58 (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

- (a) they are a danger to the public;
- (b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

- (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or
- (d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

...

#### Minor children

60. For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

#### Regulations

61. The regulations may provide for the application of this Division, and may include provisions respecting

- (a) grounds for and conditions and criteria with respect to the release of persons from detention;
- (b) factors to be considered by an officer or the Immigration Division; and
- (c) special considerations that may apply in relation to the detention of minor children.

...

#### Part 3 Enforcement

##### Human Smuggling and Trafficking

##### Organizing entry into Canada

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.



(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

- (a) on conviction on indictment
  - (i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or
  - (ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and
- (b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

#### Offence – trafficking in persons

118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

(2) For the purpose of subsection (1), ‘organize’, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

#### Disembarking persons at sea

119. A person shall not disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act.

#### Penalties

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

#### Aggravating factors

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

- (a) bodily harm or death occurred during the commission of the offence;
- (b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;

- (c) the commission of the offence was for profit, whether or not any profit was realized; and
- (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

(2) For the purposes of paragraph (1)(b), ‘criminal organization’ means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

### Offences Related to Documents

#### Documents

122. (1) No person shall, in order to contravene this Act,

- (a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person’s identity;
- (b) use such a document, including for the purpose of entering or remaining in Canada; or
- (c) import, export or deal in such a document.

(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

#### Penalty

123. (1) Every person who contravenes

- (a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and
- (b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.

(2) The court, in determining the penalty to be imposed, shall take into account whether

- (a) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121(2); and

- (b) the commission of the offence was for profit, whether or not any profit was realized.

...

#### Counselling misrepresentation

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

#### Misrepresentation

127. No person shall knowingly

- (a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
- (b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or
- (c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

...

#### Prosecution of offences – Deferral

133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section[s] 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

#### Defence – Incorporation by reference

134. No person may be found guilty of an offence or subjected to a penalty for the contravention of a provision of a regulation that incorporates material by reference, unless it is proved that, at the time of the alleged contravention,

- (a) the material was reasonably accessible to the person;
- (b) reasonable steps had been taken to ensure that the material was accessible to persons likely to be affected by the regulation; or

- (c) the material had been published in the Canada Gazette.

#### **4. Finland**

##### **Aliens' Act (378/91)**

Date of entry into force: 1 March 1991.

*Note:* This is an unofficial consolidated translation. The Act, No. 378/1991, was passed in Helsinki on 22 February 1991. The amendments included here are the following Acts on Amending the Aliens' Act, Nos. 639/1993, 28 June 1993; 640/1993, 28 June 1993; 154/1995, 3 February 1995; 606/1997, 19 June 1997; 1183/1997, 31 October 1997; and 1269/1997, 19 December 1997.

##### Article 64b (28.6.1993/639) Arrangement of Illegal Entry

Whosoever in order to obtain financial benefit for himself or another

- (1) brings or attempts to bring an alien into Finland, aware that the said alien lacks the passport, visa or residence permit required for entry,
- (2) arranges or provides transport for the alien referred to in the subparagraph above to Finland, or
- (3) surrenders to another person a false or counterfeit passport, visa or residence permit for use in conjunction with entry,

shall be fined or sentenced to imprisonment for a maximum of two years for arrangement of illegal entry.

A charge of arrangement of illegal entry need not be brought or punishment put into effect if the act may be considered pardonable, taking into account the circumstances leading to the crime and the intent of the perpetrator. In assessing the pardonability of the crime, particular attention must be given to the motives of the perpetrator and to the conditions affecting the security of the alien in his country of origin or country of habitual residence.

#### **5. Ghana**

##### **Refugee Law, 1992 (PNDCL 3305D)**

Date of entry into force: 1992.

*Note:* This is the official text.

##### 2. Illegal entry or presence in Ghana of a refugee

Notwithstanding any provision of the Aliens Act, 1953 (Act 160) but subject to the provisions of this Law, a person claiming to be a refugee within the meaning of this Law, who illegally enters Ghana or is illegally present in Ghana shall not—

- (a) be declared a prohibited immigrant;
- (b) be detained; or
- (c) be imprisoned or penalised in any other manner merely by reason of his illegal entry or presence pending the determination of his application for refugee status.

## 6. Lesotho

### Refugee Act 1983

Date of entry into force: 15 January 1985.

*Note:* This is the official text as published in Supplement No. 6 to Gazette No. 58, 9 December 1983. The date of entry into force was fixed by the Minister of the Interior in the Refugee Act 1983 (Commencement) Notice, published in Supplement No. 3 to Gazette No. 14, 8 March 1984.

#### 9. Illegal entry or presence

(1) Subject to Section 7, and notwithstanding anything contained in the Aliens Control Act, 1966, a person claiming to be a refugee within the meaning of Section 3(1), who has illegally entered or is illegally present in Lesotho shall not,

- (a) be declared a prohibited immigrant;
- (b) be detained; or
- (c) be imprisoned or penalised in any other way,

only by reason of his illegal entry or presence pending the determination of his application for recognition as a refugee under Section 7.

(2) A person to whom sub-section (1) applies shall report to the nearest immigration officer or other authorised officer within fourteen days from the date of his entry and may apply for recognition as a refugee: provided that where a person is illegally present in the country by reason of expiry of his visa, he shall not be denied the opportunity to apply for recognition of his refugee status merely on the grounds of his illegal presence.

(3) Where a person to whom this section applies,

- (a) fails to report to the nearest authorised officer in accordance with sub-section (2); and
- (b) is subsequently recognised as a refugee,

his presence in Lesotho shall be lawful, unless there are grounds to warrant his expulsion pursuant to Section 12.

(4) Where an application made under sub-section (2) is rejected, the applicant shall be granted reasonable time in which to seek legal admission to another country.

## **7.      Liberia**

### **Refugee Act 1993**

Date of entry into force: 19 January 1994.

*Note:* This is the official text. This Act was approved on 1 November 1993.

Section 9: Cessation or stay of proceedings in respect of illegal entry by refugees and protected persons

Notwithstanding the provisions of the Immigration Act, or any other relevant law, no proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful entry into or unlawful presence within Liberia

- (a) if such person applies in terms of section seven for recognition of his status as a refugee, until a decision has been made on the application and such person has had an opportunity to exhaust his right of appeal in terms of that section; or
- (b) if such person has become a recognized refugee.

## **8.      Malawi**

### **Refugee Act 1989**

Date of entry into force: 8 May 1989.

*Note:* This is the official text.

10. Prohibition of expulsion on return of refugees

(1) A refugee shall not be expelled or returned to the borders of a country where his life or freedom will be threatened on account of—

- (a) his race, religion, nationality or membership of a particular social group or political opinion; or
- (b) external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of that country.

(2) A person claiming to be a refugee shall be permitted to enter and remain in Malawi for such period as the Committee may require to process his application for refugee status.

(3) A person who presents himself to a competent officer at a border and applies for admission into Malawi for the purpose of proceeding to another country where he intends to seek asylum as a refugee shall be permitted entry in Malawi upon such conditions as may be determined by the Committee either generally or specially.

(4) A person who has illegally entered Malawi for the purpose of seeking asylum as a refugee shall present himself to a competent officer within twenty-four hours of his entry or within such longer period as the competent officer may consider acceptable in the circumstances and such person shall not be detained, imprisoned, declared a prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

(5) A person who has legally entered Malawi and wishes to remain in Malawi on the ground that he is a refugee shall not be deported from Malawi unless and until he has found a third country of refuge willing to admit him.

(6) The benefit of this section shall not be claimable by a person in respect of whom there are reasonable grounds for regarding him or any aspect of the matter as a danger to the security of Malawi or who, having been convicted of a serious crime, constitutes a real danger to the community of Malawi.

## 9. Mozambique

### **Act No. 21/91 of 31 December 1991 (Refugee Act)**

Date of entry into force: 31 December 1991.

*Note:* This is an unofficial translation.

#### Article 11 [Offences connected with illegal entry]

(1) Where any criminal or administrative offence directly connected with illegal entry into the Republic of Mozambique has been committed by the petitioner and his family members and has given rise to criminal or administrative proceedings, any such proceedings shall be suspended immediately upon the submission of the petition.

(2) If the ruling is in favour of the grant of asylum, the suspended proceedings shall be filed, provided that the offence or offences committed were determined by the same facts as those which warranted the grant of the petition for asylum.

### **Directive of 4 December 1986: General principles to be observed in according refugee status**

*Note:* This is an unofficial translation.

#### Offences arising in connection with illegal entry

(a) Where criminal or administrative offences related to illegal entry into the People's Republic of Mozambique may have been committed by the applicant and members of his family and criminal or administrative proceedings have been instituted, the proceedings shall be suspended when the application is submitted,

particularly in regard to the absence of identification documents for the applicant and the members of his family;

(b) If asylum is granted, the proceedings shall be set aside on the grounds that the offence or offences committed are the consequence of the circumstances justifying the granting of asylum;

(c) For the purposes of the preceding sub-paragraph, the Director of the National Directorate of Migration shall without delay inform the body or bodies which instituted the criminal or other proceedings of the granting of asylum.

## **10.      Nigeria**

### **National Commission for Refugees, etc. Decree 1989**

Date of entry into force: 29 December 1989.

*Note:* This is the official text as published in the Official Gazette, No. 75, vol. 76, 29 December 1989.

10. Cessation of stay of proceedings in respect of illegal entry by refugees and protected persons

Notwithstanding the provisions of the Customs and Excise Management Act 1958, as amended, no proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful entry into or unlawful presence within Nigeria—

- (a) if such person applies under section 8 of this Decree for the grant of a refugee status, until a decision has been made on the application and, where appropriate, until such person has had an opportunity of exhausting his right of appeal under that section; or
- (b) if such person has been granted refugee status.

## **11.      Switzerland**

### **Loi sur l'asile/Law on Asylum**

Date of entry into force: 1 March 1988.

Article 23(3)

Whoever takes refuge in Switzerland is not punishable if the manner and the seriousness of the persecution to which he is exposed justifies illegal crossing of the frontier; whoever assists him is equally not punishable if his motives are honourable. [Translation]



## 12. Turkmenistan

### Law on Refugees 1997

Date of entry into force: 6 July 1997.

*Note:* This is an unofficial translation. The original law was adopted on 12 June 1997 and published in the Official Gazette on 26 June 1997.

#### Article 3 Guarantees of a refugee's rights

A refugee is free from the responsibility for the illegal entry or illegal stay in the territory of Turkmenistan, if, on arriving directly from the territory where his life or freedom was threatened by danger, specified in Article 1 of this Law, he himself comes immediately to the representatives of the government bodies of Turkmenistan.

A refugee cannot be returned against his will to the country he left for the reasons in Article 1 of this Law.

Decisions and actions of the government and administration bodies, the institutions of the local self-government and officials infringing upon a refugee's rights established by the legislation of Turkmenistan may be appealed against to the higher bodies or the court.

## 13. United Kingdom

### Immigration and Asylum Act 1999

Date of enactment: 11 November 1999

#### Section 31 Defences based on Article 31(1) of the Refugee Convention

(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—

- (a) presented himself to the authorities in the United Kingdom without delay;
- (b) showed good cause for his illegal entry or presence; and
- (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.

(3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under—

- (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
- (b) section 24A of the 1971 [Immigration] Act (deception); or
- (c) section 26(1)(d) of the 1971 Act (falsification of documents).

(4) In Scotland, the offences to which this section applies are those—

- (a) of fraud,
- (b) of uttering a forged document,
- (c) under section 24A of the 1971 Act (deception), or
- (d) under section 26(1)(d) of the 1971 Act (falsification of documents),

and any attempt to commit any of those offences.

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) ‘Refugee’ has the same meaning as it has for the purposes of the Refugee Convention.

(7) If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is.

(8) A person who—

- (a) was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but
- (b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1), may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(9) A person who—

- (a) was convicted in Scotland of an offence to which this section applies before the commencement of this section, but
- (b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1), may apply to the Scottish Criminal Cases Review Commission with a view to his case being referred to the High Court of Justiciary by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(10) The Secretary of State may by order amend (a) subsection (3), or (b) subsection (4), by adding offences to those for the time being listed there.

(11) Before making an order under subsection (10)(b), the Secretary of State must consult the Scottish Ministers.

## 14. United States

### 8 Code of Federal Regulations<sup>121</sup>

8 USC 1101, 1103, and 1324c; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 104-34, 110 Stat. 1321. Updated to 3 April 2002.

#### Section 270.2 Enforcement procedures

(a) *Procedures for the filing of complaints.* Any person or entity having knowledge of a violation or potential violation of section 274C of the [Immigration and Nationality] Act [as amended] may submit a signed, written complaint to the [Immigration and Naturalization] Service office having jurisdiction over the business or residence of the potential violator or the location where the violation occurred. The signed, written complaint must contain sufficient information to identify both the complainant and the alleged violator, including their names and addresses. The complaint should also contain detailed factual allegations relating to the potential violation including the date, time and place of the alleged violation and the specific act or conduct alleged to constitute a violation of the Act. Written complaints may be delivered either by mail to the appropriate Service office or by personally appearing before any immigration officer at a Service office.

(b) *Investigation.* When the Service receives complaints from a third party in accordance with paragraph (a) of this section, it shall investigate only those complaints which, on their face, have a substantial probability of validity. The Service may also conduct investigations for violations on its own initiative, and without having received a written complaint. If it is determined after investigation that the person or entity has violated section 274C of the Act, the Service may issue and serve upon the alleged violator a Notice of Intent to Fine.

(c) *Issuance of a subpoena.* Service officers shall have reasonable access to examine any relevant evidence of any person or entity being investigated. The Service may issue subpoenas pursuant to its authority under sections 235(a) and 287 of the Act, in accordance with the procedures set forth in 287.4 of this chapter.

(d) *Notice of Intent to Fine.* The proceeding to assess administrative penalties under section 274C of the Act is commenced when the Service issues a Notice of Intent to Fine. Service of this notice shall be accomplished by personal service pursuant to 103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt. The person or entity identified in the Notice of Intent to Fine shall be known as the respondent. The Notice

121 Available on <http://www.ins.usdoj.gov/graphics/lawsregs/8cfr.htm>.

of Intent to Fine may be issued by an officer defined in 242.1 of this chapter or by an INS port director designated by his or her district director.

(e) *Contents of the Notice of Intent to Fine*

- (1) The Notice of Intent to Fine shall contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the monetary amount of the penalty the Service intends to impose.
- (2) The Notice of Intent to Fine shall provide the following advisals to the respondent:
  - (i) That the person or entity has the right to representation by counsel of his or her own choice at no expense to the government;
  - (ii) That any statement given may be used against the person or entity;
  - (iii) That the person or entity has the right to request a hearing before an administrative law judge pursuant to 5 USC 554–557, and that such request must be filed with INS within 60 days from the service of the Notice of Intent to Fine; and
  - (iv) That if a written request for a hearing is not timely filed, the Service will issue a final order from which there is no appeal.

(f) *Request for hearing before an administrative law judge.* If a respondent contests the issuance of a Notice of Intent to Fine, the respondent must file with the INS, within 60 days of the Notice of Intent to Fine, a written request for a hearing before an administrative law judge. Any written request for a hearing submitted in a foreign language must be accompanied by an English language translation. A request for hearing is deemed filed when it is either received by the Service office designated in the Notice of Intent to Fine, or addressed to such office, stamped with the proper postage, and postmarked within the 60-day period. In computing the 60-day period prescribed by this section, the day of service of the Notice of Intent to Fine shall not be included. In the request for a hearing, the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine. A respondent may waive the 60-day period in which to request a hearing before an administrative law judge and ask that the INS issue a final order from which there is no appeal. Prior to execution of the waiver, a respondent who is not a United States citizen will be advised that a waiver of a section 274C hearing will result in the issuance of a final order and that the respondent will be excludable and/or deportable from the United States pursuant to the Act.

(g) *Failure to file a request for hearing.* If the respondent does not file a written request for a hearing within 60 days of service of the Notice of Intent to Fine, the INS shall issue a final order from which there shall be no appeal.

(h) *Issuance of the final order.* A final order may be issued by an officer defined in 242.1 of this chapter, by an INS port director designated by his or her district director, or by the Director of the INS National Fines Office.

(i) *Service of the final order*

- (1) *Generally.* Service of the final order shall be accomplished by personal service pursuant to section 103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt.
- (2) *Alternative provisions for service in a foreign country.* When service is to be effected upon a party in a foreign country, it is sufficient if service of the final order is made:
  - (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
  - (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or
  - (iii) when applicable, pursuant to 103.5a(a)(2) of this chapter.
- (3) Service is effective upon receipt of the final order. Proof of service may be made as prescribed by the law of the foreign country, or, when service is pursuant to 103.5a(a)(2) of this chapter, as evidenced by the certificate of service or the certified mail return receipt.

(j) *Declination to file charges for document fraud committed by refugees at the time of entry.*

The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence. Other acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties.

## 15. Zimbabwe

### Refugee Act, 1983

Date of entry into force: 1983.

*Note:* This is the official text. This document includes only selected provisions.

#### 9. Cessation or stay of proceedings in respect of illegal entry by refugees and protected persons

Notwithstanding the provisions of the Immigration Act, 1979 (No. 18 of 1979), or section 16, subsection (1) of section 22, subsection (1) of section 23, subsection (1)

of section 24 or subsection (1) of section 25 of the Customs and Excise Act [Chapter 177], no proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful entry into or unlawful presence within Zimbabwe—

- (a) if such person applies in terms of section seven for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or
- (b) if such person has become a recognized refugee.

## **16.      OAU**

### **Guidelines for National Refugee Legislation and Commentary**

Adopted by OAU/UNHCR Working Group on Arusha Follow-up Second Meetings, Geneva, 4–5 December 1980

#### **Part IV: Prohibition of declaration of prohibited immigrant**

(1) No person who has illegally entered or is illegally present in the country in which he seeks asylum as a refugee shall be declared a prohibited immigrant, detained, imprisoned or penalized in any other way merely by reason of his illegal entry or presence, pending an examination of his application for refugee status.

(2) A person who has illegally entered or is illegally present in the country in which he seeks asylum as a refugee shall present himself to the competent authorities without undue delay.

### 3.2 Summary Conclusions: Article 31 of the 1951 Convention

*Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001*



The discussion during the first day of the Geneva expert roundtable was based on a background paper by Guy Goodwin-Gill, Professor of International Refugee Law at the University of Oxford, entitled ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection’. In addition, roundtable participants were provided with written contributions from Michel Combarrous, International Association of Refugee Law Judges (IARLJ), Frankie Jenkins, Human Rights Committee of South Africa, as well as the Refugee and Immigration Legal Centre in Melbourne, Australia. Participants included twenty-eight experts from eighteen countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Rachel Brett from the Quaker United Nations Office in Geneva moderated the discussion.

The round table reviewed the extensive practice of States in regard to refugees and asylum seekers entering or remaining illegally, many of whom fall within the terms of Article 31 of the 1951 Convention. It took account of the origins of this provision in the debates in the United Nations in 1950, and in the Conference of Plenipotentiaries held in Geneva in 1951. It noted the intention of the drafters of the Convention to lay down, among others, a principle of immunity from penalties for refugees who, ‘coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present . . . without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

The following summary conclusions do not necessarily represent the individual views of participants or of UNHCR, but reflect broadly the understandings emerging from the discussion.

## General considerations

1. Article 31 of the 1951 Convention Relating to the Status of Refugees presents particular challenges to States seeking to manage asylum applications effectively, while ensuring that specific international obligations are fully implemented.
2. The interpretation and application of Article 31 requires that account be taken both of the developing factual circumstances affecting the movements of refugees and asylum seekers, and also of developments in international law, including the impact of regional and international human rights instruments, the practice of treaty and other monitoring bodies, and the provisions of related treaties, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.<sup>1</sup>
3. It was recalled that the UNHCR Executive Committee had acknowledged that refugees will frequently have justifiable reasons for illegal entry or irregular movement, and that it had recommended appropriate standards of treatment in, among others, Conclusions Nos. 15, 22, 44, and 58.
4. It was also observed that for States Parties to the 1951 Convention and/or 1967 Protocol, Article 31 combines obligations of conduct and obligations of result.
5. Thus, Article 31(1) specifically obliges States not to impose penalties on refugees falling within its terms. Article 31(2) calls upon States not to apply to the movements of refugees within the scope of paragraph 1, restrictions other than those that are necessary, and only until their status is regularized locally or they secure admission to another country.
6. The effective implementation of these obligations requires concrete steps at the national level. In the light of experience and in view of the nature of the obligations laid down in Article 31, States should take the necessary steps to ensure that refugees and asylum seekers within its terms are not subject to penalties. Specifically, States should ensure that refugees benefiting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in the light of the applicable international law and standards.
7. In particular, while the relevant terms of Article 31 ('coming directly', 'without delay', 'penalties', 'good cause') must be applied at the national level, full account must always be taken of the circumstances of each

<sup>1</sup> Editorial note: UN doc. A/55/383, Nov. 2000.



individual case if international obligations are to be observed. It was further noted, on the basis of the practice of States, that these obligations are implemented most effectively where accountable national mechanisms are able to determine the applicability of Article 31, having regard to the rule of law and due process, including advice and representation.

8. Steps are also required to ensure that the results laid down in Article 31(2) are achieved. In particular, appropriate provision should be made at the national level to ensure that only such restrictions are applied as are necessary in the individual case, that they satisfy the other requirements of this Article, and that the relevant standards, in particular international human rights law, are taken into account.
9. The incorporation and elaboration of the standards of Article 31 in national legislation, including by providing judicial review in the case of detention, would be an important step for the promotion of compliance with Article 31 and related human rights provisions.

### **Specific considerations**

10. In relation to Article 31(1):
  - (a) Article 31(1) requires that refugees shall not be penalized solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country.
  - (b) Refugees are not required to have come directly from territories where their life or freedom was threatened.
  - (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country. The mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country.
  - (d) The intention of the asylum seeker to reach a particular country of destination, for instance for family reunification purposes, is a factor to be taken into account when assessing whether s/he transited through or stayed in another country.
  - (e) Having a well-founded fear of persecution is recognized in itself as 'good cause' for illegal entry. To 'come directly' from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal

entry. There may, in addition, be other factual circumstances which constitute 'good cause'.

- (f) 'Without delay' is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice. In this context it was acknowledged that refugees and asylum seekers have obligations arising out of Article 2 of the 1951 Convention.
  - (g) The effective implementation of Article 31 requires that it apply also to any person who claims to be in need of international protection; consequently, that person is presumptively entitled to receive the provisional benefit of the no penalties obligation in Article 31 until s/he is found not to be in need of international protection in a final decision following a fair procedure.
  - (h) The term 'penalties' includes, but is not necessarily limited to, prosecution, fine, and imprisonment.
  - (i) In principle, a carrier which brings in an 'undocumented' passenger who is subsequently determined to be in need of international protection should not be subject to penalties.
11. In relation to Article 31(2):
- (a) For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied administratively, and those ordered or applied judicially. The power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.
  - (b) The detention of refugees and asylum seekers is an exceptional measure and should only be applied in the individual case, where it has been determined by the appropriate authority to be necessary in light of the circumstances of the case and on the basis of criteria established by law in line with international refugee and human rights law. As such, it should not be applied unlawfully and arbitrarily and only where it is necessary for the reasons outlined in Executive Committee Conclusion No. 44, in particular for the protection of national security and public order (e.g. risk of absconding). National law and practice should take full account of the international obligations accepted by States, including through regional and universal human rights treaties.
  - (c) Refugees and asylum seekers should not be detained on the ground of their national, ethnic, racial, or religious origins, or for the purposes of deterrence.
  - (d) Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and of establishing the elements for their claim to asylum should be minimized. In particular, detention

- should not be extended for the purposes of punishment, or maintained where asylum procedures are protracted.
- (e) Detention beyond the initial period must be justified on the basis of a purpose indicated in 11(b) above.
  - (f) UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers provide important guidance. Families and children, in particular, should be treated in accordance with international standards and children under eighteen ought never to be detained. Families should in principle not be detained; where this is the case, they should not be separated.
  - (g) There is a qualitative difference between detention and other restrictions on freedom of movement. Many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint. Before resorting to detention, alternatives should always be considered in the individual case. Such alternatives include reporting and residency requirements, bonds, community supervision, or open centres. These may be explored with the involvement of civil society.
  - (h) Access to fair and expeditious procedures for the determination of refugee status, or for determining that effective protection already exists, is an important element in ensuring that refugees are not subject to arbitrary or prolonged detention.
  - (i) In terms of procedural safeguards, at a minimum, there should be a right to review the legality and the necessity of detention before an independent court or tribunal, in accordance with the rule of law and the principles of due process. Refugees and asylum seekers should be advised of their legal rights, have access to counsel and to national courts and tribunals, and be enabled to contact the Office of UNHCR.
  - (j) UNHCR should, upon request, be advised of, and allowed access to, all cases of detained refugees and asylum seekers.
  - (k) Where detention is deemed necessary, States should ensure that refugees and asylum seekers are treated in accordance with international standards. They should not be located in areas or facilities where their physical safety and well-being are endangered; the use of prisons should be avoided. Civil society should be involved in monitoring the conditions of detention.

### **Additional considerations**

12. Non-legal strategies and necessary follow-up are also critical. These include the preparation and dissemination of instructions to relevant levels of government and administration on the implementation of Article 31,

training, and capacity building. Particular attention should be given to ensuring that strategies and actions taken by States do not serve to exacerbate racist or xenophobic perceptions, behaviour, or attitudes.

13. States should maintain accurate records of all cases where refugees and asylum seekers are detained or where their movement is otherwise restricted, should publish statistical data of such detention and restrictions on movement, and should regularly inform UNHCR of cases of detained refugees and asylum seekers pursuant to their obligation under Article 35 of the Convention.

### 3.3 List of participants

*Expert roundtable, Geneva, Switzerland, 8–9 November 2001 (Article 31 and family unity)*

Kohki Abe, Kanagawa University, Yokohama, Japan  
T. Alexander Aleinikoff, Migration Policy Institute, Washington DC, United States  
Estelle Matilda Appiah, Attorney-General's Department, Accra, Ghana  
Lilia Dmitrievna Arestova, Government of the Russian Federation  
Rachel Brett, Quaker United Nations Office, Geneva, Switzerland  
Vincent Chetail, Graduate Institute of International Studies, Geneva, Switzerland  
Judge Sebastian De Groot, International Association of Refugee Law Judges, the Netherlands  
Shirley DeWolf, Southern African Churches in Ministry with Uprooted People, Mutare, Zimbabwe  
Istvan Dobo, Government of Hungary  
Rafael Garcia Gozalo, Government of Spain  
Guy S. Goodwin-Gill, University of Oxford, United Kingdom  
Vera Gowlland, Graduate Institute of International Studies, Geneva, Switzerland  
Colin Harvey, University of Leeds, United Kingdom  
Holger Hoffmann, Legal Practitioner, Bremen, Germany  
Robert Illingworth, Government of Australia  
Kate Jastram, Legal Practitioner, United States  
Ninette Kelley, Legal Practitioner, Canada  
Giovanni Kojanec, University 'La Sapienza', Rome, Italy  
Vitit Muntarbhorn, Chulalongkorn University, Bangkok, Thailand  
Dobromira Naydenova, Bulgarian Helsinki Committee, Sofia, Bulgaria  
Peter Nygh, Australia  
Judge Mark Ockelton, International Association of Refugee Law Judges, United Kingdom  
Thierry Schreyer, International Committee of the Red Cross, Geneva, Switzerland  
Chris Sidoti, Human Rights Council, New South Wales, Australia  
Nikos Sitaropoulos, National Commission for Human Rights, Athens, Greece  
Annikki Vanamo-Alho, Government of Finland  
Daniel Warner, Graduate Institute of International Studies, Geneva, Switzerland  
Wendy Young, Women's Commission on Refugee Women and Children, United States

For UNHCR, Erika Feller, Wilbert Van Hövell, Volker Türk, Diane Goodman (family unity discussion only), Walpurga Englbrecht (Article 31 discussion only), Nathalie Karsenty (Article 31 discussion only), Alice Edwards, and Eve Lester (NGO liaison to the Global Consultations)

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## 4.1 Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’

T. ALEXANDER ALEINIKOFF\*

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\* This paper benefited from the thoughtful comments of participants at a roundtable discussion held in San Remo, Italy, on 6–8 Sept. 2001, as part of UNHCR’s Global Consultations on International Protection.

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## I. Introduction

In recent years, the number and variety of refugee claims based on the 'membership of a particular social group' ground set out in the 1951 Convention Relating to the Status of Refugees<sup>1</sup> have increased dramatically. The social group cases have been pushing the boundaries of refugee law, raising issues such as domestic abuse,<sup>2</sup> homosexuality,<sup>3</sup> coercive family planning policies,<sup>4</sup> female genital mutilation (FGM),<sup>5</sup> and discrimination against the disabled.<sup>6</sup>

Invocation of the particular social group ground is not surprising. Its potential breadth makes it a plausible vehicle for refugee claims that do not easily fall under the other grounds set out in Article 1A(2) of the 1951 Convention. This reads:

... [T]he term 'refugee' shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...

Furthermore, since the usual materials consulted in the interpretation of international agreements provide little assistance on the question of membership of a particular social group, adjudicators have adopted a range of (often conflicting)

1 189 UNTS 150.

2 *Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144, also reprinted in 11 *International Journal of Refugee Law*, 1999, p. 496 (hereinafter '*Islam and Shah*').

3 See D. McGhee, 'Persecution and Social Group Status: Homosexual Refugees in the 1990s', 14 *Journal of Refugee Studies*, 2001, p. 20.

4 *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331 (hereinafter '*Applicant A.*').

5 *In Re Kasinga*, US Board of Immigration Appeals (BIA), Interim Decision No. 3278, 1996, 21 I. & N. Decisions 357 [1996].

6 A. Kanter and K. Dadey, 'The Right of Asylum for People with Disabilities', 73 *Temple Law Review*, 2000, p. 1117.



constructions of the Convention language.<sup>7</sup> Courts and administrative agencies have at times announced a standard that adequately resolves the case before them only later to conclude that the rule must be modified because of subsequent claims.

This paper provides a detailed analysis of the various legal approaches to the interpretation of the term ‘membership of a particular social group’ and to specific issues arising under the refugee definition. The analysis is guided by the underlying premise that a sensible interpretation of the term must be responsive to victims of persecution without so expanding the scope of the 1951 Convention as to impose upon States obligations to which they did not consent. In striking that delicate balance, it must be kept in mind that international refugee law bears a close relationship to international human rights law<sup>8</sup> – that refugees are persons whose human rights have been violated and who merit international protection.

This paper has seven sections. After this introduction, Section II briefly surveys the *travaux préparatoires* and UNHCR interpretations of the term ‘membership of a particular social group’. Section III undertakes a detailed examination of State jurisprudence in order to provide a basis for discussion of particular issues relating to the definition of membership of a particular social group. In Section IV, interpretive issues that have been of concern to adjudicative bodies are discussed. The analysis of earlier sections paves the way for the discussion in Section V, which proposes an adjudicatory standard for cases invoking membership of a particular social group as a ground for refugee status. Section VI briefly considers an issue that is frequently important in social group cases – the so-called ‘nexus’ requirement that persecution be ‘for reasons of’ one of the Convention grounds. The analysis is applied to several social group claims in Section VII. A concluding section summarizes the main points of the paper.

## II. International standards

### A. The 1951 Convention and the *travaux préparatoires*

As is well known, the term ‘membership of a particular social group’ was added near the end of the deliberations on the draft Convention. The *travaux* are particularly unhelpful as a guide to interpretation. All that is recorded is

<sup>7</sup> See McHugh J in *Applicant A.*, above n. 4, at 259:

Courts and jurists have taken widely differing views as to what constitutes ‘membership of a particular social group’ for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.

<sup>8</sup> Compare with K. Daley and N. Kelley, ‘Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence’, 12 *International Journal of Refugee Law*, 2000, p. 48.

the Swedish delegate's observation: '[E]xperience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.'<sup>9</sup> Accordingly, courts and scholars have generally turned to the term's association with the other Convention grounds – race, religion, nationality, and political opinion – for interpretive guidance. That is, they have sought to identify elements central to the other grounds (such as the 'immutability' or 'fundamentality' of the ground) and then to adopt an interpretation of particular social group consistent with the identified element. While this strategy may provide a limiting principle, it is not compelled by the Convention or other authoritative sources; it is possible that the term was adopted to cover an assortment of groups whose need for protection was based on circumstances distinct from those that provide the justification for inclusion under the other grounds.<sup>10</sup>

## B. UNHCR interpretations

### 1. *The Handbook*

The discussion of the term 'membership of a social group' in UNHCR's *Handbook*<sup>11</sup> is general and rather brief – reflecting, no doubt, the undeveloped nature of such claims at the time of the *Handbook*'s writing. It reads, in its entirety:

77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

9 UNGA, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at the Palais des Nations, Geneva, Tuesday 3 July 1951 at 10.30 a.m.', UN doc. A/CONF.2/SR.3, 19 Nov. 1951, at p. 14.

10 For example, State anti-discrimination principles may condemn classifications based on race, religion, age, disability, sexual orientation, and other characteristics on the grounds these forms of classification are 'unfair' – even if one can identify no single element common to all that accounts for the conclusion of 'unfairness'.

11 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979, re-edited 1992) (hereinafter '*Handbook*').

## 2. *The position taken in court cases*

In a brief filed in *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*,<sup>12</sup> UNHCR submitted the following:

The UNHCR's position is as follows. Individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live may, in principle, constitute a 'particular social group' within the meaning of Article 1A(2) of the 1951 Convention. Such persons do not always constitute a 'particular social group'. In order to do so the values at stake must be of such a nature that the person concerned should not be required to renounce them.

...

'Particular social group' means a group of people who share some characteristic which distinguishes them from society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs or has values such that requiring them to renounce them would contravene their fundamental human rights, they may in principle be part of a particular social group made up of like-minded persons.

...

It is important to appreciate that UNHCR's position does not entail defining the particular social group by reference to the persecution suffered. Indeed, the UNHCR agrees with the conclusion of the Court of Appeal in the present cases that persecution alone cannot determine a group where none otherwise exists.

...

[I]t is not the *reaction* to the behaviour of such persons which is the touchstone defining the group. However, the reaction may provide evidence in a particular case that a particular group exists.

It should be noted that there is arguably some tension – although not necessarily an inconsistency – between the *Handbook's* language and the UNHCR brief submitted in the *Islam* and *Shah* appeal. The former is not keyed to the idea of a characteristic that is unchangeable or fundamental.

## 3. *Other guidance*

In its 1985 Conclusion on refugee women and international protection, UNHCR's Executive Committee noted:

<sup>12</sup> *Islam* and *Shah*, above n. 2.

States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of [the 1951 Convention].<sup>13</sup>

### III. State jurisprudence

The most detailed discussions of the ‘social group’ ground occur in cases in common law jurisdictions. Accordingly, primary attention will be paid here to decisions in Canada, Australia, the United Kingdom, the United States, and New Zealand, although the jurisprudence of other countries is also briefly considered. The cases display a number of approaches – even within the same jurisdiction, jurists frequently adopt conflicting interpretations of the 1951 Convention and domestic law. As will be summarized at the conclusion of the next section, however, it is possible to identify convergence among States on several issues. This section will also discuss ‘guidelines’ and other interpretive principles proposed or adopted by non-judicial bodies in the relevant States.

To a surprising degree, courts in the common law countries tend to read and analyze cases decided in other common law States. The courts of the United States provide an exception, relying almost exclusively on domestic cases.<sup>14</sup> Recent proposed regulations by the United States Immigration and Naturalization Service, however, take note of ‘social group’ cases decided by courts of other countries.<sup>15</sup>

#### A. Canada

The Supreme Court of Canada offered an important discussion of membership of a particular social group in *Canada (Attorney-General) v. Ward*.<sup>16</sup> The case involved the claim of a former member of the Irish National Liberation Army (INLA) who was sentenced to death by the INLA for assisting in the escape of hostages. Ward asserted that he would be persecuted if returned to Northern Ireland based on his membership of the INLA.

The Supreme Court rejected an interpretation of the membership of a particular social group ground that would render it a ‘safety net to prevent any possible

13 Executive Committee, Conclusion No. 39 (XXXVI), 1985, para. (k).

14 For a rare example of peering beyond US borders, see the BIA’s mention of *Islam* and *Shah*, above n. 2, in *Matter of R.A.*, BIA Interim Decision No. 3403, 11 June 1999.

15 See Department of Justice draft regulations on ‘particular social group’ (65 Fed. Reg. 76588-98), 7 Dec. 2000, below n. 55.

16 [1993] 2 SCR 689; (1993) 103 DLR (4th) 1 (hereinafter ‘*Ward*’).

gap in the other four categories'.<sup>17</sup> As La Forest J explained, such a broad reading would make the other Convention grounds superfluous. Seeking a limiting principle, La Forest J reasoned that the meaning of membership of a particular social group should take into account 'the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative'.<sup>18</sup> Accordingly, he defined membership of a particular social group as encompassing:

- (1) groups defined by an innate or unchangeable characteristic [e.g. by gender, linguistic background, sexual orientation];
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association [e.g. human rights activists]; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>19</sup>

Applying the test, the Court determined that Ward could not meet the Convention definition. His feared persecution was not based on former membership of the INLA, nor did the INLA itself constitute a 'particular social group'. Furthermore, Ward could not establish the requisite nexus between a social group and a well-founded fear of being persecuted. His membership of the INLA 'placed him in the circumstances that led to his fear, but the fear itself was based on his action, not his affiliation'.<sup>20</sup>

The *Ward* standard is frequently referred to as an 'immutability' test, but it plainly would recognize groups beyond those based on characteristics that are unchangeable. The second category includes voluntary associations based on characteristics that are fundamental to human dignity but perhaps changeable. One example used by the Court is human rights activists. It is further important to notice that what is identified as the basis for a social group in this category is not the

17 The Court identified this approach with the scholarship of, among others, I. Foighel, 'The Legal Status of the Boat-People', 48 *Nordisk Tidsskrift for International Relations*, 1993, p. 217; A. C. Helton, 'Persecution on Account of Membership of a Social Group as a Basis for Refugee Status', 15 *Columbia Human Rights Law Review*, 1983, p. 39; G. S. Goodwin-Gill, *The Refugee in International Law* (1st edn, Clarendon, Oxford, 1983), p. 30; M. Graves, 'From Definition to Exploration: Social Groups and Political Asylum Eligibility', 26 *San Diego Law Review*, 1989, p. 739. This seems to be an overly broad reading of Goodwin-Gill's interpretation. The second edition of Goodwin-Gill's *The Refugee in International Law* (Clarendon, Oxford, 1996) examines the *Ward* decision at pp. 360–2.

18 La Forest J here follows the approach of the US case, *Matter of Acosta* (described below, n. 45) and J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991).

19 *Ward*, above n. 16, (1993) 103 DLR (4th) at 33–4. The Court notes that the third category is included 'more because of historical intentions', but also comes within an anti-discrimination approach in that 'one's past is an immutable part of the person'.

20 *Ibid.*, p. 38. In another section of the opinion, the Court concluded that Ward might state a claim for refugee status based on his political opinion.

shared possession of a voluntarily assumed characteristic fundamental to human dignity; rather, it is the *voluntary association* of group members that it would be unfair to ask group members to forsake because the *association* – not the *characteristic* – is fundamental to their human dignity. The difference in practice between the two might be slight, because it is likely that adjudicators will conclude that persons have a right to associate with others based on characteristics fundamental to human dignity. For example, if the exercise of freedom of thought is a fundamental human right, then arguably persons should not be compelled to forego associations with like-minded persons. In other words, freedom of thought means more than the right to believe what one wants in the privacy of one's home; it includes the right to join with others who share the same views.

Because 'immutability' does not fully describe groups that would come within the *Ward* standards, the analysis will be labelled the 'protected characteristics' approach. This terminology embraces the groups defined by the *Ward* test and also signals that the analysis primarily looks at 'internal' factors – that is, group definition will be based primarily on innate characteristics shared by a group of persons, not on how the group is perceived in society.

Once it is recognized that the *Ward* test extends beyond immutable characteristics, however, conceptual problems emerge. What, for instance, is the underlying principle that unites the categories identified in *Ward*? It is sometimes asserted that the concept of 'discrimination' is the key. On this basis, it is unjust to discriminate against groups for characteristics which they cannot change or, based on human rights principles, should not be compelled to change, assuming here that compelling a person to forsake a voluntary association based on a characteristic fundamental to human dignity violates human rights. But if this is the justification, it cannot explain why groups must 'voluntarily associate' in order to receive protection. That is, it would seem equally unjust to discriminate against a group of persons who are a group because of a shared protected characteristic whether or not the group members know each other or choose to associate. An apt example would be persons who resist forced sterilization or abortion. From a human rights perspective, persons should not be compelled to be subjected to such procedures whether or not they have formed voluntary groups. *La Forest J* followed the logic of *Ward* in this manner in concluding that Chinese applicants resisting coercive family practices could constitute a particular social group.<sup>21</sup> But the reason that *Ward* does not go this far – and that other jurists have rejected *La Forest J*'s conclusion – is that such an interpretation risks expanding the social group ground to include all persons whose human rights might be violated.

21 See *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at 642–6. The majority in the case does not reach the same conclusion; and courts in other jurisdictions have rejected *La Forest J*'s reasoning. See the discussion under the subheading 'Social groups and human rights violations' below.

In sum, the ‘voluntary association’ test of *Ward*’s second category appears intended to ensure that the social group definition does not become a safety net. Accepting the limitation makes it difficult, however, to construct a coherent principle that underlies the *Ward* categories.

## B. Australia

The leading decision of the High Court of Australia, *Applicant A. v. Minister for Immigration and Ethnic Affairs*,<sup>22</sup> involved applicants who asserted fears of forced sterilization because of their non-acceptance of China’s ‘one-child’ policy. The court adopted what might be termed a ‘social perception’ or ‘ordinary meaning’ approach, that is, to be a ‘particular social group’, a group must share a common, uniting characteristic that sets its members apart in the society. As described by McHugh J, what distinguishes the members of a particular social group from other persons in their country ‘is a common attribute and a societal perception that they stand apart’.<sup>23</sup> To the same effect, Dawson J viewed a particular social group as ‘a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element, the element must unite them, making those who share it a cognizable group within their society.’<sup>24</sup>

The High Court made clear that its standard was not as inclusive as the ‘safety net’ approach advocated by some scholars. The analysis of *Applicant A.*, for example, would not reach ‘statistical’ groups that may share a demographic factor but neither recognize themselves as a group nor are perceived as a group in society. An example, drawn from United States jurisprudence, is an asserted class of ‘young, urban men subject to forced conscription and harassment in El Salvador’.<sup>25</sup>

Another limiting principle identified by the High Court is that the group not be defined solely by the persecution inflicted; that is, the ‘uniting factor’ could not be ‘a common fear of persecution’.<sup>26</sup> The rule is necessary to avoid tautological definitions of groups. As Dawson J notes: ‘There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons

22 See above n. 4. Claims arising out of China’s State family planning policies are common in other jurisdictions as well, as is described below in the text accompanying notes 162–4 under the sub-heading ‘Chinese coercive family practices’.

23 *Applicant A.*, (1997) 190 CLR 225 at 265–6. See also *ibid.*, p. 264: ‘[T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group . . . [The term particular social group] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.’

24 *Ibid.*, p. 241 (footnote omitted).

25 *Sanchez-Trujillo v. INS*, 801 F 2d 1571 (9th Circuit), 1986.

26 *Applicant A.*, (1997) 190 CLR 225 at 242 per Dawson J.

into a particular social group is their common fear of persecution.<sup>27</sup> In other jurisdictions, this well-established principle is described as requiring that the social group exist ‘*dehors* the persecution’.<sup>28</sup>

The analysis in *Applicant A.* stands in rather sharp contrast to the Canadian Supreme Court’s reasoning in *Ward*. The Australian High Court’s approach is not based on an analogy to anti-discrimination principles; it is more sociological. That is, it looks to external factors – namely, whether the group is perceived as distinct in society – rather than identifying some protected characteristic that defines the group (or a characteristic that group members should not be asked to change).

Frequently these standards will overlap. Both tests, for example, are likely to conclude that homosexuals and prior large landowners in communist States constitute particular social groups. Another example arose in a subsequent High Court case, *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*,<sup>29</sup> where the Australian-born applicant was the third child of a Chinese couple. The High Court found no error in the Refugee Review Tribunal’s conclusion that so-called ‘black children’ – children born outside the family planning policies – constituted a particular social group in China. That conclusion is justified under either the *Applicant A.* or the *Ward* standards because ‘black children’ are perceived and treated as a distinct group in China and because birth order is immutable.<sup>30</sup> At times, however, the two standards may produce different results in membership of a particular social group cases. Consider, for example, claims asserted by private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, or members of a labour union. According to the facts of the particular society, either might constitute a social group under the social perception approach; it would be far harder to reach such a conclusion under the protected characteristics approach.

In *Applicant A.*, the High Court did not sustain the claim. Arguably, the characteristic that united the claimed social group was the members’ assertion of their human right not to be subject to forced sterilization and their right to make fundamental choices about their family.<sup>31</sup> A majority of the Court concluded, however, that the asserted group was too disparate, representing simply a collection of persons located in China who objected to a general social policy.<sup>32</sup> According

27 *Ibid.*, p. 242. 28 *Islam and Shah*, above n. 2, p. 503.

29 *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, (2000) 170 ALR 553.

30 The central issue in *Chen Shi Hai* was not the social group definition, but rather whether the targeting of ‘black children’ constituted the application of general laws and hence was non-persecutory. The High Court rejected this reasoning, upholding the Refugee Review Tribunal’s finding that the harmful treatment accorded ‘black children’ rose to the level of persecution and is inflicted based on their membership of a particular social group, not based on their parent’s failure to obey family planning policies.

31 Alternatively, the group might be described without reference to human rights. See Brennan CJ in *Applicant A.*, above n. 4: ‘The characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic.’

32 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 247 per Dawson J; and at 269–70 per McHugh J.



to Dawson J, there was ‘no *social* attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular *social* group for Convention purposes’.<sup>33</sup> Furthermore, to recognize a class united solely by the abuse of human rights would permit the persecution to define the class.<sup>34</sup>

### C. United Kingdom

The recent joint decision by the House of Lords in *Islam* and *Shah*<sup>35</sup> considered the claims of two married Pakistani women who were subjected to serious physical abuse by their husbands and forced to leave their homes. The applicants further asserted that the State would either be unable or unwilling to prevent further abuse if they were returned to Pakistan.<sup>36</sup> The case is of major significance. It reaches important conclusions about gender-related asylum claims and the issue of non-State actors; and the judgment includes important discussion of the jurisprudence of other States. Furthermore, the careful reasoning of the House of Lords has attracted attention from adjudicators in other common law jurisdictions.<sup>37</sup>

Counsel for the women claimants urged that the relevant social group for the case should be defined as women in Pakistan accused of transgressing social mores who are unprotected by their husbands or other male relatives. UNHCR, as intervener, suggested a definition – consistent with Executive Committee Conclusion No. 39, quoted above – as ‘individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live’.<sup>38</sup>

33 *Ibid.*, p. 270.

34 See also *Minister for Immigration and Multicultural Affairs v. Khawar*, [2000] FCA 1130, 23 Aug. 2000 (applying *Applicant A.*, above n. 4, to a case involving a Pakistani woman beaten by her husband and the failure of the State to prevent or stop the abuse; ‘particular social group’ to be determined ‘according to the perceptions of the society in question’). An appeal against this ruling was later dismissed by the High Court: see *Minister for Immigration and Multicultural Affairs v. Khawar*, [2000] FCA 14, 11 April 2002.

35 *Islam* and *Shah*, above n. 2.

36 This paper will leave aside the ‘political opinion’ claim pressed in the *Islam* case.

37 The case has already received significant attention. See, e.g., G. S. Goodwin-Gill, ‘Judicial Reasoning and “Social Group” after *Islam* and *Shah*’, 11 *International Journal of Refugee Law*, 1999, p. 537; M. Vidal, “Membership of a Particular Social Group” and the Effect of *Islam* and *Shah*’, 11 *International Journal of Refugee Law*, 1999, p. 528.

38 See the quotation in the text above at n. 13. UNHCR’s position appears to ride two horses, perhaps hoping that one will cross the finishing line first. The statement quoted in the text above is placed in bold in the brief, and appears to state the overall approach. (The brief elsewhere notes that ‘[t]he distinguishing characteristic which defines the group consists in a shared set of values which are not shared by society at large or, conversely, a common decision to opt out of a set of values shared by the rest of society.’) Alternatively, the brief favourably cites, and appears to rely upon, the reasoning of the *Acosta* decision of the US BIA (discussed below in the text accompanying n. 45). The brief therefore states: ‘It is UNHCR’s position that the relevant distinguishing characteristic may consist in any feature which is innate or unchangeable, either because it is impossible to change or because an individual should not be required to do so.’ *Ibid.*, p. 16. While these standards may frequently overlap, they represent precisely the difference between *Ward*, above n. 16, and *Acosta*, below n. 45, on the one hand, and *Applicant A.*, above n. 4, on the other.

A majority of their lordships concluded that the social group could appropriately be defined as Pakistani women, although there was also support for the more limited definition urged by the claimants.<sup>39</sup> The House of Lords agreed on certain principles, such as the now widely accepted views that the social group cannot be defined solely by the persecution and that the definition of a group is not defeated simply by showing that some members of the group may not be at risk. The House of Lords also rejected the part of the US Court of Appeals decision in *Sanchez-Trujillo* (discussed below) which held that a social group must display ‘cohesiveness’ in order to be recognized under the Convention. Furthermore, a majority of the House of Lords identified an anti-discrimination principle as underlying the five grounds mentioned in the Convention.

Yet the House of Lords indicated varying overall approaches to the definition of the term membership of a particular social group. Lords Steyn and Hoffmann largely relied upon the protected characteristics analysis of the Canadian Supreme Court in *Ward*; Lords Hope of Craighead (with the majority) and Millett (in dissent) adopted language closer to the social perception approach of the High Court of Australia in *Applicant A*.<sup>40</sup> There was no need for a choice between these views – under the facts of the case, women in Pakistan met either test – and a majority of the House of Lords accepted the broadest definition of the class (Pakistani women).

In an important decision following *Islam* and *Shah*, the Immigration Appeal Tribunal (IAT) laid out the ‘main principles that should govern cases based on membership of a particular social group’.<sup>41</sup> The Tribunal understood the House of Lords to have adopted a protected characteristics standard in *Islam* and *Shah*. It thus reported the ‘basic principle’ that the unifying characteristic of the group ‘must be one that is immutable or, put summarily, is beyond the power of the individual to change except at the cost of renunciation of fundamental human rights’.<sup>42</sup> The IAT referred to the three-part analysis of *Ward* and in *Matter of Acosta* (discussed below) – groups defined by (i) an immutable characteristic, (ii) voluntary association for reasons fundamental to human dignity, or (iii) former voluntary status – and held that the latter two categories should not be understood to expand the

39 Lords Steyn, Hoffmann, and Hope of Craighead adopted the broader class definition. Lord Steyn also signed on to the more restricted definition and was joined by Lord Hutton. *Islam* and *Shah*, above n. 2.

40 *Ibid.*, per Lord Hope of Craighead:

In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society . . . As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person’s nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.

41 *Montoya*, Appeal No. CC/15806/2000, 27 April 2001. The IAT also cited a number of decisions from other jurisdictions.

42 *Ibid.*, p. 12.

first; to do so would be to depart from ‘the underlying need for the Convention to afford protection against discriminatory denial of core human rights entitlements’. Rather, they identify groups that voluntarily associate based on a characteristic that is unchangeable or which persons should not be asked to change.<sup>43</sup>

*Islam* and *Shah* is also important because of its analysis of the ‘nexus’ element in the refugee definition in a case involving persecution by a non-State actor. This aspect of the case will be discussed below in Section VI.

#### D. United States

For a number of years, there have been two distinct lines of analysis for ‘social group’ cases in the United States, owing to the peculiar administrative structure of the United States system. Asylum cases are heard by Immigration and Naturalization Service (INS) asylum officers; if not granted, they may be raised before immigration judges in a removal proceeding and then appealed to the Board of Immigration Appeals (BIA). Both the judges and the BIA are located within the Department of Justice. BIA decisions may be appealed to a federal circuit Court of Appeals; the applicant files in the circuit in which his or her case originated. The decisions of the Courts of Appeals are, by administrative practice, binding on the BIA only for cases arising in that circuit. The Ninth Circuit Court of Appeals (which covers California and other western US states) hears many more asylum cases than any other circuit; hence its decisions play a crucial role in the development of asylum law in the United States.

The BIA and the Ninth Circuit have constructed different interpretations of ‘particular social group’. The other federal circuit courts of appeals have largely adopted the BIA’s approach.<sup>44</sup> Accordingly, asylum cases brought in the Ninth Circuit are judged by one standard; cases heard by the BIA and appealed to other circuit courts are judged by a different standard.

The BIA’s approach, first announced in the 1985 case of *Matter of Acosta*,<sup>45</sup> has been highly influential. It was cited with approval and largely followed in the Canadian Supreme Court’s *Ward* decision, and has been widely cited in cases arising in other jurisdictions as well. The Board stated that a ‘particular social group’ refers to ‘a group of persons all of whom share a common, immutable characteristic’. That

43 *Ibid.*, pp. 13–15. In essence what the IAT appears to have done was to have taken the ‘shouldn’t have to be changed’ element of category (ii) and read it into category (i) (immutability). It is not apparent that this doctrinal move clarifies the categories or the analysis. It does, however, underscore the IAT’s commitment to the protected characteristics approach and its concern that the social group ground not be read in an overly broad fashion. This paper critiques the IAT’s resolution of the *Montoya* case in Section V below.

44 See D. Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, Boston, MA, 1999), pp. 382–3.

45 *Matter of Acosta*, Interim Decision No. 2986, 1985, 19 I. & N. Decisions 211, BIA, 1 March 1985.

characteristic might be ‘an innate one such as sex, color, or kinship ties’ or ‘a shared past experience such as former military leadership or land ownership’. Importantly, the common characteristic must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution of the refugee definition.<sup>46</sup>

In *Acosta*, the BIA proceeded by identifying a common element in the other four Convention grounds and then applying that element to the term ‘particular social group’. (This form of reasoning – purportedly an application of the interpretive principle of *ejusdem generis* – has also been adopted in cases arising in other jurisdictions.<sup>47</sup> As discussed below, it is not clear that application of the principle is appropriate in interpreting the ‘for reasons of’ grounds of the refugee definition.) The Board identified that element as ‘immutability’, no doubt focusing on the race and national origin aspects of the Convention definition and drawing parallels to US constitutional law and anti-discrimination principles. The focus on ‘immutability’ has appeal because immutable characteristics (such as gender and ethnic background) have frequently been grounds for invidious treatment and because it provides a sensible way to limit a potentially very broad and ill-defined category. As was apparent to the BIA, however, the ‘immutability’ standard cannot be a basis for the ‘religion’ or ‘political opinion’ Convention grounds; hence, the second aspect of the test was added (applying to characteristics so fundamental that one should not be required to change them).

Under the *Acosta* standard, US cases have recognized that social groups can be based, for example, on gender,<sup>48</sup> tribal and clan membership,<sup>49</sup> sexual orientation,<sup>50</sup> family,<sup>51</sup> and past experiences.<sup>52</sup> Other claims have been rejected, such as those involving Chinese opposed to coercive family planning practices<sup>53</sup> and women subjected to sexual and physical abuse.<sup>54</sup> (The standards for this latter

46 *Ibid.*, pp. 233–4. Note that the formulation is not quite the same as that adopted by the Canadian Supreme Court in *Ward*, above n. 16, because it states that the characteristic – not the voluntary association based on the characteristic – must be so fundamental that an individual should not be compelled to forsake it.

47 See *Islam and Shah*, above n. 2, at p. 503; *In Re G.J.*, New Zealand Refugee Status Appeals Authority (RSA), Refugee Appeal No. 1312/93, 1 NLR 387, 1995.

48 *Fatin v. INS*, 12 F 3d 1233 (3rd Circuit), 1993.

49 *In Re Kasinga*, above n. 5, *In Re H.*, Interim Decision 3276, 1996.

50 *Matter of Toboso-Alfonso*, 20 I. & N. Decisions 819 (BIA), 1990.

51 *Lwin v. INS*, 144 F 3d 505 at 511–12 (7th Circuit), 1998 (parents of Burmese student dissidents); *Gebremichael v. INS*, 10 F 3d 28 at 36 (1st Circuit), 1993; *Iliev v. INS*, 127 F 3d 638 at 642 and n. 4 (7th Circuit), 1997.

52 *Matter of Fuentes*, 19 I. & N. Decisions 658 (BIA), 1988, concerning a former member of the national police.

53 *Matter of Chang*, 20 I. & N. Decisions 38 (BIA), 1989.

54 *In Re R.A.* above n. 14; *Gomez v. INS*, 947 F 2d 660 (2nd Circuit), 1991 (rejecting a social group claim where the group was defined as ‘women who have been previously battered and raped by Salvadorean guerrillas’).

category are evolving<sup>55</sup> and require careful consideration beyond the scope of this paper.) *Acosta* itself refused to recognize as a social group members of a taxi driver collective.

The Ninth Circuit Court of Appeals' analysis of social group contrasts rather dramatically with the BIA's *Acosta* standard. In *Sanchez-Trujillo v. INS*,<sup>56</sup> a case asserting a social group of young, urban, working-class males of military age in El Salvador, the court stated:

[t]he term ['social group'] does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.<sup>57</sup>

The group claimed by the applicant did not come within this definition because it was not a 'cohesive, homogeneous group'.

The 'voluntary association' and 'cohesiveness' elements of the *Sanchez-Trujillo* definition were no doubt crafted – like the protected characteristics standard – to prevent a seemingly unlimited social group ground for refugee status. As the court explained:

Major segments of a population of an embattled nation, even though undoubtedly at some risk for general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.<sup>58</sup>

The *Sanchez-Trujillo* analysis has been widely criticized<sup>59</sup> and explicitly rejected by courts in the United Kingdom<sup>60</sup> and Australia.<sup>61</sup> They are surely in significant tension with the BIA's protected characteristics standard,<sup>62</sup> as can be seen by

55 The Department of Justice has not yet developed a consistent approach to these issues. On her final day in office in Jan. 2001, Attorney-General J. Reno vacated the BIA's decision in *In Re R.A.*, above n. 14, and ordered that the issue be reconsidered once proposed Department of Justice regulations on 'particular social group' became final. It is far from clear whether or when proposed rules issued on 7 Dec. 2000 (65 Fed. Reg. 76588-98) (see also above n. 15) will be promulgated in final form by the Bush Administration. In addition, see *Aguirre-Cervantes v. INS*, 2001 US App. Lexis 26170; 242 F 3d 1169 (9th Circuit), 2001, recognizing a claim brought by an abused Mexican daughter based on a family group defined as social group. For a more detailed analysis, see the subheading 'Family-based claims' below.

56 *Sanchez-Trujillo v. INS*, above n. 25. 57 *Ibid.*, p. 1576. 58 *Ibid.*, p. 1577.

59 See, for example, Anker, *Law of Asylum in the United States*, above n. 44, p. 382.

60 *Islam and Shah*, above n. 2, at pp. 501–2. 61 *Applicant A.*, above n. 4, at p. 241.

62 See *Lwin v. INS*, above n. 51.

considering how the approaches apply to claims brought by homosexuals or women. Both these characteristics are either immutable or so fundamental that it would be unjust to demand that they be changed; yet classes of gays and lesbians or women are unlikely to be cohesive or homogenous or to display close affiliation among members. (Interestingly, both approaches have been interpreted to cover claims asserting a family-based group.)<sup>63</sup>

The Ninth Circuit, in a recent case, seems to have recognized the weaknesses of the *Sanchez-Trujillo* standard. The case, *Hernandez-Montiel v. INS*,<sup>64</sup> held that Mexican ‘gay men with female sexual identities’ constituted a particular social group – a group that fits within the *Acosta* standard but is hard to square with the cohesive and associational test of *Sanchez-Trujillo*. The court acknowledged that it was the only circuit to adopt a ‘voluntary associational relationship’ requirement and that its standard conflicted with the BIA’s rule in *Acosta*. It resolved the tension by simply combining the conflicting standards:

We thus hold that a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.<sup>65</sup>

No theoretical justification is offered for this rather remarkable move.<sup>66</sup> It appears to be a capitulation to the *Acosta* standard without a willingness to admit defeat.

The confusion that the competing standards and the *Hernandez-Montiel* ‘solution’ have spawned is only compounded by proposed regulations issued by the INS in December 2000.<sup>67</sup> The INS rule would establish the following:

(c) Membership of a particular social group

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it . . .

...

63 *Sanchez-Trujillo* itself, above n. 25, notes that ‘immediate members of a certain family’ would constitute a ‘prototypical’ social group embraced by the Convention’s language: 801 F 2d 1571 at 1576. See also *Aguirre-Cervantes v. INS*, above n. 55. For ‘immutable characteristics’ cases, see, for example, *Lwin v. INS*, above n. 51; and *Ananeh-Firempong v. INS*, 766 F 2d 621 at 626 (1st Circuit), 1985.

64 *Hernandez-Montiel v. INS*, 225 F 3d 1084 (9th Circuit), 2000.

65 *Ibid.*, p. 1093.

66 And, as is suggested below, it still fails to develop an appropriate standard.

67 See above n. 55.

(3) Factors that may be considered in addition to the required factors . . . but not necessarily determinative, in deciding whether a particular social group exists include whether:

- (i) the members of the group are closely affiliated with each other;
- (ii) the members are driven by a common motive or interest;
- (iii) a voluntary associational relationship exists among the members;
- (iv) the group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) members view themselves as members of the group; and
- (vi) the society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society.

In explanatory notes to the proposed rule, the INS states that the identified factors are drawn from administrative and judicial decisions that have been ‘subject to conflicting interpretations’. The proposed provision, it is argued, ‘resolves those ambiguities by providing that, while these factors may be relevant in some cases, they are not requirements for the existence of a particular social group’.<sup>68</sup> The thoughtful reader of the proposed rule might well think that the rule has produced more ambiguities than it has resolved. For instance, the opening paragraph states that group members must share a ‘common, immutable characteristic’ that either cannot be changed or that is so fundamental that he or she should not be required to change it. Yet if the characteristic must be immutable, then what sense does it make to add that a person should not be required to change it? And what purpose is served, for instance, by listing other factors that may be consulted if the ‘immutability’ elements are required? The INS formulation seeks to be inclusive and responsive, but in the end may provide rather little guidance to adjudicators.

The discussion so far has considered two alternative approaches expressly adopted in the United States jurisprudence. There is a third approach, however, that is hinted at in some of the sources, usually without the recognition that it is providing a different analysis.<sup>69</sup> For example, in *Gomez v. INS*, the Second Circuit Court of Appeals, after quoting the familiar language from *Sanchez-Trujillo*, goes on to state: ‘A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.’<sup>70</sup> The proposed

68 65 Fed. Reg. at 76594.

69 See M. Fullerton, ‘A Comparative Look at Refugee Status Based on Persecution Due to Membership of a Particular Social Group’, 26 *Cornell International Law Journal*, 1993, pp. 505 and 560.

70 *Gomez v. INS*, above n. 54, 947 F 2d 660 at 664. This ‘externalist’ approach is mentioned, but not given much weight, in a footnote in *Sanchez-Trujillo*, above n. 25: ‘We do not mean to suggest that a persecutor’s perception of a segment of a society as a “social group” will invariably be irrelevant to [the] analysis. But neither would such an outside characterization be conclusive.’ 801 F 2d 1571 at 1576 n. 7.

INS rules, quoted above, likewise state that external factors may play a role in the definition of a social group.<sup>71</sup> This third approach charts a route between the voluntary association and protected characteristics standards that have dominated the United States cases. It looks in the direction of the ‘sociological’ approach of *Applicant A*.

## E. New Zealand

The concept of membership of a particular social group has been developed in the New Zealand case law largely through the careful and exhaustive analysis of Rodger Haines, Chairman of the Refugee Status Appeals Authority (RSAA). The New Zealand cases generally follow the *Ward/Acosta* protected characteristics approach, placing significant weight on anti-discrimination principles in the Convention.<sup>72</sup> Under this test, the RSAA has recognized groups based on sexual orientation<sup>73</sup> and gender.<sup>74</sup> The RSAA has suggested that a test that looks to external social perceptions would be too encompassing. In *Re G.J.*, it stated:

The difficulty with the ‘objective observer’ approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.<sup>75</sup>

## F. France

The French jurisprudence does not include detailed analyses of membership of a particular social group. A number of decisions by French authorities have, however, approved social group claims, and the results are broadly similar to the decisions of the common law countries. Thus, cases decided in the mid-1980s

71 See subpara. (iv): ‘The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question’; and subpara. (vi): ‘The society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society.’ These elements are said to follow from the BIA’s decision in *In Re R.A.*, above n. 14, in which the Board had found it significant that the applicant had not shown that the asserted group ‘is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population’, *ibid.*, p. 15. See 65 Fed. Reg. at 76594.

72 See *Re G.J.*, above n. 47.      73 *Ibid.*

74 *Re M.N.*, Refugee Appeal No. 2039/93, 1996; Refugee Appeal No. 71427/99, 2000, the latter available on <http://www.refugeecaselaw.org/Refugee/guidelines2001.htm>.

75 *Re G.J.*, above n. 47, p. 24.



recognized as refugees Cambodian asylum seekers fearing persecution by the Khmers Rouges on the basis of their membership of the ‘*bourgeoisie commerçante*’ and their social origins.<sup>76</sup>

More recently, the *Commission des recours des réfugiés* (CRR) has affirmed that women, under certain circumstances, may constitute a particular social group. Thus, in 1991 it held that women who refuse to submit to FGM may state a valid claim to refugee status, although in the case under consideration refugee status was denied because the applicant did not show that she was personally threatened with FGM.<sup>77</sup> In a case brought by an Algerian woman, who returned to Algeria after having lived abroad for a number of years, the CRR stated that women who object to generally applicable discriminatory legislation do not, by that fact alone, constitute a particular social group. Nonetheless, in the particular case, the applicant had shown that the authorities had tolerated threats against her by Islamic militants who sought to compel her to adopt a traditional lifestyle; thus, the claim was recognized.<sup>78</sup>

French adjudicators have also considered claims brought by Chinese applicants based on a claim of threatened forced abortion and sterilization. The results in the cases follow decisions in other jurisdictions that have held that persons who oppose generally applied population policies do not constitute a particular social group.<sup>79</sup>

A turning point was reached in the case of *Ourbih*, which found that transsexuals may constitute a particular social group. Although the decision does not analyze the issue in detail, the *Conseil d’Etat* has used language that suggests an underlying approach. In 1997, it rejected the decision of the CRR to deny the claim of *Ourbih*, an Algerian transsexual, finding that the Commission had not properly examined the evidence to determine whether transsexuals were regarded as a social group in Algeria ‘en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société’.<sup>80</sup> Upon reconsideration, the CRR held that transsexuals in Algeria could constitute a particular social group because of a common characteristic that set them apart and exposed them to persecution that was tolerated by the authorities in Algeria.<sup>81</sup> The result here parallels the *Hernandez-Montiel* decision in the United States,<sup>82</sup> although arguably *Ourbih* goes further if it purports to allow

76 International Association of Refugee Law Judges, ‘Interim Report on Membership of a Particular Social Group’, Appendix I (‘French Jurisprudence’), Oct. 1998, available at <http://www.refugee.org.nz/Iarlfjrench.htm>.

77 *Aminata Diop*, CRR, Decision No. 164078, 18 Sept. 1991.

78 *Elkebir*, CRR, sections réunis (SR), Decision No. 237939, 22 July 1994.

79 *Zhang*, CRR, SR, Decision No. 228044, 8 June 1993; *Wu*, CRR, SR, Decision No. 218361, 19 April 1994.

80 ‘By reason of the common characteristics which define them in the eyes of the authorities and of society’ (author’s translation), *Ourbih*, Conseil d’Etat, SSR, Decision No. 171858, 23 June 1997.

81 *Ourbih*, CRR, SR, Decision No. 269875, 15 May 1998.      82 See above n. 64.

the fact of persecution to assist in the definition of the social group. Indeed, in most of these cases (with the exception of the Chinese coercive family planning cases), the fact that an applicant can show a specific risk of persecution seems to be a more important factor than definition of a particular social group.<sup>83</sup>

Since *Ourbih*, homosexuals have also been recognized as refugees in a series of cases, including some concerning asylum seekers from countries where homosexuality has been decriminalized.<sup>84</sup> In all these cases, membership of a social group is only rarely specified as the ground for recognition, although it is the only possible ground for doing so. Looking beyond cases concerning sexual orientation, the CRR has also recognized an Afghan woman on the grounds that, as a woman, she was exposed to serious discrimination by the Taliban due to her way of life, her desire to study, and her decision not to practise religion.<sup>85</sup>

The first asylum case concerning FGM was recognized in France in March 2001, although the social group ground was not specifically mentioned.<sup>86</sup> Most recently, in late 2001, the CRR recognized as refugees a Somali woman and a Malian couple, who did not wish their daughters to be subjected to FGM. In the first case, the CRR found that women in Somalia who refused to submit their daughters to FGM risked their daughters' forced infibulation, as well as persecution with the consent of the general population and of the factions which ruled the country without it being possible for them to claim the protection of a legally constituted public authority. The CRR also found a specific risk of persecution in that the woman was a widow and her elder daughter had already died shortly after being forcibly infibulated.<sup>87</sup> As for the Malian couple, they were both found to be members of a particular social group under the 1951 Convention and to have a well-founded fear of persecution which was voluntarily tolerated by the authorities of their country of origin.<sup>88</sup>

83 Cf. T. A. Aleinikoff, 'The Meaning of "Persecution" in US Asylum Law', 3 *International Journal of Refugee Law*, 1991, p. 5, suggesting that, once risk of harm is demonstrated, adjudicators should be lenient in considering the Convention grounds.

84 *Djellal*, CRR, SR, Decision No. 328310, 12 May 1999 (Algerian asylum seeker); *Elnov* and *Tsyouchkine*, both CRR, Decisions Nos. 318610 and 318611, 23 July 1999 (two asylum seekers from Kazakhstan); *Aourai*, CRR, Decision No. 343157, 22 Feb. 2000 (Algerian asylum seeker); *Albu*, CRR, Decision No. 347330, 3 April 2000 (Romanian asylum seeker); *Mahmoudi Gharehkeh Daghi*, CRR, Decision No. 330627, 4 Oct. 2000 (Iranian asylum seeker); *Kulik*, CRR, Decision No. 367645, 29 June 2001 (Ukrainian asylum seeker).

85 *Berang*, CRR, Decision No. 334606, 6 May 1999. Similar examples concern Algerian women granted refugee status based on their Western way of life (*Mme Benedir*, CRR, Decision No. 364663, 18 April 2001; *Mme Krour*, CRR, Decision No. 364839, 2 May 2001; *Mlle Benarbia*, CRR, Decision No. 364301, 1 June 2001).

86 *Mlle Kinda*, CRR, Decision No. 366892, 19 March 2001.

87 CRR, Decision No. 369776, 7 Dec. 2001 (no case name as applicant asked hearing to be held in camera).

88 *M. et Mme Sissoko*, CRR (SR), Decisions Nos. 361050 and 373077, 7 Dec. 2001.

## G. Germany

Fullerton describes a number of German decisions in lower level courts. She identifies two different analyses in her 1990 review of German jurisprudence.<sup>89</sup> Some courts have looked for homogeneity among group members and some sort of internal group structure; other courts have asked whether the alleged group is perceived by the general population as a group and, if so, whether it is perceived in strongly negative terms.

More recently, Judge Tiedemann of the Administrative Court in Frankfurt am Main has reported that the German jurisprudence continues to be 'very sparse'.<sup>90</sup> The majority of the lower administrative courts follow the ruling of the Federal Administrative Court (*Bundesverwaltungsgericht*) that 'political persecution' is required for recognition as a refugee under either Article 16a of the Basic Law (the German Constitution) or section 51 of the Aliens' Act (which incorporates the phraseology of the 1951 Convention refugee definition into German law).<sup>91</sup> Similarly, in an earlier Federal Administrative Court ruling concerning an Iranian homosexual, the Court noted that the appeals court had determined that the applicant's homosexuality was fundamental to his emotional and sexual life and could not expect to be relinquished as a personal act of will. This analysis is similar to the 'protected characteristics' approach of some common law jurisdictions in cases concerning membership of a particular social group. Nonetheless, the Court concluded that the applicant was eligible for asylum based on the likelihood of political persecution.<sup>92</sup>

As a result of the need to prove political persecution, there is a tendency to subsume claims under another Convention ground. Where a particular social group has been relied upon by the courts, this has tended to be without close analysis. Particular social groups recognized by the courts have nevertheless included women from Iran not willing to observe the Islamic dress code<sup>93</sup> and single women in

89 See above n. 69.

90 P. Tiedemann, 'Protection Against Persecution Because of "Membership of a Particular Social Group" in German Law', in *The Changing Nature of Persecution* (International Association of Refugee Law Judges, 4th Conference, Berne, Switzerland, Oct. 2000), pp. 340–50, available on <http://www.iarlj.nl/swiss/en/nature.pdf/tiedemann.pdf>.

91 German Federal Administrative Court, judgment of 18 Jan. 1994, 9 C 48.92, 95 BVerwGE 42.

92 German Federal Administrative Court, judgment of 15 March 1988, 9 C 278.86, 79 BVerwGE 143. A judgment more similar to other cases involving homosexuality was rendered by the Administrative Court in Wiesbaden in 1983, Case No. IV/1 E 06244/81, 26 April 1983. In that case, the court held that homosexuals in Iran constituted a social group based on a conclusion that an objective observer in Iran would recognize that homosexuals are perceived as, and treated as belonging to, a particular social group.

93 Hessen Higher Administrative Court, Decision of 14 Nov. 1988, 13 TH 1094/87, InfAusIR 1998, 17.

Afghanistan.<sup>94</sup> Administrative courts have also recognized refugee status in cases involving FGM, but this has either been on political persecution grounds or the specific Convention ground has not been specified.<sup>95</sup>

## H. The Netherlands

Cases in the Netherlands have considered many of the kinds of social group claims that have been adjudicated in other States, including those based on gender, homosexuality, and Chinese coercive family planning policies.<sup>96</sup> As stated by Thomas Spijkerboer in a leading study of Netherlands refugee law:

In Dutch legal practice, just which of the five persecution grounds is related to the (feared) persecution is virtually considered immaterial. Whether the persecution is clearly discriminatory and not just random, however, is critical. Once the discriminatory nature of the persecution has been established, the particular rubric under which it falls is ‘of less importance’. Without much ado, persecution on account of sexual orientation, on account of the nationality or religion of the spouse, on account of descent, and on account of transgression of the Chinese one-child policy have been brought under the refugee concept. Only in the decision on sexual orientation was the persecution ground actually specified (‘a reasonable interpretation of persecution for reasons of membership of a particular social group can include persecution for reason of sexual nature’).<sup>97</sup>

As to claims based on gender, Netherlands cases have recognized claims brought by women persecuted due to the actions of male relatives, but the Convention ground has not been specified.<sup>98</sup> Spijkerboer reports that cases involving sexual abuse of

94 Frankfurt Administrative Court, Decision of 23 Oct. 1996, 5 E 33532/94.A(3), NVwZ-Beilage 6/1997, p. 46.

95 See Tiedemann, above n. 90, pp. 342–3; T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, UK, 2000), pp. 118–19.

96 In the coercive family planning case, the Netherlands Council of State accepted the UNHCR position that family policies are not per se persecutory but may be implemented in a persecutory manner. In the particular case, the Council rejected the asylum claim because of lack of evidence that the applicant (a male) would be targeted upon return to China. Afdeling Bestuursrecht-spraak van de Raad van State (Administrative Law Division of the Council of State), 7 Nov. 1996, RV 1996, 6 GV 18d–21 (China).

97 Spijkerboer, *Gender and Refugee Status*, n. 95 above, p. 115 (footnotes omitted). Spijkerboer further notes, regarding claims brought by women who have objected to prevailing social mores of their society, that ‘[a]n early Dutch decision concerning an Iranian woman who had been removed from the university on account of improper behavior held that, in the absence of authoritative Council of State case law, women may be considered “a relevant persecution category”’. More recently, however, social group appears to have given way to political opinion or religion as the persecution ground in Netherlands social mores cases: *ibid.*, p. 117 (footnotes omitted).

98 *Ibid.*, p. 121.

women which argue membership of a particular social group are rare.<sup>99</sup> A ‘Work Instruction’ on ‘Women in the Asylum Process’ issued by the Netherlands Immigration and Naturalization Service states that in cases raising gender claims ‘consideration should be given primarily to persecution for reasons of political opinion’ (including imputed political opinion). Moreover, the Instruction specifically declares:

Sex cannot be the sole ground to determine membership of a ‘particular social group’. *Women in general* are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually.<sup>100</sup>

In sum, while the *results* in Netherlands cases are consistent with results in social group cases elsewhere, theoretical and doctrinal analysis of the Convention ground remains underdeveloped in the country’s jurisprudence.

#### IV. Interpretive issues

##### A. General considerations

Despite the variety of approaches discussed above, there is some degree of convergence among adjudicative bodies on several interpretive principles. The overriding concern expressed in the legal sources is that some limiting principle be identified to ensure that the ‘social group’ ground not be all-encompassing. An overly broad interpretation is resisted for several reasons. First, it is stated that the Convention was not intended to provide protection to all victims of persecution – only to those who come within one of the five Convention grounds. Thus, to read the social group ground to include all other groups of persons who flee across borders or suffer human rights abuses would conflict with the structure of the Convention. Secondly, as a matter of legal logic, the social group cannot be read so broadly that it renders the other Convention grounds superfluous. Thirdly, it is argued that an overly broad definition of ‘particular social group’ would undermine the balance between protection and limited State obligations implicit in the Convention.<sup>101</sup>

<sup>99</sup> *Ibid.*, p. 123.

<sup>100</sup> Netherlands Immigration and Naturalization Service, Work Instruction No. 148, reprinted in Spijkerboer, *Gender and Refugee Status*, n. 95 above, p. 231 (UNHCR translation).

<sup>101</sup> Perhaps the broadest definition of ‘social group’ has been suggested by A. C. Helton. He would include within the Convention’s purview ‘statistical groups’ that are victims of discrimination (such as persons with sickle cell anaemia), societal groups (people who share basic innate

At a more particular level, adjudicative bodies have largely rejected the ‘cohesiveness’ standard of *Sanchez-Trujillo*.<sup>102</sup> Indeed, with its recent decision in *Hernandez-Montiel*, the Ninth Circuit itself has moved away from ‘cohesiveness’ as the central test for the existence of a ‘particular social group’.

At a substantive level, various ‘social groups’ have received widespread recognition. Of particular significance are cases in a number of States recognizing homosexuals<sup>103</sup> and women<sup>104</sup> as groups eligible for protection. As is noted below in Section VI, the gender category has generated some of the most difficult interpretive issues for State adjudicators, particularly as to the establishment of ‘nexus’ between the persecution feared and the social group membership.

## B. The role of ‘persecution’ in the definition of a particular social group

The case law frequently asserts that a social group must exist independently of the persecution imposed on members of the group. As explained by Dawson J in *Applicant A.*:

[T]he characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.<sup>105</sup>

This view seems eminently sensible, but it can also be misapplied. An example is provided by cases arising from the enforcement of generally applicable criminal and regulatory statutes. Consider the common claim that enforcement of China’s family planning policies persecutes on the basis of social group. It is sometimes said that such claims cannot be allowed because it would be permitting the persecution to define the social group.<sup>106</sup> Again, here is the reasoning of Dawson J:

characteristics, such as race and gender), social groups (voluntary groups that interact socially, such as friends, neighbours, audiences), and associational groups (groups of persons that self-consciously pursue a shared goal or interest, such as trade unions and universities). Recognizing the breadth of the definition, Helton argues that it is the ‘only reasonable interpretation’ because ‘it is profoundly irrational to differentiate between the types of arbitrary and capricious persecution that an oppressive regime may impose’. Helton, ‘Persecution on Account of Membership of a Social Group’, above n. 17, pp. 39 and 59.

102 See Lord Hoffmann in *Islam and Shah*, above n. 2, pp. 502–3; *Ward*, above n. 16; *Applicant A.*, above n. 4, p. 241.

103 The jurisprudence is summarized in *Re G.J.*, above n. 47.

104 See, for example, *Islam and Shah*, above n. 2. 105 See *Applicant A.*, above n. 4, p. 341.

106 Another frequent ground for rejecting such claims is that implementation of such policies is not inherently persecutory. See *Matter of Chang*, above n. 53.

[T]he reason the appellants fear persecution is not that they belong to any group, since there is no evidence that being the parents of one child and not accepting the limitations imposed by government policy is a characteristic which, because it is shared with others, unites a collection of persons and sets them apart from society at large. It is not an accurate response to say that the government itself perceives such persons to be a group and persecutes individuals because they belong to it. Rather, the persecution is carried out in the enforcement of a policy which applies generally. The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms.<sup>107</sup>

It may well be that the claim in *Applicant A.* properly failed because of a lack of proof that those who violated the family planning policies were a group ‘set apart’ from society. Yet the careful words of Dawson J should not be taken to mean that those who oppose a generally applicable State policy will always be seeking to define a social group simply on the basis of the persecution they might suffer.

Another example is provided by cases involving abused spouses, in which the definition of social group has been particularly difficult. Advocates have suggested a number of approaches to defining the social group concerned, including ‘women’, ‘battered women’, and ‘battered women for whom the State will not provide protection’. Cross-cutting concerns place the applicant on the horns of a dilemma. If the group is defined too broadly, adjudicators might conclude that few members of the group are likely to be subject to persecution and hence the group does not, in fact, stand apart from society. If, however, the group is defined too narrowly, it is likely to be seen as drawn simply for the purposes of the claim and not because it reflects a group cognizable in the society at large. Lord Millett, in his dissent in *Islam and Shah*, relied upon the latter ground in rejecting the asserted class (‘women in Pakistan who have been or who are liable to be accused of adultery or other conduct transgressing social norms and who are unprotected by their husbands or other male relatives’). He found:

Whether the social group is taken to be that contended for by the appellants . . . or the wider one of Pakistani women who are perceived to have transgressed social norms, the result is the same. No cognisable social group exists independently of the social conditions on which the persecution is founded. The social group which the appellants identify is defined by the persecution, or more accurately (but just as fatally) by the discrimination which founds the persecution. It is an artificial construct called into being to meet the exigencies of the case.<sup>108</sup>

<sup>107</sup> *Applicant A.*, above n. 4, p. 243.

<sup>108</sup> *Islam and Shah*, above n. 2, p. 525. See also *Matter of R.A.*, above n. 14, finding that asserted class was constructed for the purposes of the litigation.

It is possible to agree with Lord Millett but still not reject the claim, if the appropriate social group is defined as ‘Pakistani women’, although Lord Millett rejected this definition as well because he concluded that there is insufficient evidence to demonstrate that the claimants are being persecuted on this ground. With all respect, it is difficult to see how the class of ‘Pakistani women who have transgressed social norms’ is defined by the persecution suffered. Such a group might well be seen in Pakistan as a pariah group, identified not by the persecution they suffer but rather persecuted because of their conduct.

Furthermore, to say that the group must exist *dehors* the persecution is not to say that persecution may not help define a group, both by giving the persons subject to maltreatment a sense of ‘groupness’ and by creating societal perceptions that the group stands apart. McHugh J put it this way:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.<sup>109</sup>

Under this reasoning, it would appear that an applicant would have a valid claim if he or she could establish that persons asserting the human rights at issue were, in fact, perceived by society at large as a distinct group.<sup>110</sup>

Importantly, there should be no requirement that an applicant prove that every member of a particular social group has a well-founded fear of persecution in order to establish a ‘social group’ within the meaning of the 1951 Convention. Indeed, if this were the test, the analysis would come perilously close to mandating that persecution define the class. Thus, homosexuals have been found to be a social group in a number of States; yet not all members of the class may be at risk of persecution, depending, for instance, on how openly they express their sexual orientation or whether they have allies in the government. Again, the well-founded fear element of the definition will have to be brought to bear in each case. An applicant will not be able to establish refugee status simply because he or she belongs to a group recognized as such by the society from which he or she seeks protection.

109 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 264.

110 See McHugh J: ‘There is no reason why persons “who, having only one child . . . do not accept the limitations placed on them” and who communicate that view to Chinese society could not be a “particular social group” in some situations. If, for example, a large number of persons with one child who wished to have another had publicly demonstrated against the government’s policy, they may have gained sufficient notoriety in China to be perceived as a particular social group.’ *Ibid.*, p. 269.



The BIA's *Kasinga* decision illustrates these points. The case involved a claim brought by a young woman who feared being subjected to FGM by her tribal group. The BIA, which sustained the claim, defined the social group as being 'young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice'.<sup>111</sup> It is far from clear, however, why such an elaborate definition was necessary. Perhaps the Board was concerned that some female members of the tribe consent to FGM, with the result that the narrower definition was viewed as preferable in order to make more congruent the social group and victimhood. This concern seems misplaced. The persecutory conduct is visited solely on *women of the tribe*; it is for that reason that the applicant, as a female member of the tribe, is at risk. That other women of the tribe may not seek to flee FGM is irrelevant both to the definition of the class and to the establishment of 'nexus'. In sum, the definition of the class must describe a group that stands apart in society where the shared characteristic of the group reflects the *reason* for the persecution. This is importantly different from saying that a defined class must only include persons likely to be persecuted.

### C. *Ejusdem generis*

It has sometimes been suggested that the principle of *ejusdem generis* provides a useful interpretive limit on membership of a particular social group. The principle holds that a general term following in a list of particular terms should be interpreted in a manner consistent with the general nature of the enumerated items.<sup>112</sup> So, for example, if a city ordinance prohibits 'loud noise, motorized vehicles, unleashed animals, and other conduct likely to disturb peaceful enjoyment of public parks', it would be appropriate to seek in the specific examples an underlying concept that might be applied in interpreting the broader final phrase.

The five Convention grounds are not, however, written in a manner that makes application of *ejusdem generis* appear appropriate. The Convention does not list four grounds and then add a fifth such as 'and all other grounds that are frequently a basis for persecution'.<sup>113</sup> The term 'particular social group' appears to define a free-standing Convention ground of equal kind and status to the other identified grounds. (To return to the city ordinance example, it would be analogous to an ordinance that prohibited 'motorized vehicles, unleashed animals, and all conduct

111 Above n. 5.

112 See *Black's Law Dictionary* (6th edn, West Publishing, St Paul, MN, 1990), p. 517: '[W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to those persons or things of the same general kind or class as those specifically mentioned.'

113 This is also a ground for rejecting the 'safety net' interpretation of particular social group.

that is excessively noisy’.) As stated by Kirby J in *Applicant A.*, ‘it is difficult to find a genus which links the categories of persecution unless it be persecution itself’.<sup>114</sup> Indeed, an *ejusdem generis* reading of the five grounds, as Kirby J goes on to note, would appear to violate the rule that the group must exist outside the persecution. It would be a sensible interpretive guide only if the term ‘particular social group’ were intended to be a ‘safety net’ category – an interpretation widely rejected for the reasons described above.<sup>115</sup>

The suggestion that *ejusdem generis* can play a useful interpretive role may be based on a slightly different kind of argument that looks to the underlying motivation for the designation of particular categories. For example, one might attempt to identify a norm of non-discrimination as crucial to the structure of the Convention, and thereby see the five Convention grounds as categories of persons likely to be victims of persecution. This might then provide an argument that ‘particular social group’ should be read, in the main, to cover groups that are discriminated against. Whatever the merits of such an approach, it should be clear that it does not rely on the principle of *ejusdem generis*, but rather on the underlying purposes of the Convention.<sup>116</sup>

#### D. Anti-discrimination and the definition of ‘particular social group’

The search for a limiting principle has led adjudicators in a number of States to identify anti-discrimination as an underlying norm of the 1951 Convention that can provide interpretive guidance. It is thus regularly noted<sup>117</sup> that the opening paragraph of the Convention declares:

114 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 295. One possibility is that the list includes personal characteristics that are either immutable or so fundamental that it would be unjust to compel persons to forsake them. As noted in the discussion in *Ward*, above n. 16, it is not, however, clear what unifying concept underlies these separate considerations.

115 See Goodwin-Gill, ‘Judicial Reasoning’, above n. 37, pp. 537 and 541.

116 In a comment on the earlier version of this paper discussed at the expert roundtable, the INS suggested that the *nosctur a sociis* rule of construction (the meaning of a word may be known by words accompanying it) supports the protected characteristic approach. It is argued that a common element to the other grounds is a protected or fundamental characteristic and thus this should be read into the social group ground as well. This is not an implausible argument, but it runs into difficulty because other common elements can be identified in the given grounds. One, for example, might be ‘social cognizability’; another could be ‘traditional grounds for disfavoured treatment’. Furthermore, the protected characteristics element itself is a bit artificial – it needs to reach beyond immutable characteristics in order to cover political opinion and religion. (Note also that not all immutable characteristics are necessarily fundamental – for example, height.) Once that conceptual move is made, it is not clear why an additional element could not be added to extend to social group; so the common element could logically be described as ‘immutable characteristic, fundamental characteristic or shared characteristic of a group’.

117 *Re G.J.*, above n. 47; *Islam and Shah*, above n. 2, pp. 510–11.

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings *shall enjoy fundamental rights and freedoms without discrimination* . . . (emphasis added)

The anti-discrimination approach is said to supply a common basis for the enumerated Convention grounds. That is, persons who are persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion are persons whose human rights are being violated for discriminatory reasons. Lord Hoffmann, in *Islam* and *Shah*, states:

In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect . . . [T]he inclusion of ‘particular social group’ recognised that there might be different criteria for discrimination, in *pari materiae* with discrimination on other grounds, which would be equally offensive to principles of human rights . . . In choosing to use the general term ‘particular social group’ rather than an enumeration of specific groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.<sup>118</sup>

The invocation of an anti-discrimination principle appears to accomplish four goals. First, by defining a limiting principle, it resists a ‘safety net’ approach to social group. Secondly, by stressing lack of State protection and marginalization, it explains why persons fleeing natural disasters and civil war might not be Convention refugees.<sup>119</sup> Thirdly, it rejects the ‘cohesiveness’ and ‘voluntary association’ analysis of *Sanchez-Trujillo*. Fourthly, it makes easier the recognition of women as a social group, since women are frequently the victims of serious societal discrimination.

Despite these benefits of an anti-discrimination approach, there are significant problems with identifying it as the sole underlying principle of the five Convention grounds.<sup>120</sup> The anti-discrimination principle is invoked primarily to drive home the point that the Convention does not provide protection to all persons who are victims of persecution. Yet one does not need an anti-discrimination approach to

118 *Islam* and *Shah*, above n. 2, p. 511.

119 See Hathaway, *Law of Refugee Status*, above n. 18, p. 137.

120 As Goodwin-Gill has noted, ‘it remains a gloss on the original words, of which advocates need to be aware’. Goodwin-Gill, ‘Judicial Reasoning’, n. 37 above, p. 539.

reach this result; it seems plain on the face of the Convention itself. That is, one *could* say that a political dissident is being discriminated against because of the views she holds, while other persons with views favoured by the regime are not being persecuted. This would be true, however, of any person whose human rights were being violated, as compared to all those in the particular society whose rights are not being violated.<sup>121</sup>

Furthermore, an anti-discrimination analysis may suggest additional norms that unduly restrict the scope of the Convention. It may lead adjudicators, for example, inappropriately to import into refugee law concepts from domestic anti-discrimination law, such as those relating to causation. More significantly, an anti-discrimination understanding of the Convention may lean towards an ‘immutability’ approach for defining particular social group.<sup>122</sup> This is so because domestic anti-discrimination law in many States typically defines protected groups as those who share characteristics that ought to be irrelevant to State decision making; and frequently, immutable characteristics are so identified. For instance, it is seen as unjust to distinguish people based on characteristics that they cannot alter, such as race, gender, ethnicity, or caste. Finally, it appears that even those adjudicative bodies that purport to adopt an anti-discrimination approach define it in a manner that actually goes beyond it. For example, the New Zealand Refugee Status Appeals Authority, which is firmly committed to an anti-discrimination/protected characteristics analysis, states that under its approach ‘recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way’.<sup>123</sup> While the conclusion may well be sensible, it is far from clear what function the anti-discrimination norm ultimately has in the analysis.

## E. Social groups and human rights violations

The requirement that a particular social group exist outside of the alleged persecution casts doubt on groups defined solely on the basis that their members’ human rights have been violated. For example, it is unlikely that an adjudicator would recognize the claim of a victim of torture if the asserted social group is all persons in the country who have been or might become victims of torture.

It is this reasoning that has generally defeated the claims of Chinese applicants alleging fear of forced sterilization and abortion. Although such acts would surely violate fundamental human rights, adjudicators have been hesitant to recognize

121 Goodwin-Gill has suggested that ‘while it may be, and often is, possible to interpret persecution as some form of discriminatory denial of human rights, to think exclusively in these terms may fail to reflect the social reality of oppression’. *Ibid.*, p. 539.

122 See e.g., *Re G.J.*, above n. 47.

123 *Ibid.*, p. 26, citing Hathaway, *Law of Refugee Status*, above n. 18, p. 108.

such claims because they conclude that the only characteristic shared by the purported group is the alleged persecution.

La Forest J, who authored the *Ward* decision for the Canadian Supreme Court, has argued, however, that social group claims might be made out by a class of persons whose fundamental human rights have been violated. In his dissenting opinion in *Chan v. Canada (Minister of Employment and Immigration)*,<sup>124</sup> he stated that he would amend the second *Ward* category ('groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake their association') by deleting the 'voluntary association' requirement. The relevant question, according to La Forest J, is whether the persecutor treats people with a shared attribute as comprising a group – not whether the members of the group voluntarily associate with each other.<sup>125</sup> Thus, if an individual is associated voluntarily with a status for reasons fundamental to human dignity, then a group could be cognizable; it would exist 'by virtue of a common attempt to exercise a fundamental human right'. Under the facts of the case, La Forest J would have held that persons who are persecuted for having more than one child can allege membership in a particular social group.<sup>126</sup>

Dawson J in *Applicant A.* takes issue with La Forest J's conclusion, reasoning that the group cannot simply be a random collection of persons across China whose human rights have been violated by coercive family planning practices. Dawson J adds, however, that it would be appropriate to recognize a social group if the violation of human rights gives rise to a self-perception or societal perception of a group:

A fundamental human right could only constitute a unifying characteristic if persons associated with each other on the basis of the right or, it may be added, if society regarded those persons as a group because of their common wish to exercise the right. And in that situation, it would be the unifying aspect of that element, and not its character as a fundamental human right, which allowed it to delineate a particular social group.<sup>127</sup>

Following Dawson J's logic, if persons across China united in 'support' groups for families with more than one child, or if State policy coercing abortions produced a societal perception that persons resisting forced abortions were social pariahs, then a social group claim might be sustainable. This appears to be a sensible approach that neither recognizes all human rights victims as members of a social group nor denies the possibility that victims of 'generally applicable' policies might be a cognizable social group. In sum, the fact that a group of persons has suffered human rights abuses may be a significant element in determining that a 'particular

124 See above n. 21.

125 *Ibid.*, p. 645. See also, A. Macklin, 'Canada (*Attorney-General*) v. *Ward*: A Review Essay', 6 *International Journal of Refugee Law*, 1994, pp. 362–81.

126 See also Daley and Kelley, 'Particular Social Group', above n. 8.

127 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 246.

social group' exists to the extent such abuse is visited on persons who share an independent identifiable characteristic. This is so because such abuses may support a finding that the group is perceived as a group in society in which it is located – that is, it is identified as 'persecutable', or in fact attracts persecution, because of its shared characteristic.

## V. The core inquiry: protected characteristics and social cognizability

As the examination of State jurisprudence in Section III showed, the development of the social group ground for refugee status in common law countries has occurred primarily – although not exclusively – through adoption and application of the protected characteristics approach. The results have been important in extending protection to victims of serious human rights abuses and the cases have been influential in other States. The *Islam* and *Shah* case is a particularly noteworthy example. The protected characteristics approach has also received strong support from noted scholars.<sup>128</sup>

The reasons for the success of the protected characteristics approach are apparent. It provides a limiting principle for interpretation of 'particular social group' that resonates with a human rights perspective. That is, it might plausibly be argued – as the protected characteristics approach purports to do – that each of the first four Convention grounds are predicated on human rights conceptions, and thus the 'particular social group' ground ought also to be limited to groups defined in human rights terms. A protected characteristics approach identifies groups that we might generally believe merit protection: those who would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to give up an 'immutable' characteristic or because the basis of affiliation is the exercise of a fundamental human right. The approach also provided an important innovation as adjudicative bodies found the 'voluntary association' analysis of *Sanchez-Trujillo* lacking. It has permitted recognition of groups fully warranting protection – such as women and homosexuals – that do not generally comprise members who are closely affiliated with one another.

Balanced against these advantages, however, are disadvantages that need to be assessed. Significantly, the protected characteristics test is arguably in tension with a common sense meaning of the term 'social group'. Nothing in the refugee definition – and nothing in the *travaux préparatoires* – suggests that the immutability or fundamentality of characteristics is the key to understanding the Convention grounds. Furthermore, although the States Parties' jurisprudence displays a

128 Hathaway, in particular, has forcefully and thoughtfully advocated the *Acosta* approach to the social group definition. See Hathaway, *Law of Refugee Status*, above n. 18, pp. 157–69.

deep concern that the particular social group ground not be so broadly defined as to swallow up the other Convention grounds or to make all victims of persecution automatically refugees – a concern that is plainly consistent with the language, and purposes of the Convention – this consideration alone cannot support limitations that are not otherwise consistent with and reasonably inferable from the Convention.<sup>129</sup>

The protected characteristics approach also appears to deny refugee protection to members of groups who may well be targets of persecution based on their associations that are widely recognized in society.<sup>130</sup> Examples could include such groups as students, union members, professionals, refugee camp workers, or street children. (To list these groups is not to assert that each is always entitled to recognition; it is, however, to help the reader imagine cases in which recognizing such groups might be justifiable.)

A notable example is the *Montoya* case decided by the Immigration Appeal Tribunal (IAT) in the United Kingdom in 2001.<sup>131</sup> The applicant, a manager at his father's coffee plantation in Colombia, alleged that he faced threats and extortion from a revolutionary group that the government was either unable or unwilling to control. He asserted that his family was targeted because they were wealthy landowners; he further stated that his uncle, who had run a coffee plantation in the same village, had been similarly threatened and ultimately murdered. The IAT took note that in Colombia 'the status of being an owner of land that is worked for profit is an ostensible and significant social identifier with historical overtones'; it also accepted that 'another characteristic which private landowners share is the fact that they are ineffectively protected'. Nonetheless, it concluded that the applicant was not a member of a particular social group within the meaning of the Convention because the alleged group was not based on a characteristic that members of the group 'cannot change, or should not be required to change'.<sup>132</sup> The IAT stated that the applicant could change his status as landowner and could do so 'without that having a fundamental impact on his identity or conscience'.<sup>133</sup>

While the Tribunal's conclusion that landownership is not immutable or fundamental to their self-identity is plausible, it is not obvious why this conclusion should exhaust the analysis. Assuming the claimant could establish what he had alleged, the case demonstrates a clear risk of serious human rights violations based

129 As stated by Brennan J in *Applicant A.*: 'An attempt to confine the denotation of the term "a particular social group" in order to restrict the protection accorded by the Convention' is inappropriate where the 'object and purpose of the Convention is the protection so far as possible of the equal enjoyment by every person of fundamental rights and freedoms', above n. 4, (1997) 190 CLR 225 at 236.

130 Goodwin-Gill, *Refugee in International Law* (2nd edn, 1996), above n. 17, p. 365: 'Clearly, there are social groups other than those that share immutable characteristics, or which combine for reasons fundamental to their human dignity.'

131 *Montoya*, above n. 41.

132 *Ibid.*, p. 21.

133 *Ibid.*, p. 22.

solely on the applicant's status – a risk he shared with other persons in a similar situation. Following the ordinary meaning of the words, there is no reason why landowners cannot constitute a social group; in many societies, they are clearly so perceived, both by themselves and by others. Indeed, the IAT seemed to accept that prosperous landowners in Colombia would be perceived as a social group. Yet the protected characteristics approach – at least as applied by the IAT – ruled out recognition of the claim. Why a Convention protecting human rights should be read in such a fashion is far from clear.

The protected characteristics test might be stretched to include Montoya's group, as well as other groups referred to above. Landowning, it could be argued, is a fundamental aspect of one's identity (although the IAT was not persuaded by such a claim). James Hathaway is willing to give a most generous reading to the protected characteristics approach. Thus, he suggests that '[s]tudents are logically within the social group category, since the pursuit of education is a basic international human right' that a person should not be compelled to forego.<sup>134</sup> This seems to strain the category for the sake of reaching an appropriate result in a manner that would not undermine the protected characteristics approach. It is interesting, then, that the proposed INS regulations, by recognizing other factors relevant to a social group determination, appear to be pushing the US jurisprudence beyond the *Acosta* formulation.<sup>135</sup>

An alternative reading of the Convention language is suggested by the majority opinions in the Australian High Court case of *Applicant A*. What constitutes a particular social group is 'a common attribute and a societal perception that they stand apart'.<sup>136</sup> The attribute must not only be shared, it must unite the group as a matter of self-perception or societal perception. That is to say, the shared characteristic must make 'those who share it a cognisable group within their society'.<sup>137</sup> To similar effect is language in the French *Conseil d'Etat's Ourbih* judgment – that membership of a particular social group must be examined from the perspective of whether members of the group will risk persecution 'en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société'.<sup>138</sup> This approach might best be labelled 'common characteristic/social perception', but the term 'social perception' will be used for shorthand.

134 Hathaway, *Law of Refugee Status*, above n. 18, p. 168.

135 From the foregoing discussion, it ought to be clear that an acceptable alternative is not the 'cohesiveness' and 'voluntary association' standards of *Sanchez-Trujillo*, above n. 25. As noted, the Ninth Circuit itself has backed away from this test in *Hernandez-Montiel*, above n. 64.

136 *Applicant A.*, above n. 4, (1997) 190 CLR 225 at 265–6. See also *ibid.*, p. 264:

[T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group . . . [The term 'particular social group'] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.

137 *Ibid.*, p. 241 (footnote omitted).

138 *Ourbih*, quoted above n. 80.



This social perception interpretation is present – if unrecognized – in some of the US sources, as described above, and is expressly mentioned in *Islam* and *Shah*. Thus, Lord Hope of Craighead stated:

In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society . . . As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.<sup>139</sup>

Importantly, the social perception analysis would appear to encompass the groups currently recognized under the protected characteristics approach. This is primarily due to the fact that groups recognized under the protected characteristics analysis are likely to be perceived as social groups. Why is this the case? It is so because persons in groups that are the subject of persecutory, discriminatory treatment will avoid the shared characteristic that defines the group if they are able to; but groups defined by immutable characteristics cannot do so, and groups defined by characteristics fundamental to human dignity often choose not to do so, nor should they be required to do so.<sup>140</sup> Thus, such groups are likely to maintain their membership despite unfavourable treatment, and generally will be perceived as social groups – defined by the characteristic for which the abuse is imposed. For example, persons are likely to preserve deeply held religious and political convictions even if they face harm in doing so because they may view such convictions as core to their identities. Persons who maintain these kinds of affiliations despite social pressure to change are likely to be perceived as social groups.

While most 'protected characteristics' groups are likely to be perceived as social groups, there may also be social groups perceived as such that are not based on protected characteristics. A social perception approach, therefore, moves beyond protected characteristics by recognizing that external factors can be important to a proper social group definition. Asking whether a group has been 'marked as other'<sup>141</sup> is not to collapse the social group and persecution issues, but rather to examine whether the group is a cognizable group in a particular cultural

139 *Islam* and *Shah*, above n. 2, p. 1038.

140 Note that this also explains why not all immutable characteristics define social groups – consider height in this regard. Persons are generally not persecuted on this ground, and generally not perceived as a social group. If they were perceived as a social group and so persecuted, however, they ought to receive Convention recognition. By contrast, the immutable characteristics approach cannot provide an explanation as to why some immutable characteristics establish groups and others do not.

141 T. D. Parish, 'Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee', 92 *Columbia Law Review*, 1992, pp. 923 and 946.

context.<sup>142</sup> Consider, again, the *Montoya* case, involving the Colombian landowner targeted by guerrilla forces. Even if the applicant could not come within the protected characteristics analysis, it seems quite plausible to consider him part of a group that the guerrillas have perceived as distinct and marked for persecution.

The social perception approach could also reach claims advanced by persons who believe in values at odds with the social mores of the societies in which they live.<sup>143</sup> For example, women who object to FGM or who refuse to wear traditional dress are likely to be perceived as constituting a social group because they have set themselves against the cultural, religious, or political practices of the society. By contrast, it may be more difficult to recognize some of these claims – for instance, one based on attire – under the protected characteristics approach.

As with the protected characteristics approach, the social perception test finds support in the scholarly literature. Goodwin-Gill suggests that '[f]or the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices and laws'.<sup>144</sup> He would eschew a single principle (such as 'immutability'), examining instead a range of variables:

These would include, for example, (1) the fact of voluntary association, where such association is equivalent to a certain *value* and not merely the result of accident or incident, unless that in turn is affected by [social perceptions]; (2) involuntary linkages, such as family, shared past experience, or innate, unalterable characteristics; and (3) the perception of others.<sup>145</sup>

Goodwin-Gill recognizes that this interpretation might well embrace groups of 'apparently unconnected and unallied individuals', such as mothers, women at risk of domestic violence, capitalists, and homosexuals.<sup>146</sup>

In recognizing these arguments in favour of a social perception analysis, one must not underestimate the difficulties. Exactly how, it might be asked, is an adjudicator to determine the 'social perceptions' of other societies? Furthermore, *whose* perceptions count? Should an adjudicator examine the views of the alleged persecutors, a majority of the society, the views of ruling elites? A major benefit of the protected characteristics approach is that it avoids some of these evidentiary problems: an adjudicator can make reasonable judgments about the immutability of a

142 See Goodwin-Gill, *Refugee in International Law*, above n. 17 (2nd edn, 1996), p. 362: while 'victimization' alone is not enough to demonstrate a social group, persecutory laws and practices may be 'one facet of broader policies and perspectives, all of which contribute to the identification of the group'.

143 Such claims are also frequently analyzed as political opinion or imputed political opinion claims.

144 See Goodwin-Gill, *Refugee in International Law*, above n. 17 (2nd edn, 1996), p. 362.

145 *Ibid.*, p. 366.

146 *Ibid.* See also the 'sociological' approach as suggested in Graves, 'From Definition to Exploration', above n. 17.

particular characteristic and can evaluate the testimony of the applicant as to the fundamentality of a particular aspect of his or her identity. (Of course, under the protected characteristics approach, an applicant must still show that the group to which he or she belongs is at risk of persecution in the country to which he or she would be returned.)

The evidentiary problems that accompany a social perception test are not insurmountable. There will be many cases where there is ample objective evidence that particular groups are viewed as pariah groups or recognized as standing apart in the claimant's home country. Discriminatory laws and policies, historical animosities, press accounts and the like may frequently establish, to a fair degree of certainty, that a particular group is perceived as 'other' in a particular society. Adjudicators should have little difficulty, for example, concluding that women, homosexuals or family members of targeted groups constitute social groups in many countries.

Another objection to the social perception test might be that it would appear to recognize groups no matter how trivial the shared characteristic is. Philatelists or roller-bladers, for example, might be understood as constituting 'social groups' in particular countries. In contrast, the protected characteristics approach adopts a conceptual filter, ensuring that recognized groups be united by a truly important trait. In so doing, it preserves the powerful palliative of international protection for persons for whom it would be unfair to demand that they avoid or give up their unifying characteristic. As Hathaway has stated in a comment on a draft of this paper, '[s]urely it would be more reasonable to expect the roller-bladers to take off their skates than to insist that they be granted a "trump card" on migration control to enable them to continue to roll'.<sup>147</sup>

A response to this objection begins by noting that most trivial associations are not likely to attract persecutory acts; thus roller-bladers are quite unlikely to be recognized as refugees whether or not they constitute a 'social group'. If such groups *were* seen as groups in a society, however, and persons *were* subject to persecution on the basis of membership in the group, why should international protection be denied? Whatever we may think of philatelists or roller-bladers, clearly the persecutor sees them as a group that constitutes a threat and should be suppressed, and he or she is willing to inflict unjustifiable harm to accomplish the goal of suppression. The Convention is aimed at preventing the infliction of serious abuses based on group membership, not at preserving membership in groups that are deemed important or worthy. The triviality, or not, of the shared group characteristic therefore ought not to be relevant for Convention purposes. Indeed, as noted above, in most civil law States, the likelihood of persecution is a far more significant element in refugee status determinations than a particular Convention ground. It is thus not surprising that the Convention does not use the language 'fundamental' or 'immutable'

147 J. C. Hathaway, 'Professor Aleinikoff's Paper on "Membership of a Particular Social Group"', p. 2 (on file with the author).

to qualify ‘social group’. As human history makes clear, persecutors choose groups and victims for a variety of reasons, not simply based on the *fundamentality* of the trait that defines the group.

Indeed, to adopt a ‘non-triviality’ requirement would be to give the persecutor *carte blanche* for groups that associate for ‘non-fundamental’ reasons, that is, to permit the persecutor to accomplish precisely what he or she wants – suppression of the characteristic upon which the group is based. (It is conceivable that sadistic persecutors actually seek to inflict harm, but it is more generally the case that persecutors seek to get rid of the offending characteristic.) Such an approach puts things backwards – imposing a burden on members of a group to change in order to avoid persecution rather than providing protection to those at risk of serious unjustifiable harm.

A final concern with the social perception test might be that it creates too broad an interpretation of social group, opening the floodgates to any number of groups and claimants. Why might not the disabled, the poor, students, shopkeepers, athletes, or entertainers qualify under the test? Yet, as long as adjudicators observe the rule that the group must exist outside the persecution (properly understood), the social group category will be significantly limited. Furthermore, other elements of the refugee definition – for example, the requirements that ‘nexus’ be shown and that the applicant’s fear be well-founded – supply additional limits.

Given the advantages and disadvantages of both the protected characteristics and social perception tests, which should the conscientious adjudicator adopt? In my view, the social perception test is closer to the meaning and purpose of the Convention. It is also more inclusive; the protected characteristics analysis seems to cut off plausible claims for the sole reason of identifying a limiting principle of analysis. It must also be recognized, however, that the protected characteristics approach is well entrenched in the jurisprudence of a number of States and, on the whole, has produced results consistent with the Convention that manifestly further the protection of groups at risk of persecution.

My proposal is that, rather than viewing the two approaches as inconsistent and competing analyses, one should conceptualize the protected characteristics approach as the core of the social perception analysis. That is, groups that qualify under the protected characteristics approach are virtually assured recognition under the social perception test as well. This is so, as noted above, because immutable characteristics generally produce social perceptions, particularly when those characteristics have been used as reasons for the imposition of harms. Similarly, groups based on non-immutable but nevertheless fundamental characteristics that have been subject to serious harm are also likely to be socially cognizable – otherwise, the group members would have foregone the conduct to avoid the harm. Conceptualized in this fashion, one can maintain the analysis and results of the protected characteristics approach but also understand ‘membership of a particular social group’ as including other groups that meet the social perception test.

The idea that protection can be afforded under differing analyses is not foreign to human rights law. For example, norms prohibiting race discrimination may condemn intentional discrimination as well as practices that unjustifiably impose disproportionate harms, whether or not the imposition of harms is intentional. Intent tests and effects tests ask different questions and require different kinds of evidence, but adjudicators seem to have little difficulty in applying the tests to the same claims. Nor is the application of two separate tests seen as contradictory; each condemns practices that fit within the broader category of discrimination. In a similar fashion, adjudicators in States that currently use the protected characteristics approach might consider adoption of the social perception test in addition, testing social group claims under both standards. That is, identification of a group under the protected characteristics approach would be *sufficient*, but not *necessary*, for Convention purposes.

## VI. The ‘nexus’ requirement and non-State actors

In many social group cases, the difficult issue for the adjudicator may not be the definition of the group so much as the ‘nexus’ requirement, that is, the persecution be *for reasons of* membership in the group. A full analysis of the ‘nexus’ issue is beyond the scope of this paper,<sup>148</sup> but several discrete issues need to be considered concomitant with a study of ‘particular social group’. These relate to the situation where the agent of persecution is not the State.

Examples may be drawn from the cases: (i) a woman is abused by her spouse in a State that takes no action against such abuse; (ii) a woman is threatened with FGM by her tribal group in a State that prohibits, but cannot stop, the practice; (iii) a criminal enterprise threatens the family of someone who owes it money. Difficulties arise in such cases in deciding whether the conduct of the persecutor and/or the failure of State protection is ‘for reasons of’ the victim’s membership of a social group. For instance, in *Matter of R.A.*, the BIA concluded that the applicant – who had suffered very severe abuse – could not satisfy the nexus requirement because she could not show that group membership was the motivation behind the abuse by her husband.<sup>149</sup> This was so, according to the majority, because there was no evidence that the husband had or would target other members of the group.<sup>150</sup> They found: ‘On the basis of this record, we perceive that the husband’s focus was on the

148 For an in-depth analysis, see J. C. Hathaway, ‘The Michigan Guidelines on Nexus to a Convention Ground (2001)’, available at <http://www.refugeecaselaw.org/Refugee/guidelines2001.htm>.

149 *In Re R.A.*, above n. 14, pp. 21–2. The Board of Immigration Appeals (BIA) also held that the applicant had not shown that the government encouraged spouse abuse or failed to protect women with the expectation that abuse would occur.

150 *Ibid.*, p. 20: ‘If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions towards other members of the same group.’

respondent because she was *his* wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.<sup>151</sup>

The specific reasoning in *R.A.* is open to serious question.<sup>152</sup> Indeed, the proposed INS rules – formulated to provide ‘clarification’ of the Board’s reasoning – in fact implicitly disapprove of the Board’s ‘nexus’ analysis.<sup>153</sup> Whether or not the persecutor has acted against others in a similar situation may be probative, but it surely cannot be a required element of the case, any more than a person who claims race discrimination must show that the perpetrator has also discriminated against others on the basis of race. The Convention requires a showing that *her* fear of persecution is for reasons of a characteristic *she* possesses.

Even where it cannot be shown that the persecutor has acted ‘for reasons of’ one of the Convention grounds, there are circumstances in which a refugee claim might be recognized. Haines of the New Zealand Refugee Status Appeals Authority provides a persuasive account in Refugee Appeal No. 71427/99:

[T]he nexus between the Convention reason and the persecution can be provided *either* by the serious harm limb *or* by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state actor (e.g., husband, partner or other non-state agent) for reasons unrelated to any Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. This is because ‘persecution’ is a construct of two separate but essential elements, namely the risk of serious harm and failure of protection.<sup>154</sup>

151 *Ibid.*, p. 21.

152 See also the thoughtful dissenting BIA opinion authored by Board Chairman P. Schmidt, concluding that it was reasonable to believe that the harm inflicted on the applicant was motivated on account of *R.A.*’s membership of a particular social group that is defined by her gender, her relationship to her husband, and her opposition to domestic violence. The dissent further argues that *R.A.* is indistinguishable from *Kasinga*, above n. 5, an FGM case where membership of a particular social group was established, because ‘[t]he gender-based characteristics shared by the members of each group are immutable, the form of the abuse resisted in both cases was considered culturally normative and was broadly sanctioned by the community, and the persecution imposed occurred without possibility of state protection’, *In Re R.A.*, above n. 14, p. 37.

153 The explanatory material to the proposed rules states that an applicant is not required to show that a persecutor would be prone to harm other members of the defined social group. It reads: ‘Thus, it may be possible in some cases for a victim of domestic violence to satisfy the “on account of” requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share the characteristic, because only one of these women is in a domestic relationship with the abuser.’ 65 Fed. Reg. at 76593.

154 See above n. 7, at para. 112.

In other words, the claimant must show that the feared persecution is ‘for reasons of’ one of the Convention grounds and that the State does not afford protection. The Convention ground may be supplied either by the non-State persecutor (coupled with a State that is unable or unwilling to afford protection) or by the State (when it is unwilling to afford protection for one of the Convention reasons).<sup>155</sup>

This bifurcated analysis means that a social group claim may require separate analyses of both the conduct of the non-State actor and the State to see if either is acting for reasons of the claimant’s membership of a particular social group. Consider again the example of an abusive husband. A social group claim may be established either by showing (i) that the man’s actions are predicated on his spouse’s gender and the State is unable (or unwilling) to provide protection against such conduct; or (ii) that, whatever the reasons for the husband’s actions, the State is unwilling to protect the spouse because of her gender.<sup>156</sup>

Importantly, this analysis does not suggest that every case of domestic abuse establishes a refugee claim. First, the State may have an adequate legal process for sanctioning abusers; thus the applicant would be unable to establish a lack of State protection. Secondly, even where a particular applicant had been unable to secure police protection, it might be – as explained by the Federal Court of Australia in *Khawar* – that the failure was atypical, due to the attitude or ineptitude of a particular police officer, based on police inefficiency, or based on police reluctance to become involved in domestic disputes. The claimant would have to show ‘something more’ – a requirement that ‘would be satisfied at least by a sustained or systemic absence of state protection for members of a particular social group attributable to a perception of them by the state as not deserving equal protection under the law with other members of the society’.<sup>157</sup>

155 The Federal Court of Australia has suggested that the ‘State’s systemic failure to protect the members of the particular social group’ from an abusive husband might itself constitute ‘persecutory conduct’. See *Minister for Immigration and Multicultural Affairs v. Khawar*, above n. 34, para. 124, which reads: ‘The husband’s motivation would be irrelevant: his violence would not be the persecutory conduct and would be relevant only as providing the occasion of an instance of persecution by the state.’ See also P. Goldberg, ‘Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence’, 26 *Cornell International Law Journal*, 1993, pp. 565 and 584–8.

156 Compare *Islam and Shah*, above n. 2.

157 *Minister for Immigration and Multicultural Affairs v. Khawar*, above n. 34, judgment of 23 Aug. 2000, para. 160. See also Lord Hoffmann in *Islam and Shah*, above n. 2, [1999] 2 WLR 1015 at 1035:

[S]uppose the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? . . . [I]n my opinion, he is. An essential element in the persecution,

## VII. Applications

In this section, I apply the previous analysis to several kinds of claims with which adjudicators are faced today. The analysis cannot be definitive, since cases inevitably turn on the particular circumstances of the applicant and the country of origin. Nevertheless, the discussion above should help to guide the examination of such claims.

### A. Sexual orientation

Mr A. is an openly homosexual male. He has been seriously beaten and harassed by persons in his home town. His complaints to local police have been unavailing. He alleges that homosexuality is criminalized in his country and that local and State police either tolerate or encourage violence against homosexuals.

In a number of States, homosexuality has been recognized as a particular social group within the meaning of the Convention.<sup>158</sup> This result is likely to be reached whether an adjudicator applies the protected characteristics test or the social perception test. Sexual orientation is now generally understood as unchangeable or so fundamental to human dignity that change should not be compelled. Furthermore, in many societies homosexuals are viewed as pariah groups. The lack of ‘cohesiveness’ among members of the class should not defeat the claim. To meet the ‘nexus’ requirement a claimant would have to establish either that the persecutor abused the claimant because of the claimant’s homosexuality (and the State refused to act) or that the State failed to provide protection because of the claimant’s homosexuality.

### B. Family-based claims

#### 1. *Persecution by family member based on victim’s membership in a family*

Ms R. is an 18-year-old young woman whose father has physically and sexually abused her and her three sisters for many years. Her father has threatened her

the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question ‘Why was he attacked?’ would be ‘because a competitor wanted to drive him out of business’. But another answer, and in my view the right answer in the context of the Convention, would be ‘he was attacked by a competitor who knew that he would receive no protection because he was a Jew’.

158 See *Re G.J.*, above n. 47, and cases cited therein. Importantly, the reasoning of the House of Lords in *Islam* and *Shah*, above n. 2, also appears to cover sexual orientation. The case may therefore be read as clearing up an ambiguity that had existed in lower court cases in the UK. See Vidal, ‘Membership of a Particular Social Group’, above n. 37, pp. 535–6. See also, Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), ‘Replies to the Questionnaire on Gay and Lesbian Asylum Seekers’, 14 March 2001.



mother with death if she seeks to intervene. Complaints to the police have not prevented the abuse.

Under all the approaches discussed above (including the *Sanchez-Trujillo* standard), the family has been identified as a plausible particular social group, although the fact that the persecutor himself is a member of the family makes this perhaps a novel use of the Convention ground in this instance. In an important decision (*Aguirre-Cervantes v. INS*), a Court of Appeals in the United States has nevertheless recognized the family as a social group in such circumstances.<sup>159</sup> The definition of the particular social group as ‘family’ avoids a number of difficult issues that are raised when abuse claims are stated as persecution for reason of gender – for example, because ‘nexus’ can be established by showing that the father has assaulted members of his family, there is no need to show that the State acted ‘for reasons of’ the applicant’s membership of a social group. Furthermore, the class definition avoids the difficulty noted by the BIA in *R.A.* that the husband showed no inclination to abuse women other than his wife (thereby, according to the Board, undermining the definition of social group as ‘women’). In *Aguirre-Cervantes* there was a close fit between the group and the victims of persecution – the abuser’s immediate family.

Other courts and other jurisdictions may resist following the *Aguirre-Cervantes* approach because it appears to transmute any domestic violence case that is not prevented by the State into a refugee claim – irrespective of the reasons for the failure of State protection. In abuse cases alleging a particular social group based on gender, the applicant normally identifies social values and norms that tolerate abuse of women that underlie both the actions of the abuser and the lack of protection by the State. That is, women as a class are devalued, deemed not entitled to equal protection by the State from violence. In *Aguirre-Cervantes*, however, it would be hard to conceive of proof that a society devalues family life. Perhaps it is the social construction of family – with a male head who is free to treat members of the family as he chooses without intervention from the State – that is the key to the case. Thus, the court cited evidence that domestic violence is widely condoned in Mexico, that the State is either unwilling or unable to stop it, and that the State apparently gives ‘tacit approval of a certain measure of abuse’.

## 2. *Persecution by non-State actor who victimizes members of applicant’s family*

Mrs S. and her children have received death threats from criminals to whom her husband owes money. The family lives in an area where the government cannot exercise effective control over criminal syndicates.

159 Compare *Aguirre-Cervantes v. INS*, above n. 55.

As in the previous hypothetical example, the family may constitute a particular social group. The interesting issue in this case is whether the family may assert a valid claim even if the criminal group's relationship with the husband is not related to one of the Convention grounds. Compare, for example, the classic case of a State threatening a dissident's family in order to deter the dissident's activities.<sup>160</sup> The Federal Court of Australia has found the family cognizable as a social group in such circumstances, rejecting a lower court's conclusion that the dispute was personal because 'the main target of the persecution falls outside the scope of the Convention'.<sup>161</sup> This seems a sensible result. It is the family as such that is being targeted; it is a status that cannot be escaped, and the State is unable to provide protection from the persecution.

### C. Chinese coercive family practices

Mr and Mrs C. fled China after the birth of their second child. They assert that they have been threatened with involuntary sterilization by local Chinese authorities.

Applicants claiming refugee status based on a fear of coercive family practices have generally been unsuccessful.<sup>162</sup> The cases express a number of concerns. First, while not condoning forced abortion or sterilization, courts and administrative agencies have tended to view population control measures as permissible social policies – that is, they are not inherently persecutory. Secondly, reports of actions taken by local officials may be deemed to be isolated incidents. Thus, claims may fail for not establishing a *well-founded* fear of persecution.<sup>163</sup> No doubt adjudicators have also been influenced by the fact that the majority of applicants are males from regions in China that have traditionally sent migrants abroad.

Most important for present purposes, adjudicators are hesitant to conclude that persons who object to a general social policy constitute a particular social group. Such persons are not affiliated as a group, nor – it is found – are they identified as

160 For a review of German cases on this point, see M. Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany', 4 *Georgetown Immigration Law Journal*, 1990, pp. 381, 428–37.

161 *Minister for Immigration and Multicultural Affairs v. Sarrazola*, [1999] FCA 1134, 1999 Aust Fedct Lexis 667. Compare the Netherlands decisions that grant refugee status in situations in which harm is visited on family members to get at another family member. Spijkerboer, *Gender and Refugee Status*, above n. 95, p. 120.

162 See *Chang*, above n. 53 (USA), *Applicant A.*, above n. 4 (Australia). Compare *Chan* (Canada), above n. 21. Importantly, however, the children of two-child families have been deemed to constitute a particular social group. See *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, above n. 29 (so-called 'black children'). Moreover, applicants may be able to establish claims based on persecution for reasons of religion or political opinion.

163 Compare *Chan*, above n. 21, finding that a fear of forced sterilization was not objectively well-founded.

a group by society at large. The clear underlying concern here is that a rule not be affirmed that would recognize ordinary criminals as a social group, who allegedly might be deemed to be affiliated by their violation of general State policies.

Applicants have sought to distinguish ordinary criminals by noting that the coercive family planning cases assert punishment for the exercise of fundamental human rights, such as the right to be free from egregious bodily intrusions and the right to determine one's family. This links up with the second *Ward/Acosta* category encompassing characteristics fundamental to human dignity, that is, a social group might be asserted as constituted by persons united in their assertion of fundamental human rights.<sup>164</sup> The problem with this analysis, however, is that it would appear to replace the individual Convention grounds with a single ground protecting all persons whose human rights have been violated, designating a social group for each right violated – or perhaps for all persons whose human rights are violated in a particular society. This kind of general *non-refoulement* principle might well be an admirable advance for human rights protection, but it clearly goes beyond the intent and scope of the Convention.

Adjudicators should pause, however, before leaping to the conclusion that opponents of China's family planning practices may never constitute a social group. Adoption of the approach suggested above would require examination of whether persons who have had two children or who have asserted a human right to do so have been perceived to be a social group in China. In this inquiry, the fact of persecution might support the recognition of a social group – without running foul of the rule that the persecution cannot define the group. That is, coercive State action may be perceived by the society at large as affirming the idea that those who oppose the policy are enemies of the State. Indeed, the severity of the human rights abuse underscores the statement being made by the State. It is as if the State were saying: 'These people's conduct transgresses social norms to such an extent that it is justifiable that we violate their fundamental human rights.' (Even if the punishment inflicted did not include forced abortion or sterilization, it might still help to identify violators as a pariah group in Chinese society.)

In sum, the relevant question in the Chinese coercive family planning cases ought to be whether those who oppose the policy are perceived to be a group apart in China. This would be so whether or not the group is 'cohesive' or whether or not the members of the group voluntarily affiliate with each other. It is sufficient that the group is recognized as a group in society so that any person with the characteristic that defines the group is seen as a member of the group. If so, then action taken against them that violates fundamental human rights ought to be understood to be persecution inflicted for reasons of their membership of a particular social group.

This example demonstrates the way in which the proposed approach charts a middle course – neither concluding that all persons who suffer human rights

164 See *La Forest J*, dissenting in *Chan*, above n. 21, [1995] 3 SCR 593 at 642–6.

abuses receive Convention protection on social group grounds nor automatically ruling out claims brought by those who oppose general social policies. It avoids the untoward consequences of a *Sanchez-Trujillo* approach, and also does not require a stretched application of the protected characteristics test in order to provide protection appropriate under the Convention.

#### D. Spouse abuse

Mrs T., who had been beaten many times by her husband, told him that she wants a divorce. He has thrown her out of the house and told her that he will not consent to a divorce. Although they no longer live together, the husband continues to harass the wife. Her appeals to the local authorities have brought no assistance; under the social norms of the State, the husband is free to discipline a wife who has abandoned the home.

No set of cases has tested the social group ground as much as claims involving spouse abuse. Although domestic violence claims were virtually non-existent two decades ago, they are now brought with increasing frequency in many jurisdictions. These claims raise difficult issues of the interpretation of both the term ‘membership of a particular social group’ and the nexus requirement. Adjudicators – aided by officially promulgated guidelines relating to gender-based refugee claims<sup>165</sup> – have shown a general willingness to entertain such claims, but the reasoning of the cases differs substantially across jurisdictions.

The precise definition of the social group has been a particular difficulty.<sup>166</sup> Cases have considered groups defined as women, married women, women who express opposition to abuse, and women married to abusive husbands. The protected characteristics and social perception approaches both might recognize *women* as the appropriate group. This was the conclusion of a majority of the Lords in the important *Islam* and *Shah* decision. It might be objected that this definition fails because not all members of the group are at risk.<sup>167</sup> However, as noted by Lord Steyn in *Islam* and *Shah*, this would be an inappropriate limitation on the class; the relevant question is not whether all members are subject to risk but whether the membership of the applicant in the group is the basis for *her* fear of persecution. Another objection to definition of the class as *women* could be based on the idea that an abuser might well have targeted his wife for abuse not because she is a woman but rather because she is married to him, or because he is simply an abusive person. But this reasoning seems open to question, once the analysis is expanded to take into account social

165 See e.g., Australia, Canada, the Netherlands, the UK, and the USA. Guidelines on the treatment of particularly vulnerable asylum seekers (including those facing gender-related persecution) are also being drafted by the Austrian Federal Asylum Office.

166 See Goldberg, ‘Anyplace but Home’, above n. 155.

167 This was the argument of counsel for the Secretary of State in *Islam* and *Shah*, above n. 2. See the judgment of Lord Steyn at 504.

norms. It may well be that broader norms in society, in essence, license abuse of women by neither stigmatizing the persecutor nor insisting that the State take action to prevent it. In such a case, the abuse suffered by the applicant seems plainly to befall her because she is a woman.

Some adjudicators have been more comfortable with the category of *married women*, perhaps because it more narrowly identifies the group of persons likely to suffer abuse. That is, an abusive husband may not persecute women on the street, but might well abuse any woman to whom he is married.

Under the proposed approach, it could be appropriate for adjudicators to identify either *women* or *married women* as a particular social group – it is hard to imagine a society in which these groups are not widely recognized as sharing a distinct and socially relevant characteristic. Both groups would also likely be recognized under the protected characteristics approach. The question would then be whether the applicant could demonstrate that the persecution was suffered for reasons of belonging to this group. As the ‘nexus’ discussion above noted, this could be established in two ways. Either the applicant could show that the abuser persecuted her because of her membership of the particular social group, and that the State was either unable or unwilling to prevent the abuse, or she could show that, whatever the motives of the abuser, the State was *unwilling* to prevent the abuse because of her membership in the defined group.

Admittedly, this analysis is at odds with the BIA’s decision in *Matter of R.A.*, but that judgment seems open to serious question – as indicated by the proposed INS rules and the ruling of the US Attorney-General vacating the Board’s decision and remanding the case to the Board for reconsideration once the INS promulgates a final rule. There is no justification for a requirement that an applicant prove that her abuser would abuse all women (or all married women). Again, the issue for investigation is whether the applicant is at risk because of circumstances she is in and whether it is her membership in a group that puts her at risk.

### VIII. Conclusion

It would be wise to keep in mind the words of Sedley J, writing for the Court of Appeal in the *Islam* and *Shah* case (and quoted by Lord Steyn in *Islam* and *Shah*):

[A]djudication [of a particular social group claim] is not a conventional lawyer’s exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual’s past and prospective situation in a particular cultural, social, political, and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.<sup>168</sup>

168 *R. v. IAT and Secretary of State for the Home Department, ex parte Shah*, English Court of Appeal, [1997] Imm AR 145 at 153.

Additionally, it is crucial to stress that social group determinations are fact- and country-specific. That is, there is no *a priori* reason to assume that a group identified for Convention purposes as a social group in one country will qualify as a social group in other countries. With these chastening considerations in mind, I offer the following summary of the preceding discussion.

While the term ‘particular social group’ should not be artificially limited in its application, so too it cannot be given a meaning that renders the other categories superfluous. Importantly, a group cannot be defined simply based on the persecution that has been visited upon it. Two general analyses have been identified – the protected characteristics approach and the social perception approach. I have argued that the social perception test, while occasioning some difficulties, is probably the better reading of the Convention. The central issue for analysis in a social group case, then, should be whether the alleged group is united by a common characteristic by which members identify themselves or are identified by the government or society. Nonetheless, the two approaches can be seen as consistent if the protected characteristics analysis is understood to define a core set of groups that are virtually ensured recognition under the social perception test. Understood in that fashion, the protected characteristics test can be applied by adjudicators who find that approach more suitable; such adjudicators can be safe in the knowledge that the approach will identify the vast bulk of groups that should be afforded protection under the Convention. I have argued, however, that they should be willing to assess claims that fail the protected characteristics test under the social perception test as well.

Under either test, there is no requirement that a group be ‘cohesive’ in order to be recognized as a ‘particular social group’ within the meaning of the Convention, that is, there need be no showing that all members of a group know each other or voluntarily associate together. The relevant issue is whether or not group members share a common characteristic that defines a group. So too an applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists. He or she need only demonstrate that a fear of persecution is based on his or her membership of the group.

While a ‘particular social group’ cannot be defined solely by the fact that all members of the group suffer persecution nor by a common fear of persecution, persecutory action towards a group may be a relevant factor in determining whether a group is cognizable as such in a particular society. The fact that abuse is visited on persons who share an independent identifiable characteristic may demonstrate that the group is perceived as a group in the society in which it is located, that is, it is identified as ‘persecutable’, or in fact attracts persecution, because of its shared characteristic.

I have suggested that invocation of *ejusdem generis* or understanding the Convention primarily in ‘non-discrimination’ terms has only limited relevance for interpreting the term ‘particular social group’.

As to the requirement of a nexus between membership of a social group and a well-founded fear of persecution, where an applicant is harmed by a non-State actor, such harm may constitute persecution for reasons of membership of a particular social group if (i) the harm is inflicted for reasons of such membership and the State is unable or unwilling to prevent the harm; or (ii) the harm is inflicted and the State, for reasons of the applicant's membership of a particular social group, is unwilling to prevent the harm.

It is worth recalling one final point. A conclusion that a particular social group exists in an individual case does not, of course, establish that all members of the group are entitled to recognition as refugees. An applicant would need to demonstrate a well-founded fear of being persecuted for reasons of membership of that group.

## 4.2 Summary Conclusions: membership of a particular social group

*Expert Roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy, 6–8 September 2001*



The San Remo Expert Roundtable addressed the question of the meaning of ‘membership of a particular social group’ in the refugee definition, as contained in the 1951 Convention Relating to the Status of Refugees. The discussion was based on a background paper by T. Alexander Aleinikoff, Migration Policy Institute and University of Georgetown, entitled ‘“Membership in a Particular Social Group”: Analysis and Proposed Conclusions’. In addition, roundtable participants were provided with written contributions from Justice Lory Rosenberg, United States Board of Immigration Appeals, Deborah Anker, Harvard Law School, and James C. Hathaway, University of Michigan, and subsequent comments were received from the US Government, and Joan Fitzpatrick, University of Washington. Participants included thirty-three experts from twenty-three countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Lee Anne de la Hunt, from the University of Cape Town Legal Aid Clinic, moderated the discussion.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

1. The membership of a particular social group ground is the Convention ground with the least clarity. Varying interpretations have been given to it in different jurisdictions, with two dominant approaches having been developed in common law jurisdictions – those of protected characteristics and social perception. In civil law jurisdictions, this ground is less developed, with more focus placed on the interpretation of persecution and on the other four grounds. The evolution of this ground has advanced the understanding of the refugee definition as a whole.



2. The ground must be given its proper meaning within the refugee definition, in line with the object and purpose of the Convention. It is important that its interpretation should not render the other Convention grounds superfluous.
3. Depending on the circumstances of an individual case, one or more grounds may overlap or may be equally applicable. This phenomenon is not limited to the social group ground.
4. There is no requirement that a group be cohesive in order to be recognized as a particular social group within the meaning of the Convention, that is, there need be no showing that all members of a group know each other or associate together.
5. A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, and which sets them apart. The characteristic will ordinarily be one which is innate, unchangeable, or which is otherwise fundamental to human dignity.
6. While a particular social group cannot be defined solely by the fact that all members of the group suffer persecution nor by a common fear of persecution, nevertheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.
7. An applicant need not establish that every member is at risk of persecution to establish a well-founded fear of persecution.
8. Adjudicating refugee claims based on membership of a particular social group involves a global appraisal of an individual's past and prospective situation in a particular cultural, social, political, and legal context, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.
9. Consideration could be given to the continued evolution of the membership of a particular social group category in particular by exploring the relevance of a 'social perception' test.

### 4.3 List of participants

*Expert roundtable, San Remo, Italy, 6–8 September 2001 (membership of a particular social group, gender-related persecution, internal protection/relocation/flight alternative)*

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Widney Brown, Human Rights Watch, New York, United States  
Eduardo Cifuentes Muñoz, Government of Colombia  
Bo Cooper, Government of the United States  
Krista Daley, Immigration and Refugee Board, Ottawa, Canada  
Lee Anne De la Hunt, University of Cape Town, Legal Aid Clinic, South Africa  
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Penelope Mathew, Australian National University, Canberra, Australia  
Djamchid Momtaz, University of Tehran, Iran  
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David Palmer, Government of Australia  
Chan-un Park, Lawyers for a Democratic Society (MINBYUN), Seoul, Republic of Korea  
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# 5.1 Gender-related persecution

RODGER HAINES QC\*

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\* This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on gender-related persecution organized as part of the Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention Relating to the Status of Refugees.

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## I. Introduction

The principle of non-discrimination has been correctly described as fundamental to the concept of human rights.<sup>1</sup> It is specifically affirmed, for example, in the Preamble to the United Nations Charter,<sup>2</sup> the Universal Declaration of Human Rights, 1948,<sup>3</sup> the International Covenant on Civil and Political Rights, 1966,<sup>4</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.<sup>5</sup> The principle of equality and the prohibition of discrimination has been reaffirmed and strengthened in a multitude of international human rights treaties. Observance, however, has been far from exemplary and this is no less true in the case of the Convention Relating to the Status of Refugees, 1951.<sup>6</sup> In particular, it has not always been recognized that women and the girl-child enjoy the equal protection of the 1951 Convention.

From at least 1985, however, a concerted effort has been made by the Office of the United Nations High Commissioner for Refugees (UNHCR) to correct this inequity. The Executive Committee of the High Commissioner's Programme has similarly called upon States to recognize that refugee women who are victims of violence and persecution are in need of protection under the 1951 Convention.<sup>7</sup> Thus, in October 1995, the Executive Committee:

1 P. Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford, 1990), p. 75. See also, M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl am Rhein, Germany, and Arlington, VA, USA, 1993), pp. 458 and 460: 'Along with liberty, equality is the most important principle imbuing and inspiring the concept of human rights'; 'The principle of equality and the prohibition of discrimination runs like a red thread through the [International Covenant on Civil and Political Rights].'

2 The UN Charter, 1945, also includes sex among the prohibited grounds of discrimination alongside race, language, and religion, Art. 1(3).

3 Universal Declaration of Human Rights, UNGA Res. 217 A (III), 10 Dec. 1948 (hereinafter 'Universal Declaration'), Arts. 2 and 7.

4 International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, 6 ILM 368, 1967 (hereinafter 'ICCPR'), Arts. 2(1), 3, and 26.

5 Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13, Arts. 1–5.

6 Convention Relating to the Status of Refugees, 1951, 189 UNTS 150 (hereinafter '1951 Convention'). References to the 1951 Convention in this paper should be read as including the Protocol Relating to the Status of Refugees, 1967, 606 UNTS 267.

7 See e.g., Executive Committee, Conclusion No. 39 (XXXVI) 1985, Refugee Women and International Protection, paras. b and k, which welcomed the recommendations regarding the situation of refugee and displaced women adopted by the World Conference to Review and Appraise the

call[ed] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women . . . In accordance with the principle that women's rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.<sup>8</sup>

The result has been an increasingly comprehensive set of guidelines and position papers on gender-related persecution issued by UNHCR and others.<sup>9</sup> At the same time, the analysis and understanding of sex and gender in the refugee context has advanced substantially in the case law,<sup>10</sup> in State practice,<sup>11</sup> and in academic

8 Executive Committee, Conclusion No. 77 (XLVI) 1995, General Conclusion on International Protection, para. g, UN doc. A/AC.96/878, IIIA.1. See generally, UNHCR, Division of International Protection, 'Gender-Related Persecution: An Analysis of Recent Trends', *International Journal of Refugee Law*, special issue, 1997, pp. 79–113. See also, 'Report of the Fourth World Conference on Women, Platform for Action', UN doc. A/CONF.177/20, 17 Oct. 1995, Annex II, particularly para. 136 which acknowledges that women 'may . . . be forced to flee as a result of a well-founded fear of persecution for reasons enumerated in the 1951 Convention . . . including persecution through sexual violence or other gender-related persecution'.

9 These include UNHCR, 'Guidelines on the Protection of Refugee Women', July 1991; UNHCR, 'Sexual Violence Against Refugees: Guidelines on Prevention and Response', 1995; the Symposium on Gender-Based Persecution held in Geneva, 22–23 Feb. 1996 (reported in *International Journal of Refugee Law*, special issue, 1997, pp. 1–251), and UNHCR, 'Gender-Related Persecution', UNHCR Position Paper, Jan. 2000 (hereinafter 'UNHCR, 2000 Position Paper on Gender-Related Persecution').

10 See e.g., *In Re Kasinga*, US Board of Immigration Appeals (BIA), Interim Decision No. 3278, 1996, [1996] I. & N. Decisions 357; *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144; [1999] 2 AC 629, and 11 *International Journal of Refugee Law*, 1999, pp. 496–527 (hereinafter '*Islam and Shah*'); *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, (2002) 187 ALR 574, and [2000] HCA 14, 11 April 2002; Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority (NZ RSAA), [2000] NZAR 545; [2000] INLR 608. These decisions are discussed *inter alia* in D. E. Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question?', 15 *Georgetown Immigration Law Journal*, 2001, p. 391.

11 See e.g., Immigration and Naturalization Service (INS), 'Gender Guidelines: Considerations for Asylum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women', 26 May 1995 (USA); Department of Immigration and Multicultural Affairs, 'Guidelines on Gender Issues for Decision Makers', July 1996 (Australia); Immigration and Refugee Board, 'Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution', 25 Nov. 1996 (Canada); Immigration and Naturalization Service, 'Work Instruction No. 148 (Netherlands): Women in the Asylum Procedure', 1997 (Netherlands); and Immigration Appellate Authority (IAA), 'Asylum Gender Guidelines', Nov. 2000 (UK) (hereinafter 'IAA, Asylum Gender Guidelines'). For recent developments in the USA, see 'INS Issues Proposed Rule on Gender and Domestic Violence-Based Asylum Claims', 77 *Interpreter Releases* 1737, 18 Dec. 2000. The Refugee Act 1996 (Ireland), section 1(1), defines 'membership of a particular social group' so as to include membership of a group of persons whose defining characteristic is their belonging to the female or the male sex. The Swedish legislature inserted a specific provision in the Aliens Act in 1997 that

writing.<sup>12</sup> This relates not least to a greater appreciation of the differences between sex, as an indicator of biological difference, and gender, as the relationship between women and men based on socially-defined roles that are assigned to one sex or another.<sup>13</sup>

These developments have run parallel to, and have been assisted by, developments in international human rights law and in international humanitarian law – including in particular the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>14</sup> The Rome Statute of the International Criminal Court has also been significant in explicitly recognizing sexual violence as able to constitute a crime against humanity and a war crime.<sup>15</sup> As in other aspects of the refugee definition, State practice in relation to sex and gender issues in the refugee context varies but overall demonstrates convergence on the principle of a gender-inclusive and gender-sensitive interpretation of the 1951 Convention.<sup>16</sup>

Experience has shown that a gender-inclusive and gender-sensitive interpretation of the 1951 Convention does not lead inexorably to the consequence that all female asylum seekers are automatically entitled to refugee status.<sup>17</sup> The asylum

people persecuted on account of their gender are entitled to a humanitarian residence permit. A 1998 amendment to the Swiss Asylum Act stipulates that gender-specific flight motives must be taken into account and the agreement constituting the basis for the new German Government in 1998 also contains specific rules with regard to gender persecution: see T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, 2000), p. 3. The Austrian Federal Asylum Office is currently in the process of elaborating guidelines on the treatment of particularly vulnerable asylum seekers, including separated children, traumatized asylum seekers and cases of gender based persecution.

12 For two recent and notable examples, see Spijkerboer, *Gender and Refugee Status*, above n. 11, and H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001). For a discussion of US law, see D. E. Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, 1999), pp. 252–66, 365–76, and 388–93; and P. Goldberg, ‘Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context’, 66 *Brooklyn Law Review*, 2000, p. 309.

13 For a more detailed discussion of this particular issue, see the subheading ‘Sex and gender an integral element of refugee enquiry’ below. Crawley, *Refugees and Gender*, above n. 12, p. 6; Refugee Women’s Legal Group (RWLG), ‘Gender Guidelines for the Determination of Asylum Claims in the UK’, July 1998, para. 1.8; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 1.

14 For further details, see the subheading ‘War, civil war, and civil unrest’ below; and E. Møse, ‘The Criminality Perspective’, 15 *Georgetown Immigration Law Journal*, 2001, p. 463.

15 Rome Statute of the International Criminal Court, UN doc. A/CONF.183/9, 17 July 1998, Arts. 7 and 8. Art. 6 also includes in its definition of genocide ‘imposing measures intended to prevent births within the group’.

16 See, e.g., A. Leiss and R. Boesjes, *Female Asylum-Seekers: A Comparative Study Concerning Policy and Jurisprudence in the Netherlands, Germany, France, the United Kingdom, also Dealing Summarily with Belgium and Canada* (Dutch Refugee Council, Amsterdam, April 1994), p. 94; J. Bissland and K. Lawand, ‘Report of the UNHCR Symposium on Gender-Based Persecution’, *International Journal of Refugee Law*, special issue, 1997, pp. 13 and 28.

17 C. Bernier, ‘The IRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution’, *International Journal of Refugee Law*, special issue, 1997, pp. 167 and 168. Canada, which has



seeker must still establish that the fear of persecution is well founded, that the nature of the harm anticipated rises to the level of serious harm, that there would be a failure of State protection if he or she were returned, and that the well-founded fear of being persecuted is for reasons of race, religion, nationality, membership of a particular social group, or political opinion. The refugee status inquiry is always individual; it is always particularized.

The purpose of this paper is to propose a way of interpreting the refugee definition in a gender-sensitive manner. Section II briefly examines general issues relating to the interpretation of Article 1A(2) of the 1951 Convention, which prescribes an inquiry into whether the refugee claimant is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .

The subsequent sections III–V analyze the different elements of the words ‘persecution’, ‘well-founded’ and ‘for reasons of’ contained in the refugee definition. They show that the different elements of this definition all need to be met for a person to be recognized as a refugee. While gender is not specifically referred to in the definition, it can influence or even dictate the type of persecution or harm suffered and the reasons for this treatment. Section VI examines the five different Convention grounds qualifying for refugee status from a gender perspective. Finally, section VII briefly identifies a few of the most significant procedural issues which may arise and which require a gender-sensitive response. While the primary focus of this analysis is on the particular situation of women and girls, it is of course true that men and boys can also face gender-related persecution.

## II. The interpretation of Article 1A(2)

Neither the refugee definition nor the 1951 Convention in general refers to sex or gender.<sup>18</sup> This omission is, however, without significance. The ordinary meaning of Article 1A(2) of the 1951 Convention in its context and in the light of the object and purpose of the Convention requires the conclusion that the Convention protects both women and men and that it must therefore be given a

one of the longest experiences with guidelines on women refugee claimants has not detected any noticeable effect on the number of gender-related claims in Canada. The experience of the USA has been similar. See D. E. Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, Washington DC, 1999), p. 254, n. 405.

<sup>18</sup> The non-discrimination provision of the 1951 Convention, namely, Art. 3, refers only to race, religion and country of origin as prohibited grounds of discrimination.

gender-inclusive and gender-sensitive interpretation.<sup>19</sup> In addition, Article 26 of the ICCPR confers an independent right to equality before the law and to the equal protection of the law, over and above the accessory prohibition of discrimination in Article 2 of the ICCPR.<sup>20</sup>

#### A. Universal access to the refugee protection regime

As can be seen from the face of the text, the refugee definition applies to all persons without distinction as to sex, age, disability, sexual orientation, marital status, family status, race, religious belief, ethnic or national origins, political opinion, or any other status or characteristic. The only categories of persons who are not included in the definition are those described in the cessation provisions of Article 1C and the exclusion provisions of Articles 1D, 1E, and 1F. Even then, none of these provisions makes any distinction between individuals on the basis, for example, of their sex, age, disability, sexual orientation, marital or family status, race, political opinion, or religious or ethical belief.

The intention to provide universal access to the refugee regime is expressly affirmed by the first and second recitals in the Preamble to the 1951 Convention:

*Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

*Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms . . .

19 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art. 31, which provides: 'A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' See also, *Applicant A. v. Minister for Immigration and Ethnic Affairs*, High Court of Australia, (1997) 190 CLR 225, per McHugh J; UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, paras. 2–6.

20 Nowak, *CCPR Commentary*, above n. 1, p. 465. Art. 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**B. The focus of the inquiry is on the specific characteristics and circumstances of the claimant**

While access to the refugee protection regime is universal, the refugee definition is strict and requires a highly specific examination of the particular characteristics and circumstances of the refugee claimant. It must be demonstrated that the individual has a well-founded fear of being persecuted and that that fear is for at least one of the five 'reasons' enumerated in the definition. In more general terms, the inquiry is into who the individual is or what he or she believes and the reason why that person is unable or unwilling to avail him or herself of the protection of the country of origin. Both sex and gender are an inherent aspect of the question whether the claimant meets the refugee definition.

**C. Sex and gender are integral elements of the refugee inquiry**

The purpose of the 1951 Convention is to provide surrogate protection to men, women, and children from persecution. Since men, women, and children can be persecuted in different ways and since Article 1A(2) demands an inquiry into the specific characteristics and circumstances of the individual claimant, the sex and/or age of the refugee claimant are integral elements of the refugee inquiry.

Equally integral are the power structures in the country of origin and in particular the civil, political, social, and economic position of the refugee claimant. In this context, as has been explained by Heaven Crawley and others:

The term 'gender' . . . refers to the social construction of power relations between women and men, and the implications of these relations for women's (and men's) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and culturally specific, so that what it is to be a 'woman' or 'man' varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences.<sup>21</sup>

Indeed, as the Refugee Women's Legal Group in the United Kingdom has further clarified:

21 Crawley, *Refugees and Gender*, above n. 12, pp. 6–7. See also, Refugee Women's Legal Group (RWLG), 'Gender Guidelines for the Determination of Asylum Claims in the UK', July 1998, paras. 1.8–1.15 (hereinafter 'RWLG, Gender Guidelines'); UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 1.

Gender is a social relation that enters into, and partly constitutes, all other social relations and identities. Women's experiences of persecution, and of the process of asylum determination, will also be shaped by differences of race, class, sexuality, age, marital status, sexual history and so on. Looking at gender, as opposed to sex enables an approach [to the refugee definition] which can accommodate specificity, diversity and heterogeneity.<sup>22</sup>

Gender-related persecution refers to the experiences of women who are persecuted *because* they are women, that is, because of their identity and status as women. Gender-specific persecution refers to forms of serious harm which are specific to women.<sup>23</sup> The reasons for such persecution and the form it takes may, however, overlap. The former will be discussed in the context of the 'for reasons of' and 'Convention grounds' elements. The latter will be discussed in the section on 'Persecution'.

#### D. The importance of the 1967 Protocol

The 1967 Protocol to the 1951 Convention not only removed the 1 January 1951 dateline and the geographic limitation, it fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses which are properly called persecution.<sup>24</sup>

#### E. Sex and gender are already included in the 1951 Convention

The text, object, and purpose of the 1951 Convention require a gender-inclusive and gender-sensitive interpretation. Sex and gender are already included in the refugee definition. If sight of this fact is lost, a misconceived interpretation can reflect and reinforce gender biases leading to the marginalization of women in the refugee context.<sup>25</sup> It has been suggested that 'sex' or 'gender' be added as a sixth ground to the 1951 Convention. Quite apart from the fact that there is no realistic prospect of the Convention being expanded in this way, the argument in favour of a sixth ground may have the unintended effect of further marginalizing women

22 RWLG, 'Gender Guidelines', above n. 21, para. 1.10.

23 Crawley, *Refugees and Gender*, above n. 12, p. 7.

24 Vienna Convention on the Law of Treaties, above n. 19, Art. 31(3)(a), specifically provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

25 Crawley, *Refugees and Gender*, above n. 12, pp. 4–5; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 2.

if misinterpreted as an implicit concession that sex and gender have no place in refugee law at the present.<sup>26</sup>

The failure of decision makers to recognize and respond appropriately to the experiences of women stems not from the fact that the 1951 Convention does not refer specifically to persecution on the basis of sex or gender, but rather because it has often been approached from a partial perspective and interpreted through a framework of male experiences.<sup>27</sup> The main problem facing women as asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.<sup>28</sup>

### III. Understanding the meaning of ‘persecution’

Underlying the 1951 Convention is the international community’s commitment to the assurance of basic human rights without discrimination.<sup>29</sup> The Convention does not, however, protect persons against any and all forms of even serious harm.<sup>30</sup> There must be a risk of a type of harm that would be inconsistent with the basic duty of protection owed by a State to its own population.<sup>31</sup> The dominant view is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.<sup>32</sup> Persecution is most appropriately defined as the sustained or systemic failure of State protection in relation to one of the core entitlements recognized by the international community.<sup>33</sup>

The relevant core human rights are those contained in the so-called international bill of rights, comprising the Universal Declaration of Human Rights and, by virtue of their almost universal accession, the ICCPR and the International Covenant on

26 T. Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, Sept. 1994), p. 68; UNHCR, ‘Interpreting Article 1’, above n. 19, para. 19.

27 Crawley, *Refugees and Gender*, above n. 12, p. 35. 28 *Ibid.*

29 Preamble (first and second recitals) to the 1951 Convention; *Canada (Attorney-General) v. Ward*, Supreme Court, Canada, [1993] 2 SCR 689 at 733; (1993) 103 DLR (4th) 1 (hereinafter ‘*Ward*’).

30 J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), p. 103.

31 *Ibid.*, pp. 103–4.

32 *Ibid.*, p. 108, approved in *Ward*, above n. 29, [1993] 2 SCR 689 at 733.

33 Hathaway, *Law of Refugee Status*, above n. 30, pp. 104–5 and 112, approved in *Horvath v. Secretary of State for the Home Department*, UK House of Lords, [2001] 1 AC 489 at 495F, 501C, 512F and 517D (hereinafter ‘*Horvath*’) and by Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, (2002) 187 ALR 574, and [2002] HCA 14, 11 April 2002, at para. 111. See also, Refugee Appeal No. 71427/99, above n. 10, at para. 51; Crawley, *Refugees and Gender*, above n. 12, pp. 40–2; RWLG, ‘Gender Guidelines’, above n. 21, para. 1.17; IAA, ‘Asylum Gender Guidelines’, above n. 11, para. 2.3.

Economic, Social and Cultural Rights, 1966.<sup>34</sup> To these must be added the Convention on the Elimination of All Forms of Racial Discrimination, 1965,<sup>35</sup> the Convention on the Elimination of All Forms of Discrimination Against Women, 1979,<sup>36</sup> and the Convention on the Rights of the Child, 1989.<sup>37</sup>

Four distinct types of obligation have been identified. First are those rights stated in the UDHR and translated into immediately binding form in the ICCPR, and from which no derogation whatsoever is permitted, even in times of compelling national emergency. These include: freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman or degrading punishment or treatment; freedom from slavery; the right to recognition as a person in law; and freedom of thought, conscience, and religion.<sup>38</sup>

Second are those rights enunciated in the Universal Declaration and translated into binding and enforceable form in the ICCPR, but from which States may derogate during a public emergency which threatens the life of the nation and the existence of which is officially proclaimed.<sup>39</sup> These include: freedom from arbitrary arrest or detention; equal protection of the law; fair criminal proceedings; personal and family privacy and integrity; freedom of internal movement; the right to leave and return; freedom of opinion, expression, assembly, and association; the right to form and join trade unions; the ability to partake in government; access to public employment without discrimination; and the right to vote.<sup>40</sup>

Third are those rights contained in the Universal Declaration and carried forward into the ICESCR. In contrast to the ICCPR, the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires States to take steps to the maximum of their available resources progressively to realize rights in a non-discriminatory way. Examples of this third category of rights are the right to work, the right to food, clothing, housing, medical care, social security, and basic education; and protection of the family, particularly children and mothers. While the standard of protection is less absolute than that

34 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 220 A (XXI), 16 Dec. 1966, 993 UNTS 3 (hereinafter 'ICESCR'). See generally, Hathaway, *Law of Refugee Status*, above n. 30, pp. 108–12.

35 Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195.

36 Above n. 5.

37 Convention on the Rights of the Child, 1989, UNGA Res. 44/25, 20 Dec. 1989. See also generally, J. C. Hathaway, 'The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute', in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Proceedings of the 1998 Conference of the International Association of Refugee Law Judges, Oct. 1998), pp. 80 and 85–90; Refugee Appeal No. 71427/99, above n. 10, at para. 51.

38 Hathaway, *Law of Refugee Status*, above n. 30, p. 109; Crawley, *Refugees and Gender*, above n. 12, p. 40; RWLG, 'Gender Guidelines', above n. 21, para. 1.20; IAA, 'Asylum Gender Guidelines', above n. 11, para. 2A.4.

39 Hathaway, *Law of Refugee Status*, above n. 30, p. 109.

40 *Ibid.*, pp. 109–10; Crawley, *Refugees and Gender*, above n. 12, p. 40; IAA, 'Asylum Gender Guidelines', above n. 11, para. 2A.4.

which applies to the first two categories of rights, the State is in breach of its basic obligations where it either ignores these interests, notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment.<sup>41</sup> Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living or the entitlement to food, shelter, or health care will, at a certain level, be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and will unquestionably constitute persecution.<sup>42</sup> Economic, social, and cultural rights have particular impact on standards of living and are directly relevant in the context of refugee claims by women and children.<sup>43</sup> It cannot be assumed that because these rights are third category rights they are of any less significance in the refugee inquiry than first and second category rights.

Fourth are the rights recognized in the Universal Declaration but not codified in either of the 1966 Covenants. These rights include the right to private property and protection against unemployment.<sup>44</sup>

Whether the anticipated harm rises to the level of persecution depends not on a rigid or mechanical application of the categories of rights, but on an assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened. It must also be remembered that all human rights and fundamental freedoms are universal, indivisible, interdependent, and interrelated.<sup>45</sup>

#### A. Persecution = serious harm + the failure of State protection

Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the State's ability and willingness to respond effectively to that risk.<sup>46</sup> Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of

41 Hathaway, *Law of Refugee Status*, above n. 30, pp. 110–11.

42 *Ibid.*, p. 111. See further also the discussion by R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford, 1995), pp. 100–1.

43 H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals – Text and Materials* (2nd edn, Oxford University Press, 2000), p. 163.

44 Hathaway, *Law of Refugee Status*, above n. 30, p. 111; Crawley, *Refugees and Gender*, above n. 12, p. 40.

45 'Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights', UN doc. A/CONF.157/24, 25 June 1993, ch. 1, para. 5; and the 'Platform for Action' adopted at the 1995 Fourth World Conference on Women, above n. 8, ch. 1, para. 2. Reference may also be made to the General Comments of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, and the General Recommendations of the Committee on the Elimination of All Forms of Discrimination Against Women and of the Committee on the Elimination of Racial Discrimination.

46 Hathaway, *Law of Refugee Status*, above n. 30, p. 125.

protection. This can be expressed in the formula: persecution = serious harm + the failure of State protection.<sup>47</sup>

## B. Serious harm

Women often experience persecution differently from men.<sup>48</sup> In particular, they may be persecuted through sexual violence or other gender-specific or gender-related persecution.<sup>49</sup> Such violence must be given a broad interpretation and may be defined as any act of gender-related violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>50</sup> Violence against women is to be understood to encompass, but not be limited to:<sup>51</sup>

1. physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation;
2. physical, sexual, and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment, and intimidation at work, in educational institutions and elsewhere, trafficking in women, and forced prostitution;<sup>52</sup> and

47 RWLG, 'Gender Guidelines', above n. 21, para. 1.17, approved in *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 653F; *Horvath*, above n. 33, [2001] 1 AC 489 at 515H; Refugee Appeal No. 71427/99, above n. 10, at para. 67; and *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10, at paras. 31 and 118. See also, Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere', above n. 10, p. 391.

48 Executive Committee, Conclusion No. 73 (XLIV) 1993, Refugee Protection and Sexual Violence, paras. d and e.

49 Executive Committee, Conclusion No. 77 (XLVI) 1995, General, para. g; Executive Committee, Conclusion No. 79 (XLVII) 1996, General Conclusion on International Protection, para. o; Executive Committee, Conclusion No. 81 (XLVIII) 1997, General Conclusion on International Protection, para. t; Executive Committee, Conclusion No. 87 (L) 1999, General Conclusion on International Protection, para. n.

50 UN General Assembly, 'Declaration on the Elimination of Violence Against Women', 20 Dec. 1993, UN doc. A/RES/48/104, 23 Feb. 1994, Art. 1. It is well established that persecution may involve physical or mental ill-treatment. See e.g., *R. v. Secretary of State for the Home Department, ex parte Sasitharan*, English High Court (Queen's Bench Division), [1998] Imm AR 487 at 489–90 per Sedley J; *Abdulaziz Faraj v. Secretary of State for the Home Department*, English Court of Appeal, [1999] INLR 451 at 456; *Khawar v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (1999) 168 ALR 190, para. 37, upheld on appeal in *Minister for Immigration and Multicultural Affairs v. Khawar*, above n. 10.

51 UNGA, 'Declaration on the Elimination of Violence Against Women', above n. 50, Art. 2; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, pp. 4–5.

52 For a definition of trafficking, see the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, Nov. 2000, UN doc. A/55/383, Art. 3.



3. physical, sexual, and psychological violence perpetrated or condoned by the State, wherever it occurs.

### C. Discrimination

Differences in the treatment of various groups do exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. Discrimination on its own is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution. Not every breach of a refugee claimant's human rights constitutes persecution.<sup>53</sup> It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned.<sup>54</sup> Discrimination can, however, affect individuals to different degrees and it is necessary to recognize and give proper weight to the impact of discriminatory measures on women. Various acts of discrimination, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution for the purposes of the 1951 Convention.<sup>55</sup>

Discrimination against women, as defined in the Convention for the Elimination of Discrimination Against Women, means:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>56</sup>

As the Committee on the Elimination of Discrimination Against Women has noted:

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of . . . the Convention [for the Elimination of Discrimination Against Women].<sup>57</sup>

53 Hathaway, *Law of Refugee Status*, above n. 30, pp. 103–4.

54 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), at para. 54 (hereinafter 'UNHCR, *Handbook*'); UNHCR, 'Interpreting Article 1', above n. 19, para. 17.

55 Refugee Appeal No. 71427/99, above n. 10, at para. 51.

56 Convention on the Elimination of All Forms of Discrimination Against Women, above n. 5, Art. 1.

57 Committee on the Elimination of Discrimination Against Women, 'Violence Against Women', General Recommendation No. 19, 1992, para. 7, available on <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>. This Recommendation states that the definition of discrimination in Art. 1 of the Convention on the Elimination of all Forms of Discrimination Against Women

#### D. The failure of State protection

While persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of State protection, the refugee definition does not require that the State itself be the agent of harm. Persecution at the hands of ‘private’ or non-State agents of persecution equally falls within the definition. The State’s inability to protect the individual from persecution constitutes failure of local protection.<sup>58</sup> There are four situations in which it can be said that there is a failure of State protection:

1. persecution committed by the State concerned;
2. persecution condoned by the State concerned;
3. persecution tolerated by the State concerned; and
4. persecution not condoned or not tolerated by the State concerned but nevertheless present because the State either refuses or is unable to offer adequate protection.

State complicity in persecution is not a prerequisite to a valid refugee claim.<sup>59</sup>

#### E. The standard of State protection

The refugee inquiry is not an inquiry into blame.<sup>60</sup> Rather the purpose of refugee law is to identify those who have a well-founded fear of persecution for

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. See General Recommendation No. 19, para. 6. The text of the Recommendation is reproduced in S. Joseph, J. Shultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2000), p. 564.

58 *Ward*, above n. 29, [1993] 2 SCR 689 at 709 and 716–17; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 5; UNHCR, ‘Interpreting Article 1’, above n. 19, para. 19.

59 UNHCR, *Handbook*, above n. 54, para. 65; UNHCR, ‘An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR’, *European Series*, vol. 1, No. 3, Sept. 1995, pp. 27–30; *Adan v. Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293 at 306A; *R. v. Secretary of State for the Home Department, ex parte Adan*, *R. v. Secretary of State for the Home Department, ex parte Aitseguer (conjoined appeals)*, House of Lords, [2001] 2 WLR 143 at 147F, 156–7, and 168; *Islam and Shah*, above n. 10; *Horvath*, above n. 33; *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10; W. Kälin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’, 15 *Georgetown Immigration Law Journal*, 2001, p. 415; and R. Marx, ‘The Notion of Persecution by Non-State Agents in German Jurisprudence’, 15 *Georgetown Immigration Law Journal*, 2001, p. 447.

60 This is reflected in the wish expressed in the Preamble to the 1951 Convention that ‘all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States’.

a Convention reason. The level of protection provided by a State should be such as to reduce the risk to a refugee claimant to the point where the fear of persecution could be said to be no longer well-founded. Otherwise an individual who holds a well-founded fear of being persecuted for one of the five reasons stated in the 1951 Convention will be expelled or returned to the frontiers of territories where his or her life or freedom would be threatened in breach of the *non-refoulement* obligation.<sup>61</sup>

A refugee claimant is not required to risk his or her life seeking ineffective protection of a State, merely to demonstrate that ineffectiveness.<sup>62</sup> The proper approach to the question of State protection is to enquire whether the protection available from the State will reduce the risk of serious harm to below the level of well-foundedness. The duty of the State is not, however, to eliminate all risk of harm,<sup>63</sup> but before it can be said that the refugee claimant can access State protection, that protection must be meaningful, accessible, effective, and available to all regardless of sex, race, ethnicity, sexual orientation, disability, religion, class, age, occupation, or any other aspect of identity. In some cases, there may be protection in theory, but not in actual practice.<sup>64</sup>

## F. Cultural relativism

Suffering and abuse are not culturally authentic values and cannot be justified in the name of cultural relativism.<sup>65</sup> Whether the harm threatened is sufficiently serious to be described as ‘persecution’ must be measured against the core human rights entitlements recognized by the international community. Breaches of human rights cannot be ignored, discounted, or explained away on the basis of culture, tradition, or religion.

The Declaration on the Elimination of Violence Against Women, 1994, stipulates that States ‘should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to [the] elimination [of violence against women]’.<sup>66</sup> The Convention on the Elimination of All Forms of Discrimination

61 1951 Convention, Art. 33(1).

62 *Ward*, above n. 29, [1993] 2 SCR 689 at 724; Refugee Appeal No. 71427/99, above n. 10, at paras. 62–7. Contrast *Horvath*, above n. 33.

63 Hathaway, *Law of Refugee Status*, above n. 30, p. 105.

64 RWLG, ‘Gender Guidelines’, above n. 21, para. 3.3; IAA, ‘Asylum Gender Guidelines’, above n. 11, para. 2B.3.

65 J. J. Shestack, ‘The Philosophical Foundations of Human Rights’, in *Human Rights: Concept and Standards* (ed. J. Symonides, Ashgate, Aldershot, 2000), pp. 31 and 59.

66 Declaration on the Elimination of Violence Against Women, above n. 50, Art. 4. See generally, ‘Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45’, UN doc. E/CN.4/1995/42, 22 Nov. 1994, paras. 63–9, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/>

Against Women requires States parties to take all appropriate measures ‘[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.<sup>67</sup> The Human Rights Committee has stated that States parties to the ICCPR should ensure that traditional, historical, religious, or cultural attitudes are not to be used to justify violations of women’s right to equality before the law and to equal enjoyment of all rights under the Covenant.<sup>68</sup>

Implicit in these requirements is an obligation to protect women from practices premised on assumptions of inferiority or traditional stereotypes. Practices such as female genital mutilation,<sup>69</sup> suttee,<sup>70</sup> bride burnings, forced marriages, rape, and domestic violence are not only a violation of liberty and security of the person, they are clearly dangerous and degrading to women and an expression of the inherently inferior standing which women hold in many societies.<sup>71</sup> The right to safety, dignity of life, and freedom from cruel, inhuman or degrading treatment or punishment is not culturally derived, but stems from the common humanity of the individual.<sup>72</sup>

## G. Domestic violence

Physical and mental violence and ill-treatment within the family are a widespread and often gender-specific form of harm. The fact that such treatment occurs within the family context does not mean that it will not constitute ‘serious

75ccfd797b0712d08025670b005c9a7d?Opendocument, and ‘Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85’, UN doc. E/CN.4/1996/53, 6 Feb. 1996, paras. 100–15, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c41d8f479a2e9757802566d6004c72ab?Opendocument>.

67 Convention on the Elimination of All Forms of Discrimination Against Women, above n. 5, Art. 5(a).

68 Human Rights Committee, ‘Equality of Rights Between Men and Women’, General Comment No. 28, 2000, para. 5.

69 See e.g., World Health Organization/UN Children’s Fund (UNICEF)/UN Fund for Population Activities (UNFPA), ‘Joint Statement on Female Genital Mutilation’, 1997, which concluded that female genital mutilation is an infringement on the physical and psychosexual integrity of women and girls, is a form of violence against them, and is therefore universally unacceptable.

70 The former Hindu custom whereby a widow burnt herself to death on her husband’s funeral pyre.

71 N. Valji and L. A. De La Hunt, ‘Gender Guidelines for Asylum Determination’, National Consortium on Refugee Affairs, 1999, p. 18 (South Africa); *Aguirre-Cervantes v. INS*, 242 F 3d 1169 (9th Circuit), 2001.

72 Valji and De La Hunt, ‘Gender Guidelines for Asylum Determination’, above n. 71, p. 8; R. Higgins, *Problems and Process*, above n. 42, pp. 96–7.

harm'. Treatment which would constitute serious harm if it occurred outside the family will also constitute serious harm if it occurs within the family. As with other forms of harm, whether it constitutes persecution within the meaning of the 1951 Convention should be assessed on the basis of internationally recognized human rights standards and on the issue of causation. This issue is addressed below in section V, 'Understanding the meaning of "for reason of"'.<sup>73</sup>

## H. Gender-based discrimination enforced through law

Gender-based discrimination is often enforced through law as well as through social practices.<sup>74</sup> A woman's claim to refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects.<sup>75</sup> The claimant will need to establish that:

1. the policy or law is inherently persecutory; or
2. the policy or law is used as a means of persecution for one of the Convention reasons; or
3. the policy or law, although having legitimate goals, is administered through persecutory means; or
4. the penalty for non-compliance with the policy or law is disproportionately severe.<sup>76</sup>

## I. War, civil war, and civil unrest

The role of women in the biological and social reproduction of group identity places them in a position of particular vulnerability during war, civil war, and civil unrest. This vulnerability and the political significance of gender during periods of war and civil unrest must be specifically recognized.<sup>77</sup> Women may be direct participants as fighters or they may perform supportive roles such as intelligence gathering, providing food, and nursing the wounded. This may place them

73 IAA, 'Asylum Gender Guidelines', above n. 11, para. 2A.23; Crawley, *Refugees and Gender*, above n. 12, p. 129; UNHCR, 'Interpreting Article 1', above n. 19, para. 31.

74 Crawley, *Refugees and Gender*, above n. 12, p. 51.

75 UNHCR, *Handbook*, above n. 54, para. 65; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 4; UNHCR, 'Interpreting Article 1', above n. 19, para. 18; Immigration and Refugee Board, 'Women Refugee Claimants', above n. 11, p. 11.

76 UNHCR, *Handbook*, above n. 54, paras. 57–60; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, pp. 4–6; UNHCR, 'Interpreting Article 1', above n. 19, para. 18; Immigration and Refugee Board, 'Women Refugee Claimants', above n. 11, p. 11; Crawley, *Refugees and Gender*, above n. 12, p. 51.

77 *Ibid.*, p. 88.

at risk of persecution for a Convention reason. Many women may be targeted for persecution because of their race, nationality, clan membership, or association. In addition, women may be targeted because, as women, they have a particular symbolic status.<sup>78</sup>

Women are particularly vulnerable to persecution by sexual violence as a weapon of war.<sup>79</sup> As Crawley has noted:

[W]omen are specifically targeted for violence because of the symbolism of gender roles. The violation of women's bodies acts as a symbol of the violation of the country (or equally a given political, ethnic or national group) . . . During war, women's bodies become highly symbolic and the physical territory for a broader political struggle in which sexual violence including rape is used as a military strategy to humiliate and demoralise an opponent; women's bodies become the battleground for 'pay backs', they symbolize the dominance of one group over another . . . It is important to recognise that sexual violence and rape may be an actual *weapon* or a *strategy* of war itself, rather than just an expression or consequence. In the context of armed conflict or civil war, the rape of women is also about gaining control over other men and the group (national, ethnic, political) of which they are a part.<sup>80</sup>

## J. Internal protection

Refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable.<sup>81</sup> Where the risk of persecution stems from actions of a State agent or non-State agent that can and will be effectively suppressed by the national government, there is no need for this surrogate international protection. As a result many countries take into account whether the claimant can avail him or herself of a safe place in the country of origin.

<sup>78</sup> Ibid., p. 89.      <sup>79</sup> Ibid.

<sup>80</sup> Ibid., pp. 89–90. Sexual violence is prohibited by common Article 3 to the Geneva Conventions of 1949 and by the two Additional Protocols of 1977. The Rome Statute of the International Criminal Court, Arts. 7 and 8, defines 'crimes against humanity' and 'war crimes' as including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. See also, International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, 2 Sept. 1998, Case No. ICTR-96-4-T, available at <http://www.icttr.org>, which defines rape in international law and holds that rape can constitute genocide and, more recently, the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac, Kovac and Vukovic*, 22 Feb. 2001, at [www.un.org/icty/foca/trialc2/judgement/index.htm](http://www.un.org/icty/foca/trialc2/judgement/index.htm).

<sup>81</sup> *Ward*, above n. 29, [1993] 2 SCR 689 at 709; *Horvath*, above n. 33, [2001] 1 AC 489 at 495C, 501C, and 517D; *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10, at paras. 20 and 113.

This is sometimes called the internal protection, internal relocation, or internal flight alternative.

The protection analysis requires an objective and forward-looking assessment of the situation in the part or parts of the country proposed as alternative or safe locations.<sup>82</sup> Before refugee status can be denied on the grounds that the refugee claimant has an internal protection alternative available allowing him or her to relocate, it must be possible to say that he or she can genuinely access domestic protection which is meaningful. Four minimum conditions must be satisfied. First, the proposed site of internal protection must be safely and practicably accessible. Secondly, the proposed site of internal protection must eliminate the well-founded fear of persecution, that is, the place in question must be one in which the refugee claimant is not at risk of persecution for a Convention reason. Thirdly, in the proposed site of internal protection the individual must not be exposed to a risk of other forms of Convention or non-Convention-related serious harm, even if not rising to the level of persecution. Fourthly, meaningful domestic protection implies not just the absence of risk of harm, it requires also the provision of basic norms of civil, political, and socio-economic rights.<sup>83</sup>

The first condition means that a woman cannot be required to put her or her children's personal safety at risk. It also means that, where it is a requirement of the society in the country of origin that she travel in the company of a male relative but no such relative is available, the proposed site is not practicably accessible. Where the woman is responsible for the care of children, the proposed site of internal protection must be safely and practicably accessible by the group. The second condition is largely self-explanatory.

It is the third and fourth conditions which have particular application to refugee claims by women. In many societies women do not enjoy equal rights or equal access to rights. It may be that women cannot access accommodation and other fundamental necessities or cannot do so unless accompanied by a husband or a male relative. In many flight situations this may not be possible. Equally, women on their own, particularly if accompanied by children, may suffer discrimination in all aspects of life due to custom, religion, or socially constructed roles. These features can be exacerbated by the rupturing of the social fabric which often accompanies armed conflict, civil unrest, or persecution. The ability of women to access for themselves and their families basic civil, political, and socio-economic rights is of the first

82 UNHCR Position Paper, 'Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle")', Feb. 1999, para. 13.

83 Hathaway, *Law of Refugee Status*, above n. 30, p. 134, approved and applied in *Butler v. Attorney-General*, New Zealand Court of Appeal, [1999] NZAR 205 and *Al-Amidi v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (2000) 177 ALR 506; Refugee Appeal No. 71684/99, NZ RSAA, [2000] INLR 165 at paras. 55–79; *Canaj v. Secretary of State for the Home Department*, English Court of Appeal, [2001] INLR 342 at para. 31; 'Michigan Guidelines on the Internal Protection Alternative', 21 *Michigan Journal of International Law*, April 1999, 131 and at <http://www.refugeecaselaw.org/refugee/guidelines.htm>.

importance. They must be able to provide the family with enough to eat, to maintain the household, to take care of the children and, in many cases, to support their spouse or partner. It must also be remembered that in some circumstances women face particular problems as their difficulties can stem not only from their religion, race, ethnicity, or other minority status, but also because of their sex or gender. The denial of refugee status on the basis that an internal protection alternative exists in the country of origin cannot be premised on the implicit assumption that a woman must tolerate the denial of her basic human rights.

#### IV. Understanding the meaning of ‘well-founded’

The requirement that the refugee claimant hold a ‘well-founded’ fear of being persecuted if returned to the country of origin requires a forward-looking assessment of the prospective risk of harm. That assessment must be made by the decision maker at the date of the decision on the refugee claim.<sup>84</sup>

The requirement that the fear of being persecuted be well-founded requires an objective assessment of the risk of persecution faced by the claimant.<sup>85</sup> This requirement can present substantial difficulty where little is known of the true conditions in the country of origin. As the UNHCR *Handbook* indicates:

[W]hile the burden of proof in principle lies on the refugee claimant, the duty to ascertain and evaluate all the relevant facts is shared between the claimant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.<sup>86</sup>

84 For a discussion of the French, German, and Swiss law, see W. Kälin, ‘Well-Founded Fear of Persecution: A European Perspective’ in *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (ed. J. Bhabha and G. Coll, 1st edn, Federal Publications, Washington DC, 1992), p. 21. For a discussion of Canadian and US law, see B. Jackman, ‘Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective’, in *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (ed. J. Bhabha and G. Coll, 1st edn, Federal Publications, Washington DC, 1992), p. 37. For a more recent comparative study, see J.-Y. Carlier, D. Vanheule, P. Galiano, and K. Hullmann (eds.), *Who is a Refugee? A Comparative Case Law Study* (Kluwer, The Hague, 1997). For a summary of Australian and New Zealand case law, see *Re C.*, Appeal No. 70366/96, NZ RSA, [1997] 4 HKC 236 at 264.

85 UNHCR, *Handbook*, above n. 54, para. 38.

86 UNHCR, *Handbook*, above n. 54, paras. 196–7.



Women in particular may face difficulty in establishing their claim to refugee status. Many may come from countries where they have been denied meaningful or even any education and may be illiterate. Many may come from countries where they have been denied meaningful participation in life and may be inarticulate. In some countries, women live in seclusion. Little may be known about them or their status and treatment, both in their society at large and in the home. Most importantly, there may be little information as to their ability to access meaningful State protection. The shared responsibility of the decision maker to ascertain all the relevant facts in cases of this kind must be given meaningful effect, as must the benefit of the doubt principle.

## V. Understanding the meaning of ‘for reasons of’

In a move to establish how best to conceive the causal linkage or nexus between the Convention ground and the risk of being persecuted, a colloquium elaborated in 2001 the ‘Michigan Guidelines on Nexus to a Convention Ground’.<sup>87</sup> These state as follows:

1. . . . The risk faced by the applicant must be causally linked to at least one of the five grounds enumerated in the Convention – race, religion, nationality, membership of a particular social group, or political opinion.

2. In many states, the requisite causal linkage is explicitly addressed . . . [while] in other states causation is not treated as a free-standing definitional requirement, but rather is subsumed within the analysis of other Convention requirements . . .

3. It is not the duty of the applicant accurately to identify the reason that he or she has a well-founded fear of being persecuted. The state assessing the claim to refugee status must decide which, if any, Convention ground is relevant to the applicant’s well-founded fear of being persecuted.

4. The risk of being persecuted may sometimes arise only when two or more Convention grounds combine in the same person, in which case the combination of such grounds defines the causal connection to the well-founded fear of being persecuted.

5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution.

87 ‘Michigan Guidelines on Nexus to a Convention Ground’, 25 March 2001, 23 *Michigan Journal of International Law*, 2002, p. 210; also available at <http://www.refugeecaselaw.org/refugee/guidelines2001.htm>.

**Nature of the required causal link**

6. The causal connection required is between a Convention ground and the applicant's well-founded fear of '*being persecuted*' . . . The focus [is] on the applicant's predicament . . .

7. Because it is the applicant's predicament which must be causally linked to a Convention ground, the fact that his or her *subjective* fear is based on a Convention ground is insufficient to justify recognition of refugee status.

8. The causal link between the applicant's predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm *or* which cause the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk . . .<sup>88</sup>

As stated by the New Zealand Refugee Appeals Authority:

Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided *either* by the serious harm limb *or* by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because 'persecution' is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is 'for reason of' a Convention ground, the summative construct is itself for reason of a Convention ground.<sup>89</sup>

The Michigan Guidelines continue:

8. . . . Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.

9. A causal link may be established whether or not there is evidence of particularized enmity, malignity or *animus* on the part of the person or group

<sup>88</sup> *Ibid.*, paras. 1–8 (emphasis added).

<sup>89</sup> Refugee Appeal No. 71427/99, above n. 10, at para. 112 (emphasis added). This passage was adopted and applied by Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10, at para. 120 and see also, Gleeson CJ at paras. 29–31 and McHugh and Gunmow JJ at paras. 79–80. See also, *Islam and Shah*, above n. 10, at 646C–D, 648C, 653E–G, and 654D.

responsible for the infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.

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

### **Standard of causation**

11. Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.

12. The standard of causation must also take account of the practical realities of refugee status determination, in particular the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.

13. In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

### **Evidence of causation**

14. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.

15. A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group. Thus, evidence that persons who share the applicant's race, religion, nationality, membership of a particular social group, or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground is a contributing factor to the risk of being persecuted.

16. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicant's predicament, irrespective of whether other

individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.

17. No special rule governs application of the causal nexus standard in the case of refugees who come from a country in which there is a risk of war or other large-scale violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.<sup>90</sup>

## VI. The five Convention grounds

Gender is a relevant and at times highly significant factor and characteristic which must be taken into account when deciding whether the well-founded fear of being persecuted is for a Convention reason. Gender must inform the assessment of race, religion, nationality, membership of a particular social group, or political opinion. ‘Religion’ and ‘political opinion’ in particular need to be properly interpreted to include women’s experiences. In some cases, ‘women’ (or some subcategory thereof) may qualify as a ‘particular social group’.<sup>91</sup>

The UK Immigration Appellate Authority has noted:

Women may face persecution because of a Refugee Convention ground which is attributed or imputed to them. In many societies a woman’s political views, race, nationality, religion and social affiliations are often seen as aligned with relatives or associates or with those of her community. It is therefore important to consider whether a woman is persecuted because of a Convention ground which has been attributed or imputed to her.<sup>92</sup>

### A. Race

On this Convention ground, the UK Refugee Women’s Legal Group has noted:

90 ‘The Michigan Guidelines on Nexus to a Convention Ground’, above n. 87, paras. 8–17.

91 RWLG, ‘Gender Guidelines’, above n. 21, para. 4.1; *Islam and Shah*, above n. 10; Refugee Appeal No. 71427/99, above n. 10; and *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10.

92 IAA, ‘Asylum Gender Guidelines’, above n. 11, para. 3.3; Spijkerboer, *Women and Refugee Status*, above n. 26, pp. 47–53.

Whilst actual or attributed racial identity is not specific to women, it may operate in tandem with gender to explain why a woman fears persecution. For example, whilst the destruction of ethnic identity and/or prosperity of a racial group may be through killing, maiming or incarcerating men, women may be viewed as propagating ethnic identity through their reproductive role, and may be persecuted through, for example, sexual violence or control of reproduction.<sup>93</sup>

## B. Religion

A woman may face harm for her adherence to, or rejection of, a religious belief or practice or for her decision to adhere to a religious belief or practice in a manner different to that prescribed.<sup>94</sup>

Religion includes but is not limited to:

- (a) freedom to hold a belief system of one's choice or not to hold a particular belief system;
- (b) freedom to practise a religion of one's choice or not to practice a prescribed religion; and
- (c) freedom to practise a religion in the manner of one's choice.<sup>95</sup>

To cite the UK Immigration Appellate Authority's 'Asylum Gender Guidelines':

Where the religion assigns particular roles or behavioural codes to women, a woman who refuses or fails to fulfil her assigned role or abide by the codes may have a well-founded fear of persecution on the ground of religion.

Failure to abide by the behavioural codes set out for women may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes about religion.<sup>96</sup>

There is often overlap between religious and political persecution. The political nature of oppression of women in the context of religious laws and ritualization

93 RWLG, 'Gender Guidelines', above n. 21, para. 4.6. See also, UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 7; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.6. The Convention on the Elimination of All Forms of Racial Discrimination, above n. 35, Art. 1, gives a broad definition to the term 'racial discrimination'. It means 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. The broad interpretation given to race and national or ethnic origins is confirmed by *King-Ansell v. Police*, New Zealand Court of Appeal, [1979] 2 NZLR 531; and *Mandla v. Dowell Lee*, UK House of Lords, [1983] 2 AC 548; UNHCR, 'Interpreting Article 1', above n. 19, para. 26.

94 RWLG, 'Gender Guidelines', above n. 21, para. 4.9; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.11.

95 RWLG, 'Gender Guidelines', above n. 21, para. 4.9; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.12. See e.g., *Matter of S.A.*, Interim Decision No. 3433 (BIA) 2000, p. 11–12.

96 IAA, 'Asylum Gender Guidelines', above n. 11, paras. 3.13 and 3.14.

must be recognized. Where religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion regardless of what a woman herself actually believes.<sup>97</sup> As the Refugee Women's Legal Group has also noted: 'A woman's religious identity may be aligned with that of other members of her family or community. Imputed or attributed religious identity may therefore be important.'<sup>98</sup>

### C. Nationality

Nationality should be understood not simply as citizenship but, in its broadest sense, to include membership of an ethnic or linguistic group and may overlap with the terms 'race', 'religion', and 'political opinion'.<sup>99</sup>

### D. Membership of a particular social group

Underlying the 1951 Convention is the principle that serious harm cannot be inflicted for reasons of personal status.<sup>100</sup> The Preamble to the Convention refers explicitly to the principle of non-discrimination enshrined in the Universal Declaration, Article 2 of which states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . . (emphasis added)

Article 26 of the ICCPR is in similar terms and requires that

. . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (emphasis added)<sup>101</sup>

97 UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 7; RWLG, 'Gender Guidelines', above n. 21, para. 4.10; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.15; Refugee Appeal No. 2039-93 *Re M.N.*, NZ RSAA, 12 Feb. 1996, p. 41, available at <http://www.refugee.org.nz/rsaa/text/docs/2039-93.htm>; Refugee Appeal No. 71427/99, above n. 10, at paras. 86–7.

98 RWLG, 'Gender Guidelines', above n. 21, para. 4.11. See also, IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.16.

99 RWLG, 'Gender Guidelines', above n. 21, para. 4.7; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.8. See also, above n. 93.

100 D. J. Steinbock, 'The Refugee Definition as Law: Issues of Interpretation' in *Refugee Rights and Realities: Evolving International Concepts and Regimes* (ed. F. Nicholson and P. Twomey, Cambridge University Press, 1999), p. 13, at pp. 20–3. At p. 20, the author states that the aims of the refugee definition concern the two great paradigms of the post-war period: the rights of non-discrimination and of free expression. They thereby serve to safeguard two essential attributes of the human personality.

101 Art. 26 is quoted in full above at n. 20.

Neither of these instruments attempts to list comprehensively the characteristics upon which discrimination might be based. Rather, they recognize that an exhaustive definition is impossible.

Likewise the social group ground in the 1951 Convention is an open-ended category which does not admit of a finite list of applications. There is nevertheless an inherent limitation involved in the words ‘particular social group’. Membership of a particular social group is one of only five categories. It is not an all-encompassing category. Not every association bound by a common thread is included.<sup>102</sup> In addition, in common law jurisdictions at least, there can only be a particular social group if the group exists independently of, and is not defined by, the persecution. Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.<sup>103</sup>

Cohesiveness is not a requirement for the existence of a particular social group. While this may be helpful in proving the existence of a social group, the meaning of ‘particular social group’ should not be limited by requiring cohesiveness.<sup>104</sup>

The other four Convention grounds (race, religion, nationality, and political opinion) describe a characteristic or status which is either beyond the power of an individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed. Applying this core concept of protection against the infliction of harm on the basis of difference in personal status or characteristics, three possible categories of ‘particular social group’ have been identified:

- (a) groups defined by an innate or unchangeable characteristic;
- (b) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (c) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>105</sup>

The first category would embrace individuals fearing persecution on such bases as sex, linguistic background, and sexual orientation, while the second would encompass, for example, human rights activists. Excluded are groups defined by a

102 For a more detailed investigation of the Convention ground ‘membership of a social group’ see the paper by T. A. Aleinikoff in Part 4.1 of this book; *Ward*, above n. 29, [1993] 2 SCR 689 at 728–32; *Applicant A.*, above n. 19, at (1997) 190 CLR 225 at 242 and 260; *Islam and Shah*, above n. 10, at [1999] 2 AC 629 at 643B–C, 656D, and 658H; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 7.

103 *Ward*, above n. 29, [1993] 2 SCR 689 at 729; *Applicant A.*, above n. 19, (1997) 190 CLR 225 at 242, 263–4, and 285–6; *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 639G–H, 645E, 656G, 658H, and 662B. See also, UNHCR, ‘2000 Position Paper on Gender-Related Persecution’, above n. 9, p. 7.

104 *Ward*, above n. 29, [1993] 2 SCR 689 at 739; *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 642A–643G, 651G, 657F, 658H, and 661D; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 8.

105 *Ward*, above n. 29, [1993] 2 SCR 689 at 739; Hathaway, *Law of Refugee Status*, above n. 30, p. 161.

characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.

Sex-based groups are clear examples of social groups defined by an innate and immutable characteristic. Thus, while sex is not a separately enumerated ground in the Convention, it is properly within the ambit of the social group category.<sup>106</sup>

Women who behave in a manner at odds with prevailing social or cultural mores can also constitute a particular social group.<sup>107</sup> The group ties derive from shared attitudes and value systems intrinsic to the nature of the persons concerned which go to their identity or status. In this context, external factors beyond the group's internally unifying characteristics are also relevant in associating persons as a social group. For example, while discrimination alone does not create the particular social group, it may help to give it more definition, by setting persons aside from the broader tolerated segments of society. This approach would recognize the proposition that women who choose to live outside the framework of accepted social codes and who are at risk of severe punishment because of their choice fall within the Convention.<sup>108</sup> In this regard, more than one Convention reason may be relevant, including not only social group membership but also actual or imputed political opinion or religion.<sup>109</sup>

Family or kin associations may define a particular social group. There are cases where women are persecuted solely because of their family or kinship relationships. For example, a woman may be persecuted as a means of demoralizing or punishing members of her family or community, or in order to pressure her into revealing information.<sup>110</sup>

## E. Political opinion

The 1951 Convention definition refers to 'political opinion' rather than to 'political activity'. There is no requirement that a claimant have acted upon his or her beliefs prior to departure from his or her country in order to qualify for refugee status.<sup>111</sup> Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, and policy

106 Hathaway, *Law of Refugee Status*, above n. 30, p. 162; *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 644D and 652C; Refugee Appeal No. 71427/99, above n. 10, at para. 106; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 8; Executive Committee, Conclusion No. 39 (XXXVI) 1985, *Refugee Women and International Protection*, para. k; Crawley, *Refugees and Gender*, above n. 12, p. 70.

107 *Islam and Shah*, above n. 10.

108 Refugee Appeal No. 2039/93 *Re M.N.*, 12 Feb. 1996; Refugee Appeal No. 71427/99, above n. 10.

109 *Ibid.* 110 RWLG, 'Gender Guidelines', above n. 21, para. 4.26.

111 Hathaway, *Law of Refugee Status*, above n. 30, p. 149.



may be engaged.<sup>112</sup> This may include opinion as to gender roles. Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground that they are alleged or known to hold opinions contrary to, or critical of, the policies of the government or ruling party.<sup>113</sup> This broad construction must also be applied where the agent of persecution is not the State, but a non-State agent of persecution or private actor.

As stated in paragraph 80 of the UNHCR *Handbook*: 'Holding political opinions different from those of the agent of persecution is not in itself a ground for claiming refugee status, and an applicant must show that he or she has a well-founded fear of being persecuted for reason of holding such opinions.' As the refugee definition requires a forward-looking assessment of a risk of harm anticipated in the future, however, an applicant claiming fear of persecution because of political opinion need not show that the agent of persecution in the country of origin knew of the opinions before the applicant left the country. He or she may have concealed any political opinion and never have suffered any discrimination or persecution. The mere fact, however, of refusing to avail him or herself of the protection of the government, or a refusal to return may disclose the applicant's true state of mind and give rise to a risk of persecution. 'In such circumstances', as stated in paragraph 83 of the *Handbook*, 'the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he [or she] returned'.<sup>114</sup>

In some societies, overt demonstration of political opinion by women may not be possible as women are not allowed formally to participate in political life. Furthermore, the fact that a woman may challenge particular social conventions about the manner in which women should behave may be considered political by the authorities and may attract persecutory treatment on that basis.<sup>115</sup> In some case law, private sphere activities are seen as inherently non-political, but there is no such thing as an inherently political or inherently non-political activity. Whether or not activities are political depends on their context; whether or not they can give rise to legitimate claims to refugee status depends on the reaction of the agent of persecution and/or of the authorities in the country of origin of the claimant.<sup>116</sup> What is a

112 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996) p. 49, approved in *Ward*, above n. 29, [1993] 2 SCR 689 at 746. See also, Hathaway, *Law of Refugee Status*, above n. 30, p. 154: 'Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion.'

113 A. Grahl-Madsen, *The Status of Refugees in International Law*, (A. W. Sijthoff, Leyden, 1966), vol. I, p. 220, approved in *Ward*, above n. 29, [1993] 2 SCR 689 at 746.

114 UNHCR, *Handbook*, above n. 54, para. 83.

115 Department of Immigration and Multicultural Affairs, *Guidelines on Gender Issues for Decision-Makers*, July 1996 (Australia), para. 4.25, reproduced in *International Journal of Refugee Law*, special issue, 1997, pp. 195 and 210.

116 Spijkerboer, *Women and Refugee Status*, above n. 26, p. 58.

political opinion is not a matter of definition but depends entirely on the context of the case.<sup>117</sup>

‘Private’ issues commonly associated with women are not inherently less political than those taking place in the ‘public’ sphere. Conflicts concerning the demarcation of privacy (for example, freedom to choose to wear the veil or not, to have an education or undertake certain work, to be sexually active or not, to choose one’s partner, to be free from male domination and violence, to exercise reproductive rights, or to reject female genital mutilation) can be viewed as conflicts of a political nature.<sup>118</sup>

Where the refugee claimant is not directly involved in political activity in the conventional sense, a claim for refugee status requires that political opinion be properly understood to include an opinion regarding the treatment or status of women within the claimant’s country, culture, or social, religious, or ethnic group.<sup>119</sup> As the Refugee Women’s Legal Group has noted:

A woman who opposes institutionalised discrimination against women or expresses views of independence from the social or cultural norms of society may sustain or fear harm because of her actual political opinion or a political opinion that has been or will be imputed to her. She is perceived within the established political/social structure as expressing politically antagonistic views through her actions or failure to act. If a woman resists gendered oppression, her resistance is political.

Where a woman does not directly or intentionally challenge institutionalised norms or behaviour she may nonetheless be imputed (i.e. attributed) with a political opinion. This can be seen, for example, in the characterisation of a raped woman as adulterous, in the social ostracism of an unmarried, separated, divorced, widowed or lesbian woman, and in the politicisation of (unintentional) violations of dress codes.<sup>120</sup>

117 Spijkerboer, *Women and Refugee Status*, above n. 26, p. 58:

Private talk in itself can be subversive, and therefore a political act, as in Orwell’s 1984. In the context of refugee law, cooking will normally be a private act, and therefore irrelevant. This may change, however, if the food is given to a political opponent of the authorities, or if the cooking is done communally by relatives of ‘disappeared’ persons. There is political talk and private talk – as we know. But there is also private cooking and political cooking.

Therefore, an analysis of refugee law that uses the public/private distinction has to be on its guard. Public and private are not aspects of acts. They are aspects of analyses, be it by the authorities of the country of origin of an applicant (who may find cooking political), be it by an asylum adjudicator (who may find cooking inherently private).

118 Spijkerboer, *Women and Refugee Status*, above n. 26, p. 46; RWLG, ‘Gender Guidelines’, above n. 21, para. 4.16.

119 Crawley, *Refugees and Gender*, above n. 12, p. 69.

120 RWLG, ‘Gender Guidelines’, above n. 21, paras. 4.17–4.18. See also, IAA, ‘Asylum Gender Guidelines’, above n. 11, paras. 3.25–3.26.

Women's opinions on social and economic issues and their activities in these spheres may be interpreted by the authorities in the country of origin as political opinions. Social and economic rights may be violated for political reasons.

## VII. Procedural issues

Protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive refugee determination procedure.<sup>121</sup> Procedures for refugee determination are critical and must be made responsive to the experiences of women refugee claimants.<sup>122</sup> Decision makers must be aware of, and respond to, the procedural and evidential difficulties that women face.

Among the more significant issues identified by the Refugee Women's Legal Group is the fact that:

some women asylum seekers arrive alone. Others arrive as part of a family unit and are sometimes not interviewed about their experiences even when it is possible that they, rather than, or as well as, their male relatives, face a risk of being persecuted. Male relatives or associates may not raise relevant issues because they are unaware of the details, or their importance, or are ashamed to report them.

It is important not to assume that a woman's status is derivative; a woman's claim to refugee status may in some cases be as strong as, or stronger than, that of her male relative or associate.<sup>123</sup>

It has also been noted that as a matter of routine, women should be given the opportunity to submit an independent refugee application.<sup>124</sup> Indeed, the Refugee Women's Legal Group has pointed out: 'Women face particular difficulties in

121 UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 8; UNHCR, 'Guidelines on the Protection of Refugee Women', July 1991, paras. 57–76 and in particular the gender-sensitive techniques for interviewing women refugees (para. 72) and country conditions affecting women (para. 73); UNHCR, 'Sexual Violence Against Refugees: Guidelines on Prevention and Response', 1995, para. 4.3; Spijkerboer, *Women and Refugee Status*, above n. 26, ch. 6; Crawley, *Refugees and Gender*, above n. 12, ch. 10; RWLG, 'Gender Guidelines', above n. 21, section 5; Immigration and Refugee Board, 'Women Refugee Claimants', above n. 11, section D; Department of Immigration and Multicultural Affairs (Australia), 'Guidelines on Gender Issues for Decision-Makers', July 1996, section 3; IAA, 'Asylum Gender Guidelines', above n. 11, section 5; G. Hinshelwood, 'Interviewing Female Asylum Seekers', *International Journal of Refugee Law*, special issue, 1997, p. 159; W. Kälin, 'Gender-Related Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer, The Hague, 2002), p. 111.

122 Executive Committee, Conclusion No. 73 (XLIV) 1993, Refugee Protection and Sexual Violence, para. g.

123 RWLG, 'Gender Guidelines', above n. 21, paras. 5.2–5.3.

124 Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.2.

making their case to the authorities, especially when they have had experiences that are difficult and/or painful to describe. The interview should be non-confrontational and exploratory.<sup>125</sup> As a result, it is important that women should not be interviewed in the presence of male relatives, unless they specifically otherwise request.<sup>126</sup> For their part, ‘interviewers and decision makers should familiarise themselves with the role, status and treatment of women in the country from which a woman has fled’.<sup>127</sup> It is therefore necessary to train all those involved in the refugee determination process so that they are sensitive to gender issues. In particular, women refugee applicants should have access to a woman interviewer and interpreter who have received appropriate training.<sup>128</sup>

### VIII. Conclusion

In conclusion, developments in international human rights law and international humanitarian law, including international jurisprudence, as well as substantial advancements in State practice, in case law, and in academic writing, have seen progress towards a gender-sensitive interpretation of the provisions of the 1951 Convention in many jurisdictions. State practice, while variable, demonstrates a convergence of understanding that the refugee definition, properly interpreted, can encompass gender-related claims. It has also strengthened the ability of women claimants in particular to access gender-sensitive asylum procedures, and to have their claims interpreted beyond the narrow confines of a framework of male experiences. The text, object, and purpose of the 1951 Convention, including the principle of non-discrimination, require a gender-inclusive and gender-sensitive interpretation, without which gender biases can be reinforced. In this respect, there is no need to add a sixth ground to those already enumerated in the 1951 Convention itself.

125 RWLG, ‘Gender Guidelines’, above n. 21, para. 5.8.

126 Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.2; RWLG, ‘Gender Guidelines’, above n. 21, paras. 5.10–5.16.

127 RWLG, ‘Gender Guidelines’, above n. 21, para. 5.43. See also, Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.4.

128 Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.3; RWLG, ‘Gender Guidelines’, above n. 21, para. 5.21.

## 5.2 Summary Conclusions: gender-related persecution

*Expert roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy, 6–8 September 2001*



The San Remo expert roundtable addressed the question of gender-related persecution and the 1951 Convention Relating to the Status of Refugees, basing the discussion on a background paper by Rodger Haines QC, Refugee Status Appeals Authority of New Zealand, entitled ‘Gender-Related Persecution’. In addition, roundtable participants were provided with written contributions from Justice Catherine Branson, Federal Court of Australia, Deborah Anker, Harvard Law School, Karen Musalo and Stephen M. Knight, Hastings College of Law, University of California, and the World Organization Against Torture. Participants included thirty-three experts from twenty-three countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Deborah Anker, from Harvard Law School, moderated the discussion.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

The Convention is, *inter alia*, founded on the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. Because men, women, and children can experience persecution in different ways, Article 1A(2) demands an inquiry into the specific characteristics and circumstances of the individual claimant. Accordingly, the below understandings follow:

1. The refugee definition, properly interpreted, can encompass gender-related claims. The text, object, and purpose of the Refugee Convention require a gender-inclusive and gender-sensitive interpretation. As such, there would be no need to add an additional ground to the Convention definition.
2. Gender refers to the social construction of power relations between women and men and the implications of these relations for women’s and

men's identity, status, roles, and responsibilities. Sex is biologically determined.

3. Even though gender is not specifically referenced to in the refugee definition, it is clear – and thus accepted – that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment.
4. Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds can prove very important in determining whether a particular applicant has a well-founded fear of persecution on account of one of the Convention grounds. The main problem facing women asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.
5. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.
6. In cases where there is a real risk of serious harm at the hands of a non-State actor (e.g. husband, partner, or other non-State actor) for reasons unrelated to any Convention ground, and the lack of State protection is for reason of a Convention ground, it is generally recognized that the nexus requirement is satisfied. Conversely, if the risk of harm by the non-State actor is Convention-related, but the failure of State protection is not, the nexus requirement is satisfied as well.
7. Where individual women do not meet the requirements of the refugee definition of the 1951 Convention, their expulsion may nevertheless be prohibited under other applicable human rights instruments.
8. Protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive refugee status determination procedure.

### 5.3 List of participants

*Expert roundtable, San Remo, Italy, 6–8 September 2001 (membership of a particular social group, gender-related persecution, internal protection/relocation/flight alternative)*

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Eduardo Cifuentes Muñoz, Government of Colombia  
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Lee Anne De la Hunt, University of Cape Town, Legal Aid Clinic, South Africa  
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# 6.1 Internal protection/relocation/flight alternative as an aspect of refugee status determination

JAMES C. HATHAWAY\* AND MICHELLE FOSTER

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## I. Introduction

In many jurisdictions around the world,<sup>1</sup> the possibility of an ‘internal flight alternative’ (IFA) (often referred to as ‘internal relocation alternative’)

\* M. Kagan JD (Michigan, 2000) prepared a careful synthesis of background materials upon which this study draws heavily. I am indebted to the insights on this issue provided by participants in the First University of Michigan Colloquium on Challenges in International Refugee Law in April 1999 in which the understanding of an ‘internal protection alternative’ relied upon here was refined; and to the contributors to the expert roundtable convened at San Remo, Italy, in Sept. 2001 to discuss this paper. This paper generally takes account of legal developments up to 1 Jan. 2002.

1 Such a test has no relevance in State Parties to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, entered into force 20 June 1974. Under Art. I(2) of this regional arrangement, the definition of a refugee includes

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.

Emphasis added.

is invoked to deny refugee status to persons at risk of being persecuted for a Convention<sup>2</sup> reason in part, but not all, of their country of origin.<sup>3</sup> In this, as in so many areas of refugee law and policy, the viability of a universal commitment to protection is challenged by divergence in State practice. The goals of this paper are therefore, first, briefly to review the origins and development of the practice of considering IFA as an aspect of the refugee status determination process; secondly, to identify key protection concerns in leading formulations of the IFA rule; and, thirdly, to propose relevant substantive and procedural standards which recognize the legal plausibility in some circumstances of considering internal protection alternatives, but which we believe avoid most of the protection pitfalls of current practice and doctrine.

For the sake of clarity, we refer to the ‘best standard’ approach proposed in this paper as the ‘internal protection alternative’ (IPA), a form of words which more precisely captures the essence of the permissible range of State discretion. In short, we believe that refugee status may not lawfully be denied simply because the asylum seeker ought first to have attempted to flee within his or her own State, nor even on the grounds that it would presently be possible for the applicant to secure ‘safety’ in the home country by relocating internally. Where an asylum seeker is shown to have access to true internal *protection* inside his or her own country, however, refugee status need not be recognized. This is because international refugee law is designed only to provide a back-up source of protection to seriously at-risk persons. Its purpose is not to displace the primary rule that individuals should look to their State of nationality for protection, but simply to provide a safety net in the event a State fails

2 1951 Convention Relating to the Status of Refugees, 189 UNTS 150 (hereinafter ‘1951 Convention’).

3 This was the conclusion of the authors of a review of State practice in eighteen jurisdictions: see European Legal Network on Asylum (ELENA), ‘The Application of the Concept of Internal Protection Alternative’ (research paper, European Council on Refugees and Exiles (ECRE), London, 1998, updated 2000) (hereinafter ‘ELENA Research Paper’), p. 65: ‘Today, however, there is no doubt that the concept is firmly established in the national jurisprudence of State parties to the 1951 Refugee Convention.’ For example, the 1996 European Union’s Joint Position interpreting the refugee definition includes reference to the internal protection alternative: see ‘Joint Position Defined by the Council of the European Union on the Basis of Article K.3 of the European Union Treaty on the Harmonized Application of the Definition of the Term “Refugee” in Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees’, 4 March 1996, OJ 1996 L63/2 (hereinafter ‘EU Joint Position’). Reference to the concept has also been recently codified in US asylum law via amended regulations: see Code of Federal Regulations (CFR), Title 8, Immigration and Nationality Regulations, s. 208.13 (hereinafter ‘US Regulations’), which provide that the presumption of entitlement to refugee status that flows from a showing of past persecution does not extend to those applicants who ‘could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so’ (s. 208.13(1)(i)(B)). Further, the regulations provide that an applicant ‘does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so’ (s. 208.13 (2)(C)(ii)).

to meet its basic protective responsibilities.<sup>4</sup> As observed by the Supreme Court of Canada:

The international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution.<sup>5</sup>

It follows logically that persons who face even egregious risks, but who can secure meaningful protection from their own government, are not eligible for 1951 Convention refugee status. Thus, courts in most countries have sensibly required asylum seekers to exhaust reasonable domestic protection possibilities as a prerequisite for the recognition of refugee status. Where, for example, the risk of being persecuted stems from actions of a deviant local authority or non-State entity (such as a paramilitary group, or vigilante gang) that can and will be effectively suppressed by the national government, there is no need for surrogate international protection.

The common scepticism of advocates about – and frequently outright rejection of<sup>6</sup> – the routine canvassing of internal protection alternatives is primarily a function of two factors. First, even though refugee law is generally understood as surrogate protection, State practice traditionally assumed that proof of a sufficiently serious risk in one part of the home country was all that was required. An individual ordinarily qualified for refugee status if there was a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'<sup>7</sup> in the applicant's city or region of origin. Until the mid-1980s, there was no practice of routinely denying asylum on the grounds that protection against an acknowledged risk could be secured in another part of the applicant's State of origin.

To some extent, the traditional failure to explore the possibility of internal protection simply reflected the predisposition of Western asylum States to respond generously (for political and ideological reasons) to the then-dominant stream of refugees from communism arriving at their borders. With the arrival during

4 J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) (hereinafter 'Hathaway, *Refugee Status*'), quotes at pp. 127–8, the French *Conseil d'Etat* in a decision of May 1983: '[T]he existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces external to the State' (unofficial translation).

5 *Canada (Attorney-General) v. Ward*, [1993] 2 SCR 689 at 716.

6 See e.g., B. Frelick, 'Down the Rabbit Hole: The Strange Logic of Internal Flight Alternative', in *World Refugee Survey* (US Committee for Refugees, Washington DC, 1999), p. 22 (hereinafter 'Frelick').

7 1951 Convention, Art. 1A(2).

the 1980s of increasing numbers of refugees from countries that were politically, racially, and culturally 'different' from Western asylum countries, the historical openness of the developed world to refugee flows was replaced by a new commitment to exploit legal and other means to avoid the legal duty to admit refugees.<sup>8</sup> The IFA inquiry emerged from this context and has played a major role in justifying negative assessments of refugee status.

In addition to concerns about its inauspicious origins, the propriety of considering internal alternatives to asylum has been called into question by the lack of clarity about *why* such considerations are an inherent part of the status determination process. Neither the United Nations High Commissioner for Refugees (UNHCR) nor most States have been consistent and clear in elaborating the legal basis for undertaking such an assessment. As the analysis in Sections II and III of this paper demonstrates, the apparently simple formulation of the IFA principle masks a huge range of variation between and even within States. The doctrinal confusion produces widely inconsistent results for refugee applicants and constitutes a source of unpredictability in refugee decision making.

These legitimate concerns notwithstanding, it must be conceded that the move to embrace IFA rules in recent years may also be explained by the growing number of persons seeking asylum since the late 1980s who are fleeing largely regionalized threats (including many internal armed conflicts) rather than monolithic aggressor States. The changing nature of the circumstances precipitating flight may have allowed the consideration of the possibility of securing protection within one's own State in a way not previously available when the aggressor was usually a central government. If international refugee law is surrogate protection, and if national protection can (given the regionalized nature of many refugee-producing phenomena) be delivered in some, but not all, parts of the State of origin, then it follows logically that refugee law should be applied in a way that recognizes the extant realities and possibilities for individuals and groups to benefit from the protection of their own country, but which does not compromise access to asylum for those not in a position to avail themselves of national protection.

Defining this balance was the task set for the University of Michigan's first Colloquium on Challenges in International Refugee Law held in April 1999. Drawing on a framework prepared by the lead co-author of this paper in conjunction with the European Council on Refugees and Exiles (ECRE), a group of nine senior Michigan law students undertook a comprehensive review of the relevant jurisprudence of leading asylum countries. They synthesized their collective research by substantive sub-topics, and framed a series of critical legal and policy concerns. These were shared with a distinguished group of leading refugee law academics

8 See J. C. Hathaway, 'The Emerging Politics of *Non-Entrée*', 91 *Refugees*, 1992, pp. 40–1; also published as 'L'émergence d'une politique de non-entrée', in *Frontières du droit, Frontières des droits* (ed. F. Julien-Laferrrière, L'Harmattan, Paris, 1993), pp. 65–7.

from around the world, each of whom contributed a brief response paper. The students and academics then worked collaboratively for three days in Ann Arbor, Michigan, on 9–11 April 1999, to refine an analytical framework for adjudicating internal protection concerns in consonance with general duties under the 1951 Convention. The result of that effort is the ‘Michigan Guidelines on the Internal Protection Alternative’.<sup>9</sup> The Guidelines have been shared with policymakers, decision makers, and advocates around the world, including with all members of the International Association of Refugee Law Judges. The first formal adoption of the Guidelines was by the New Zealand Refugee Status Appeals Authority, in its Decision No. 71684/99 of 29 October 1999.<sup>10</sup> The recommendations of this paper (detailed in Sections IV–VI) draw heavily on the Guidelines, though with some differences of emphasis.

In sum, whatever the precise reasons for its development and proliferation in the jurisprudence of many States, the aim of this paper is neither to engage in debates as to IFA’s suspect origins, nor to argue for its rejection on this basis. Rather, this study undertakes a consideration of the legal basis for the asserted right to deny refugee status on internal protection grounds and seeks to articulate the legitimate scope of rules to govern its application in practice.

## II. Conceptual evolution of the IFA inquiry

The precise origins of the IFA test are not clear. However, the source most often referred to as encapsulating the classic formulation of the principle is paragraph 91 of the UNHCR *Handbook*, which provides:

The fear of being persecuted need not always extend to the *whole* territory of the refugee’s country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.<sup>11</sup>

While there is little doubt that UNHCR hoped that paragraph 91 would deter States from excluding persons from refugee status ‘merely’ because they could have sought internal refuge, three salient features of this formulation have, in practice,

<sup>9</sup> See J. C. Hathaway, ‘The Michigan Guidelines on the Internal Protection Alternative’, 21(1) *Michigan Journal of International Law*, 1999, p. 131 and available on <http://www.refugeecaselaw.org/Refugee/guidelines.htm> (hereinafter ‘Michigan Guidelines’).

<sup>10</sup> [2000] INLR 165; this decision is also reported at [www.refugee.org.nz/index.htm](http://www.refugee.org.nz/index.htm).

<sup>11</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979, re-edited 1992) (hereinafter ‘*Handbook*’), at para. 91 (emphasis in original).

frequently led to unwarranted denials of protection. First, the phrasing of paragraph 91 implies that exclusion from refugee status *may* be justified if the applicant failed to seek refuge in a part of the country of nationality, thus introducing a legitimate basis for the application of such a test. Secondly, it engages language that suggests a retrospective analysis, that is, an inquiry into whether the refugee ‘*could* have sought refuge in another part of the same country’ (emphasis added). Rather than focusing on the predicament that the applicant faces at the time of assessment, the *Handbook’s* formulation appears to require an evaluation of the appropriateness of the applicant’s pre-flight behaviour, a notion embodied in the shorthand phrase ‘internal flight’. Thirdly, it introduces the concept of ‘reasonableness’ into the assessment, a phrase not derived from the 1951 Convention itself, nor elaborated upon in the *Handbook*. This formulation has a punitive connotation: if the failure to seek internal refuge is not adjudged to have been ‘reasonable’, then the person should be excluded from protection. This is of course difficult to reconcile with the explicit and closely circumscribed exclusion provisions contained in the 1951 Convention.

Although the *Handbook* was issued in 1979, the notion of IFA remained largely dormant until the mid-1980s when northern States began to explore legal options for restricting the application and scope of the 1951 Convention. IFA jurisprudence can be said to have begun in 1983–4 when the German Higher Administrative Court, in an approach endorsed by the Federal Constitutional Court in 1989, established a two-stage test that closely mirrored the framework set out in paragraph 91.<sup>12</sup> Importantly, however, the Court did not adopt the retrospective quality of the *Handbook’s* framework, but provided instead that an applicant could be denied protection if able to find safety in an alternative region in his or her home country, providing that the proposed region is free from other dangers or disadvantages that would be tantamount to persecution. The gist of this approach was soon embraced by leading common law jurisdictions,<sup>13</sup> although the second element of the test was altered to incorporate the ‘reasonableness’ language of the UNHCR *Handbook*. As appellate courts began routinely to endorse the legitimacy of the IFA rule and

12 Judgment of 10 Nov. 1989, German Federal Constitutional Court, 2 BvR 403/84, 2 BvR 1501/84, *Entscheidungssammlung zum Ausländer- und Asylrecht* (EZAR) 203 No. 5.

13 In two early cases, courts in the UK and the US adopted the IFA doctrine, although they did not engage in substantive analysis of its parameters. In *R. v. Immigration Appeal Tribunal (IAT), ex parte Jonah*, [1985] Imm AR 7, the English High Court of Justice (Queen’s Bench Division) (QBD) suggested that a trade unionist from Ghana who faced persecution in his previous home might be denied refugee status if he could live safely in a distant village. The Court ultimately granted asylum because relocation would have forced him to be separated from his wife (an early application of the reasonableness test). In *Matter of Acosta*, 19 I&N Decisions 211, the US Board of Immigration Appeals (BIA) in 1985 rejected an appeal by a Salvadorean man partly on the basis that ‘the facts do not show that this threat existed in other cities in El Salvador. It may be that the respondent could have avoided persecution by moving to another city in that country’ (at 235–6).

to articulate its components,<sup>14</sup> the incidence of reliance on IFA considerations increased significantly throughout the 1990s.

The *Handbook's* formulation did not explicitly set out the textual basis for IFA analysis. However, further guidance as to the appropriate application of IFA analysis was provided by the UNHCR in March 1995 in an 'Information Note on Article 1 of the 1951 Convention', wherein it observed that the 'underlying assumption' for the application of the doctrine is 'a regionalized failure of the State to protect its citizens from persecution'. It explained:

Under such circumstances, it is assured that the State authorities are willing to protect a person against persecution by non-State agents, but they have been prevented, or otherwise are unable to assure, such protection in certain areas of the country.<sup>15</sup>

An important feature of the 1995 UNHCR formulation is that, despite continuing to use the language of 'internal flight alternative' and continuing to suggest at least a partly retrospective analysis,<sup>16</sup> the UNHCR acknowledged that the proper focus of the inquiry is on the ability and/or willingness of the State of nationality to provide *protection*. Emphasis was placed on the need for an 'effective internal flight alternative',<sup>17</sup> which would exist only where the proposed region is 'accessible in safety and durable in character' and where the conditions in the region correspond to major human rights instruments.

This protection-focused approach was even more clearly highlighted in an overview published later in the same year by the UNHCR Regional Bureau for

14 In 1990, the US Court of Appeals (Third Circuit) held that a refugee applicant's prima facie case for asylum must include an allegation that 'he would be persecuted beyond the local vicinity of his hometown': *Etugh v. Immigration and Naturalization Service (INS)*, 921 F 2d 36 at 39. In 1991, the English High Court (QBD) quoted para. 91 verbatim, and relied upon it to reject an asylum application: *R. v. Secretary of State for the Home Department, ex parte Gunes*, [1991] Imm AR 278. Also in 1991, the Canadian Federal Court of Appeal endorsed a para. 91-style, two-pronged test, namely, that the decision maker must be satisfied that 'there is no serious possibility of the claimant being persecuted in the part of the country in which it finds an IFA exists' and that the conditions in the IFA must be such 'that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there': *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 FCJ 706 at 710. In 1994, the Full Court of the Federal Court of Australia handed down an influential decision in *Randhawa v. Minister for Immigration Local Government and Ethnic Affairs*, (1994) 124 ALR 265, 19 May 1994, in which it rejected a claim by a Punjabi Sikh who feared Hindu militants would kill him for belonging to the Akali Party on internal flight grounds.

15 UNHCR, 'Information Note on Article 1 of the 1951 Convention', March 1995 (hereinafter 'UNHCR 1995 Information Note'), at section 6.

16 *Ibid.*, section 6 states: 'The possibility to find safety in other parts of the country must have existed at the time of flight and continue to be available when the eligibility decision is taken and the return to the country of origin is implemented.'

17 *Ibid.*

Europe.<sup>18</sup> This document emphasized that '[p]rotection must actually be available for the person in question in the alternative location' and that the '[p]rotection must be meaningful'.<sup>19</sup> While continuing to endorse the *Handbook's* notion of 'reasonableness' as part of a protection-based IFA standard, UNHCR for the first time provided some concrete guidance on the essential elements of a 'reasonableness' assessment.<sup>20</sup> The reasonableness test was said to include factors such as the provision of basic civil, political, and socio-economic human rights, the subjective circumstances of the applicant, and even the 'depth and quality of the fear itself'.<sup>21</sup>

UNHCR's most recent analysis of the IFA concept is set out in a 1999 Position Paper entitled 'Relocating Internally as a Reasonable Alternative to Seeking Asylum'. This document impliedly reverses the conceptual thinking of the 1995 papers (in which IFA was conceived as relevant to the question of the willingness and capacity of the State of nationality to provide *protection*). Instead, IFA was said to be relevant to whether or not an applicant's fear is *well-founded*:

The judgement to be made in cases where relocation is an issue is whether the risk of persecution that an individual experiences in one part of the country can be successfully avoided by living in another part of the country. If it can, and if such a relocation is both possible and reasonable for that individual, this has a *direct bearing on decisions related to the well-foundedness of the fear*. In the event that there is a part of the country where it is both safe and reasonable for the asylum-seeker to live, *the 'well-founded fear' criterion may not be fulfilled*. The analysis about possible internal relocation can be a legitimate part of the holistic analysis of *whether the asylum-seeker's fear of persecution is in fact well-founded*.<sup>22</sup>

In addition to introducing the important conceptual shift from an analysis based on protection to one based on well-founded fear, it is evident from the above passage that the 1999 Position Paper also engaged the language of 'relocation', reflecting some State practice that had attempted to move away from a focus on 'flight' to a prospective analysis of relocation alternatives.<sup>23</sup> The 1999 Position Paper suggested that two key points should be addressed: first, whether the alternative site is a safe location (an analysis of whether the proposed site is free of the relevant risk

18 UNHCR, Regional Bureau for Europe, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR*, European Series, vol. 1, No. 3 (Sept. 1995) (hereinafter 'UNHCR 1995 Overview').

19 *Ibid.*, p. 32. 20 *Ibid.* 21 *Ibid.*

22 UNHCR, 'Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called "Internal Flight Alternative" or "Relocation Principle"', 1999 (hereinafter 'UNHCR 1999 Position Paper'), at para. 9 (emphasis added).

23 This approach has been particularly favoured in New Zealand case law, although more recently the approach of the Michigan Guidelines (see above n. 9) has been explicitly adopted. For a survey of the approach of the New Zealand authorities, see Decision No. 71684/99, New Zealand Refugee Status Appeals Authority (RSAA), above n. 10.



and is generally habitable, stable, and accessible); and, secondly, whether it would be reasonable for this asylum seeker to seek safety in that location (which would include reference to a non-exhaustive list of factors set out in the Position Paper such as age, sex, health, family situation and relationships, language abilities, and social or other vulnerabilities). As will be explained below, basing an inquiry on these two notions is problematic.<sup>24</sup> While UNHCR's important shift in understanding the correct 'textual home' for IFA analysis was supported by some State practice, it is nonetheless vital that we consider as a preliminary matter whether viewing the IFA inquiry as directed to the existence of a well-founded fear is justified as a matter of international law.

### III. The conceptual basis for analysis of internal alternatives to asylum

The leading cases concerning the IFA principle have generally noted that the refugee definition in Article 1A(2) of the 1951 Convention includes two key clauses: the well-founded fear clause ('owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion') and the protection clause ('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'). While courts have frequently recognized that the clearest textual home for IFA is in the protection clause,<sup>25</sup> the elements of the two clauses are sometimes conflated, with the result that IFA is said to be relevant to both prongs. For example, in *Randhawa v. Minister for Immigration, Local Government and Ethnic Affairs*, Black CJ explained:

Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders . . . In the present case the

<sup>24</sup> See text below at nn. 85–111.

<sup>25</sup> See e.g. *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, [1994] 1 FC 589; *Re S.*, Decision No. 11/91, New Zealand RSAA, 5 Sept. 1991; and *Randhawa*, above n. 14.

delegate correctly asked whether the appellant's fear was well-founded in relation to the country of nationality, not simply the region in which he lived.<sup>26</sup>

Clearly, the elements of 'well-founded fear' and 'protection' are to some extent intertwined. Indeed, in assessing whether a person has a well-founded fear of being persecuted in any region in the country, the decision maker, in addition to identifying the serious harm that may be inflicted for a Convention reason, must also scrutinize the State's ability and willingness effectively to respond to the risk.<sup>27</sup> As succinctly framed by the House of Lords in *R. v. Immigration Appeal Tribunal, ex parte Shah and Islam*, 'Persecution = Serious Harm + The Failure of State Protection'.<sup>28</sup> If the State can effectively suppress the risk of serious harm in the claimant's place of origin, then the person does not have a well-founded fear of being persecuted.

It is crucial to understand, however, that the analysis shifts significantly once it has already been established that a person has a well-founded fear of being persecuted in his or her home area (region 'A'), which of course implies that the State is unable or unwilling to protect the person in that region.<sup>29</sup> Once this is established,

<sup>26</sup> *Randhawa*, above n. 14, pp. 268–9.

<sup>27</sup> *Hathaway, Refugee Status*, above n. 4, p. 125. This formulation has been adopted in e.g. *R. v. IAT and Another, ex parte Shah; Islam v. Secretary of State for the Home Department*, UK House of Lords, [1999] 2 AC 629; *Horvath v. Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577; and *Canada (Attorney-General) v. Ward*, above n. 5. In *Minister for Immigration and Multicultural Affairs v. Khawar and Others*, [2002] HCA 14, McHugh and Gummow JJ of the High Court of Australia took the view that the absence of domestic protection is not relevant to the meaning of 'persecution': paras. 66–72. However the other two judges comprising the majority disagreed. Kirby J explicitly affirmed the general common law view that failure of State protection is an essential element of 'being persecuted': paras. 106–18. Gleeson CJ also accepted that 'failure of the state to intervene to protect the victim [of persecution] may be relevant to whether the victim's fear of continuing persecution is well-founded' (para. 29), and also appeared to accept the 'bifurcated' approach to persecution in stating that '[w]here persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be for reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state' (para. 31). Callinan J (in dissent) did not address the issue.

<sup>28</sup> *R. v. IAT and Another, ex parte Shah; Islam v. Secretary of State for the Home Department*, above n. 27, per Lord Hoffmann. Lord Hoffmann explained, at p. 653, that the relevant persecution comprised two elements:

First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them . . . These two elements have to be combined to constitute persecution within the meaning of the Convention.

<sup>29</sup> H. Storey has recently questioned the logic of what he refers to as the 'home test', that being the assumption that a refugee claim should in the first instance be assessed in relation to the applicant's place of origin. His essential point is that this approach unjustifiably imports a domicile test into refugee law, treating as legally irrelevant risks which might accrue in other parts

it is neither logical nor realistic to find that the fact that the State can protect the person in some *other* region of the country (region ‘B’) means that she no longer has a well-founded fear of being persecuted in region A.<sup>30</sup> The well-founded fear of being persecuted in region A has not been negated or removed by the provision of national protection in region B, just as the risk would not be removed or negated by the availability of protection in a country of second nationality or in an asylum State. In all of these cases, the refugee continues to face a well-founded fear of being persecuted in region A of his or her country of origin, but is able to avail him or herself of countervailing national protection. To hold otherwise is to construct a legal fiction fundamentally at odds with common sense.

Indeed, the text of the 1951 Convention itself envisages that the possibility of national protection will not necessarily allay the well-founded fear, as was well explained by Sedley LJ in the seminal *Karanakaran* decision:

[B]oth the special adjudicator and the tribunal failed to approach the Convention methodically. They treated the availability of internal [protection] as a reason for holding that the fear of persecution was not well-founded. There may possibly be countries where a fear of persecution, albeit genuine, can so readily be allayed in a particular case by moving to another part of the country that it can be said that the fear is either non-existent or not well-founded, or that it is not ‘owing to’ the fear that the applicant is here. But a clear limit is placed on this means of negating an asylum claim by the subsequent provision of the Article that the asylum-seeker must be, if not unable, then unwilling because of ‘such fear’ – *ex hypothesi* his well-founded fear of persecution – to avail himself of his home

of the applicant’s country of origin. ‘Risk of this kind may be more or less real or more or less remote, but never purely academic’: H. Storey, ‘The Internal Flight/Protection Alternative – Key Issues’, July 2001, at p. 15 (on file with authors). On balance, however, there seems little reason to depart from the accepted practice of focusing the inquiry on circumstances in the asylum seeker’s home area. As an evidentiary matter, an applicant who believes that risks in another region may have an impact on the home region is in no sense foreclosed from adducing evidence to that effect. Since refugee status is forward-looking and requires only demonstration of a ‘real chance’ or ‘serious possibility’ of being persecuted, the fact that the harm has not already accrued in the home region is in no sense dispositive of the claim. On the other hand, if there is no such evidence, it is difficult to see why refugee status needs to be recognized. There is also a slippery slope argument to be made: any move away from an initial focus on the circumstances in the region most familiar to the applicant is likely to make it difficult for him or her to discharge the shared duty of fact-finding (see *Handbook*, above n. 11, at para. 196) and suggests the logic of a requirement to demonstrate a country-wide risk of being persecuted (see text below at nn. 32–9).

30 According to G. de Moffarts, ‘Refugee Status and the Internal Flight or Protection Alternative’ (remarks delivered to the meeting of the International Association of Refugee Law Judges, ‘The 1951 Convention at Fifty: The Way Forward’, Pretoria, South Africa, 12–15 July 2001) (hereinafter ‘de Moffarts’): ‘The Internal Flight Alternative is a consequence of the surrogate nature of international protection. The Convention definition itself limits refugee status to a person who can demonstrate inability or legitimate unwillingness to “avail himself of the protection of (the home) state”.’

state's protection. If the simple availability of protection in some part of the home state destroyed the foundation of the fear or its causative effect, this provision would never be reached.<sup>31</sup>

Lest it be thought that this is merely a semantic debate, it is important to elucidate the negative practical consequences of anchoring IFA analysis in the well-founded fear language of the 1951 Convention.

First, it has led some States and courts to assert a requirement that the applicant establish 'country-wide persecution'.<sup>32</sup> If an applicant's fear is said not to be well founded if it is objectively reasonable for him or her to relocate to a part of his or her own country, it is not illogical to insist that the applicant establish not only a well-founded fear in his or her own locality, but also that this fear extends to every other city, town, and village in the country of origin. For example, in *In Re C.A.L.*, the US Board of Immigration Appeals rejected a Guatemalan man's claim for refugee status on the basis, *inter alia*, that:

[H]e has not provided any convincing evidence to suggest that his fear of persecution would exist throughout Guatemala. This Board has found that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place within a country. *He must show that the threat of persecution exists for him country-wide.* (emphasis added)<sup>33</sup>

31 *Karanakaran v. Secretary of State for the Home Department*, English Court of Appeal, [2000] 3 All ER 449 at 473–4.

32 This approach has led to criticism from UNHCR: 'An ongoing practice was the restrictive interpretation in some countries of various elements of the refugee definition . . . coupled with the requirement that applicants for refugee status satisfy an excessively stringent burden and standard of proof. For example, a handful of countries rejected asylum-seekers on the grounds that, although they demonstrated a well-founded fear of persecution, they could not prove that said fear extended to the whole of the territory of their country of origin': UN Doc. E/1991/85, 30 May 1991, p. 5. Interestingly, despite this official position, a UNHCR official has recently argued that there should be a three-step approach to IFA determination, with the first question being whether the asylum-seeker has 'prove[n] a reasonable possibility of being persecuted throughout the country of origin'. If so, 'this proves that his or her fear is well-founded': H. Massey, 'Reasonableness Rescued? The Michigan Guidelines on the "Internal Protection Alternative" and UNHCR's Position on "Relocating Internally as a Reasonable Alternative to Seeking Asylum"' (draft working manuscript dated May 2001) (hereinafter 'Massey'), p. 4 (on file with authors).

33 Decision No. A70-684-022, BIA, 21 Feb. 1997, at p. 5. See also, *Matter of R.*, Interim Decision No. 3195, BIA, 15 Dec. 1992, wherein the Board stated that 'while it is not always necessary to demonstrate a country-wide fear, it is the exception rather than the rule that one can qualify as a refugee without such a showing'; and *In Re A.E.M.*, BIA, Interim Decision No. 3338, 20 Feb. 1998, in which the BIA held that 'in light of the country conditions . . . [revealing] that the Shining Path operates in only a few areas of Peru, the respondents have not provided any evidence to suggest that their fear of persecution from the Shining Path would exist throughout that country'. See also, US Regulations, above n. 3. The IAT in the UK has taken a similar approach in interpreting a rule incorporating para. 91 of the *Handbook* into domestic regulations, which provide that 'a successful asylum claim require[s] the applicant to establish persecution in all parts of the country to which it was "practical" to return': *Dupovac*, Decision No. R11846, IAT, 8 Feb. 1995.

Similarly, the US Court of Appeals for the Third Circuit affirmed the rejection of a Nigerian man's appeal, holding that the appellant had erred in his application before the Board of Immigration Appeals in failing to allege that he would be unable to live safely in another part of the country. The Court concluded:

[I]n this case the Board correctly decided Etugh had not made out a *prima facie* case for asylum. Etugh failed to allege he would be persecuted beyond the local vicinity of his hometown, Akirika . . . The scope of persecution Etugh alleges is not national and does not sustain his motion to reopen.<sup>34</sup>

This approach is not justified by the text of the 1951 Convention; rather it requires additional restrictive words to be read into the Convention definition such that it reads 'well-founded fear of being persecuted *throughout the country of nationality*'.<sup>35</sup> Moreover, it imposes an extremely onerous burden on refugee applicants, a burden that is exacerbated by the many practical restrictions applicants often suffer in being able to obtain access to sufficiently precise and comprehensive country information. UNHCR has consistently criticized the country-wide persecution notion,<sup>36</sup> describing this requirement as 'an impossible burden and one which is patently at odds with the refugee definition, the key criterion of which is that the asylum seeker show that he or she has a well-founded fear of being persecuted for a Convention reason'.<sup>37</sup> Indeed, it is in direct conflict with the well-established approach to distributing the burden of proof in refugee cases, which UNHCR explains as follows:

[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.<sup>38</sup>

The 'country-wide persecution' approach also tends to produce a wide-ranging fishing expedition into potential alternative protection regions, and risks 'the conflation of issues' and a 'consequent lack of focused analysis'.<sup>39</sup>

34 *Etugh v. INS*, above n. 14.

35 See H. Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined', 10 *International Journal of Refugee Law*, 1998, p. 499 at p. 524. Interestingly, this is the approach impliedly embraced by the Massey paper, above n. 32, where he cites the 'Michigan Guidelines' as referring to a well-founded fear of being persecuted in one region or at least part of the country of origin. He then says that '[t]his phraseology begs the question whether, according to the Guidelines, proving a risk of persecution in one part of the country of origin actually proves that the asylum-seeker's fear is overall well-founded within the meaning of the refugee definition or establishes only a presumption to this effect': p. 4.

36 Concern with this notion can be traced back to at least the 1991 statement, above n. 32.

37 UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001 (hereinafter 'UNHCR 2001 Note on Interpreting Article 1'), at n. 28.

38 *Handbook*, above n. 11, at para. 196.

39 *Karanakaran v. Secretary of State for the Home Department*, above n. 31, p. 476, per Sedley LJ.

By contrast, analyzing the IFA as a protection alternative provides structure to the determination exercise and encourages a logical, methodical approach to the determination process.<sup>40</sup> It is thus of considerable assistance to decision makers as well as to applicants. A protection-based understanding of IFA reinforces the fact that once the applicant has established a well-founded fear in one location, she is entitled to the full weight of the establishment of a *prima facie* case. In this way, the IFA analysis is understood as akin to an exclusion inquiry such that the evidentiary burden is then on the party asserting an IFA to establish that it exists.

A second major practical concern is that conceiving the IFA issue as part of the initial inquiry into the existence of a well-founded fear of being persecuted encourages decision makers to pre-empt the analysis of well-founded fear in the first region by moving directly to the question of an IFA. Although UNHCR emphasizes that it is wrong to use IFA analysis to deny access to refugee status determination<sup>41</sup> or as an ‘easy answer’ or ‘short-cut’ to bypass refugee status determination,<sup>42</sup> situating the issue as part of the well-founded fear analysis tends to produce precisely this result. There are many examples of decision makers relying upon the existence of an IFA to dismiss a claim without considering the conditions giving rise to the well-founded fear in the region of origin.<sup>43</sup> For example, in *Syan v. Refugee Review Tribunal and Another*, the Australian Federal Court held that, ‘having found against the appellant on the question of internal flight, it was not necessary to determine whether the applicant had a well-founded fear of persecution based on a Convention reason’.<sup>44</sup> This affirmed the existing practice of the Refugee Review Tribunal, which has dismissed a number of cases on the preliminary issue of IFA without even considering the particulars of the applicant’s well-founded fear of being persecuted.<sup>45</sup> Similarly, in *R. v. Secretary of State for the Home Department, ex parte*

40 The four steps in IPA assessment are set out in the text below at notes 112–85 and summarized in the Michigan Guidelines, above n. 9.

41 UNHCR, ‘1999 Position Paper’, above n. 22, at para. 2. See also, UNHCR ‘1995 Information Note’, above n. 15, at section 6, where it is emphasized that ‘[d]ue to the complexity of the issues involved, the concept of internal flight alternative should not be applied in the framework of accelerated procedures’.

42 UNHCR, ‘1999 Position Paper’, above n. 22, at para. 18.

43 See e.g., the decision in *R. v. IAT, ex parte Probakaran*, [1996] Imm AR 603, wherein the English High Court (QBD) stated: ‘It seems to me that if there is a safe place, from a Convention point of view, to which a person can be returned within his own country, it may in a number of cases be unimportant whether he would be at risk of persecution for a Convention reason in the part of that country from which he had come. The only relevance of whether there might be a risk of persecution for a Convention reason would be whether that risk established the question of whether it was shown to be unreasonable to require that the asylum seeker go back to the safe part of his country’: p. 604. See also, *R. v. IAT, ex parte Mahendran*, English Court of Appeal, Decision of 13 July 1999 (unreported decision on file with authors), holding that, even when an adjudicator errs on a credibility finding, an appeal can be dismissed because IFA can be an independent stand-alone inquiry.

44 (1995) 61 FCR 284 at 288, per Beazley J.

45 See e.g. Decision No. V98/08482, Australian Refugee Review Tribunal (RRT), 31 March 1999: ‘As the Tribunal has found that internal flight is a viable option . . . the Tribunal has not proceeded

*Singh*, the English High Court of Justice (Queen's Bench Division) held that 'the alternative flight option is a point that, on its own, would conclude this application against the applicant'.<sup>46</sup>

This approach is a dangerous one, since an analysis of an IFA requires 'an in-depth examination to establish whether the persecution faced by the applicant is clearly limited to a specific area and that effective protection is available in other parts of the country'.<sup>47</sup> This concern is well exemplified in *R. v. Secretary of State for the Home Department, ex parte Akar*, in which a Kurdish woman claiming asylum on the basis that she and her family had supported the Kurdish separatist PKK was denied asylum by the adjudicator on IFA grounds alone and in the absence of an evaluation of all the evidence relating to the extent and nature of her well-founded fear of persecution. On an application for judicial review, the English High Court of Justice (Queen's Bench Division) dismissed her submissions, approving the use of IFA as a threshold inquiry as follows:

The third matter is that the Applicant contends that there were various errors of fact and that various items of background documentation were ignored. In my judgment, the Special Adjudicator was entitled, in the circumstances of this case, to focus as he did on the circumstances in Istanbul, on the existence of the two brothers in Istanbul, and to conclude from all the matters before him that there was no reason why this lady could not safely and reasonably live in Istanbul with them, particularly as the personal persecution of which she had experience related to life in the village.<sup>48</sup>

This decision must be open to question given the allegations of the applicant as to the basis of her well-founded fear. It is inherent in the notion of an internal *alternative* that the decision maker first understands the conditions to which the safe region is said to be a suitable alternative. On the one hand, by commencing the inquiry with an assessment of the well-founded fear in the region from which the person fled before moving to the protection question, the decision maker has a clear benchmark against which to assess the sufficiency of the internal protection available to the applicant. To locate the analysis within the well-founded fear criterion, on the other hand, allows the decision maker to avoid this careful analysis, and raises a substantial risk that legitimate claims will be dismissed following only cursory consideration of the relevant circumstances.

to determine whether the applicant otherwise satisfied the Convention definition of a refugee'; and Decision No. V98/08414, RRT, May 1999, in which it was held that '[i]t is not necessary for the Tribunal to determine whether there is a well-founded fear of persecution in part of a country before a relocation may be considered'.

46 Decision No. CO/2696/98, English High Court (QBD), 3 March 1999, per Scott Baker J (unreported decision on file with authors).

47 Decision No. 70951/98, New Zealand RSAA, 5 Aug. 1998.

48 Decision No. CO/1789/99, English High Court (QBD), 17 Sept. 1999 (unreported decision on file with authors).

In summary, to hold that the availability of alternative internal protection removes the well-founded fear of being persecuted involves a legal fiction which has concrete detrimental ramifications for refugee applicants. It is both more logical and linguistically satisfactory to view IFA analysis as relevant to the question whether national protection is available to counter the well-founded fear.<sup>49</sup> This language of the 1951 Convention naturally supports such a conceptualization of an IFA, which is moreover consistent with the well-established view of refugee law as surrogate protection.<sup>50</sup> Indeed, to collapse protection considerations into the well-founded fear element makes the protection aspect of the definition largely superfluous.

The main objection<sup>51</sup> that has been raised to an understanding of IFA rooted in the 1951 Convention's protection clause is that it impermissibly extends the notion

49 According to the EU Joint Position, above n. 3, at section. 8:

Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1A of the Geneva Convention has been fulfilled, namely that the person concerned 'is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country', to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may be reasonably expected to move.

50 Hathaway, *Refugee Status*, above n. 4, p. 133. This understanding has been endorsed in *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another*, (1997) 190 CLR 225 at 248, where Dawson J held that it is a 'well-accepted fact that international refugee law was meant to serve as a "substitute" for national protection where the latter was not provided due to discrimination against persons on grounds of either civil or political status'; *Canada (Attorney-General) v. Ward*, above n. 5, p. 731 per La Forest J: '[I]nternational refugee law was meant to serve as a "substitute" for national protection where the latter was not provided'; *Horvath v. Secretary of State for the Home Department*, above n. 27, p. 581 per Lord Hope: 'The general purpose of the Convention is to enable a person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community'; at p. 589 per Lord Lloyd: 'Thus the principle of surrogate protection finds its proper place in the second half of article 1A(2). If there is a failure of protection by the country of origin, the applicant will be unable to avail himself of that country's protection'; at p. 594 per Lord Clyde. But two judges of the High Court of Australia have recently challenged this view, finding that the notion of refugee law as surrogate protection 'add[s] a layer of complexity . . . which is an unnecessary distraction': *Minister for Immigration and Multicultural Affairs v. Khawar and Others*, above n. 27, at para. 73, per McHugh and Gummow JJ.

51 It has been argued that a second concern is that there is no 'protection clause' in the portion of the refugee definition which addresses the claims to refugee status made by stateless persons. A stateless person need only show that he or she 'is unable or, owing to such fear, is unwilling to return to [the country of former habitual residence]'. If the 'protection clause' contained in the portion of the refugee definition applicable to persons with a nationality is the sole basis to engage in analysis of the internal protection alternative, it would not be possible to canvass internal protection alternatives in relation to a stateless person. Yet this result may well make sense. The right to internal freedom of movement within a state does not inhere in all persons, but only in persons 'lawfully within the territory of a State': International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976 (hereinafter 'ICCPR'), at Art. 12(1). Indeed, the right to re-enter a State cannot even be asserted as a matter of international



of ‘protection’ beyond that intended by the framers of the 1951 Convention. It has been argued by Antonio Fortín that historical evidence suggests that the concept of ‘protection’ in the definition was intended to refer solely to diplomatic protection, rather than to internal national protection.<sup>52</sup> This leads him to conclude that, in light of the stipulation of the 1969 Vienna Convention on the Law of Treaties that ‘special meaning shall be given to a term [of a treaty] if it is established that the parties so intended’,<sup>53</sup> the reference to ‘protection’ in the refugee definition should be read as ‘diplomatic protection’. The argument is that refugee status is dependent upon whether or not a person can avail him or herself of the diplomatic protection of his or her country of nationality, the implication being that availability of this external protection obviates the need for surrogate protection, regardless of the risks that await an individual in the country of origin.

There are a number of significant problems with this analysis. First and most obviously, the extended term ‘diplomatic protection’ does not appear in the text of the 1951 Convention itself. Taking account of both the ordinary meaning of the

legal entitlement by non-citizens: ICCPR, Art. 12(4). Thus, because only a citizen is by definition both entitled to re-enter his or her country and to move and establish residence in any part of that State, there are good grounds not to engage in an internal protection analysis with respect to stateless persons. Such an inquiry is predicated on a legal right to re-enter both the State and a given region thereof, neither of which may be presumed in the case of a stateless person.

52 A. Fortín, ‘The Meaning of “Protection” in the Refugee Definition’, 12(4) *International Journal of Refugee Law*, 2000, p. 548 at p. 551 (hereinafter ‘Fortín’). Two judges in the majority of a recent decision of the High Court of Australia, *Minister for Immigration and Multicultural Affairs v. Khawar and Others*, above n. 27, have relied upon this historical interpretation. While Gleeson CJ accepted that the historical meaning of ‘protection’ was diplomatic or consular protection, he also considered that there is a broader sense in which the term ‘protection’ is used in the Convention (para. 17), citing in support, *inter alia*, the judgment of Lord Hope of Craighead in *Horvath v. Secretary of State for the Home Department* in which his Lordship explained that ‘in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element’ (para. 19). Gleeson CJ explained that the ‘broader sense of protection’ may be of significance in interpreting various aspects of the Convention today, explaining: ‘on the questions whether persecution is a threat, (which usually involves consideration of what has occurred in the past as a basis for looking at the future), and whether such persecution is by reason of one of the Convention grounds, and whether fear of persecution is well-founded, the obligation of a state to protect the fundamental rights and freedoms of those who are entitled to its protection may be of significance’ (para. 24). In applying this analysis, he appeared to accept the ‘bifurcated’ approach to the meaning of ‘being persecuted’ (para. 31), cited above n. 27. Yet, while arguing that the historical meaning of protection was external protection, Kälín acknowledges that ‘the very cornerstone of the regime of international refugee protection’ is ‘surrogate protection created by modern international refugee law’: Kälín, below n. 59, p. 431. Moreover, Kälín recognizes that, ‘in international law, the “historical” interpretation of international treaties is only a supplementary means of determining the content of a treaty provision’ and he provides ‘strong reasons’ for supporting a contemporary interpretation of the 1951 Convention that gives the protection clause ‘an extended meaning that also covers internal protection’ (*ibid.*, at pp. 427–8). This is consistent with the general approach to interpretation of the 1951 Convention. As Kirby J of the High Court of Australia has explained: ‘[l]ike the language itself, the Convention moves with the times’: *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, (2000) 201 CLR 293 at 312.

53 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(4).

notion of ‘protection’<sup>54</sup> and the ways in which the term ‘protection’ is used elsewhere in the 1951 Convention, the Fortín position is anomalous. In particular, the Preamble refers to the intention of the parties to ‘revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection afforded by such instruments’, and to the importance of coordinated measures to facilitate UNHCR’s task of ‘supervising international conventions providing for the protection of refugees’.<sup>55</sup> Clearly, ‘protection’ as referred to in the Preamble cannot mean only ‘diplomatic protection’, since the Convention is concerned nearly exclusively with the provision of ‘protection’ understood in the sense of human rights protection.

Secondly, the isolated historical references that can be located do not justify the conclusion that the framers of the 1951 Convention clearly had this highly specialized understanding of ‘protection’ in mind. During the early phases of the drafting process, the goal had been to draft a single convention to govern the status of both refugees and stateless persons. Statements were therefore made during the early debates of the Ad Hoc Committee which appear to support Fortín’s position, but only because they were addressed to the circumstances in which a *stateless person* (not a refugee) could be deemed not to require international protection.<sup>56</sup> In the case of a stateless person – but not for a refugee – the willingness of a country’s diplomatic personnel to enfranchise him or her by the provision of, for example,

54 Protection is defined as ‘the act or an instance of protecting, the state of being protected’; while ‘protect’ is defined as ‘keep safe; defend; guard’: *Concise Oxford Dictionary* (9th edn, Oxford University Press, 1995). See also *Lay Kon Tji v. Minister for Immigration and Ethnic Affairs*, (1998) 158 ALR 681, where Finkelstein J of the Federal Court of Australia surveyed the various forms of ‘protection’ which comprise the enjoyment of ‘effective nationality’ in the context of an application for refugee status by a dual national, noting that ‘protection of the subject operates at two levels, viz., the domestic and the international’ (at p. 690).

55 1951 Convention, Preamble.

56 The Ad Hoc Committee debated during its first session in Jan. and Feb. 1950 the question whether the 1951 Convention should deal with the problem of statelessness, ultimately deciding that the 1951 Convention should deal only with refugees. To the extent that the references cited are to discussions which occurred before the issue of statelessness was excluded from the 1951 Convention, they are of questionable value in shedding light on the goals of the 1951 Convention. For example, Fortín states that the Secretary-General ‘postulated the need to establish an organization to provide to refugees the diplomatic protection that they lacked’: Fortín, above n. 52, p. 560. However the supporting quote of the Secretary-General states: ‘The conferment of a status is not sufficient in itself to regularize the standing of *stateless persons* and to bring them into the orbit of the law; they must also be linked to an independent organ which would to some extent make up for the absence of national protection and render them certain services which the authorities of a country of origin render to their nationals abroad’: Fortín, above n. 52, p. 560 (emphasis added). Similarly, Fortín argues that the Director-General of the International Refugee Organization recalled that refugees are ‘unprotected aliens’ insofar as they lack the protection which States grant to their nationals abroad, Fortín, above n. 52, p. 560. However the actual quote cited by Fortín states: ‘The refugee *who enjoys no nationality* is placed in an abnormal and inferior position which not only reduces his social value, but destroys his self-confidence’ (emphasis added).

a passport or entry visa might well be taken as indicative of a resolution to that person's dilemma, and hence logically inform the question of whether international protection is required. It is striking that once the decision to draft a separate convention on statelessness was made, there were only a few references made to the legal significance of 'diplomatic protection',<sup>57</sup> and in fact very little discussion dedicated to the meaning of the 'protection' aspect of the definition at all.<sup>58</sup> There is simply too little historical evidence<sup>59</sup> to justify the conclusion that the authors of the 1951 Convention 'specifically assigned to the term "protection" the special meaning of "diplomatic protection"'.<sup>60</sup> Moreover, it is possible to locate references in the *travaux préparatoires* that support a flexible and open-ended definition of 'protection'. For example, in discussing the proposed Article 1C(3), Mr Hoare, the delegate of the United Kingdom, argued that 'it would be better to say "enjoys the protection of the country of his new nationality", for that would leave the State concerned to decide whether the refugee in fact enjoyed such protection, and how the phrase should be interpreted'.<sup>61</sup>

Thirdly, even if it were somehow shown that the special meaning of 'diplomatic protection' should inform the 1951 Convention's general references to 'protection', the Fortín view misinterprets the notion of diplomatic protection under international law. The well-established meaning of 'diplomatic protection' in international law is that it is 'action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State'.<sup>62</sup> This is a considerably narrower

57 Fortín cites the views of the US representative, Mr Henkin, who viewed protection as a 'term of art' (Fortín, above n. 52, p. 562), as well as the less direct statements by the Acting President of the Conference of Plenipotentiaries, Mr Humphrey (p. 563), and the representative of Israel, Mr Robinson (p. 561).

58 It is clear from reading the *travaux préparatoires* that the important and controversial issues in relation to Art. 1 were the temporal and geographical restrictions imposed in the 1951 Convention and the issue of how closely to define the Convention grounds. There was no extensive discussion of the meaning of 'protection'.

59 Apart from the three quotes from the *travaux* referred to above at n. 56, Fortín bases his assertions largely on secondary sources. W. Kälin, also a proponent of the view that the historical meaning of protection was 'diplomatic protection', makes reference to the record of the Ad Hoc Committee in which it is stated that 'unable' referred to refugees possessing a nationality who are refused passports 'or other protection by their own government', W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', 15 *Georgetown Immigration Law Journal*, 2001, p. 415 at p. 425. Yet this reference hardly seems dispositive, since the reference to 'other protection' is clearly open-ended.

60 Fortín, above n. 52, p. 551.

61 UN General Assembly, 'Summary Record of the Twenty-Third Meeting Held at the Palais des Nations, Geneva, on Monday, 16 July 1951', UN doc. A/Conf.2/SR.23, p. 19.

62 See J. Dugard, Special Rapporteur, 'First Report on Diplomatic Protection', 52nd Session of the International Law Commission (ILC), UN doc. A/CN.4/506, 7 March 2000, at Art. 1. It is important to note that this Article is not an example of progressive development on the part of the ILC, but rather a codification of existing international law: see M. Bennouna, Special Rapporteur, 'Preliminary Report on Diplomatic Protection', 50th Session of the ILC,

concept than that advocated by proponents of the ‘protection equals diplomatic protection’ view in the refugee context. The precise outer parameters of the constructed notion of diplomatic protection are not clear, although it is said to include the provision of administrative assistance such as the issuance of passports and other documents. Thus, not only do proponents of this view seek to read additional words into the Convention text, but they also substitute the precise and well-established understanding of the term created by the addition of these words with a modified and expanded version of this term of art in international law.<sup>63</sup> This analysis simply cannot be maintained as a matter of treaty interpretation.

Fourthly, it is difficult to justify the ‘diplomatic protection’ interpretation as being consistent with the object and purpose of the 1951 Convention (a primary requirement of treaty interpretation), since its relevance to refugee status is not clear. As the right to exercise diplomatic protection is a wholly discretionary right belonging to the State, which is exercised to ensure that international laws are observed,<sup>64</sup>

UN doc. A/CN.4/484, 4 Feb. 1998, at para. 5. The most frequently cited case as authority for the well-established narrow definition of diplomatic protection in international law is *Mavrommatis Palestine Concessions*, Permanent Court of International Justice, Series A, No. 2, 30 Aug. 1924.

63 See Report of the ILC on the Work of its 49th Session, 12 May–18 July 1997, UN doc. A/52/10, at para. 178, where ‘diplomatic protection’ is described as a ‘term of art’ within the meaning set out in *Mavrommatis*, above n. 62. Yet Fortin, above n. 52, p. 554, argues:

It is generally agreed that, in addition to what has been described above [i.e. the true meaning of diplomatic protection], it encompasses certain actions that diplomatic and consular representatives may undertake in order to ensure better standards of treatment for the nationals of the country abroad, as well as the provision of so-called ‘administrative assistance’ to nationals abroad, meaning the issuance and authentication of certificates, the issuance and renewal of passports and so forth.

There is no case law cited in support of the general agreement adverted to and the position is entirely at odds with the work of the ILC in this area. Fortin quotes an ILC report in support of his proposition; however the passage cited *contradicts* rather than supports his understanding of the meaning of ‘diplomatic protection’. The passage quoted distinguishes between diplomatic protection ‘*properly so called*, that is to say a formal claim made by a State in respect of an injury to one of its nationals which has not been redressed through local remedies’ (emphasis added) and other diplomatic functions: see Fortin, above n. 52, p. 555. The passage is taken from the Report of the ILC on the Work of its 49th Session, and is followed, in the ILC report, by a clear exposition of the narrow basis of diplomatic protection at international law: *ibid.*, paras. 182–3. Indeed, in a subsequent report (Bennouna, above n. 62), the ILC noted: ‘However, as noted by the Commission’s working group, diplomatic protection *strictu sensu* is very different from the diplomatic mission or consular functions exercised by the sending State in order to assist its nationals or protect their interests in the receiving country’ (at para. 12).

64 See, *Mavrommatis Palestine Concessions Case*, above n. 62, p. 12, where the Permanent Court of International Justice stated:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

the decision of a State not to exercise diplomatic protection in relation to one of its nationals may have no bearing whatever on whether it could provide internal protection to the national.<sup>65</sup> Rather, the decision whether or not to exercise diplomatic protection may reflect considerations of domestic or international politics that have no relationship to the ability of a State to protect its nationals internally. Thus, arguing that refugee status should turn upon the willingness or ability of the State to exercise diplomatic protection is illogical.

Fifthly, the availability of diplomatic protection does not necessarily bear any relationship whatsoever to the question of whether a State would *wish* to protect an individual against a well-founded fear of being persecuted.<sup>66</sup> As Grahl-Madsen has succinctly explained:

It is entirely conceivable that a person may have well-founded fear of being persecuted upon his eventual return to the country of his nationality, yet he may have nothing to fear at the hands of the members of the foreign service of that country. The Convention would, in fact, be rendered meaningless if a person's claim to refugee status should depend on whether the diplomats or

As Bennouna, above n. 62, at para. 19, explained:

In the traditional view [of diplomatic protection], the endorsement of a claim is a discretionary right of the State of nationality, which has complete latitude to accept or reject it 'without being required to justify its decision in any way whatsoever' e.g., without having to rely on the unfounded nature of the claim or on its foreign policy needs.

See also Dugard, above n. 62, ILC draft Article 3 and commentary at paras. 61–74. While the traditional view that diplomatic protection is a right of the State has been subject to criticism in recent years, it clearly remains the position in international law (*ibid.*).

65 This point was recognized by the Federal Court of Australia in *Lay Kon Tji v. Minister for Immigration and Ethnic Affairs*, above n. 54. In that case, Finkelstein J found that the potential inability of Portugal to provide diplomatic protection would not render it a State that is incapable of providing effective nationality such that it ought not to be deemed a country of second nationality pursuant to Art. 1A(2) of the 1951 Convention. This was because: '[A] national does not have a right to diplomatic protection from his or her State; that is, it is not a right of nationality. Diplomatic protection is the right of the State to intervene on behalf of its nationals. The State has complete discretion whether to exercise this right and is not in any way bound to protect its nationals' (at p. 693). See also, N. Nathwami, 'The Purpose of Asylum', 12(3) *International Journal of Refugee Law*, 2000, p. 354 at p. 359.

66 Indeed, this point is acknowledged by one of the proponents of the historical view of protection as 'diplomatic protection':

Conceptually, it is conceivable that a victim of persecution by non-state actors [which] cannot be stopped by the authorities may be forced to leave his or her country of origin but is able and willing to live abroad as an alien enjoying full external protection by his country. In such cases he or she would be in a situation similar to that of many migrants who are forced to go abroad in order to survive economically but are not in need of surrogate international protection.

Kälin, above n. 59, p. 426.

consular officers of his home country were likely to persecute him should he ever ask them for protection or assistance.<sup>67</sup>

Indeed, the diplomatic protection thesis allows the unilateral action of the State of nationality to remove the refugee's right to protection, a position irreconcilable with Article 1C(1) which denies status only where the refugee voluntary re-avails him or herself of the protection by the State of nationality.<sup>68</sup>

Sixthly, the 1969 Vienna Convention specifically directs attention to subsequent practice in the application of a treaty which establishes agreement of the parties regarding its interpretation. Accordingly, reference to the leading cases in common law jurisdictions reveals that the narrow 'diplomatic protection' approach is inconsistent with a growing body of jurisprudence that recognizes that the object of the 1951 Convention is 'surely to afford protection and fair treatment to those for whom neither is available in their own country'.<sup>69</sup> Whatever the historical origins of the protection clause, the concept of refugee law as providing surrogate or substitute protection is now accepted by most senior courts in the common law world, having been described as a 'well-accepted fact'.<sup>70</sup> In the specific context of IFA analysis, there is also growing consensus that the 'protection' aspect of the definition is the appropriate place for situating the analysis of internal alternative national protection. As framed by Lee J of the Australian Federal Court:

To put it [the IPA question] in the terms of the Convention definition, if the applicant is outside the country of his nationality because of a well-founded fear of persecution, is he unable to avail himself of the protection of that country? That . . . question . . . involves consideration of the applicant's circumstances as they are now and his ability to return to his country of nationality and obtain protection.<sup>71</sup>

67 A. Grahl-Madsen, *The Status of Refugees in International Law* (A. W. Sijthoff, Leyden, 1966), vol. I, p. 257.

68 This is because diplomatic protection is not a right of the individual; therefore the individual 'cannot renounce it effectively' (Nathwami, above n. 65, p. 358). Rather, the right to exercise diplomatic protection is a right of the State: see above n. 64. Nathwami explains: 'If diplomatic protection were a crucial criterion for determining refugee status, the State of origin might grant diplomatic protection over the head of the refugee and, thus, obstruct the grant of asylum to the refugee' (ibid.). While it is true that the kinds of considerations normally referred to in relation to Art. 1C(1) relate to 'external' protection (such as consular assistance), this does not suggest that protection means external protection alone. As G. S. Goodwin-Gill argues, there is no reason why protection cannot refer both to diplomatic protection and internal protection, depending on the context: G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), pp. 15–16 and 79.

69 *R. v. Secretary of State for the Home Department, ex parte Sivakumaran*, House of Lords, [1988] 1 All ER 193 at 196 per Lord Keith of Kinkel. See Vienna Convention, above n. 53, Art. 31(3)(b).

70 *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another*, above n. 50, per Dawson J. See generally the cases cited above in nn. 50 and 52.

71 *Al-Amidi v. Minister for Immigration and Multicultural Affairs*, (2000) 177 ALR 506 at 510. See also, *Randhawa v. Minister for Immigration, Local Government and Ethnic Affairs*, above n. 14, pp. 268–9; *Butler v. Attorney-General*, New Zealand Court of Appeal, [1999] NZAR 205; *Karanakaran v.*

Finally, the assertion that ‘protection’ should be understood as ‘diplomatic protection’ is also out of step with most<sup>72</sup> contemporary pronouncements of UNHCR as manifested in its official documents,<sup>73</sup> outreach materials,<sup>74</sup> and interventions

*Secretary of State for the Home Department*, above n. 31; *Adan v. Secretary of State for the Home Department*, English Court of Appeal, [1997] 2 All ER 723; *Islam v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (2000) 171 ALR 267. The same view is adopted in the EU Joint Position, above n. 3, at section 8 (cited above n. 49).

72 In one recent statement, UNHCR has unfortunately endorsed the diplomatic protection approach on the basis that ‘[u]nwillingness to avail oneself of this external [diplomatic] protection is understood to mean unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur’: UNHCR, ‘2001 Note on Interpreting Article 1’, above n. 37, at para. 35. Yet because the availability of diplomatic protection similarly has no bearing on the question of removeability, this explanation for the ‘diplomatic protection’ position does not withstand scrutiny.

73 It is argued by Fortin, above n. 52, and more recently by Massey, above n. 32, p. 4 (relying on Fortin) that the diplomatic protection thesis is the UNHCR’s ‘long-held understanding’ of the meaning of protection, and that any inconsistency with this approach was ‘temporary’: Massey, above n. 32, at n. 18. This assertion is not accurate. For example, the UNHCR *Handbook*, above n. 11, takes a flexible approach to the definition of ‘protection’. In para. 65, the discussion of agents of persecution strongly suggests that protection means internal protection: ‘Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.’ The protection phrase is specifically considered at paras. 97–100, and while ‘external’ protection is envisaged as being encompassed within the phrase, it is by no means said to be confined to external protection. For example, para. 99 states:

What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g., refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.

To the same effect, see UNHCR, ‘1995 Information Note’, above n. 15, at section 5, in which UNHCR states: ‘The essential issue in establishing the basis and justification for the extension of international protection is the fact of an absence of national protection against persecution, whether or not this deficiency can be attributed to an affirmative intention to harm on the part of the State.’ In its 1995 Overview, above n. 18, pp. 28–9, UNHCR stated that:

the decisive criterion for refugee status is that an individual having a well-founded fear of persecution is *unable or, owing to such fear, is unwilling to avail himself of the protection* of his country of origin. Thus the essential element for the extension of international protection is the absence of national protection against persecution, irrespective of whether this absence can be attributed to an affirmative intention to harm on the part of the state. A situation in which the state is incapable of providing national protection against persecution by non-government agents clearly renders the individual unable to avail himself of the protection of his country of origin.

Thus, at least from 1979 to 1995, UNHCR appears to have favoured a broader understanding of ‘protection’.

74 For example, in a segment answering ‘frequently asked questions’ on the UNHCR website, the question, ‘What is protection?’ is answered as follows:

Governments normally protect their citizens, assuring them their right to life, freedom and physical security. When governments are unable or unwilling to do so and

in domestic adjudication.<sup>75</sup> In all these contexts, UNHCR insists that ‘protection’ in the Convention sense corresponds with the ordinary meaning of that word, not with ‘diplomatic protection’. As explained in the 1994 Note on International Protection submitted by the High Commissioner to the Executive Committee:

Unlike most other people who leave their country, refugees seek admission to another country not out of choice but out of absolute necessity, to escape threats to their most fundamental human rights from which the authorities of their home country cannot or will not protect them. Left unprotected by their own Government, refugees must seek the protection that every human being requires from the authorities of a country of refuge and from the international community. It is this vital need for international protection that most clearly distinguishes refugees from other aliens.<sup>76</sup>

In sum, there is simply no compelling reason to force a narrow, decontextualized reading of ‘protection’ onto the 1951 Convention. Giving the term ‘protection’ its ordinary meaning is consistent with the UNHCR’s traditional view that the terms of the 1951 Convention and 1967 Protocol should be interpreted consistently with

individual human rights are violated, people are forced to flee to another country. Since by definition, refugees are protected by their governments, the international community steps in to ensure the individual’s rights and physical safety.

‘The 1951 Convention: Lasting Cornerstone of Refugee Protection’, accessed in Aug. 2001 at <http://www.unhcr.org>

In another section on the UNHCR website, it is said:

What sets refugees apart from other people who may be in need of humanitarian aid is their need for international protection. Most people can look to their own government and state institutions to protect their rights and physical security, even if imperfectly. Refugees cannot. In many cases, they are fleeing in terror from abuses perpetrated by the state. In other instances, they are escaping from oppression that the state is powerless to prevent, because it has lost control of territory or otherwise ceased to function in an effective way. By definition, refugees cannot benefit from the protection of their own government.

‘Issues: Asylum and Protection’ accessed in Aug. 2001 at <http://www.unhcr.org>.

<sup>75</sup> See e.g. *Canada (Attorney-General) v. Ward*, above n. 5, p. 711, in which UNHCR intervened to argue that:

the distinction between ‘unable’ and ‘unwilling’ is irrelevant to this appeal, that there is no requirement for state complicity in the definition, and that the proper focus should be on whether the claimant, *because of the state’s inability to protect*, is ‘unable’ or ‘unwilling’ to seek the protection of the authorities in his or her home state. The High Commissioner also endorses the position of the Board that the absence of protection may create a sufficient evidentiary basis for a presumption of a well-founded fear by the claimant.

Emphasis in original.

<sup>76</sup> UNHCR, ‘Note on International Protection Submitted by the High Commissioner’, Executive Committee of the High Commissioner’s Programme, 45th Session, UN doc. A/AC.96/830, 7 Sept. 1994, at para. 8. See also, paras. 1, 10, 11, and 22.



‘the generous spirit in which they were conceived’, so as to have an inclusive rather than restrictive meaning.<sup>77</sup>

#### IV. The logic of a shift to ‘internal protection alternative’

To this point we have established that, as a matter of principle, an understanding of refugee law as surrogate protection compels the view that if national protection can be delivered in some, but not all, parts of the State of origin, then refugee law should be applied in a way that recognizes the extant realities and possibilities for individuals and groups to benefit from the protection of their own country. While the existence of an internal alternative to asylum has sometimes been argued to defeat the existence of a well-founded fear of being persecuted, we have shown the dangers of such an approach – in particular, the tendency of States taking this view to impose a nearly impossible affirmative duty on asylum applicants to demonstrate a country-wide risk of being persecuted, and the implied legitimization of using the IFA inquiry to short-circuit a careful consideration of the affirmative elements of the refugee claim. In contrast, for the reasons set out in Section III, it is both more logical and linguistically satisfactory to view IFA analysis as relevant to the question whether national protection is available to counter the well-founded fear shown to exist in the applicant’s region of origin.

The question remains, however, why we view it as important not only to clarify the appropriate textual home for the analysis of internal options to asylum, but also to propose a decisive shift in nomenclature and substantive focus – discarding the ‘internal flight alternative’ and ‘internal relocation alternative’ labels in favour of the notion of an ‘internal protection alternative’ (IPA), and rejecting the current UNHCR recommendation to analyze whether it is ‘reasonable’ to require the claimant to avail himself or herself of ‘safety’ in the proposed internal destination in favour of a commitment to assess the sufficiency of the protection which is accessible to the asylum seeker there. We set out our thinking on these points in this Part.

First, the use of the phrase ‘internal flight’ connotes a misconceived conceptual framework, suggesting as it does that the inquiry is to some extent retrospective.<sup>78</sup>

77 UNHCR, ‘Report of the United Nations High Commissioner for Refugees’, UN doc. E/1995/52, 25 April 1995, p. 9.

78 According to H. Storey, above n. 29, p. 3: ‘Some leading cases still cited . . . treat the IFA/IPA test as one of past flight. It would be useful to put paid to this misconception once and for all . . . [The] [c]entral focus must . . . be on the question of whether *upon return* a person would be able to relocate to another part of the country of nationality.’ But see R. Marx, ‘Comments on James C. Hathaway and Michelle Foster, Internal Protection/Relocation/Flight as an Aspect of Refugee Status Determination’, 31 Aug. 2001 (on file with authors). Marx argues that the phrase ‘internal flight alternative’ is to be preferred precisely because it restricts application of the principle to persons who had an internal option at the time they entered the asylum State. Protection options

As adverted to in Section III, there is no justification in the Convention text for an implied exclusion or punitive provision based upon a failure to explore internal options before seeking asylum.<sup>79</sup> Moreover, such an approach is inconsistent with the well-accepted notion that refugee analysis is concerned with future risk of persecution, and thus with assessment of risk at the date of determination.<sup>80</sup> Although the current UNHCR formulation and most State practice now assume a prospective analysis, the continued use of the phrase ‘internal flight’ is dangerous.<sup>81</sup> For example, some States have used the notion as an aspect of findings on credibility, arguing that, as the refugee claimant did not ‘flee’ internally, his or her claim for asylum abroad is not genuine.<sup>82</sup> Phrasing the question as whether a person can ‘relocate’ within his or her country of nationality, while constituting a significant improvement on the notion of ‘internal flight,’ also conceptualizes the inquiry in an incorrect manner. The legally relevant issue is not the ability of the refugee applicant physically to move, but rather the degree of protection she or he will receive upon

which have arisen subsequent to that time, he argues, are relevant to the denial of refugee status only if they allow the cessation criteria of Art. 1C(5) of the 1951 Convention to be met. A key concern raised by this approach is the risk that refugee status could be denied to persons who had a protection option at the time of arrival, but who by the time of status determination may no longer have such an option. And while Marx is clearly correct that the declaratory nature of refugee status argues against allowing governments to invoke IPA grounds which have emerged during delays in processing refugee claims, in practice courts have resisted application of Art. 1C(5) criteria to even long-delayed initial status assessments. In the decision of *Penate v. Canada (Minister of Employment and Immigration)*, Trial Division, [1994] 3 FC 79 at 94, Reed J of the Federal Court of Canada observed that Art. 1C(5) speaks to:

the revoking of status after it has been granted and with respect to which . . . the [government] and not the individual has the burden of proof. In my view, in the context of the initial determination as to whether or not status will be granted, the question is a different one. The question is not what type of changed country conditions are necessary to justify the revoking of status. The question is whether the particular changed circumstances are relevant to the applicant’s claim and how they relate thereto.

79 See text above at nn. 11–12.

80 See e.g., *Minister for Immigration and Multicultural Affairs v. Jama*, Full Court of the Federal Court of Australia, [1999] FCA 1680, 3 Dec. 1999, at para. 24:

[T]he objective facts to be considered in reaching a determination as to whether the applicant’s fear is well-founded are not confined to those which induced the fear. A judgement must be made as to what *may happen in the future*, including any change in current circumstances . . . There may be no current risk of persecution . . . yet a change in circumstances may readily be foreseen that would create a significant risk of persecution.

81 Despite emphasizing the prospective nature of the analysis, UNHCR continues to refer to the principle as an ‘alternative to flight’: see UNHCR, ‘1999 Position Paper’, above n. 22, at para. 11.

82 ECRE, ‘Position on the Interpretation of Article 1 of the Refugee Convention’, Sept. 2000. Conversely, Portuguese and Spanish authorities consider that the fact that an asylum seeker tried to find a safe area before leaving the country of origin can be considered an indication of the well-foundedness of the asylum claim: ELENA Research Paper, n. 3, pp. 48–50.

arrival in the alternative site.<sup>83</sup> As neatly summarized by the New Zealand Refugee Status Appeal Authority:

[T]o pose any question postulated on ‘internal flight alternative’ is to ask the wrong question. Rather, the question is one of protection and is to be approached fairly and squarely in terms of the refugee definition, namely whether the applicant ‘... is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.<sup>84</sup>

Secondly, since the focus is on protection, a term found in the Convention text and an inherent part of the analysis of a claim to refugee status, additional terms such as ‘safety’ and ‘reasonableness’ should not be made part of the test. These terms are vague and open to vastly divergent subjective interpretation. Most importantly, reliance on the notion of ‘safety’ has produced highly questionable results in particular cases, as it has been interpreted as meaning considerably less than ‘protection’. For example, the Netherlands *Rechtseenheidskamer* takes the view that northern Iraq constitutes an IFA<sup>85</sup> even though UNHCR advises that the Kurdish enclave in northern Iraq is ‘volatile and may change at any time’, the territory remains a part of Iraq, and NATO generals have conceded that they are not equipped to prevent Saddam Hussein’s entry into the zone.<sup>86</sup> Yet an analysis that asks only whether an internal site is ‘safe’ is open to such a finding, since the question of present and immediate safety may be construed to present a very low threshold. By contrast, a protection inquiry is forward-looking and, as will become evident below, is concerned with the durability of affirmative protection, rather than simply the immediate (and possibly short-term) ability to avoid persecution.<sup>87</sup>

The other key problem with the focus on the ability of an asylum seeker to find ‘safety’ in the country of origin is that it may be understood to impose an effective

83 According to Linden J of the Federal Court of Canada, ‘A Brief Reaction to Hathaway’s Paper’, Sept. 2001 (on file with the authors): ‘The advice to change the label of principles in this area to Internal Protection Alternative is particularly helpful, for it will focus our attention on the true issue that is involved here – whether protection can be obtained elsewhere in the country’; and L. D. Rosenberg of the US Board of Immigration Appeals, ‘Commentary on Internal Flight/Protection Alternative’, Sept. 2001 (on file with the authors):

It is desirable to use ‘internal protection’ because that language emphasizes the fact that it is protection that is at the center of the inquiry as to whether there should be surrogate protection afforded by the receiving state. It is in determining whether internal protection is available that we can conclude whether a refugee is in need, *now*, of protection.

84 *Re R.S.*, New Zealand RSAA, Decision No. 135/92, 18 June 1993.

85 See ELENA Research Paper, above n. 3, pp. 40–1.

86 UNHCR, ‘Action Plan on the Influx of Iraqi Asylum-Seekers: UNHCR Observations’, memo to the K4 Committee of the Council of the European Union, Brussels, 21 April 1998, as cited in Frelick, above n. 6, p. 26. See generally, Frelick, above n. 6, pp. 24–7.

87 See text below at n. 120, and at nn. 157–85.

duty on the applicant to hide or ‘go underground’ in order to avoid detection.<sup>88</sup> In other words, UNHCR’s rather fungible safety standard can be interpreted as asking, ‘Is it somehow possible for the asylum seeker to avoid domestic harm?’ rather than ‘Can the individual secure access to domestic protection?’<sup>89</sup> This approach is evident in cases that view as decisive the fact that an asylum seeker has somehow managed to avoid persecution for a short period before fleeing his or her home State. For example, in *R. v. Immigration Appeal Tribunal, ex parte Guang*, the applicant had incurred a fine for breaching the one-child policy in China and had subsequently displayed a poster in his village expressing the view that the government imposed lighter penalties on well-connected people. A warrant was issued for his arrest and he fled to Shanghai where he stayed with a friend for two months before escaping to the United Kingdom. A UK court rejected his claim for asylum on the basis that he did not suffer persecution during the two months he hid in Shanghai.<sup>90</sup>

More generally, an emphasis on ‘safety’ alone runs a significant risk of encouraging a view that it is incumbent upon the asylum seeker to avoid persecution in the proposed internal destination by suppressing his or her political or religious beliefs in order to avoid detection by the relevant authorities. There are a number of worrying examples of courts apparently taking such an approach by reference to the safety standard, particularly in cases involving opponents of the one-child policy in China.<sup>91</sup> In one decision of the Australian Federal Court involving a medical practitioner who was involved in political activity directed at opposition to the one-child policy, including frequently writing angry letters to government officials objecting

88 For example, in *Ahmed v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 718, the Canadian Federal Court of Appeal considered the claim of a Bangladeshi member of the Awami League who had been able to avoid harm in his country for fourteen months by going into virtual hiding with a family in a distant town, working as their private cook, and rarely leaving the home. As the Court concluded: ‘The mere fact that the appellant lived a certain time without significant problems in Chittagong, away from his home and half in hiding, is obviously not sufficient to conclude that he could rely on state protection in his country.’

89 Indeed, UNHCR’s 1999 elaboration of this issue regrettably suggests that the relevant question is ‘whether the risk of persecution that an individual experiences in one part of the country *can be successfully avoided* by living in another part of the country’: UNHCR, ‘1999 Position Paper’, above n. 22, at para. 9 (emphasis added).

90 *R. v. IAT, ex parte Guang*, English High Court (QBD), Decision No. CO/3029/98, 1 Sept. 1999.

91 E.g., in *R. v. IAT, ex parte Sui Rong Suen*, [1997] Imm AR 355, the English High Court (QBD) upheld the rejection (by the tribunal below) of the claim of a 16-year-old Chinese girl who fled to the UK after throwing a rock at police who were brutalizing her mother for violating the one-child policy. She first went to her grandmother’s home, but stayed only a few days because the police were looking for her there. She then went to a friend’s place one-and-a-half hours away from her village. After a week, her father advised her to leave the country, and bribed an official to obtain a passport for her. The IAT, with very little analysis, found internal flight to be viable because there was no evidence that authorities had pursued her outside her province. The High Court (QBD) affirmed the decision since, ‘[o]n the findings of fact of the adjudicator it is clear that there would be no persecution, in his view, in any part of China other than the Fujian Province’ (at p. 363). This decision implies that the fact that she was able to avoid the authorities by hiding precluded the recognition of refugee status.

to the one-child policy, the Court found an internal flight alternative to exist since there was evidence that ‘the applicant had, in fact, been able to restrain herself from expressing her opinions on the question of the one-child policy between 1992 and 1996’.<sup>92</sup>

This ‘duty of restraint’ is inconsistent with the very premise of the 1951 Convention, that is, that individuals have a right to be free of persecution for reasons of their political beliefs (and other grounds), which presupposes a freedom to express and act upon those political beliefs. It can never be acceptable for decision makers to require asylum seekers to avoid persecution by denying their fundamental civil and political rights such as freedom of expression of opinion and of association and freedom to express and practise religious beliefs.<sup>93</sup> Given the Preamble’s affirmation that the refugee regime is premised on ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’, refugee status may not be refused simply because an applicant could live in safety by declining to exercise his or her fundamental beliefs. As the Full Court of the Federal Court of Australia has recognized in a different case:

[A]n assumption that a person with a strongly held religious belief should act reasonably, and compromise that belief to avoid persecution, would be contrary to the humanitarian objects of the Convention.<sup>94</sup>

An approach which looks not merely to ‘safety’, but instead to the sufficiency of (affirmative) protection, ensures that such concerns do not arise.

Beyond its insistence on an analysis of protection rather than safety, the IPA standard also differs from UNHCR’s traditional formulation by the fact that the duty to seek internal protection is not predicated on an assessment of whether or not it would be ‘reasonable’ for the asylum seeker to accept internal protection. While superficially liberal, the ‘reasonableness’ test in practice allows decision makers to assess the asylum seeker’s alternatives in light of their own view of what constitutes ‘reasonable’ behaviour. As Frelick rightly observes:

92 *Ye Hong v. Minister for Immigration and Multicultural Affairs*, [1998] FCA 1356, 2 Oct. 1998.

93 Indeed, it is recognized that persons at risk because they are members of ‘groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association’ are entitled to refugee status on grounds of membership of a particular social group: *Ward*, above n. 5, p. 739. The importance of not requiring applicants to abdicate their religious beliefs in order to remain inside their country was recognized, for example, in a German case concerning Turkish citizens of the Yezidi religion. The Federal Constitutional Court held that there was no IPA in existence in Turkey for practising Yezidis fleeing religious persecution. By continuing to practise their religion they would be faced with severe financial hardship and they could not be expected to compromise their religious beliefs in order to avail themselves of safety. See ELENA Research Paper, above n. 3, p. 34.

94 *Wang v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 1599, at para. 85, where Merkel J paraphrases and adopts the previous decision of the Full Court of the Federal Court of Australia in *Omar v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 1430 at para. 42. Merkel J helpfully summarizes the authority for this proposition: see generally paras. 82–91.

Reasonableness, as Alice no doubt would observe, depends on which side of the looking glass one is standing. Viewed from the host country perspective, the risks and dangers to asylum seekers back in their far away countries may appear less threatening than they do from the perspective of persons who have directly experienced those conditions up close and who fear being sent back through the looking glass to experience them again.<sup>95</sup>

Even UNHCR's 1999 position paper suggests only an open-ended list of possible menu items that States may choose to consider in assessing reasonableness.<sup>96</sup> Decision makers are thus required to make their own individual assessments as to what is 'reasonable' in a particular case. Such an amorphous test is not amenable to structure or guidance by appellate courts. Storey has remarked on the situation in the United Kingdom that, 'despite seeing the IFA as an essential element of the 1951 Convention scheme, there has been little sign that UK judges have either welcomed or seen the necessity for decision makers either to analyse it or apply it themselves within a clear or settled framework of analysis'.<sup>97</sup>

This inherent lack of analytical clarity produces wide inconsistency between jurisdictions. For example, while decisions in Denmark, the Netherlands, and the United Kingdom have generally held that the presence of family in the proposed internal destination is not necessary, other decisions, particularly in jurisdictions such as Canada, Finland, Switzerland, and New Zealand, have insisted on the relevance of family and other social networks. A similar divergence is evident in respect of other factors comprising the 'reasonableness' test. For example, the Netherlands Council of State has held that the prospect of the deterioration of an asylum seeker's socio-economic status will not prevent an IFA from being recognized,<sup>98</sup> the Danish Refugee Appeals Board is unlikely to take account of socio-economic factors in deciding whether an internal option is reasonable,<sup>99</sup> and the Canadian Federal Court has denied the relevance of the potential for economic prosperity in assessing the viability of an IFA.<sup>100</sup> On the other hand, German<sup>101</sup> and Swiss<sup>102</sup> courts have

95 Frelick, above n. 6, p. 23.

96 It is said that the claimant's personal profile will be important and that factors to be considered might include but are not limited to age, sex, health, family situation and relationships, ethnic and cultural group, political and social links and compatibility, social or other vulnerabilities, language abilities, educational, professional, and work background, and any past persecution suffered and its psychological effects: UNHCR, '1999 Position Paper', above n. 22, at para. 16.

97 H. Storey, 'United Kingdom Case Law on "Internal Flight Alternative"', 11(2) *Immigration and Nationality Law and Practice*, 1997, p. 57 at p. 58.

98 Decision No. A-2.0273, Netherlands Council of State, 1980.

99 See ELENA Research Paper, above n. 3, p. 30.

100 *Singh v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada (Trial Division), [1993] FCJ 630, 23 June 1993.

101 See e.g., the decision of the Bavarian Administrative Court, AN 12 K 89.39598, 30 May 1990, and the decision of the Bavarian Higher Administrative Court, Az. 24 BZ 87.30943, 15 Nov. 1991.

102 In a decision of the Swiss Asylum Appeal Board (French-speaking division), 6 Dec. 1994, 2nd Ch., No. 175 287, it was held that there was no IPA for the Yezidis in the entire Turkish territory

sometimes argued for the relevance of economic or financial hardship in assessing the adequacy of an IFA. A similar divergence can be seen in relation to language skills. While decision makers in New Zealand have held that an absence of relevant language skills does not rule out internal relocation, courts in Switzerland and Canada have held that the ability to speak the language of the relocation alternative is highly relevant. We agree with de Moffarts' conclusion that '[t]he reasonableness approach tends to an eclectic or ad hoc jurisprudence concerning claimants from the same countries and in similar situations'.<sup>103</sup>

Indeed, application of the 'reasonableness' standard may even produce inconsistent results within the same jurisdiction. This is exemplified in a series of cases before the Canadian Federal Court involving consideration of the possibility of relocation to Colombo by older Sri Lankan Tamils. On the one hand, the Court considered internal relocation a reasonable alternative for an 82-year-old Tamil, confined to a wheelchair, impoverished and isolated from family.<sup>104</sup> On the other, the Court rejected the possibility of requiring relocation to Colombo for a 75-year-old Tamil woman who had no family there,<sup>105</sup> and remanded another case because the tribunal panel had failed to consider that the applicant was a widow in her sixties with no family support or connections in Colombo and with no knowledge of English or Sinhalese.<sup>106</sup> This analysis makes plain that the 'reasonableness' of an IFA is essentially in the eye of the beholder.

Not only is the reasonableness standard prone to arbitrariness, but it involves an unfocused and open-ended inquiry which is not anchored in the language or object of the 1951 Convention. Many of the factors frequently taken into account by decision makers in this context have more relevance to immigration law-based humanitarian applications than to determinations under the Convention definition. For example, where applicants have a low level of education, do not speak the dominant language of the proposed destination, and have limited employment experience, decision makers are more likely to reject a submission that an internal relocation alternative is available to the applicant. As an Australian tribunal held:

The applicant has lived in the Jaffna area all his life. He has never lived or worked in Colombo (with the exception of four months before his departure to Australia). He does not speak Sinhalese and has never had a job. He has limited education. As an inarticulate, elderly person from the north who

where, following the emigration of a large part of their population, they no longer had a socio-economic network.

103 De Moffarts, above n. 30.

104 *Periyathamby v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), (1995) 26 Imm LR (2d) 179.

105 *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), Decision No. IMM-5091-97 (1998); 1998 Fed. Ct. Trial Lexis 1017.

106 *Jayabalasingham v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), Decision No. IMM-140-98 (1998); 1998 Fed. Ct. Trial Lexis 1283.

speaks no Sinhalese, the applicant would be particularly vulnerable . . . I am satisfied that it would not be reasonable to require him to relocate to Colombo where there are continuing large-scale round-ups of Tamils, arbitrary detention of Tamils, and continuing human rights abuses on the part of the [Sri Lankan security forces].<sup>107</sup>

The difficulty with such cases is that decision makers do not explain why educated, employable people are less at risk of suffering from ‘continuing large-scale round-ups of Tamils, arbitrary detention of Tamils, and continuing human rights abuses’ than uneducated claimants. These cases tend to conflate the considerations relevant to refugee status with those more relevant to an application for entry on humanitarian or compassionate grounds. Indeed, the humanitarian nature of the inquiry has been explicitly acknowledged by some adjudicators.<sup>108</sup> Yet it is difficult to understand why an extra-legal discretion, by application of the humanitarian-based reasonableness test, should reside in decision makers in respect of only this aspect of the 1951 Convention. If it is justified in this context, then one might wonder why it is not equally justified in respect of other aspects of the definition. For example, where serious harm in respect of which a person is at risk does not amount to ‘persecution’, why should decision makers not consider whether it is nonetheless unreasonable to expect the applicant to endure it on return to his or her home country?

This objection is not merely a theoretical one; rather, it is this very lack of justification for the reasonableness test in the Convention text that makes it an unwieldy basis upon which to anchor the assessment of an internal alternative to asylum. This point is well exemplified in the judgment of the New Zealand Court of Appeal in *Butler v. Attorney-General*:

[T]he various references to and tests for ‘reasonableness’ or ‘undue harshness’ . . . must be seen in context or, to borrow [the English Court of Appeal’s] metaphor, ‘against the backcloth that the issue is whether the claimant is entitled to the status of refugee’. It is not a stand alone test, authorising an unconfined inquiry into all the social, economic and political circumstances of the application including the circumstances of members of the family . . .

Rather than being seen as free standing . . . the reasonableness test must be related to the primary obligation of the country of nationality to protect the claimant . . . The reasonableness element must be tied back to the definition

107 Decision No. V96/05239, Australian RRT, 11 March 1997.

108 For example, in *Jayabalasingham*, above n. 106, Richard J held that, when the tribunal had stated that the reasonableness of the IPA requires ‘some additional or extraordinary hardship’, it had erred by bringing the threshold of the test beyond humanitarian and compassionate considerations. See also *Ramanathan*, above n. 105, in which Hugessen J held that it is incorrect to exclude humanitarian and compassionate grounds when considering the possibility of internal protection.



of ‘refugee’ set out in the Convention and to the Convention’s purposes of original protection or surrogate protection for the avoidance of persecution.<sup>109</sup>

The risk of continuing to insist on this approach therefore is that any careful interpreter of the 1951 Convention will eventually be drawn to the position articulated by the UK Immigration Appeals Tribunal in *Ashokanathan* that ‘reasonableness’ is simply a kind of ‘humanitarian gloss’ on strictly legal treaty obligations.<sup>110</sup> Indeed, Canadian courts now set ‘a very high threshold for the unreasonableness test’.<sup>111</sup> By contrast, an analysis focused on the sufficiency of protection has the distinct advantage of being a standard actually derived from a treaty that States have formally agreed to be binding on them. In addition, it provides a focused and principled framework of analysis, based on the aims and objects of the 1951 Convention.

## V. Steps for assessment of an internal protection alternative

In order to determine whether a claim to refugee status may lawfully be denied on grounds of an internal protection alternative (IPA), four criteria must be considered. First, is the proposed IPA accessible to the individual – meaning access that is practical, safe, and legal? Secondly, does the IPA offer an ‘antidote’ to the well-founded fear of being persecuted shown to exist in the applicant’s place of origin – that is, does it present less than a ‘real chance’ or ‘serious possibility’ of the original risk? Thirdly, is it clear that there are no new risks of being persecuted in the IPA, or of direct or indirect *refoulement* back to the place of origin? And, fourthly, is at least the minimum standard of affirmative State protection available in the proposed IPA?

In this section, we outline the considerations relevant to the application of each of these four analytical steps. As we hope to make clear, far from being a radical departure from prior practice, the IPA approach merely draws together the ‘best

109 *Butler v. Attorney-General*, above n. 71, p. 218.

110 *Ashokanathan*, Decision No. 13294, UK IAT. According to C. Yeo, ‘The “Internal Flight Alternative”: Counter-Arguments’, 15(1) *Immigration, Asylum and Nationality Law*, 2001, p. 9 at p. 16:

Looking to the future, the approach to an internal protection alternative advocated in the Michigan Guidelines on IPA and adopted in New Zealand seems preferable to the current UK position. Uncertainty would also be reduced and the approach is more readily compatible with the text of the Convention. It might also lead to a higher success rate in asylum applications. While the Michigan approach may appear to restrict positive discretion, Adjudicators might prove to be more amenable to accepting IFA counter-arguments if such arguments were more firmly based on a logical foundation.

111 *Canada (Minister of Citizenship and Immigration) v. Ranganathan*, Canadian Federal Court of Appeal, Decision No. A-348-99, 21 Dec. 2000.

practice' of State Parties in a legal framework directly derived from the 1951 Convention itself. For this reason, the IPA approach is neither inherently more liberal nor more conservative than earlier formulations; it is simply a framework explicitly designed to identify persons who do not require the surrogate protection at the heart of refugee law because they already have access to the protection of their own State.

### A. Step 1: accessibility

Since IPA analysis is concerned with the possibility of a *present* source of alternative internal protection, the first question is whether the asylum seeker can in fact gain access to the region proposed as an IPA. This notion that the IPA must not be 'merely theoretical or abstract'<sup>112</sup> is already a well-accepted proposition in the jurisprudence of States Parties:<sup>113</sup>

[N]otwithstanding that real protection from persecution may be available elsewhere within the country of nationality . . . [IPA does not apply] if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law, the practical realities facing a person who claims to be a refugee must be carefully considered.<sup>114</sup>

Closely related to the question of practical accessibility is the duty to assess the physical risks entailed in the process of travel to or entry into the IPA. This has also been well recognized in State practice.<sup>115</sup> For example, in *Dirshe v. Canada (Minister of Citizenship and Immigration)*, the Canadian Federal Court emphasized this concern in a case where travel to the proposed IPA involved passage through an area in which violent gangs and roving militia were present:

112 Decision No. N94/03786, Australian RRT, 1995.

113 For example, the US Court of Appeals for the Third Circuit held in *Etugh*, above n. 14, that there was an IPA for the Nigerian claimant because the deportation procedure could be effected without the applicant having to re-enter his hometown (where a clear risk existed). Applying the converse proposition, the UK IAT in *Baglan* (Decision No. 12620) granted the appeal of a Turkish Kurd on the grounds that the Home Office proposed to deport him not to the identified 'safe enclave', but rather to Istanbul (where he was found to face the risk of persecution). As Linden J stated in *Thirunavukkarasu v. Canada*, above n. 25, p. 598, '[a]n IFA cannot be speculative or theoretical only; it must be a realistic, attainable option'.

114 *Randhawa*, above n. 14, p. 270. The principle has more recently been reiterated by the Full Court of the Federal Court of Australia in *Perampalam v. Minister for Immigration and Multicultural Affairs*, (1999) 84 FCR 274, at 288 per Moore J.

115 The US BIA held in *Matter of H.* (BIA, Decision No. 3276, 1996) that it would be prepared to give weight to the government's contention that an internal protected area existed for the Somali claimant only if first provided with clarification of just how the government would propose to deport the individual to the protected area (in view of the dangers between Mogadishu – where access was possible – and the allegedly safe area).

The Tribunal erred in law in its assessment of the applicant's fear of gangs and roving militia in relation to the [IPA]. In order for an [IPA] to be viable, it must be physically possible for the applicant to get there. This involves an assessment of how the applicant is to get there. If it is dangerous for the applicant to get to the safe area, it cannot be said that the [IPA] is a practical possibility.<sup>116</sup>

The final aspect – legal accessibility – has two dimensions. First, it is imperative that an asylum seeker not be returned to an IPA where return requires passage through an intermediate State which will not legally permit the asylum seeker's entry. For example, a Kurd could not be returned to northern Iraq via Turkey if Turkey will not grant a visa to permit entry into Turkey. This was emphasized by the Federal Court of Australia in *Al-Amidi v. Minister for Immigration and Multicultural Affairs*:

The Tribunal was satisfied that the applicant could not enter Iran or Syria and was likely to be satisfied on the evidence before it that he could not enter Turkey. There was nothing before the Tribunal to allow it to be satisfied that the applicant would be given travel documents, and, if returned from Australia, that he would be able to enter northern Iraq. Indeed, the Tribunal did not consider that question. That represented a fundamental flaw in the decision-making process and one which meant that the task set for the Tribunal by the Act was not carried out.<sup>117</sup>

Secondly, since the rationale of internal alternative protection is that refugee status is not required to be granted where the applicant's own government is able to protect him or her in at least part of the country of origin, it would make little sense to deny asylum on the basis of an internal option that the national government has formally made unavailable to the applicant.<sup>118</sup> As was well explained by the Canadian Federal Court in *Sathananthan v. Canada*, in refusing to recognize the existence of an IPA for a Tamil in Sri Lanka:

[T]he applicant's evidence was that he was ordered by the police in Colombo to go North within 48 hours – a place where . . . the applicant had a

116 *Dirshe v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-2124-96 (1997), 1997 Fed. Ct. Trial Lexis 521.

117 *Al-Amidi v. Minister for Immigration and Multicultural Affairs*, above n. 71, pp. 510–11. See also, the decision of the Bavarian Higher Administrative Court, which held that a Kurdish asylum seeker could not be expected to return to northern Iraq as he did not possess any valid travel documents, without which he would be unable to access the territory of northern Iraq via Syria, Turkey, or Iran and there would be no other legal way of entering northern Iraq, Decision No. 23 B 99.32990, 23 March 2000, cited in ELENA Research Paper, above n. 3, p. 35.

118 For example, the UK IAT correctly held in *Yang* (Decision No. 13952, 1996) that no relocation alternative existed for the Chinese applicant in that case, since '[o]n the background evidence available to us it seems that China administratively controls where its citizens may live and there is therefore no freedom of internal movement without consent'.

well-founded fear of persecution . . . [The] finding [of internal protection] is grounded in faulty analysis . . . based . . . [*inter alia*] on a contradiction (one can stay in Colombo but if one does one will be breaking the law and will be arrested).<sup>119</sup>

Once practical, safe, and legal accessibility to the proposed IPA has been established, the inquiry turns to an assessment of the quality of protection available in the IPA. This in turn involves a threefold analysis: does the IPA constitute an ‘antidote’ to the original risk of being persecuted; are there new risks of being persecuted, or of *refoulement* to the region of origin; and is the level of affirmative protection available in the IPA consistent with the minimum acceptable standard?

## B. Step 2: antidote

An IPA can obviously be said to exist only in a place where the applicant does not face a well founded fear of being persecuted. It is not, however, sufficient simply to find that the original agent of persecution has not *yet* established a presence in the proposed site of internal protection. Rather, there must be reason to believe that the reach of the agent of persecution is likely to remain localized outside the designated place of internal protection. For example, a German court found that a Lebanese asylum seeker could not avail himself of an IPA as Syrian troops, who perceived the applicant to be an opponent of the Baath party in power in Syria, were in the process of expanding their already extensive control over a large part of Lebanon. The Court thus held that ‘it was . . . not certain that the applicant would be safe from persecution by the Syrian military for a considerable period of time’.<sup>120</sup>

The method of measuring the degree of risk in the IPA is the usual ‘well-founded fear’ test, that is, whether there is a ‘reasonable possibility’, ‘reasonable chance’, or ‘real chance’ of being persecuted in the IPA. On the one hand, a fear of being persecuted is well founded even if there is not a clear probability that the individual will be persecuted. On the other hand, the mere chance or remote possibility of being persecuted is an insufficient basis for the recognition of refugee status. The relevant inquiry is whether there is a significant risk that the individual may be persecuted in the IPA in the foreseeable future.

Clearly, an inquiry into the potential for an IPA to provide an antidote to the persecution feared in the localized region presupposes an initial assessment of the nature and degree of the well-founded fear in the applicant’s region of origin. This is because the antidote required will vary considerably according to the risk of

119 *Sathanathan v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-5152-98 (1999); 1999 Fed. Ct. Trial Lexis 1149.

120 Higher Administrative Court (Hessen), Decision No. UE 1568/84, 2 May 1990.

persecution faced in the first region. Thus, protection that is meaningful and effective in one case may not be so in another. For example, while a man who fears guerrillas requires protection from a strong government military that can confine the threat to localized regions, a strong military that can suppress guerrilla activity may be meaningless for a woman fleeing domestic violence who needs assertive police protection. This again serves to highlight the importance of approaching the inquiry in a methodical manner, beginning with an assessment of well-founded fear before proceeding to the protection assessment. An analysis that conceives of IPA as part of the initial well-founded fear assessment obscures the importance of this two-stage assessment and runs the risk of producing an inadequate assessment of continuing risk in the intended IPA.

In practical terms, a decision regarding the existence of an IPA is a function of (a) the ability of the agent of persecution to be present in the IPA;<sup>121</sup> and (b) the likelihood of pursuit in the IPA. A Canadian decision illustrates the interplay of these two essential elements in the inquiry:

[In rejecting the claimant's application, the Immigration and Refugee Board] failed to address the applicant's evidence that the applicant's husband is a sophisticated, vindictive and obsessed individual and that, based on his past conduct, he would be able to track down the applicant anywhere in Peru, even without his political connections [to the Shining Path].

*Inter alia*, the Board suggested that a reasonable [IPA] existed outside Lima, as the applicant could find employment as a teacher. However, it did not deal with the submission that the applicant's husband could trace her through the Ministry of Education. Further, despite finding state protection had been refused in the past, the Board offered no substantive reason to justify that the applicant would be safe outside Lima.<sup>122</sup>

In this decision, the Court appropriately considered the fact that the husband was sophisticated and well connected in the government and the Shining Path (that is, capable of pursuit) and that he was obsessed (that is, likely to pursue).

The frequent concern of courts with whether the asylum seeker is a prominent activist or relatively anonymous should similarly be understood to inform the issue

121 E.g., the Federal Court of Canada found that an Argentinian claimant opposed to mandatory union dues and a member of the Radical Civic Union party (UCR), faced the risk of beatings by trade unionists. But the court found a valid IPA because 'there are municipal and provincial jurisdictions controlled by political opponents of the Justicialista (Peronist) Party and its trade union allies . . . [T]he claimant could live safely in provinces of Argentina controlled by the UCR': *Vidal v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada (Trial Division), Decision No. A-644-92 (1997); Fed. Ct. Trial Lexis 408. Similarly, in New Zealand RSAA, Decision No. 1613/93, the tribunal found that a low caste Indian could find internal protection 'by relocating either to Uttar Pradesh or Bihar [where] the appellant would be able to take advantage of the lower caste governments there in power'.

122 *Gonzales-Cambana v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-933-96 (1997); 1997 Fed. Ct. Trial Lexis 689.

of the likelihood of pursuit by the agent of persecution into the proposed IPA.<sup>123</sup> However, as emphasized above, it is vital that adjudicators be careful to avoid transforming this analysis into a duty on behalf of claimants to become anonymous by suppressing their political or religious views or by hiding from the agents of persecution in the new site.<sup>124</sup> As the Australian Refugee Review Tribunal held in a case rejecting the possibility of an IPA for a person at risk because of strong religious convictions, '[t]he issue of internal flight is not a significant one when one takes the approach of considering the likely conduct of the applicant upon return, for one may expect that this conduct would be the same whatever part of the country he returned to'.<sup>125</sup>

Perhaps the most important and controversial issue that arises under this element of the IPA analytical framework is whether there can ever be an effective antidote inside the applicant's country of origin where the agent of persecution is the government itself. In short, is the very idea of an IPA in the face of a risk of being directly persecuted by the government logically inconsistent, given that the 1951 Convention conceives of the national government as the source of legally relevant protection ('... unable or ... unwilling to avail himself of the protection of that country...')? Comparative jurisprudence reveals divergent answers to this question.

At one extreme, some decision makers have taken the view that whether or not the persecutor is the State is completely irrelevant to the analysis.<sup>126</sup> However, these

123 For example, the Administrative Court of Austria found that well-known Kurdish opposition figures in Iraq could not find protection in the 'safe' Kurdish zone because 'Kurdish authorities in the autonomous safety zone are not in a situation to protect the applicant from danger of persecution by Iraqi authorities. The evidence presented showing general instability lets us believe that, absent concrete proof to the contrary, it would not be improbable that the Iraqi secret police could undertake activities directed against known opposition fighters in the safety zone of Northern Iraq, without effective hindrance from the Kurdish authorities. Therefore there is no [IPA] available for the applicant': Decision No. 95/20/0284, 12 Sept. 1996 (unofficial translation).

124 See the text above at nn. 88–90. For example, in *In Re C.A.L.*, above n. 33, the US BIA inappropriately relied on a lack of notoriety to reject a Guatemalan man's asylum claim on the basis of an IPA, finding (*inter alia*) that '[w]e do not consider the respondent to be a high profile victim of harassment by the guerrillas' (p. 5). This was significant given that:

[t]he Department of State country conditions report on Guatemala states that the numbers of guerrillas have declined through the years, the guerrillas are concentrated in remote areas with large Indian populations not easily accessible to government control, and the threat to the general population has decreased.

*Ibid.*, p. 5.

125 Decision No. V96/04931, Australian RRT, 25 Nov. 1996.

126 For example, in *Matter of R.*, above n. 33, the US BIA held that:

[a]ssuming, arguendo, that he previously suffered persecution in Punjab, on the evidence of the record before us, we do not find it unreasonable to expect him to have sought refuge elsewhere in India. In view of the un rebutted opinion of the Department

decisions tend to be problematic, as they often ignore the superior capacity of the State to pursue the applicant into alternative regions or impose an effective obligation on the applicant to hide from the State in an alternative location.

At the other extreme, some courts have taken the view that if the agent of persecution is the government an IPA can never exist.<sup>127</sup> This approach has the advantage of ensuring that the benefit of any doubt regarding the government's potential for continued persecution in the alternative region is resolved in favour of the asylum seeker. In addition, it is consistent with the general position in international human rights law.<sup>128</sup> However, it may also be too simplistic, as it fails to consider the different types of government entities and their varying capacity for nationwide persecution.

We recommend a middle ground approach which takes into account the differences between levels of government, as well as divergences in the degree of governmental implication in the risk of being persecuted. The most straightforward type of case, where the application of an IPA test is most obviously appropriate, is one in which the State is not the agent or sponsor of the persecution, but is simply unable to respond to the risk posed by non-State agents in a particular region. In such cases there is no reason to assume that the government cannot be trusted elsewhere in the country. Thus, these cases should be analyzed as standard IPA claims, without any particular presumption as to outcome. Decision makers should nonetheless carefully consider all relevant factors, including whether the State is truly willing but unable to provide protection in the applicant's home region, whether the persecuting group's activities (or the government's inability to control the group's activities) are truly limited to one region, and whether in the IPA the government effectively protects similarly situated persons.

On the other hand, the least logical situation in which to find an IPA is where the agent of persecution is the national government itself. Where, for example, harm is threatened by the police or military of a country, or where the national government

of State . . . we find that a preponderance of the evidence establishes that conditions in India, outside Punjab, are not such that the applicant would have a well-founded fear of returning to that country.

127 In decisions involving Tamils from Sri Lanka and Kurds from Turkey, the Netherlands Council of State has refused even to consider internal relocation, holding in effect that internal relocation is excluded if the national authorities are the agent of persecution (*A.R.R. v. S.* (1982); *R.V.* (1982); *A.R.R. v. S.* (1988) and *R.V.* (1994)). The Swiss Asylum Appeal Board (French-speaking division), 21 April 1993, 4th Ch., No. 138 356, has held that there is no possibility of internal protection where the asylum seeker is directly persecuted by the central authorities. In that case the Board recognized the claim to asylum of a member of the Turkish Communist Party/Marxist-Leninist who had been labelled an 'undesirable person' by the Turkish authorities.

128 For example, in *Alan v. Switzerland*, UN Doc. CAT/C/16/D/21/1995, 8 May 1996, the Committee Against Torture addressed the claim of a rejected Kurdish asylum seeker from Turkey. The Committee, concerned that the agent of persecution was the Turkish State itself, found that there was no safe area for the applicant inside Turkey.

actively sponsors or supports the persecutory activities of a theoretically independent agent, there should be a strong presumption against finding an IPA.<sup>129</sup> Indeed, the presumption against IPA in such circumstances may logically be defined as verging on irrefutable.<sup>130</sup> This is consistent with the view of UNHCR that, ‘in the overwhelming majority of cases involving a fear of State agents of persecution, the availability of a safe internal alternative will not be a relevant consideration’.<sup>131</sup> A national government presumably has the capacity to pursue anywhere within its jurisdiction. When the State has itself threatened a person in his or her home region, even a small chance that the government will pursue the person logically amounts to a genuine risk of harm.<sup>132</sup> As explained by the US Court of Appeals for the Ninth Circuit in *Singh v. Moschorak*:

All that is required for refugee status to be recognized is a ‘real chance’, a ‘serious possibility’ of persecution. Even if the national government presently sees no reason to persecute a particular group in a particular place, it has already demonstrated its willingness to persecute elsewhere. Surely this alone – unless there has been a fundamental change of government – is

129 Recently promulgated US regulations establish a presumption that internal relocation is not reasonable where the persecutor is a government or is government-sponsored, unless the INS ‘establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate’ (US Regulations, above n. 3).

130 For example, the US Court of Appeals for the Ninth Circuit observed that ‘it has never been thought that there are safe places within a nation when it is the nation’s government that has engaged in the acts of punishing opinion that have driven the victim to leave the country’: *Singh v. Moschorak*, 53 F 3d 1031 at 1034 (9th Circuit), 1995; *Chanchavac v. INS*, 2000 US App. Lexis 5066 (9th Circuit), 27 March 2000.

131 UNHCR, ‘1999 Position Paper’, above n. 22, pp. 1–3.

132 This approach has also been taken by the European Court of Human Rights in interpreting Art. 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5. In *Chahal v. United Kingdom* (Decision No. 70/1995/576/662, 1996), the Court was concerned with an application for asylum in the UK of a Sikh separatist, who alleged persecution in the Punjab region of India. The UK offered to send him to another part of India, claiming that only the local Punjabi police posed a real risk, which had lessened in recent years in any event. Chahal introduced evidence that Sikh separatists are at risk of disappearance, arrest, extrajudicial execution, and torture anywhere in India. The Court essentially accepted Chahal’s evidence and rejected the possibility of an IPA:

Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India.

*Ibid.*, para. 104.

In a more recent decision, the European Court of Human Rights in *Hilal v. United Kingdom*, Decision No. 45276/99, 6 March 2001, rejected the UK Government’s argument that an ‘internal flight’ option existed in mainland Tanzania for an applicant fleeing persecution in Zanzibar. The Court explained that ‘[t]he police in mainland Tanzania may be regarded as linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action’ (at para. 67).



enough to meet the ‘real chance’, ‘serious possibility’ standard throughout the country over which that government has authority.<sup>133</sup>

The logic of avoiding consideration of IPA when an official organ of the national State is the direct or indirect agent of persecution is well illustrated in the recent decision of the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v. Jang*, a case in which internal protection was assessed in relation to a Christian woman fearing persecution on religious grounds in China as a result of the enforcement of a national law restricting religious practices. One of the issues to be considered by the Court was whether the tribunal below had erred in failing to consider the IPA option since the enforcement of the national law varied between regions. The Court rejected the notion that the possibility of internal protection was an appropriate consideration in such a case:

However, where the feared persecution arises out of action taken by government officials to enforce the law of the country of nationality, or to implement a policy adopted by the government of that country, it will be much more difficult for [a] . . . decision maker to reach satisfaction that there is no real risk of the refugee applicant being persecuted if returned to that country. In such a case, if there is a safe area, this must be because the responsible officials have failed to discharge their duty to enforce the relevant law or policy . . . That situation might change overnight, either because of the appointment of one or more new officials or insistence on enforcement by superior offices. There will often (perhaps usually) be a ‘real risk’ of that happening.<sup>134</sup>

It should be emphasized that this extreme caution against considering IPA applies both in cases where the national government is the direct persecutor and where the national government is the sponsor of persecution by other State or non-State agents. As has usually been recognized, this is because there is no greater reason to entrust an applicant’s protection to a government which persecutes indirectly than to one which persecutes directly.

When might it be possible to rebut the extremely strong presumption against IPA where the national government is the direct or indirect agent of persecution? The assertion that a person can be safe in an alternative region of the country when the national government is the agent or sponsor of persecution, absent the imposition

133 *Singh v. Moschorak*, above n. 130. See also, *Damaize-Job v. INS*, 787 F 2d 1332 at 1336 (9th Circuit), 1986, where the Court said, in relation to the contention that the Nicaraguan government persecuted Miskito Indians only on the Atlantic Coast:

[T]he record does not indicate any clear intent on the part of the Sandinistas to limit their persecution to any one geographical area, and Damaize testified that he can be readily identified as a Miskito wherever he goes.

134 *Minister for Immigration and Multicultural Affairs v. Jang*, (2000) 175 ALR 752 at 758–9.

of a requirement that the person hide from the government, essentially presumes that relocation will fundamentally alter the person's relationship with the national government. This suggests an analogy to the Convention's cessation clause that allows refugee status to be withdrawn when 'the circumstances in connection with which he has been recognized as a refugee have ceased to exist'.<sup>135</sup> The test of whether a change of circumstances has taken place is an onerous one: the change must be proven to be substantial, truly effective, and durable.<sup>136</sup> A comparably high burden should rest on the asylum State seeking to establish that a person who faces the risk of being persecuted by a national government can be said to be protected by that same government in the proposed IPA.<sup>137</sup> In particular, once the national government has displayed an interest in persecuting an individual, it cannot be assumed that periods of non-persecution, even in a different location, are sufficient evidence that the government no longer intends to harm the applicant. This was recognized by a New Zealand tribunal in a case concerning a claim by a member of the All India Sikh Student Federation who had been tortured by Indian police:

It is common in such cases for police activity to be unpredictable and spasmodic, though their interest remains constant. It is a common feature of cases heard by the Authority that police will visit at irregular intervals. On occasion those intervals are closely spaced, on other occasions they are widely spaced. For that reason care must be taken to ensure that inferences are drawn not only from the regularity of the visits, but also from the equally fundamental factor, namely the suspicions held by the police.<sup>138</sup>

There are, however, two 'intermediate categories' in which it is appropriate to apply a presumption against IPA, but not a nearly insurmountable presumption of the kind befitting situations of direct or indirect national government persecution.

The first intermediate category consists of cases where the threat is one that emanates from local governmental authorities. Because local governments operate under the authority of the national government, an IPA should be found to exist

135 1951 Convention, Art. 1C(5).

136 UNHCR, Executive Committee, Conclusion No. 69 (XLIII) 1992, opines that the change in circumstances must be 'fundamental, stable and durable'.

137 US courts have generally recognized that the burden rests on the party seeking to rebut the presumption in cases involving State persecution. In a case involving a Coptic Christian from the Sudan whose family had been terrorized by government forces on religious grounds, the Court of Appeals for the 5th Circuit held that:

[w]hen a party seeking asylum demonstrates that a national government is the 'persecutor', the burden should fall upon the INS to show that this government's persecutive actions are truly limited to a clearly delineated and limited locality and situation, so that the applicant for asylum therefore need not fear a likelihood of persecution elsewhere in the nation.

*Abdel-Masih v. INS*, 73 F 3d 579 at 587 (5th Circuit), 1996.

138 *Re R.S.*, New Zealand RSAA, above n. 84.

only very rarely in such a case. In principle, a national government that fails to intervene to prevent persecution by local authorities is highly unlikely to be a solid guardian of those who were victimized in that locality. Only if there is clear evidence that the persecuting authority has no sway outside its own region and that there were particularly extenuating circumstances to explain the national government's failure to counteract localized harms in the region of origin (of a kind not relevant to the proposed IPA) might it be possible to consider an IPA in such circumstances. A case in which the presumption may have been properly rebutted (but was not in fact considered) is *Rakesh Maini*, a recent decision of the US Court of Appeals for the Ninth Circuit.<sup>139</sup> The decision involved the claim of a mixed Sikh-Hindu couple who were attacked by local Marxist party (CPM) operatives in Calcutta. As the CPM has no power in most other parts of India, the Court might reasonably have inquired into the possibility of internal protection.

On the whole, however, courts have properly taken a cautious approach to allegations that persecution is localized because the relevant action is by local authorities. For example, in *Mirza v. Canada (Minister of Citizenship and Immigration)*, a Pakistani man applied for asylum in Canada because he feared persecution by local police based on his political activities. The police had raided a political meeting he had organized, and a local court issued an arrest warrant for him. The tribunal denied refugee status on internal protection grounds, finding that 'even if the arrest warrants were indeed valid, the panel, in light of the current country conditions, finds that the arrest warrants would not be acted upon'. The Federal Court overturned this finding, emphasizing that the arrest warrants could be executed anywhere in Pakistan, even if issued only by a local court.<sup>140</sup>

The second 'intermediate' category for which IPA may be relevant comprises cases where the national government has not supported the non-State agent of harm, but has simply tolerated its actions. While also operating under a presumption against the existence of an IPA, such cases may be more open to a rebuttal of the presumption since the conditions forming the basis of the government's decision to tolerate persecution in one region may not pertain to other regions of the country. For example, the extent of ethnic tension in a particular region may be so high that government intervention to protect an oppressed minority from vigilante thugs could legitimately be said to pose the risk of exacerbating widespread violence. In such circumstances, a government may decide that it has no practical option but to tolerate the abuse of a minority by non-State actors in a particular region at a particular moment. It may, however, be willing and able to protect that same minority in a different region in the country. Nonetheless, the instance of tolerance of privately inflicted persecution requires a careful inquiry as to the reasons

139 *Rakesh Maini v. INS*, 212 F 3d 1167 (9th Circuit), 2000.

140 Canadian Federal Court Trial Division, Decision No. IMM-4618-98 (1999); 1999 Fed. Ct. Trial Lexis 842.

for the government's actions, and suggests that caution should be exercised before finding the presumption rebutted.

C. Step 3: no new risk of being persecuted, or of *refoulement*, to the region of origin

The third step in IPA analysis is to ensure that, by returning a person to an alternative region of their country of origin, the returning State is not simply substituting one predicament for another. The proposed IPA would clearly not offer protection if the risk of one form of persecution were obviated only to be replaced by a different risk of persecution for a Convention reason in the IPA. What of the situation, however, where there exists a risk of even *generalized* war or other violence in the proposed IPA (thus not qualifying an individual originating in the IPA to refugee status because there is no nexus to one of the five Convention grounds)? Or what if the only potential IPA were located in an uninhabitable desert (again, not sufficient to qualify an individual originating in the IPA to refugee status, as generalized hardship would not ordinarily amount to a risk of 'being persecuted')? Should an IPA be held to exist in either of these situations?

Jurisprudence in most States Parties suggests that, where the asylum seeker would confront either generalized harm within the realm of persecution or other forms of serious adversity, the existence of an IPA may be denied on the grounds of 'unreasonableness'.<sup>141</sup> As recently explained by Brooke LJ in *Karanakaran*:

In theory it might be possible for someone to return to a desert region of his former country, populated only by camels and nomads, but the rigidity of the words 'is unable to avail himself of the protection of that country' has been tempered by a small amount of humanity. In the leading case of *Ex p. Robinson* this court followed an earlier decision of the Federal Court of Canada and suggested that a person should be regarded as unable to avail himself of the protection of his home country if it would be unduly harsh to expect him to live there.<sup>142</sup>

141 See, e.g., the recent decision of the Full Court of the Federal Court of Australia in *Perampalam v. Minister for Immigration and Multicultural Affairs*, above n. 114, in which the Court noted that:

It cannot be reasonable to expect a refugee to avoid persecution by moving into an area of grave danger, whether that danger arises from a natural disaster (for example, a volcanic eruption), a civil war or some other cause. A well-founded fear of persecution for a Convention reason having been shown, a refugee does not also have to show a Convention reason behind every difficulty or danger which makes some suggestion of relocation unreasonable.

*Ibid.*, p. 284 per Burchett and Lee JJ.

142 See above n. 31, p. 456. See also, *Randhawa v. Minister of Immigration*, above n. 14; *R. v. Secretary of State for the Home Department and another, ex parte Robinson*, English Court of Appeal, 11 July 1997, [1997] 4 All ER 210; *Adan v. Secretary of State for the Home Department*, above n. 71.

However, as described in some detail in Section IV above,<sup>143</sup> the risks of continuing to insist upon a consideration of these factors within the rubric of a ‘reasonableness’ inquiry are significant, including both inconsistency between and even within jurisdictions, and most importantly the imposition of a decision maker’s perspective on appropriate behaviour in analyzing circumstances likely to be beyond his or her personal experience. As explained above, the ‘reasonableness’ inquiry is also extremely vulnerable to challenge or outright abrogation, since it appears to grant decision makers the right to engage in an open-ended humanitarian assessment of a kind not called for by the 1951 Convention itself.<sup>144</sup> Rather than relying upon a vague term not found in the text of the 1951 Convention, the protection approach to IPA analysis requires that potential risks of a kind not capable of grounding an independent claim to refugee status be taken into account in ways that can more readily be accommodated within the 1951 Convention framework. This tack is not only more legally justified than the asserted duty to assess ‘reasonableness’, but as a pragmatic matter is more likely to be accepted by those adjudicators sceptical of the viability and justification of the amorphous reasonableness test. The relevance of generalized or non-persecutory serious harm in the IPA can be taken into account within the terms of the 1951 Convention in two ways.

First, it may be the case that the harm faced in the proposed IPA is sufficiently serious to fall within the realm of ‘persecution’, but nonetheless an insufficient basis for a refugee claim because it is truly generalized in its infliction or impact (that is, there is no nexus to one of the five Convention grounds). This might be the case if an applicant were exposed in the IPA to generalized threats to life or physical security associated with war, or to generalized extreme economic deprivation on a variety of fronts (for example, lack of food, shelter, or basic health care). While persons originating in the proposed IPA would fail the test for refugee status on nexus grounds, the same cannot be said of the person whose case is being considered on IPA grounds. The latter person did *not* face these (persecutory) risks in his or her place of origin, and has already been found to face a well-founded fear of being persecuted *for a Convention reason* in his or her home area. The only reason – albeit an indirect reason – that she or he now faces the prospect of a threat to life or physical security in the proposed IPA is therefore the flight from the place of origin *on Convention grounds* which has led him or her (via the asylum State) now to be confronted with a harm within the scope of persecution. The risk now faced is therefore a risk faced ‘for reasons of’ the Convention ground which initiated the original involuntary movement from the home region. This is because the nexus criterion in the refugee definition requires only a causal relationship between a protected factor (race, religion, nationality, political opinion, membership of a particular social group) and the persecutory risk. If the protected ground is a contributing

143 See the text above at nn. 95 *et seq.*      144 See the text above at nn. 108–10.

factor to the risk of being persecuted, then Convention status is appropriately recognized.<sup>145</sup>

This is the position impliedly accepted in the German approach to IPA analysis. For example, the German Federal Administrative Court has explained:

[A]n alternative is not possible where the applicant would face threats elsewhere in his country of origin that are equivalent in intensity to those which initially led him to flee. Such threats need not be of a political nature; so long as the applicant would be forced into a precarious position to avoid . . . persecution . . . in his region of origin, the applicant effectively has no access to an internal [protection] alternative.<sup>146</sup>

The alternative scenario presently addressed by ‘reasonableness’ analysis involves a risk in the IPA which is not sufficiently egregious to amount to a risk of ‘being persecuted’. An independent refugee claim by a person originating in the IPA would therefore not, even if able to satisfy the nexus requirement, meet the definition of a Convention refugee. Yet serious harms falling short of persecutory conduct may nonetheless be relevant to the assessment of IPA. This is because a person under consideration for IPA has already *prima facie* satisfied the ‘well-founded fear of being persecuted’ (inclusory) language of the 1951 Convention. The decision maker is now engaged in what amounts to an inquiry into exclusion from refugee status on the grounds that the applicant (like a person with an actual or *de facto* second nationality) does not in fact require surrogate international protection. In a fundamental sense, the question is whether the IPA can amount to an adequate substitute for the refugee status otherwise warranted in the asylum country. Critically, this inquiry is predicated on the fact that the person being considered for IPA *has already been found to have a well-founded fear of being persecuted*.

Because the IPA analysis amounts to an effort to identify a suitable in-country solution for a person known to face the risk of persecution in that same country, the decision maker is logically expected to engage in the same sort of analysis which would inform comparable exclusion inquiries. In the case of an individual

145 See J. C. Hathaway, ‘The Michigan Guidelines on Nexus to a Convention Ground’, 23(2) *Michigan Journal of International Law*, 2002, p. 207 and available on <http://www.refugeecaselaw.org/Refugee/guidelines2001.htm>. Storey, above n. 35, p. 527, has argued for a similar approach (albeit in the context of the reasonableness approach):

To say that a risk of persecution in an IFA can be indirect entails recognising that, while the level of risk in one or more IFAs must be shown to be uniformly intense, the continuing directness of the cause of risk for a Convention reason need not. All that matters is that there continue to exist a serious possibility that conditions in the IFA would either re-expose the claimant to direct risk, cause the claimant to accept, or be forced to accept, undue hardship, or lead to a person becoming a victim of a violation of core fundamental human rights.

146 German Federal Administrative Court Decision No. BverwG C 45.92, 14 Dec. 1993 (unofficial translation).

possessed of actual or *de facto* nationality in a third State – the best comparator for the IPA analysis – account would clearly need to be taken of the duty of *non-refoulement*. That is, an asylum State would be prohibited from denying refugee status on grounds of actual or *de facto* third (safe) State nationality if there were reason to believe that the conditions in the third State – while not themselves amounting to a direct risk of being persecuted – would nonetheless force the applicant back to his country of origin, thereby *indirectly* exposing the individual to the risk of being persecuted. Concern to avoid indirect *refoulement* underlies the text of Article 33(1) of the 1951 Convention, which provides: ‘No Contracting State shall expel or return (“*refouler*”) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened.’<sup>147</sup> The phrase ‘in any manner whatsoever’ is strongly indicative of the need for a broad rather than a narrow assessment of the applicant’s predicament, focused on the particular concerns and circumstances of the individual applicant.<sup>148</sup>

Thus, if the conditions in the proposed IPA are such that this particular applicant may be compelled in fact to return to the area in which the risk of being persecuted exists rather than remain in the IPA, returning him or her to the IPA constitutes indirect *refoulement*.<sup>149</sup> By directing IPA analysis to those factors that may drive this particular person back to the risk of persecution, asylum seekers gain the benefit of a focus on their specific physical, psychological, and social circumstances. In short, the inquiry is whether *this* applicant – given who he or she is, what he or she believes, and his or her essential make-up – would in fact be exposed to the risk of return to the place of origin if required to accept an IPA in lieu of his presumptive entitlement to asylum abroad.<sup>150</sup>

Critically, the assessment called for is *not* whether the decision maker believes that the conditions in the IPA are, in the decision maker’s mind, sufficient to drive a ‘reasonable’ person back to the place of origin. Under ‘reasonableness’ analysis, an adjudicator might question why a person would ever return to a home region if she truly has a well-founded fear of being persecuted in that region and may thus be tempted to find the ‘reasonableness’ test satisfied even where there is a real chance that indirect *refoulement* will occur. By contrast, the IPA approach is premised on the notion that the decision maker’s sole focus should be on whether this person is likely to be forced back to the dangerous region, regardless of what is ‘reasonable’ in

147 1951 Convention, Art. 33(1) (emphasis added).

148 See e.g. J. C. Hathaway and J. A. Dent, *Refugee Rights: Report on a Comparative Survey* (York Lanes Press, Toronto, 1995), p. 6.

149 The invocation of the duty of *non-refoulement* in relation to the risk of being forced to move internally parallels the approach of the ‘Guiding Principles on Internal Displacement’, UN doc. E/CN.4/1998/53/Add.2, 11 Feb. 1998 (hereinafter ‘IDP Guiding Principles’), at Principle 15(d): ‘Internally displaced persons have . . . [t]he right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.’

150 “Those characteristics do not matter because “of the opinion and feelings of the person concerned”, but because of the risk they may cause’: de Moffarts, above n. 30.

the circumstances. This approach therefore constrains the scope of decision makers to import their own subjective notions and assumptions of rational and appropriate behaviour into the determination process. This indirect *refoulement* analysis has been impliedly embraced, for example, by a German Administrative Court, which recognized that '[o]ne can, of course, see how it might logically be that strongly religious communities would feel compelled to risk persecution in order to return to a region of the country of origin in which they could practice their faith'.<sup>151</sup>

It is clearly the case that the shift away from 'reasonableness' analysis in favour of consideration of both indirect nexus and indirect *refoulement* proposed here will, in many and perhaps most circumstances, yield a result which parallels that obtained under the 'reasonableness' approach. Indeed, the IPA approach has been criticized on the basis that it constitutes a reasonableness assessment 'by a different name'.<sup>152</sup> For example, both methods of analysis acknowledge that an absence of well-founded fear of being persecuted in the IPA is insufficient to constitute meaningful protection. Even at the level of specific considerations, the range of factors that may be relevant to IPA indirect nexus or indirect *refoulement* analysis is large and includes some of the same factors as courts have taken into account in assessing 'reasonableness'.<sup>153</sup> However at this point the similarity ends. Whereas reasonableness involves, as has been shown above, the decision maker's view of reasonable behaviour,<sup>154</sup> the IPA approach concentrates on the reality of the conditions for the applicant – the so-called 'thin skull' rule familiar to tort lawyers. It appears that critics of the IPA approach have failed to grasp this fundamental distinction.<sup>155</sup> Moreover, 'reasonableness' assessment is not a dependable basis for the protection of asylum seekers,<sup>156</sup> since it is not anchored in a conceptual connection to the refugee definition. By contrast, a focus on either indirect nexus or the risk of indirect *refoulement* provides a structured, principled, and focused inquiry

151 Baden-Württemberg Administrative Court, Decision of 17 May 1990, A 12 S 533/89.

152 Massey, above n. 32, p. 9. While criticizing the rejection of a 'reasonableness' criterion, Massey nonetheless accepts the conceptual logic of the indirect *refoulement* approach.

153 The similarities in factors that may be considered in a reasonableness inquiry as compared with the 'indirect *refoulement*' inquiry were recognized in New Zealand RSAA, Decision No. 71729/99, 22 June 2000, [2001] NZAR 183. However, that decision emphasized that there is no super-added reasonableness test, and that the significance of 'reasonableness' follows from its relevance to the issue of the availability of sufficient internal protection (*ibid.*, at paras. 75–6).

154 See the text above at nn. 95–7.

155 For example, Massey attempts to apply this step of the Michigan approach by constructing a series of scenarios in which the risk in the IPA does not amount to persecution, but is nonetheless serious. He then asks whether the asylum seeker would have 'a greater chance of survival' in the original site than the proposed site in each of the scenarios, Massey, above n. 32, pp. 7–9. The Michigan approach, however, specifically eschews the notion of such a clinical objective weighing of relative risks, favouring instead an acknowledgment that the focus is on what this applicant is likely to do, whether or not it is adjudged 'rational' in the circumstances.

156 Interestingly, Massey appears to accept this criticism of the UNHCR approach. 'The [1999 UNHCR] Position Paper does not give any explanation how these considerations [the applicant's personal profile] in particular, or the "reasonableness" test in general, enter into the assessment of well-founded fear': Massey, above n. 32, pp. 17–18.



and is not at risk of being dismissed by courts as a ‘humanitarian gloss’ on the Convention text. Rather, it is required as a matter of international law.

#### D. Step 4: minimum affirmative State protection available

The fourth and most conceptually challenging element in the protection approach to devising a Convention-based IPA test gives content to the concept of ‘protection’. If, as we believe, the only textually sound basis to require an at-risk person to accept an internal alternative to refugee status is that he or she can ‘avail himself [or herself] of the protection of that country’, then it is incumbent upon proponents of the IPA view to suggest just how the relevant ‘protection’ should be conceived.

The point of departure – acknowledged in the case law and by UNHCR – is that ‘protection’ is not simply the absence of the risk of being persecuted. That is, a person may not be at risk of persecution, yet simultaneously not be protected. The notion of ‘protection’ clearly implies the existence of some affirmative defence or safeguard. Yet once one moves beyond this truism, there is very little conceptual clarity as to the method by which the essential content of protection might be defined. One context-specific touchstone, however, is provided by the Preamble to the 1951 Convention in which it is noted that the key aim of the treaty is to ‘revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of *and protection accorded by such instruments* by means of a new agreement’ (emphasis added).<sup>157</sup> At the very least, then, ‘protection’ as conceived by the 1951 Convention includes *legal rights* of the kind stipulated in the Convention itself.

Some decisions rendered under the traditional ‘reasonableness’ framework have acknowledged the importance of legal rights to the assessment of internal protection alternatives. For example, cases involving child applicants have stressed the importance of access to education and basic economic subsistence.<sup>158</sup> Moreover, in its *Chahal* decision, the European Court of Human Rights recognized the centrality

157 ‘The Convention and the Protocol represent a point of departure in considering the appropriate standard of treatment for refugees, often exceeded, but still at base proclaiming the fundamental principles of protection, without which no refugee can hope to attain a satisfactory and lasting solution to his or her plight’: Goodwin-Gill, above n. 68, p. 296.

158 See e.g., Judgment of 24 March 1997, German Federal Constitutional Court, 2 BvR 1024/95, NVwZ 97, 65. In *Elmi v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), Decision No. Imm-580-98 (1999), 1999 Fed. Ct. Trial Lexis 220), the tribunal had rejected the asylum claim of a 16-year-old Somali who had been 10 years old when he fled Somalia, on the ground that he could relocate within Somalia. The court overturned the decision out of concern for his ability to access education or employment:

What is merely inconvenient for an adult might constitute ‘undue hardship’ for a child . . . In a case of a child whose education already has been disrupted by war, and who would arrive in Bossaso (IFA) without any money, the question arising is not simply of ‘suitable employment’, but of any livelihood at all.

of these concerns to the IPA inquiry. In that case, the Court denied that the Sikh militant claimant had an IPA in India, in part because the Indian police and security forces would not be able to protect his civil and political rights there.<sup>159</sup> Perhaps most directly, Lord Woolf included reference to human rights standards in his formulation of the IPA test in the leading UK decision of *R. v. Secretary of State for the Home Department and another, ex parte Robinson*:

In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backdrop that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, . . . (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination.<sup>160</sup>

Yet this fundamental rights approach has received too little judicial attention. It may be that decision makers fear that ‘fundamental rights and freedoms’ is an unmanageably vague notion. Moreover, it may be thought that a rights-based approach travels considerably beyond the requirements of the 1951 Convention text. This point was implicitly made in an English decision dealing with the claim of a Sri Lankan Tamil who argued that it would be unreasonable for him to be returned to Sri Lanka. The Court affirmed the rejection of his application by the Tribunal below, stating:

It would not seem to me necessary, in considering [the reasonableness test, . . . for decision makers] . . . to conduct a wide-ranging inquiry into the quality of life which a returning applicant for asylum might expect to enjoy in the part of his home country to which it was proposed to return him.<sup>161</sup>

The challenge, then, is to devise a principled approach which adumbrates the rights-based understanding of ‘protection’ compelled by the internal structure of the 1951 Convention, but which cannot be dismissed as simply a humanitarian option to be adopted by more generous States.

The minimum acceptable level of legal rights inherent in the notion of ‘protection’ is certainly open to debate. It might be argued that ‘protection’ requires a government normally to be able to deliver all of the basic international human rights in the region of proposed protection. On this basis reference would be made, at a minimum, to the obligations contained in the International Covenant

159 See above n. 132. 160 See above n. 142, pp. 939–40.

161 *R. v. IAT, ex parte Sivanentheran*, English Court of Appeal, [1997] Imm AR 504 at 509.

on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. More realistically, Hugo Storey posits that ‘protection’ ought not to be defined on the basis of absolute standards, but rather exists where there is no discrimination in the enjoyment of all basic human rights between persons returned on IPA grounds and others already resident in that place.<sup>162</sup> A third alternative is suggested by the UN’s 1998 ‘Guiding Principles on Internal Displacement’,<sup>163</sup> which combine the absolute and relative approaches. Guiding Principle 1 states:

Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.<sup>164</sup>

Principles 10–30 revert to a more absolute approach, requiring respect for a series of more detailed rights framed with specific reference to the dilemmas that confront persons who are – as are those excluded on IPA grounds – forced to relocate within their own country. There is therefore a logical appeal to defining the minimum standard of affirmative protection in the proposed IPA by reference to comparable norms.

Others, however, will argue that this approach risks going considerably beyond what the 1951 Convention requires.<sup>165</sup> Specifically, if the failure to ensure any of these basic rights were to be deemed a sufficient basis to find an asylum applicant to be ‘unprotected’ in the proposed IPA site, an unwieldy disjuncture in the conceptualization of the refugee definition could arise. This is because there is no consensus that *any* risk to even a core, internationally protected human right is

162 Storey, above n. 29, pp. 5–11.      163 IDP Guiding Principles, above n. 149.

164 *Ibid.*, Guiding Principle 1(1).

165 Professor R. Piotrowicz of the Department of Law, University of Wales, Aberystwyth, has made this argument quite clearly:

The main point of the Convention is to ensure that those who have nowhere else to go should not be sent to a territory where they are persecuted. If . . . the State seeking to rely on the IPA/IFA/IRA cannot expect the asylum seeker to use the IPA/IFA/IRA in the absence of conditions that meet ‘applicable human rights standards’, even though the population at large in the relevant territory may not benefit from the rights referred to by these same ‘applicable international human rights standards’ . . . we would have a situation where a superior human rights regime is demanded for asylum seekers but is not available to the rest of the population in the IPA/IRA/IFA. Furthermore, it may be that, even if the level of human rights protection is not as good as it might be, nevertheless people in those areas are not being persecuted or having their rights breached for reasons envisaged in the Refugee Convention. If that is the case, why should it be relevant to the State seeking to rely on the IPA/IRA/IFA?

R. Piotrowicz, ‘Comment on the Draft Summary Conclusions’, 1 Oct. 2001 (on file with the authors).

tantamount to a risk of 'being persecuted'. While first level human rights – the non-derogable civil and political rights (for example, freedom from torture) – are nearly universally so recognized, a more nuanced analysis of the relevance of second level (derogable civil and political) and third level (economic, social, and cultural) rights is required. Some, but not all, threats to these rights amount to a risk of 'being persecuted'.<sup>166</sup> There will therefore clearly be situations in which protection would be granted on the basis of a risk inconsistent with the 'Guiding Principles' – for example, lack of access to sanitation facilities, inability to receive a passport, absence of assistance in tracing relatives, or even confiscation of property – even though the risk of such harms would not normally entitle a person originating in the proposed IPA site to secure recognition of refugee status.

Because of this concern, the drafters of the IPA approach laid out in the 'Michigan Guidelines' determined that reference could instead be made to the rights which comprise the 1951 Convention's own definition of 'protection'. Since the rationale for IPA analysis is to determine whether an internal site may be regarded as affording a sufficient answer to the applicant's well-founded fear of being persecuted such that the presumptive remedy of protection in an asylum State is not required, then there is a logic to measuring the sufficiency of IPA 'protection' in relation to the actual protective duties of asylum States.<sup>167</sup> The required standard is not respect for *all* human rights, but rather provision of the rights codified as the 1951 Convention's endogenous definition of 'protection' in Articles 2–33. In general terms, these standards impose a duty of non-discrimination *vis-à-vis* citizens or other residents of the asylum country and refugees in relation to a core subset of civil and socio-economic rights,<sup>168</sup> including, for example, freedom of religion,<sup>169</sup> freedom

166 Hathaway, *Refugee Status*, above n. 4, pp. 105–24.

167 A comparable approach was taken in *Lay Kon Tji v. Minister for Immigration and Ethnic Affairs*, above n. 54, in which the Federal Court of Australia considered whether Portugal could provide 'effective nationality' to an applicant from East Timor. The Court held:

[B]y the Refugee Convention those countries that do grant refugee status to an individual are also required to accord to the refugee freedom of religion (Article 4), to allow the refugee freedom of association (Article 15), and to permit the refugee to have free access to local courts (Article 16). If the country of second nationality would not confer those rights on the putative refugee, being rights which by international law must be afforded to a national, it could hardly be supposed that it was intended that the putative refugee must seek the protection of that state. The reason a putative refugee need not seek the protection of that state is because the nationality that the state offers cannot be regarded as a truly effective nationality.

(*Ibid.*, pp. 691–2).

168 See generally, J. C. Hathaway, 'The International Refugee Rights Regime', 8(2) *Collected Courses of the Academy of European Law*, 2000, pp. 91–139 (hereinafter, Hathaway, 'Rights Regime').

169 1951 Convention, Art. 4.

of movement,<sup>170</sup> access to courts,<sup>171</sup> and rights to work,<sup>172</sup> social assistance,<sup>173</sup> and primary education.<sup>174</sup>

Reference to the 1951 Convention's internal standard of 'protection' has been criticized on the basis that there are difficulties with a literal application of Articles 2–33 to the internal protection analysis.<sup>175</sup> This is certainly true to some extent, as the 1951 Convention's rights regime is tailored to counteract the disadvantages of involuntary alienage.<sup>176</sup> It is important to understand, however, that the IPA approach embraced by the 'Michigan Guidelines' does not suggest a literal application of Articles 2–33 in considering internal protection, but rather that decision makers seek inspiration from the kind of interests protected by these Articles as a way of defining an endogenous notion of affirmative protection in the refugee context. While in some ways falling somewhat short of the standard of 'protection' that would follow from assessment by reference to all key human rights or even to the 'Guiding Principles on Internal Displacement', the non-discrimination approach embodied in the 1951 Convention nonetheless provides a legally solid and contextualized assurance of durable protection. For example, the Canadian decision of *Soosaipillai v. Canada (Minister of Citizenship and Immigration)* – in which the Federal Court held that it would be 'unduly harsh' to require an elderly Tamil couple to seek protection in Colombo because ethnic discrimination would lead to difficulties in gaining access to the government services, which the frail applicants required<sup>177</sup> – could just as readily (and more legally justifiably) have been adjudicated in the claimants' favour on the basis of a protection-based understanding of IPA.

As this example makes clear, our point is not that the 'reasonableness' approach cannot generate positive protection results for asylum seekers whose cases are subject to internal protection analysis. To the contrary, in the hands of experienced and thoughtful decision makers, we believe the results will be largely the same. The difference, however, is that the greater analytical structure of IPA analysis and its more solid footing in international refugee law allow it *more dependably* to generate rights-regarding determinations of the reality of internal protection. By focusing on the provision of fundamental civil and socio-economic rights on a non-discriminatory basis – whether by reference to the whole spectrum of international human rights law, the 'Guiding Principles on Internal Displacement', or to the rights in the 1951 Convention itself – an understanding of 'protection' that is readily amenable to appellate and other accountability is established.

The final point to emphasize is that minimum affirmative *State* protection implies that there is a State in fact in control in the proposed IPA. This is not a notion

170 *Ibid.*, Art. 26. 171 *Ibid.*, Art. 16. 172 *Ibid.*, Arts. 17, 18, 19, and 24.

173 *Ibid.*, Arts. 20, 21, and 23. 174 *Ibid.*, Art. 22. 175 Massey, above n. 32, pp. 10–12.

176 Hathaway, 'Rights Regime', above n. 168.

177 Canadian Federal Court Trial Division, Decision No. IMM-4846-98 (1999); 1999 Fed. Ct. Trial Lexis 834.

free from controversy or from divergence in State practice.<sup>178</sup> It is an extremely important issue, however, since lack of adherence to this principle has resulted in questionable applications of the internal protection principle. For example, some governments reject Iraqi Kurdish asylum seekers on the ground that they can relocate to one of the two Kurdish enclaves in northern Iraq.<sup>179</sup> Similarly, some courts have held that Somali applicants can be returned to Somaliland or Puntland, even though no State structure is in place there.<sup>180</sup> In cases involving Somali claimants in particular, such findings have frequently required applicants to turn to their own clan for protection.<sup>181</sup> In one particularly worrying decision, the Spanish Supreme Court explicitly required the applicant to commit himself to joining one ethnic faction in order to obtain protection in holding that: ‘Liberia is divided into territorial zones which are under the influence of different governments or authorities of the tribes or ethnic rivals, so that its citizens can avail themselves of the protection of the government they feel allied (related) to.’<sup>182</sup>

The fundamental problem with such decisions is that none of the proposed protectors – whether it is ethnic leaders in Liberia, clans in Somalia, or embryonic local authorities in portions of northern Iraq – is positioned to deliver what Article 1A(2)

178 See e.g., de Moffarts, above n. 30:

The Geneva Convention does not specify what authority should give ‘the protection of his country’. To be meaningful, protection does not necessarily have to be given by the central authority. It may also be [delegated to] a ‘*de facto*’ authority established on a part of the national territory [for] citizens having an effective link with this authority.

This approach does not, however, address the question of the international legal accountability of such a ‘*de facto* authority’, the critical concern from a protection perspective.

179 In *Tawfik v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 835, the Canadian Federal Court denied refugee status to a Turkish Kurd on the grounds that ‘with some portion of northern Iraq under the de facto control of an elected Turkish government’, an IPA existed. German courts have been somewhat in conflict on whether this approach is appropriate. While the Higher Administrative Court of Schleswig-Holstein (judgments of 18 Feb. 1998, 2 L 166/96 and 2 L 41/96) argued that northern Iraq cannot offer internal protection because there are no State-like structures there, the Federal Administrative Court (BverwG 9 C 17.98, 8 Dec. 1998) has disagreed, holding that the key question is whether a person would be targeted by Iraqi agents: ELENA Research Paper, above n. 3, p. 35.

180 See e.g., the decision of the Canadian Federal Court (Trial Division) in *Saidi v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 932, in which refugee status was denied to a Somali applicant on the grounds that ‘his clan affiliation and its acceptance by the majority in the north of the country’ established an IPA. This is also the practice in Denmark: ELENA Research Paper, above n. 3, p. 33.

181 See e.g., the decisions of the Netherlands *Rechtseenheidskamer* (Law Unity Chamber), AWB 99/104, 3 June 1999; and AWB 99/73, 3 June 1999 (holding that the Mudug province in Somalia could be considered safe for members of the Darod and Hawiye clans which control much of the territory).

182 Decision of 19 June 1998: see ELENA Research Paper, above n. 3, p. 49. See also *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 FC 605, in which the Canadian Federal Court suggested, in the context of Lebanon, that there was a duty to seek the protection not only of one’s national State, but also of ‘an established authority’ acting as a government.

of the 1951 Convention requires, namely, the protection of a State accountable under international law. The protective obligations of the 1951 Convention in Articles 2–33 are specifically addressed to ‘States’. The very structure of the 1951 Convention requires that protection will be provided not by some legally unaccountable entity with *de facto* control, but rather by a government capable of assuming and being held responsible under international law for its actions. In practical terms, the rights enumerated in the 1951 Convention similarly envisage that protection will be provided by an entity that has established, *inter alia*, a formal system for regulating aliens’ social and economic rights,<sup>183</sup> a legal and judicial system,<sup>184</sup> and a mechanism for issuing identity and travel documents.<sup>185</sup> Indeed, the fundamental premise that refugee protection is an inter-State system intended to deliver surrogate or substitute protection assumes the right of at-risk persons to access a legally accountable State – not just some (hopefully) sympathetic or friendly group – if and when the individual’s own State fails fundamentally to protect his or her basic rights. There is simply no basis in law or principle to deviate from this foundational principle in the internal protection context.

## VI. Procedural safeguards

While procedural questions have been alluded to in the context of the substantive analysis presented above, we wish here to reiterate and draw together at least the most important issues of process in the internal protection context.

First, because IPA is defined in part by whether or not it can truly deliver an ‘antidote’ to the applicant’s well-founded fear of being persecuted,<sup>186</sup> it follows necessarily that an IPA test should never be used in an accelerated procedure to deny refugee status before inquiring fully into the particular circumstances of an applicant.<sup>187</sup> As explained above, the unfortunate practice of considering ‘internal flight’ as providing grounds for summary dismissal of a refugee claim is arguably logical if such considerations are (inaccurately) viewed as part of the basic ‘well-founded fear’ inquiry.<sup>188</sup> Under the protection approach, however, there can be no

183 1951 Convention, Arts. 6, 17–19, and 21. 184 *Ibid.*, Arts. 12 and 16.

185 *Ibid.*, Arts. 25, 27, and 28. 186 See the text above at nn. 120 *et seq.*

187 E.g. in *Perampalam v. Minister for Immigration and Multicultural Affairs*, above n. 114, the Full Court of the Federal Court of Australia held that the lower tribunal had committed an error of law in its application of the ‘relocation principle’, on the basis *inter alia* of its ‘sparse findings’ which did not:

engage in anything like an examination of the evidence to determine whether it would be reasonable to assume that the . . . extortion demands [of the Liberation Tigers of Tamil Eelam] would cease if the appellant moved a mere quarter of a mile away from her home to her daughter’s home.

*Ibid.*, p. 283 per Burchett and Lee JJ.

188 See the text above at nn. 41–8.

question of internal protection being considered before the decision maker establishes the nature and scope of the well-founded fear of being persecuted in the region from which an applicant has fled. As held by the New Zealand Refugee Status Appeals Authority:

Applications raising the issue of ‘internal [protection] alternative’ raise a number of complex questions, and no international consensus exists as to its precise relevance for the determination of refugee status. In most instances, it will require an in-depth examination to establish whether the persecution faced by the applicant is clearly limited to a specific area and that effective protection is available in other parts of the country. For this reason, it is not appropriate to consider such applications in the same manner as manifestly unfounded applications.<sup>189</sup>

Secondly, it is extremely important that IPA be assessed in each individual case.<sup>190</sup> Thus, decision makers should never apply generalized findings regarding ‘safety’ for whole ethnic or other groups in an IPA without considering the feasibility of the IPA for the particular individual whose application is being considered. It is vital that decision makers assess the prospects for each individual applicant in obtaining protection in the proposed IPA, based on an assessment of the risk factors in each particular case, rather than on broad and general conclusions of the situation of all members of a particular group in the proposed IPA.<sup>191</sup>

An excellent example of the overriding importance of this principle is provided by the decision of the Canadian Federal Court in *Bhambri v. Canada*.<sup>192</sup> That case concerned an application for asylum by a Sikh man, suspected by police of supporting Sikh militants, who had been arrested, beaten and tortured by the Indian police on three occasions over the course of thirteen months, for periods of seven days, twelve days, and three weeks respectively. Bhambri had escaped each time by bribing the police. Following his father’s arrest on two occasions, designed to elicit information as to Bhambri’s whereabouts, Bhambri fled to an unnamed region of India where he lived with an aunt, a medical doctor. The aunt was subsequently arrested for

189 New Zealand RSAA, Decision No. 70951/98, above n. 47. According to the ELENA Research Paper, above n. 3, a number of European countries, including Spain and Austria, have clearly eliminated IPA from a manifestly unfounded or accelerated procedures: see *ibid.*, pp. 17 and 49.

190 According to de Moffarts, above n. 30: ‘Each case should be decided on its particular circumstances, not according to some blanket approach to different categories or nationalities of claimants.’

191 This is specifically required in some jurisdictions. For example, a Netherlands court ruled that the north of Iraq cannot be an IPA for every rejected asylum seeker from Iraq; rather Netherlands officials must examine each individual case in order to determine whether the applicant has sufficient ties with northern Iraq: *Rechtseenheidskamer*, 13 Sept. 1999, AWB 99/3380.

192 *Bhambri v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), Decision No. IMM-649-96, [1996] FCJ 1661, 18 Dec. 1996.



having treated a Sikh militant for a bullet wound, and Bhambri then fled India. The Federal Court nonetheless approved the Convention Refugee Determination Division's clearly insufficiently particularized finding:

Since the applicant was released from detention every time he was arrested, upon payment of a bribe, the Punjab police did not consider the applicant to be a terrorist or a supporter of terrorists . . . Sikhs can usually resettle elsewhere in India. This would most certainly be possible in the case of this applicant because he was not a member of any political organization, nor did he engage in anti-government activities.<sup>193</sup>

This result is highly questionable given the specific circumstances of this applicant's predicament. Even if it were true that 'Sikhs can usually resettle in India', it is dangerous to rely on such generalizations in lieu of assessment of the reality of an individual's case.<sup>194</sup>

Thirdly, the adoption of the protection approach necessarily implies, as described above,<sup>195</sup> that the authorities of the asylum State have the evidentiary

193 Ibid.

194 This is often a problem in cases involving Sikhs from the Punjab and Tamils from the north of Sri Lanka. Although the Canadian Federal Court (Trial Division) has emphasized that the inquiry must be individualized and that there can be no generic determination of reasonableness (see *Pathmakanthan v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 1158), in practice both the Immigration and Refugee Board and the Court continue to apply general conclusions in individual cases. This can be seen in the approach to an application for asylum by a Punjabi farmer who had been forced to provide food, shelter, and transportation to Sikh militants. Following this activity he was arrested and detained by the Indian police, and was interrogated and 'badly tortured' by them. He managed to bribe his way out of prison and required six weeks of medical attention. He twice attempted to live with relatives in other provinces, initially in Uttar Pradesh and then in Delhi. However, police inquiries and his family's concern regarding the police suspicion drove him back to Punjab, where he was again detained and tortured by the police. The Convention Refugee Determination Division (CRDD) rejected his asylum claim on IFA grounds and this rejection was affirmed on appeal to the Federal Court, where Gibson J explained:

On the facts before it, and, in particular, by reference to documentary evidence, the CRDD in this matter found there to be IFA destinations in India for Sikhs from the Punjab. The CRDD then turned to the second portion of the test, consideration of whether the IFA destinations, or any of them, would be reasonable for this Applicant on the circumstances of his individual claim . . . I conclude that the CRDD applied the appropriate test in law in reaching the conclusion it did regarding an IFA for this particular applicant.

*Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-1200-97 (1997); 1997 Fed. Ct. Trial Lexis 1408. Although acknowledging a role for an assessment of 'reasonableness' in the particular case, the CRDD's decision (as approved by the Federal Court) gave short shrift to the particular circumstances of this case, preferring simply to adhere to its general view that Sikhs have an IPA in India. See also, *Matter of R.*, above n. 33; and Australian RRT, Decision No. V96/04189, 26 Feb. 1997.

195 See the text above at n. 41.

burden of proof to establish a *prima facie* case that an IPA exists.<sup>196</sup> This follows logically from the fact that before turning to a consideration of the possibility of an IPA, a decision maker is already satisfied that the applicant has established that he or she faces a well-founded fear of being persecuted for a Convention reason, thus giving rise to a presumptive entitlement to refugee status. When one considers that the responsibility for fact-finding is shared throughout the entire refugee status determination,<sup>197</sup> it is vital that applications not be rejected based on an incorrect assumption that the applicant bears the onus of disproving every theoretical IPA site. The protection approach views an IPA inquiry as being akin to an exclusion inquiry, with the accompanying high degree of caution involved in finding that a sufficient degree of protection is available to obviate the need for protection under the Convention regime. The evidentiary responsibility on the asylum State to establish that an IPA exists extends to each of the four essential elements of the test of sufficiency of the IPA, namely, accessibility, antidote, no new risk of being persecuted or of indirect *refoulement*, and presence of affirmative protection. Once a *prima facie* case is presented, the asylum seeker may similarly rely upon any of these factors to rebut the assertion that an IPA exists.<sup>198</sup>

Finally and most fundamentally, procedural fairness must be accorded refugee applicants in the assessment of an IPA, as in relation to all aspects of refugee status determination. In the IPA context, this means that, at a minimum, the applicant must be given clear and adequate notice that the adjudicating authority intends to canvass the possibility of denying status on internal protection grounds. This includes notice as to the specific location which is proffered as an IPA, with adequate

196 C. Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths, London, 2000), pp. 280–1. There is, however, no universal agreement on this point. For example, the New Zealand RSAA has recently affirmed that the onus is on the refugee applicant to establish that no IPA is available, although this finding turned on the specific legislative provisions in New Zealand: Decision No. 71729/99, New Zealand RSAA, 22 June 2000, above n. 153, at para. 90. Even in these circumstances, the RSAA has made it clear that, once a *prima facie* case is established, the asylum State must give notice that an IPA is to be considered (unless this is obvious from the context of the case); Also, ‘the decision-maker has a legal obligation to disclose to the claimant any evidence relating to the internal protection alternative which the decision-maker intends to rely upon’ (*ibid.*, at para. 92). It has been suggested, however, that there is no necessary inconsistency between the notion that the asylum seeker is charged with the overall onus to prove his or her case, even as the authorities of the asylum State – once a *prima facie* case for refugee status is made out – then assume the evidentiary burden to show an internal protection alternative. At this point, ‘it may be presumed, in the absence of evidence to the contrary, that the [risk of] persecution will continue’: Justice D. Baragwanath, ‘A Comment on Professor Hathaway’s and Ms Foster’s Paper’, Sept. 2001, p. 7 (on file with authors).

197 ‘[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner’: UNHCR, *Handbook*, above n. 11, at para. 196.

198 This is important to emphasize, as one analyst has incorrectly concluded that the affirmative protection approach creates a set of additional hurdles to be overcome by the applicant: Massey, above n. 32, p. 12, n. 38.

opportunity to prepare a case in rebuttal.<sup>199</sup> As the Canadian Federal Court has explained:

[I]n some cases the claimant may not have any personal knowledge of other areas of the country, but, in all likelihood, there is documentary evidence available and, in addition, the Minister will normally offer some evidence supporting the [IPA] if the issue is raised at the hearing.

On the other hand, there is an onus on the Minister and the Board to warn the claimant if an [IPA] is going to be raised. A refugee claimant enjoys the benefit of the principles of natural justice . . . A basic and well-established component of the right to be heard includes notice of the case to be met . . . The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid [IPA] exists in response to an allegation by the Minister. Therefore, neither the Minister nor the [adjudicating tribunal] may spring the allegation of an [IPA] upon a complainant without notice that an [IPA] will be in issue at the hearing.<sup>200</sup>

## VII. Conclusion

Our analysis proposes the rejection of two extreme positions. On the one hand, it makes little sense to recognize the refugee status of an individual who truly can access meaningful domestic protection in a part of his or her country of origin, thereby avoiding the risk of being persecuted. In view of the fundamental surrogate protection purpose of international refugee law, there is no duty to admit as refugees those whose own government can be counted on to protect their basic rights in part, but not all, of the national territory. As refugees now frequently flee largely regionalized threats rather than monolithic aggressor States, the continuing viability of refugee law demands that account be taken of genuine opportunities for internal protection.

On the other hand, the specific approach taken in some States to assessment of internal protection possibilities often leaves much to be desired. Fundamentally, it is contrary to the ordinary meaning of words to insist that the existence of an internal

199 Some courts have specifically imposed this requirement. For example, the Canadian Federal Court of Appeal held that a claimant from Afghanistan could not be denied refugee status on IPA grounds unless the tribunal could point to a specific alternative region of Afghanistan as constituting an IPA: *Rabbani v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), Decision No. IMM-236-96 (1997), 1997 Fed. Ct. Trial Lexis 681. See also Austrian Administrative Court, Decision No. 95/20/0295, 1996, in which the Court rejected an IPA for a Kurd from Turkey because the Minister failed to specify an exact IPA location.

200 *Thirunavukkarasu v. Canada*, above n. 25, pp. 595–6.

protection option means that an asylum seeker does not have a ‘well-founded fear of being persecuted’. Nobody would suggest, for example, that an individual at risk in Zurich, but who can find safety in Geneva, is not at risk in Switzerland. He or she is at risk in Switzerland, but can also find a remedy there. This common sense conceptualization of the issue can easily be accommodated by the structure of the 1951 Convention. Even a person who has a well-founded fear of being persecuted in the country of origin must also demonstrate that he or she ‘is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country’. If the applicant’s own government is genuinely able and willing to protect him or her in a new location, this requirement is not satisfied, and refugee status may be denied. But because internal protection is considered only after the applicant has established a *prima facie* case of risk in his or her place of origin, internal protection is effectively treated as an issue of exclusion from refugee status in relation to which the government bears the evidentiary burden.

This is not a semantic or purely academic debate. As we have shown, the assessment of internal protection as part of the initial ‘well-founded fear’ analysis has frequently led to unwarranted denials of refugee status. In particular, treating internal protection as relevant to the initial case to be made by the asylum seeker has logically led some courts to impose a duty on the applicant to prove that no city, town, or village is safe for him or her, an approach rightly condemned by UNHCR as imposing an impossible evidentiary burden. Of even greater concern, locating internal protection analysis in the basic well-founded fear inquiry has provided a basis for the pre-emption of an analysis of risk in the place of origin altogether where internal protection appears to be plausible. Yet without a clear sense of the underlying risk, how can the sufficiency of countervailing internal protection truly be assessed? UNHCR’s recent gloss on the ‘well-founded fear’ approach – namely, that there must be access to ‘safety’, and that it must be ‘reasonable’ to seek internal protection – has not remedied the problem. To the contrary, this standard has been relied upon by some decision makers to impose what amounts to a duty to hide (for example, by suppressing religious or political beliefs) in the country of origin, an approach patently at odds with the most basic goals of refugee law. The fungible notion of ‘safety’ (not a term found in the 1951 Convention) has also proved a dangerous distraction, leading some States to return applicants to face the risk of war and other serious dangers. While the harshness of this approach can be mitigated by judicious application of the ‘reasonableness’ criterion, in practice the inherent subjectivity of such an inquiry too often results in an ad hoc jurisprudence in which similarly situated persons are not similarly treated. And because there is no basis in the Refugee Convention to insist on the assessment of ‘reasonableness’, decision makers have understandably begun to question whether reasonableness should really be a part of the refugee status inquiry at all.

Our analysis here has therefore drawn together what we consider to be the best practice of courts around the world in a single, analytically clear approach, termed

the ‘internal protection alternative’. Firmly based on the text of the 1951 Convention itself, this standard is explicitly designed to realize the most basic goal of the Convention, namely, to identify as refugees only those persons who require the surrogate protection of refugee law because they do not have access to the protection of their own State. By undertaking the four fundamental inquiries outlined above – accessibility, antidote to the original well-founded fear, no new risk of being persecuted or of *refoulement* to the region of origin, and the presence of minimum affirmative State protection – we can ensure that protection is only denied on the basis of a clear understanding of both all risks, and all possibilities for meeting the asylum seeker’s protection needs within the borders of his or her own country. So conceived, internal protection analysis is an inherent part of refugee status determination, effectively enabling States to meet new protection challenges without risk of denying protection to persons who have no choice but to turn to the international community.

## 6.2 Summary Conclusions: internal protection/relocation/flight alternative

*Expert roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy, 6–8 September 2001*



The San Remo expert roundtable addressed the question of the internal protection/relocation/flight alternative as it relates to the 1951 Convention Relating to the Status of Refugees. The discussion was based on a background paper by Professor James C. Hathaway and Michelle Foster, University of Michigan, entitled ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’. In addition, roundtable participants were provided with written contributions including from Hon. Justice Baragwanath, High Court of New Zealand, Hugh Massey, United Kingdom, Marc Vincent, Norwegian Refugee Council, Reinhard Marx, practitioner, Germany, and the Medical Foundation for the Care of Victims of Torture. Participants included thirty-three experts from twenty-three countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Hugo Storey, from the International Association of Refugee Law Judges (IARLJ), moderated the discussion.

There has been no consistent approach taken to the notion of IPA/IRA/IFA by States Parties: a number of States apply a reasonableness test; others apply varying criteria, including in one jurisdiction the ‘internal protection alternative’ approach as defined in the background paper. UNHCR has expressed its concern over recent years that some States have resorted to IPA/IRA/IFA as a procedural short cut for deciding the admissibility of claims. Given the varying approaches, it was considered timely to take stock of the different national practices with a view to offering decision makers a more structured analysis to this aspect of refugee status determination. These summary conclusions do not finally settle that structure, but may be useful in informing the application, and further developing the parameters, of this notion.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

1. IPA/IRA/IFA can sometimes be a relevant consideration in the analysis of whether an asylum seeker's claim to refugee status is valid, in line with the object and purpose of the Refugee Convention. The relevance of considering IPA/IRA/IFA will depend on the particular factual circumstances of an individual case.
2. Where the risk of being persecuted emanates from the State (including the national government and its agents), IPA/IRA/IFA is not normally a relevant consideration as it can be presumed that the State is entitled to act throughout the country of origin. Where the risk of being persecuted emanates from local or regional governments within that State, IPA/IRA/IFA may only be relevant in some cases, as it can generally be presumed that local or regional governments derive their authority from the national government. Where the risk of being persecuted emanates from a non-State actor, IPA/IRA/IFA may more often be a relevant consideration which has though to be determined on the particular circumstances of each individual case.
3. The individual whose claim to refugee status is under consideration must be able – practically, safely, and legally – to access the proposed IPA/IRA/IFA. This requires consideration of physical and other barriers to access, such as risks that may accrue in the process of travel or entry; and any legal barriers to travel, enter, or remain in the proposed IPA/IRA/IFA.
4. If the asylum seeker would be exposed to a well-founded fear of being persecuted, including being persecuted inside the proposed IPA/IRA/IFA or being forced back to and persecuted in another part of the country, an IPA/IRA/IFA does not exist.
5. The mere absence of a well-founded fear of being persecuted is not sufficient in itself to establish that an IPA/IRA/IFA exists. Factors that may be relevant to an assessment of the availability of an IPA/IRA/IFA include the level of respect for human rights in the proposed IPA/IRA/IFA, the asylum seeker's personal circumstances, and/or conditions in the country at large (including risks to life, limb, or freedom).
6. Given its complexity, the examination of IPA/IRA/IFA is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure.
7. More generally, basic rules of procedural fairness must be respected, including giving the asylum seeker clear and adequate notice that an IPA/IRA/IFA is under consideration.
8. Caution is desirable to ensure that return of an individual to an IPA/IRA/IFA does not arbitrarily create, or exacerbate, situations of internal displacement.

### 6.3 List of participants

*Expert roundtable, San Remo, Italy, 6–8 September 2001 (membership of a particular social group, gender-related persecution, internal protection/relocation/flight alternative)*

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## 7.1 Current issues in the application of the exclusion clauses

GEOFF GILBERT\*

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\* This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on exclusion organized as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention Relating to the Status of Refugees. The paper benefited from the discussions held at the expert roundtable in Lisbon, Portugal, on 3 May 2001, organized by UNHCR and the Carnegie Endowment for International Peace. This paper also benefited greatly from the discussion with UNHCR staff at a meeting on 'asylum, terrorism and extradition' held at UNHCR headquarters, Geneva, on 10 Nov. 2000. Particular thanks are owed to I. Khan, V. Türk, N. Karsenty, K. Mancini, R. Mponda, S. Kimbimbi, A. Klug, A. Painter, B. Gorlick, and R. Towle; thanks are also due to F. Hampson, N. Rodley, and M. Sunkin, colleagues at the University of Essex. Needless to add, the views expressed and any errors are mine alone. The position outlined in this paper is accurate on the basis of the materials available as at 11 Jan. 2002.

## I. Introduction

Those applicants found to fall within Article 1F of the Convention Relating to the Status of Refugees 1951<sup>1</sup> are excluded from refugee status. Article 1F provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

As a consequence, *non-refoulement* protection under Article 33 of the 1951 Convention is unavailable. In addition, however, a 1951 Convention refugee will lose protection from *refoulement* if he or she falls within paragraph 2 of Article 33:

1. No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a

1 Convention Relating to the Status of Refugees 1951, 189 UNTS 150, as amended by the 1967 Protocol, 606 UNTS 267. See also, 1950 Statute of the United Nations High Commissioner for Refugees, UNGA Res. 428(V) Annex, UN GAOR Supp. (No. 20) 46, UN doc. A/1775, 14 Dec. 1950, para. 7(d):

Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:

...

- (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

The Organization of African Unity (OAU) Convention on the Specific Aspects of Refugee Problems in Africa 1969, 1001 UNTS 45, provides similarly in Art. I.5. The OAU Convention also includes serious non-political crimes as a ground for cessation in Art. I.4(f). See also, the special supplementary issue of the *International Journal of Refugee Law*, vol. 12, Autumn 2000, on 'Exclusion from Protection: Article 1F of the UN Refugee Convention and Article I(5) of the OAU Convention in the Context of Armed Conflict, Genocide and Restrictionism'. See also, J. C. Hathaway and C. J. Harvey, 'Framing Refugee Protection in the New World Disorder', 34(2) *Cornell International Law Journal*, 2001, pp. 257–320.

final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This paper will explore the content of exclusion, the relationship between Articles 1F and 33(2), and residuary guarantees where Convention protection does not avail. The last topic necessarily involves examining the relationship between *non-refoulement*, conventional and customary, and human rights guarantees, as well as those instances where only human rights provisions prevent return. Part of the problem, however, is that international refugee law is analyzed and expanded upon in domestic tribunals relying on domestic constitutions and legislation which might not incorporate the 1951 Convention in its original form, but combine different Articles into one provision in a manner possibly contrary to the Convention, and without there being an ‘International Refugee Tribunal’ to which to appeal for an authoritative ruling on the meaning of the 1951 Convention. Nevertheless, it is futile to bewail the absence of an ‘International Refugee Tribunal’ fifty years after the conclusion of the Convention, and since States’ obligations are set out in the 1951 Convention, it is the proper meaning of the Convention that provides the correct measure of the degree of fulfilment achieved by domestic legislation and jurisprudence;<sup>2</sup> States cannot rely on domestic laws to justify failure to meet treaty obligations.<sup>3</sup>

## II. The nature and function of Article 1F

Article 1F excludes the applicant from refugee status. The guarantees of the 1951 Convention are not available. Reference to the *travaux préparatoires*<sup>4</sup> shows

2 Namely, Lord Steyn in *R. v. Secretary of State for the Home Department, ex parte Adan, R. v. Secretary of State for the Home Department, ex parte Aitseguer*, UK House of Lords, 19 Dec. 2000, [2001] 1 All ER 593 at 605:

It follows that, as in the case of other multilateral treaties, the [1951 Convention] must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention on the Law of Treaties 1969] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. *And there can only be one true meaning.*

Emphasis added.

3 Art. 27 of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679, 1969, 1155 UNTS 331.

4 For the *travaux*, see UNHCR’s *Refworld* (CD-ROM, 8th edn, 1999); G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), especially pp. 95–114 and 147–50; and

that the exclusion clauses sought to achieve two aims. The first recognizes that refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. Due to serious transgressions committed prior to entry, the applicant is not deserving of protection as a refugee – there is an intrinsic link ‘between ideas of humanity, equity and the concept of refuge’.<sup>5</sup> The second aim of the drafters was to ensure that those who had committed grave crimes in the Second World War or other serious non-political crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations, did not escape prosecution.<sup>6</sup> Nevertheless, given that Article 1F represents a limitation on a humanitarian provision, it needs to be interpreted restrictively. It only applies to pre-entry acts by the applicant. Given the potential consequences of excluding someone from refugee status,

P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis* (Cambridge University Press, 1995). See also, P. Shah, ‘Taking the “Political” out of Asylum: The Legal Containment of Refugees’ Political Activism’, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999), p. 119 at pp. 130 *et seq.*

- 5 See Standing Committee of the Executive Committee of the High Commissioner’s Programme, ‘Note on the Exclusion Clauses’, 47th Session, UN doc. EC/47/SC/CRP.29, 30 May 1997, para. 3. Care must be taken, however, to ensure that no appearance of partiality develops. The difference in treatment received in some Western States by members of an armed group fighting one country and the members of another armed group fighting another country in the Middle East has led to criticism from some quarters.
- 6 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, statements of Herment (Belgium) and Hoare (UK). There was a degree of confusion, however, between the fear that asylum might confer immunity upon serious international criminals and the issue of priority between extradition treaties and the 1951 Convention, although that was inevitable where extradition was the sole method of bringing perpetrators of such serious crimes before a court with jurisdiction to prosecute. See A/CONF.2/SR.24, SR.29, and SR.35, item 5(a), 27 and 28 Nov. and 3 Dec. 1951, Conference of Plenipotentiaries. See also, Weis, above n. 4, at p. 332. Cf. Sub-Committee of the Whole on International Protection, ‘Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, UN doc. EC/SCP/66, 22 July 1991, interim report annexed thereto, para. 54:

Most States which have replied permit the extradition of refugees in accordance with relevant legislation and/or international arrangements if the refugee is alleged to have committed an extraditable offence in another country. A number of States, however, exclude the extradition of a refugee if, in the requesting State, he or she would be exposed to persecution on the grounds mentioned in Article 1 of the [1951] Convention, if he or she would not be given a fair trial (Article 6 of the European Human Rights Convention) or would be exposed to inhuman and degrading treatment (*ibid.*, Article 3). One State generally prohibits the extradition of a refugee to his/her country of origin. In two States, the extradition of a refugee is specifically excluded: in one because refugees, as regards extradition, are treated as nationals of the country and, therefore, by definition, cannot be extradited; in the other because refugees are protected against extradition by the constitution. Two States, on the other hand, permit the extradition of a refugee to a ‘safe third country’, i.e. a country other than the country of origin.

See also, J. Fitzpatrick, ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’, 12 *International Journal of Refugee Law* (Supp.), 2000, p. 272.

Article 1F must be applied sparingly and only where extreme caution has been exercised.<sup>7</sup>

### III. The contemporary context of Article 1F

The past decade has seen ever more restrictive responses to asylum seekers trying to obtain refugee status in Western Europe and North America.<sup>8</sup> The increased interest in Article 1F can be seen as part of that trend. Only ‘deserving’ refugees should be granted Convention status. The consequence is that Article 1F is becoming more intrinsic to status determination with the concomitant danger that all applicants are perceived as potentially excludable.<sup>9</sup> The past decade, however, has also seen an increased interest in prosecuting international criminals arising out of the conflicts in, *inter alia*, the former Yugoslavia and Rwanda. Many of the perpetrators of gross violations of the laws of war and crimes against humanity fled abroad and some have sought refugee status. The coincidence of a more restrictive approach to the interpretation of the 1951 Convention in general and the increased preponderance of war criminals in Europe,<sup>10</sup> has re-emphasized the two aims of the drafters of the 1951 Convention: protection of only the ‘deserving’ refugee; and the need to ensure that serious international criminals do not escape punishment.<sup>11</sup>

On the other hand, international criminal law has progressed since 1951. Extrajurisdiction to the *locus delicti* is no longer the only practical way to ensure that offenders

7 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), para. 149.

8 See A. Travis, ‘Analysis’, *The Guardian*, 5 Jan. 2001, p. 19. At the same time, the vast majority of refugees have remained in neighbouring countries to those from which they fled and have rarely reached Western Europe or North America. During 1992–2001, 86 per cent of the world’s refugees originated from developing countries, while these countries provided asylum for 72 per cent of the global refugee population. Low-income countries host seven out of ten refugees (UNHCR, *Statistical Yearbook 2001* (Geneva, Oct. 2002), pp. 12–13). In addition, war-torn countries such as Afghanistan, Angola, Colombia, Sri Lanka, and Sudan continue to host large internally displaced populations.

9 States would argue that the General Assembly and the Security Council have both recently exhorted them to ensure that refugee status is not granted to ‘terrorists’. See, ‘Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism’, 49/60 of 9 Dec. 1994, annexed to UNGA Res. 51/210, 16 Jan. 1997. Para. 3 reaffirms that States should take appropriate measures before granting refugee status so as to ensure ‘the asylum-seeker has not participated in terrorist acts’. See also, UNSC Res. 1269 (1999), 19 Oct. 1999, para. 4, and the comments of the French member of the Security Council, A. Dejammet, on the refusal of asylum to terrorists; and UNGA Res. 50/53, 11 Dec. 1995.

10 Alleged perpetrators of the Rwandese genocide have been found in Belgium and the UK.

11 See P. van Krieken, ‘Article 1F: An Introduction’, lecture 1 at the Amsterdam seminar ‘Article 1F and Afghan Asylum Seekers: Towards a Common Strategy’, 8–9 June 2000, organized by the Netherlands Immigration and Naturalization Service on behalf of a High Level Working Group of the European Union (EU).

are punished. At a particular level, those who have committed crimes within the geographical and temporal remits of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>12</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>13</sup> established by the Security Council, which crimes would fall within Article 1F, can be prosecuted away from the *locus delicti*. In part, this is to ensure a fair and effective trial, but it also removes the fear of persecution. In the future, the International Criminal Court will have a broader, more general jurisdiction over a swathe of crimes all of which would fall within Article 1F, although its effectiveness will depend on the number of ratifying States.

Most interestingly, the use of universal jurisdiction in domestic courts for serious international crimes has burgeoned in recent years. The *Pinochet* cases,<sup>14</sup> if ill-health had not halted the extradition process, reveal English courts prepared to surrender the senator to Spain for torture committed in Chile. The Netherlands Supreme Court has ruled that Dutch courts have jurisdiction over war crimes and related offences committed in a war in which the Netherlands did not take part.<sup>15</sup> An Amsterdam seminar in June 2000 on 'Article 1F and Afghan Asylum Seekers'<sup>16</sup> also concluded that, if an applicant is excluded from refugee status, national and international law imposes a legal obligation to proceed to prosecution. In Germany, the Bavarian Supreme Court convicted a Bosnian Serb of abetting murder and attempted murder with respect to the death of fourteen Bosnian Muslims in 1992;<sup>17</sup> he was not convicted of any genocide-related offence for lack of *mens rea*, but, when the ICTY expressed no interest in his transfer to The Hague, the German court assumed jurisdiction to prosecute on the ground that Germany was internationally so obliged because of its commitments under the Fourth Geneva Convention 1949 and the First Additional Protocol 1977.<sup>18</sup> Most recently, the Brussels Court of

12 See below n. 33. 13 See below n. 33.

14 The final decision of the House of Lords on 24 March 1999, *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet*; *R. v. Evans and Another and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, can be found at [1999] 2 WLR 827; see also, *Pinochet 1* [1998] 3 WLR 1456, and *Pinochet 2*, [1999] 2 WLR 272; in the latter, it was held that Lord Hoffmann should have recused himself in *Pinochet 1* and that therefore the decision in *Pinochet 1* was set aside.

15 Criminal Division, 11 Nov. 1997, No. 3717 AB, cited in Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', 6302011/97/DVB, 19 Nov. 1997, at n. 2, published as Netherlands State Secretary of Justice, 'Note on Article 1F to Parliament, November 1997', in *Refugee Law in Context: The Exclusion Clause* (ed. P. van Krieken, Asser Press, The Hague, 1999), pp. 300–12.

16 See above n. 11, 'Conclusion and Recommendation § 5, Legal/Criminal Proceedings to be Applied if Article 1F is Applied'.

17 *Public Prosecutor v. Djajić*, No. 20/96, Bavarian Supreme Court (*Bayerisches Oberstes Landesgericht*), 23 May 1997, excerpted in *Neue Deutsche Wochenschrift*, 1998, p. 392. This analysis is based on the case summary by C. Safferling, 92 *American Journal of International Law*, 1998, p. 528. A Danish court has convicted a Bosnian Muslim of gross violence and murder for crimes committed in a camp near Mostar, *The Times*, 23 Nov. 1994, p. 13.

18 75 UNTS 31–417, 1950; 1125 UNTS 3–608, 1979; 16 ILM 1391, 1977.



Assizes in June 2001 convicted four Rwandan nationals of war crimes committed in Rwanda in 1994 on the basis of 1993 Belgian legislation establishing universal jurisdiction for grave violations of the 1949 Geneva Conventions and 1977 Additional Protocols.<sup>19</sup>

In the same way, international extradition law has developed since 1951. Where a serious international crime has been perpetrated, multilateral conventions now provide a duty to extradite or prosecute (*aut dedere, aut judicare*) and act as a surrogate extradition treaty if no other arrangement exists between the affected States.<sup>20</sup> Equally, however, extradition law has built in guarantees for requested fugitives – these multilateral anti-terrorist conventions all provide that extradition should be refused where there are substantial grounds for believing that he or she might be prosecuted, punished, or prejudiced on account of his or her race, religion, nationality, or political opinion.<sup>21</sup> The two most recent United Nations multilateral anti-terrorist conventions, on the Suppression of Terrorist Bombings and the Financing of Terrorism, both incorporate a non-persecution clause and extend it to ‘ethnic origin’.<sup>22</sup>

For the contemporary context of Article 1F, though, it is essential to pay due regard to the developments in international human rights law since 1951. The intervening fifty years have seen the recognition of various rights as peremptory norms,<sup>23</sup> most clearly freedom from torture. At least in so far as *non-refoulement* is

19 For details of the case, including the text of the judgment, see *Procureur-Général v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera*, <http://www.asf.be/AssisesRwanda2/fr/frStart.htm>.

20 See the Tokyo Convention of 1963 on Offences and Certain Other Acts Committed on Board Aircraft, UKTS 126 (1969), Cmnd 4230; the Convention for the Suppression of the Unlawful Seizure of Aircraft, done at The Hague, 16 Dec. 1970, 10 ILM 133, 1971; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, 23 Sept. 1971, 10 ILM 1151, 1971; the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 13 ILM 42, 1974; the Hostages Convention, 18 ILM 1456, 1979; the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO doc. SUA/CON/15, 10 March 1988, 27 ILM 668, 1988; the 1980 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 124, Cmnd 8112; the International Convention for the Suppression of Terrorist Bombings, 1998, 37 ILM 249, 1998; and the International Convention for the Suppression of the Financing of Terrorism, Annex to UNGA Res. 54/109, 25 Feb. 2000. See also, the draft Comprehensive Convention on International Terrorism, UN doc. A/C.6/55/1, 28 Aug. 2000. The major international and regional instruments dealing with international terrorism are listed in UNHCR, ‘Security Concerns’, below n. 25, at pp. 8–10.

21 See also, Art. 5 of the Council of Europe’s 1977 European Convention for the Suppression of Terrorism, ETS 90, 15 ILM 1272, 1976. In addition, see UNHCR, ‘Report of the United Nations High Commissioner for Refugees’, GAOR, 36th Session, Supp. No. 12, UN doc. A/36/12, 28 Aug. 1981, para. 24.

22 Art. 12 of the Bombings Convention and Art. 15 of the Financing of Terrorism Convention, see above n. 20. Note that membership of a particular social group is not listed as one of the grounds for persecution that would justify refusing extradition: cf. Art. 1 of the 1951 Convention.

23 See *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, ICJ Reports 1970, p. 3 at para. 34.

based on the protection of the individual from torture, and maybe more broadly, it too reflects an *erga omnes* obligation.

While increased interest in exclusion is part of a wider policy to limit refugee status in general, there is a need to review its present application in the light of developments in international criminal law, international extradition law, and international human rights law. Article 1F is not obsolete, for there are situations where the crimes are so heinous that balancing them against the fear of persecution does compromise the nature of refugee status. The Office of the United Nations High Commissioner for Refugees (UNHCR) recognizes, for instance, that Article 1F should be applied in Rwanda-type situations.<sup>24</sup> Equally, the tragic events in New York, Washington DC, and Pennsylvania of 11 September 2001 would never allow for refugee status for the perpetrators or those who planned the operation.<sup>25</sup> And the perpetrator can be informally protected if the State of refuge is concerned, but Article 1F, particularly subparagraph (b), has to be reconsidered in the light of developments since 1951.

#### IV. Article 1F

Although consideration of Article 1F is divided between the three subparagraphs, in reality an applicant for refugee status might well be excludable under more than one of them – a crime against humanity would be within Article 1F(a), but could also be a serious non-political crime and an act contrary to the purposes and principles of the United Nations.

24 Sub-Committee on Administrative and Financial Matters of Executive Committee, 'Lessons Learnt from the Rwanda Emergency', UN doc. EC/1995/SC.2/CRP.21/Rev.1, 23 June 1995, para. 10(i):

The profile of Rwandese arriving in the United Republic of Tanzania in April 1994 and Zaire in July 1994 was unique and reflected the genocide and conflict that preceded the exodus. This was not a typical refugee flight, but for the most part an orchestrated and organized mass population movement executed under coherent military and political control. From the nature of this movement, the following conclusions can be drawn: (i) despite all the problems of identification and security involved, UNHCR must continue to encourage efforts by host Governments and the international community to ensure, under Article 1F of the 1951 Convention, that persons whom there are serious grounds for considering as perpetrators of atrocities should be removed from refugee camps, excluded from refugee status and deprived of international protection and assistance. The international community should provide the necessary support and funds to assist host Governments at their request in removing criminal elements from refugee camps and in disarming armed militias; . . .

See also, UNHCR, 'Note on the Exclusion Clauses', above n. 5, paras. 22 *et seq.*; and Executive Committee, 'Report of the Eighth Meeting of the Standing Committee', 48th Session, UN doc. A/AC.96/888, 9 Sept. 1997, para. 15.

25 See UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection, UNHCR's Perspective', Position Paper, 29 Nov. 2001, para. 3.

A. Article 1F(a)<sup>26</sup>

Article 1F(a) provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments<sup>27</sup> drawn up to make provision in respect of such crimes; . . .

This is a more general provision than is to be found in paragraph 7(d) of the Statute of the UNHCR,<sup>28</sup> which refers to crimes ‘mentioned in Article VI of the London Charter of the International Military Tribunal’.<sup>29</sup> However, interpretation of Article 1F is therefore not fixed in the 1946 definition, although the London Charter crimes are certainly included within sub-paragraph (a). In addition, regard should be had to the Geneva Conventions of 1949 and the Additional Protocols of 1977,<sup>30</sup> the 1948 Genocide Convention,<sup>31</sup> the Draft Code of Crimes Against the

26 See UNHCR, ‘The Exclusion Clauses: Guidelines on their Application’, 1 Dec. 1996, paras. 19–48. See also, J. Pejić, ‘Article 1F(a): The Notion of International Crimes’, 12 *International Journal of Refugee Law* (Supp.), 2000, p. 11. See also, J. Rikhof, ‘War Crimes Law as Applied in Canada’, in *Modern Global Crises and War Crimes: Canada, Peacekeeping and International Humanitarian Law* (ed. R. Wiggers, Centre for Foreign Policy Studies, Dalhousie University, 2002).

27 To the extent that customary international law in this area provides interpretation and analysis of the crimes as set out in the various instruments, then regard must be had to it as well. The reference in Art. 1F(a) to crimes ‘as defined in . . . international instruments’ would only exclude a crime that existed solely in customary international law, but there is no such crime.

28 See above n. 1.

29 Cited in judgment of the International Military Tribunal at Nuremberg, which may be found in *Trial of the Major War Criminals Before the International Military Tribunal* (1948), vol. XXII, pp. 413–14. See also 41 *American Journal of International Law*, 1947, p. 172.

(a) Crimes against Peace: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes: namely, violations of the laws and customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

30 See above n. 18.

31 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS 277 (1951).

Peace and Security of Mankind,<sup>32</sup> the Statutes of the ICTY and the ICTR<sup>33</sup> and their jurisprudence,<sup>34</sup> and the Statute of the International Criminal Court (ICC).<sup>35</sup> What is clear is that there is no one accepted definition of the Article 1F(a) crimes, although the later documents (the Statutes of the ad hoc tribunals and the ICC) carry weight as a consequence of the more recent analysis made for their preparation. Although the definition for the two ad hoc tribunals is very general by comparison with Articles 6–8 of the Rome Statute, their jurisprudence will inform the interpretation of the specific clauses in the latter instrument once the ICC is sitting. Nevertheless, the differences to be found in those instruments, partly as a consequence of the differing circumstances with which each tribunal is or will be tasked, highlight the fact that the meaning of war crimes in international law should receive a dynamic interpretation.

That being said, it leaves crimes against peace in an uncertain state as a crime that an individual can commit. While the crime of aggression is listed in Article 5 of the Rome Statute, subparagraph 2 goes on to state that:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Under Articles 121 and 123, a review conference to consider, *inter alia*, the ‘crime of aggression’ can only be held seven years after the entry into force of the Statute. In the meantime, it is clear that there is no accepted definition of the crime of aggression giving rise to individual criminal responsibility.<sup>36</sup> There is debate as to whether only those in a position of high authority in a State can be responsible for

32 To the extent that the International Law Commission’s Code reflects customary international law, its definition of aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes is another authoritative source of interpretation: UN doc. A/51/332, 1996.

33 The Statute of the ICTY was adopted by UNSC Res. 827 (1993) and may be found in 32 ILM 1192, 1993; the Statute of the ICTR is to be found in UNSC Res. 935 and 955 (1994), reprinted in 5 *Criminal Law Forum*, 1994, p. 695.

34 See, *Duko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY, Case No. IT-94-1-AR72, 1995, at para. 134. See also, *The Prosecutor v. Kupreskic*, Case No. IT-95-16-T, 14 Jan. 2000.

35 Done at Rome, 17 July 1998, 37 ILM 999, 1998, as corrected by the *procès-verbaux* of 10 Nov. 1998 and 12 July 1999. See also, R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).

36 International responsibility for aggression is defined in the 1974 Resolution on the Definition of Aggression, 14 Dec. 1974, UNGA Res. 3314 (XXIX), 69 *American Journal of International Law*, 1975, p. 480, as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition’.

a crime against peace, but if individual responsibility for the crime against peace is to be consistent with the 1974 General Assembly Resolution on the Definition of Aggression,<sup>37</sup> then, as well as the leaders of a State, it might include leaders of rebel groups in non-international armed conflicts which seek secession, but few if any others.

Crimes against humanity in international law are not defined as precisely as domestic criminal laws are, but differences in interpretation seem to be limited to discrete judicial subsystems. Part of crimes against humanity under Article 1F is the crime of genocide which has not been altered from its 1948 Convention definition in any of the recent Statutes,<sup>38</sup> although case law from the tribunals has interpreted its meaning.<sup>39</sup> Beyond genocide, however, the content of crimes against humanity is less uniform. Article 5 of the ICTY Statute<sup>40</sup> lays down that crimes against humanity take place in armed conflict. The modern view is that crimes against humanity can take place in peacetime,<sup>41</sup> a fact recognized in the statutes of the ICTR<sup>42</sup> and the ICC.<sup>43</sup> The latter two instruments require that crimes against humanity

37 See above n. 36.

38 ICTY (Art. 4), above n. 33; ICTR (Art. 2), above n. 33; and ICC (Art. 6), above n. 35.

39 E.g. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998.

40 See above n. 33. Article 5 ('Crimes against humanity') provides:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; [and] (i) other inhumane acts.

And see, *Tadić* above n. 34, *Kupreskic*, above n. 34, and *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T 10, 10 Dec. 1998.

41 Acknowledged by the Tribunal in *Tadić*, above n. 34, at paras. 140–1. See also, M. C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law*, 1994, p. 457.

42 See above n. 33. Article 3 ('Crimes against humanity') provides

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; [and] (i) other inhumane acts.

43 See above n. 35. Article 7 ('Crimes against humanity') provides:

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;

(Footnote 43 continued)

- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) ‘Extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.

be part of a widespread or systematic attack against any civilian population,<sup>44</sup> and that is the more current interpretation rather than restricting crimes against humanity to times of armed conflict. As such, given that crimes against humanity can be committed under the Rome Statute as part of an organizational policy,<sup>45</sup> they could include terrorism.<sup>46</sup>

There is further divergence as to the place of 'persecution' in crimes against humanity in the three instruments.<sup>47</sup> While the Statutes of the ICTY and ICTR list a separate crime of persecution in identical terms, the opening paragraph of Article 3 of the Statute of the ICTR requires that all the listed crimes must be part of a widespread or systematic attack against a civilian population 'on national, political, ethnic, racial or religious grounds'. Persecution is thus a prerequisite of all ICTR crimes against humanity rather than simply a separate crime. The Rome Statute is much more detailed and, while persecution is a separate crime, it is parasitic, having to be perpetrated in connection with one of the other crimes in Article 7 or Articles 6 or 8. With respect to persecution, the ICTY Statute best reflects current thinking. Furthermore, while the Rome Statute is not geographically or temporally limited and has been agreed by States in international conclave, it is narrower than the customary international law of crimes against humanity.<sup>48</sup> The Article 1F definition should not be limited by the recent Statutes, although given the specific remit of the two ad hoc tribunals, UNHCR should take the Rome Statute as reflecting an understanding more broadly agreed within the international community and the one which will continue to develop as cases come before the ICC.

As for war crimes, the various Statutes are equally as divergent, although, given the non-international character of the Rwanda conflict, this was inherent. What is clear as a consequence of the Statutes and the jurisprudence of the two ad hoc tribunals is that, as well as grave breaches of the Geneva Conventions and First Additional Protocol in international armed conflicts,<sup>49</sup> violation of the laws and customs of war, in international and non-international conflicts, can give rise to individual criminal responsibility.<sup>50</sup> Furthermore, individual criminal responsibility attaches to breaches of common Article 3 of the 1949 Geneva Conventions in

44 Art. 7.2(a) of the Rome Statute, above n. 35, defines such attacks as: 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.' Given that crimes against humanity have been explicitly removed from the sphere of armed conflicts, 'attack' could not be restricted to the meaning ascribed in Art. 49 of Protocol 1, 1977, above n. 18.

45 Art. 7.2(a) and (i), above n. 35. 46 See below on Art. 1F(b).

47 For the traditional analysis of the place of persecution in crimes against humanity, see Fenrick, 'The Prosecution of War Criminals in Canada', 12 *Dalhousie Law Journal*, 1989, p. 256 at pp. 266 *et seq.*

48 See paras. 140–1 of *Tadić*, above n. 34. And see *Fédération Nationale des Déportés et Internés Résistants et Patriotes et al. v. Barbie*, French Court of Cassation, 78 ILR 125, 1985.

49 Respectively, Arts. 49 (I); 50 (II); 129 (III); 146 (IV); and 85 (Protocol 1), above n. 18.

50 *Tadić*, above n. 34, at paras. 89 and 96 *et seq.*

non-international armed conflicts. Referring to the international interest in the prohibition of serious breaches of customary rules and principles in internal conflicts, various military manuals, domestic legislation in the former Yugoslavia and Belgium, and two Security Council resolutions,<sup>51</sup> the ICTY held in paragraph 134 of its judgment that:

[all] of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

If it had been limited to parts of common Article 3 and specified provisions of Additional Protocol II, then it would have been uncontroversial,<sup>52</sup> but the Tribunal's robust approach from 1995 has been followed in part in Article 8 of the Rome Statute.<sup>53</sup> The situation now is that breaches of the laws of war are always unlawful but not necessarily criminalized. Custom prescribes that some give rise to individual criminal responsibility and the Rome Statute provides a narrower list of crimes over which the International Criminal Court will exercise jurisdiction.<sup>54</sup> Article 1F

51 *Tadić*, above n. 34, at paras. 129–33.

52 There would not appear to be the required degree of specificity to create crimes in common Art. 3 as a whole. The principle of *nullem crimen sine lege* argues against such a broad understanding of the criminal scope of common Art. 3. See also, the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* case, Permanent Court of International Justice (1935), Series A/B, No. 65 at pp. 52–3:

Instead of applying a penal law equally clear to both the judge and the party accused . . . there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely on the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.

Cf. Decision of 3 Nov. 1992, Case No. 5 StR 370/92, *Border Guards Prosecution* case, German Federal Criminal Court (*Bundesgerichtshof Strafsenat*), published in English in 100 ILR 364, available in German at <http://www.uni-wuerzburg.de/dfr/dfr.bsjahre.html>. In this case, the court rejected a defence claim based on *nullem crimen sine lege* on the basis that the guards should have known that the defence they relied on under the former East German law was contrary to the human rights obligations of East Germany itself and that 'the act, when committed, was criminal according to the general principles of law recognized by the international community' (*ibid.*, p. 389). The court used human rights as set out in the International Covenant on Civil and Political Rights (hereinafter 'ICCPR') to strike down the defence.

53 See above n. 35, which lists fifty crimes, thirty-four with respect to international armed conflicts and sixteen specifically applying in non-international armed conflicts. See also the International Committee of the Red Cross's forthcoming review of the customary international law of armed conflict.

54 In some cases, the Rome Statute may have gone further than custom in the imposition of individual criminal responsibility, but this is not the norm. E.g. Art. 8.2(b)(xxvi):



of the 1951 Convention would exclude those committing crimes as prescribed by customary international law and is more in line with the ICTY's analysis.

It should also be borne in mind that, according to Article 27 of the Statute of the International Criminal Court, official capacity, even as head of State, is no excuse.<sup>55</sup> Furthermore, command responsibility includes military and civilian commanders and superior orders will only be an excuse in the rarest of cases.<sup>56</sup> The net is drawn widely, therefore, around those who have 'committed' Article 1F(a) crimes.

## B. Article 1F(b)<sup>57</sup>

Article 1F(b) provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: . . .

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; . . .

While the complex provisions of Article 1F(b) are fleshed out below, there are some basic issues that influence all elements of the interpretation. Given that a status determination hearing can never replicate a full criminal trial of the issues, it is nevertheless fundamental to the decision-making process that exclusion is on the basis that there are serious reasons for considering that the applicant has committed a serious non-political crime. Therefore, the hearing should assume the applicant innocent until 'proven guilty', the benefit of the doubt must be accorded to the applicant given the very serious consequences, and there should be no automatic presumptions, each case being viewed on its own facts.

There are various issues concerning the traditional interpretation of Article 1F(b) that need to be addressed in this context. With respect to 'terrorism', an initial

2. For the purpose of this Statute, 'war crimes' means: . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (xxvi)  
Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

See also, Arts. 4 and 5 of Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, 2 *American Journal of International Law Supp.*, 1908, p. 117; Art. 38 of the 1989 Convention on the Rights of the Child, UNGA Res. 44/25, Annex, 44 UN GAOR Supp. (No. 49), p. 167, UN doc. A/44/49 (1989). It is arguable that custom did not even render recruitment of under-fifteens unlawful, let alone criminal.

55 The *Pinochet* cases, above n. 14, hold only that former heads of State can be prosecuted for acts not within their official capacity.

56 Arts. 28 and 33 of the Rome Statute, above n. 35. See also, Art. 86 of the First Additional Protocol, above n. 18.

57 See also, W. Kälin and J. Künzli, 'Article 1F(b): Freedom Fighters, Terrorists and the Notion of Serious Non-Political Crimes', 12 *International Journal of Refugee Law (Supp.)* 2000, p. 46.

problem is that international law provides no definition,<sup>58</sup> although the United Nations has outlawed several crimes deemed ‘terrorist’ in the popular perception.<sup>59</sup> Labelling something as terrorism is a matter of political choice rather than legal analysis, distinguishing it in some indecipherable way from the more ‘acceptable’ conduct of the so-called freedom fighter.<sup>60</sup> It is a buzz word, a blanket term for violent crimes and, as such, too imprecise to assist critical analysis. Furthermore, the United Nations has done little to clarify the issue.<sup>61</sup> Originally, any reference to terrorism was accompanied by a reaffirmation of the right of ‘peoples’ to use any means to achieve self-determination from colonial or racist regimes;<sup>62</sup> terror is terror:

58 Equally, most countries in Western Europe have not managed to define ‘terrorism’ for the purposes of their domestic criminal law; cf. the UK Terrorism Act 2000, which is not to say, however, that the UK definition answers all possible questions.

59 See the conventions listed above at n. 20. On the amorphous nature of terrorism, see G. Gilbert, ‘The “Law” and “Transnational Terrorism”’, 26 *Netherlands Yearbook of International Law*, 1995, p. 3; and G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff, The Hague, 1998), especially pp. 251–61. See also, UNHCR, ‘Exclusion Guidelines’, above n. 26, at para. 66.

60 Reminding one of Humpty Dumpty’s views on the meaning of words in Lewis Carroll’s *Through the Looking Glass and What Alice Found There* (1872, reprinted 1998), p. 190: ‘When I use a word . . . it means just what I choose it to mean – neither more nor less.’ Even perpetrators of serious international crimes, such as hijacking, have been protected from *refoulement* in the past. See, Case No. 72 XII 77, *Antonin L. v. Federal Republic of Germany*, 80 ILR 673 (Bavarian Higher Administrative Court (BayVGH), 7 June 1979), where it was held that an asylum application could be accepted from a person who was about to be prosecuted for hijacking, a serious international crime. The court decided that the applicant had hijacked the plane to flee the then Czechoslovakia to escape persecution for his political opinions. In *Abdul Hussain*, unreported, 17 Dec. 1998, the English Court of Appeal acquitted hijackers who fled Iraq on the basis that they had acted under duress.

61 See L. C. Green, ‘International Crimes and the Legal Process’, 29 *International and Comparative Law Quarterly*, 1980, p. 567 at p. 582.

62 UNGA Res. 3034 (XXVII), 1972.

#### The General Assembly

1. Expresses deep concern over increasing acts of violence which endanger or take innocent human lives or jeopardize fundamental freedoms;

2. Urges States to devote their immediate attention to finding just and peaceful solutions to the underlying causes which give rise to such acts of violence;

3. Reaffirms the inalienable right of self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations;

4. Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms;

5. Invites States to become parties to the existing international conventions which relate to various aspects of the problem of international terrorism.

See also, UNGA Res. 31/102, 1976; UNGA Res. 32/147, 1977; UNGA Res. 34/145, 1979; UNGA Res. 36/109, 1981; UNGA Res. 38/130, 1983; UNGA Res. 61/40, 1985; UNGA Res. 44/29, 1989;

What [terrorist groups seeking self-determination] and other, less structured terrorist groups have in common is far more significant in applying the political offence exemption than the ways in which they may differ. All these groups exhibit a willingness to engage in the indiscriminate killing of people to achieve political ends.<sup>63</sup>

Even those fighting for self-determination should at minimum obey common Article 3 of the Geneva Conventions 1949.<sup>64</sup>

The United Nations has spoken more clearly against terrorism in recent years. The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism 49/60 of 9 December 1994<sup>65</sup> provides no definition of terrorism, but holds in paragraph 2 that the methods and practices of terrorism are contrary to the purposes and principles of the United Nations.<sup>66</sup> While it is questionable whether the General Assembly through an annexed declaration can restate the purposes and principles of the United Nations, the Declaration goes on to encourage States to deem terrorist crimes non-political for the purposes of extradition law.<sup>67</sup> Furthermore, paragraph 3 reaffirms that States should take appropriate measures before granting refugee status so as to ensure 'the asylum-seeker has not participated in terrorist acts'.<sup>68</sup> The 1998 International Convention for the Suppression of Terrorist Bombings<sup>69</sup> eschews a definition of terrorism, but Article 2 outlaws those international bombings in public places causing death or serious bodily injury or extensive destruction resulting in major economic loss. A similar stance of listing violent crimes but providing no definition of terrorism can be seen in the Council of Europe's much earlier 1977 European Convention for the Suppression of Terrorism.<sup>70</sup> Two more recent UN documents have attempted to

UNGA Res. 46/51, 1991; cf. UNGA Res. 48/122, 1993. For a full review of the UN's response to terrorism in the period after 1972, see Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Review of Further Developments in Fields with which the Sub-Commission has been or may be Concerned: Review of Issues not Previously the Subject of Studies but which the Sub-Commission has Decided to Examine', Preliminary Report on Terrorism and Human Rights, UN doc. E/CN.4/Sub.2/1999/27, fifty-first session, 7 June 1999, paras. 6–15.

63 Prepared statement of Judge Sofaer, Legal Adviser, US State Department, at the Senate Hearing on the Anglo-US Supplementary Extradition Treaty, S.HRG 99-703 re TR.DOC.99-8, 1 Aug. 1985, at p. 263.

64 On the other hand, UNHCR is equally prepared to engage in these fine distinctions. UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', 1 April 1988, paras. 21 and 22, states that, where the applicant was engaged in a UN-recognized struggle for national liberation, that is a mitigating factor to be taken into account before exclusion.

65 See above n. 9. 66 See below on Art. 1F(c). 67 See above n. 9, para. 6.

68 See also, UNSC Res. 1269 (1999), para. 4, and the comments of the French member of the Security Council, A. Dejammet, on the refusal of asylum to terrorists, above n. 9.

69 See above n. 20.

70 See above n. 21. The Parliamentary Assembly of the Council of Europe provided a definition in Recommendation 1426, 20 Sept. 1999, although some of the language is imprecise:

define terrorism.<sup>71</sup> General Assembly Resolution 53/108<sup>72</sup> on Measures to Eliminate International Terrorism declares in paragraph 2 that:

criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

Thus, it is crimes intended to inculcate terror in the population for political purposes. The International Convention for the Suppression of the Financing of Terrorism<sup>73</sup> defines terrorism in part by reference to other UN anti-terrorist conventions<sup>74</sup> and additionally in Article 2(1)(b) as:

(Footnote 70 continued)

5. The Assembly considers an act of terrorism to be 'any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public'.

71 Moreover, the Special Rapporteur on Terrorism and Human Rights, L. K. Koufa, has promised to elaborate on 'acts of terrorism' in future reports. See Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Preliminary Report on Terrorism and Human Rights', above n. 62, para. 43.

72 UNGA Res. 53/108, 26 Jan. 1999.

73 See above n. 20; and see *Secretary of State for the Home Department v. Rehman*, [2000] 3 All ER 778 (English Court of Appeal).

74 See above n. 20. The OAU Draft Convention on the Prevention and Combating of Terrorism, CAB/LEG/24.14/vol. 1, adopts a similar approach in Art. 1, with a partial definition in subpara. 2:

'Terrorist act' means any act or threat of act committed with a terrorist intention or objective directed against the nationals, property, interests or services of any State Party or against the foreign nationals living on its territory and which is prohibited by its legislation, as well as any act which is aimed at financing, encouraging, providing training for or otherwise supporting terrorism. The term terrorist act also includes, but is not limited to, any act of violence or threat of violence, irrespective of the reasons or objectives, carried out individually or collectively, calculated or intended to provoke a state of terror in the general public, a group of persons or particular persons in the territory of any one of the States Parties.

Art. 3.1 provides that armed struggle for self-determination will not count as terrorism; see above n. 62. See also, the draft Comprehensive Convention on International Terrorism, above n. 20, Art. 2.1:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss;

[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict,<sup>75</sup> when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or international organization to do or abstain from doing any act.<sup>76</sup>

Although Article 2(1)(b) is much more specific than paragraph 2 of Resolution 53/108, in practice they will cover the same sort of crimes – those intended to promote political change or conservatism by means of violent intimidation. In sum, although there has been some movement towards providing terrorism with specificity, there is as yet no internationally agreed definition and the attempts so far are still vague and open-ended.<sup>77</sup>

(Footnote 74 continued)

when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

Art. 3 excludes crimes taking place wholly within one State which were committed by a national of that State in most cases.

75 Author's footnote: *Quaere*, what of the position of a police officer in a situation not reaching the level of an armed conflict according to common Art. 3 of the Geneva Conventions 1949?

76 Approved by the Supreme Court of Canada in *Suresh*, below n. 142, at para. 98.

77 The EU anti-terrorism measures of 27 Dec. 2001, 2001/927/EC, 2001/930/CFSP, and 2001/931/CFSP, OJ 2001 L344/83, 90, and 93, 28 Dec. 2001, provide a very long definition. 2001/931/CFSP, Article 1.3, provides:

For the purposes of this Common Position, 'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
  - (a) attacks upon a person's life which may cause death;
  - (b) attacks upon the physical integrity of a person;
  - (c) kidnapping or hostage taking;
  - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
  - (e) seizure of aircraft, ships or other means of public or goods transport;
  - (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
  - (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
  - (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
  - (i) threatening to commit any of the acts listed under (a) to (h);
  - (j) directing a terrorist group;

After the events of 11 September 2001, the United Nations has come out much more strongly against terrorism, although without any definition of terrorism. United Nations Security Council Resolution 1373,<sup>78</sup> adopted under Chapter VII of the United Nations Charter, called upon all States to:

[take] appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

and to 'ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts'. As UNHCR has pointed out,<sup>79</sup> however, the refugee protection instruments have never provided a safe haven for terrorists.<sup>80</sup>

To be excluded under Article 1F(b), the applicant must have committed a serious non-political crime. In what circumstances will someone have committed such a crime? There does not need to be proof sufficient for a criminal trial, but there should be serious reasons for considering that the applicant did commit a serious non-political crime. Obviously, as well as perpetrating the completed offence, it includes inchoate offences such as attempts, conspiracies, and incitement. Difficulties arise where the applicant is a member of a group that engages in serious non-political crimes. Is mere membership of a group sufficient to exclude?<sup>81</sup> Are all members complicit?<sup>82</sup> Is constructive knowledge adequate to impose individual criminal responsibility? Under Article 28 of the Rome Statute of the International Criminal Court, a commanding officer or person in an equivalent position shall be responsible where:

*(Footnote 77 continued)*

- (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, 'terrorist group' shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. 'Structured group' means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

78 28 Sept. 2001. See para. 3(f) and (g). See also, UNSC Res. 1368, 12 Sept. 2001, and UNGA Res. 56/1, 18 Sept. 2001.

79 UNHCR, 'Security Concerns', above n. 25, at paras. 3 and 12.

80 Despite the fact that not one of those involved was a refugee or an asylum seeker, this has not stopped States engaging in one of their less edifying responses and scapegoating refugees after 11 Sept. 2001, e.g. the UK Anti-Terrorism, Crime and Security Act 2001 and the EU anti-terrorism measures, above n. 77, 2001/930/CFSP at Arts. 6, 16, and 17.

81 See below, section V.D, 'Standard of proof for Article 1F and membership of the group'.

82 See e.g. Art. 3(e) of the Genocide Convention 1948, above n. 31.

(a) . . . (i) [t]hat military commander or person either knew or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes; and

(ii) [t]hat military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution [and where]

(b) . . . (i) [t]he superior either knew, *or consciously disregarded information which clearly indicated*, that the subordinates were committing or about to commit such crimes;

(ii) [t]he crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) [t]he superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>83</sup>

Nevertheless, the international law of armed conflict has a highly developed understanding of command responsibility not to be found in ordinary criminal law to which Article 1F(b) applies. Command responsibility is very specific and is inappropriate as a basis for attributing individual criminal responsibility on the basis of complicity. Article 1F(b) only excludes from refugee status those who have committed a serious non-political crime. According to the UNHCR 'Exclusion Guidelines',<sup>84</sup> membership *per se*, whether of a repressive government or of an organization advocating violence, should not be enough to exclude under Article 1F(b).<sup>85</sup> Seniority within the government or organization might provide 'serious reasons for considering' that the applicant was a party to the preparation of a serious non-political crime perpetrated by others. However, given that Article 1F(b) represents a limitation on an individual right – *non-refoulement* – it should be interpreted restrictively and, without evidence of involvement in a specific serious non-political crime, it would be contrary to the spirit and intention, if not the very language, of the 1951 Convention to exclude someone in that position for mere membership. To the extent that the ad hoc tribunals have found civilians to be liable for war crimes based on their position in the command hierarchy,<sup>86</sup> however, senior members of a government or an organization which carries out Article 1F(b) crimes could be found to have constructive knowledge sufficient for the purpose of exclusion. United States practice, though, is not to exclude on the grounds of membership alone; on the other hand, Canada and Germany will exclude simply for membership.<sup>87</sup>

83 See above n. 35 (emphasis added). 84 See above n. 26, paras. 40 and 45 *et seq.*

85 See also, UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 64, at paras. 14 *et seq.*

86 Namely, *Akayesu*, above n. 39.

87 Meeting between the author and UNHCR staff on the subject of 'asylum, terrorism and extradition', UNHCR headquarters, Geneva, 10 Nov. 2000. See also, e.g. s. 19(1) of the Canadian Immigration Act.

The next issue concerns the non-political character of the crime and how closely interrelated the application of Article 1F(b) should be with the law of extradition, particularly the political offence exemption.<sup>88</sup> First, for the purposes of extradition law, there are very few crimes specifically designated non-political. Some older extradition treaties exclude from the political offence exemption attempts on the life of the head of State in *attentat* clauses.<sup>89</sup> Before the Conventions on Terrorist Bombings<sup>90</sup> and the Financing of Terrorism,<sup>91</sup> multilateral anti-terrorist treaties did not exclude the political offence exemption. The somewhat special Genocide Convention and Anti-Apartheid Convention did render their proscribed crimes non-political,<sup>92</sup> but there were no other universal treaties excluding the political offence exemption.<sup>93</sup> In Europe, the 1977 European Convention for the Suppression of Terrorism<sup>94</sup> adopted an approach of declaring non-political for the purposes of extradition between parties to that Convention crimes under certain United Nations multilateral anti-terrorist conventions. In addition, it excluded from the exemption other crimes that would usually be associated with terrorist attacks.<sup>95</sup>

88 See the Supreme Court of Canada in *Attorney-General v. Ward*, [1993] 2 SCR 689. See in general, Gilbert, *Transnational Fugitive Offenders*, above n. 59, ch. 6.

89 See I. A. Shearer, *Extradition in International Law* (Manchester, 1971), p. 185. The corollary must be that otherwise such crimes would be within the protection of the exemption. For a modern example of the *attentat* clause, see Annex 1 to the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, LMM(90)32:

1. It may be provided by a law in any part of the Commonwealth that certain acts shall not be held to be offences of a political character including—

- (a) an offence against the life or person of a Head of State or a member of his immediate family or any related offence . . .
- (b) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence . . .
- (c) murder, or any related offence as aforesaid;
- (d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on the parties thereto an obligation either to extradite or to prosecute the person sought.

2. Any part of the Commonwealth may restrict the application of any of the provisions made under paragraph 1 to a request from a part of the Commonwealth which has made similar provisions in its laws.

90 See above n. 20. 91 See above n. 20.

92 Genocide Convention, above n. 31, Art. VII; Convention on Suppression and Punishment of the Crime of Apartheid 1973, Art. XI(2), 13 ILM 50, 1974.

93 Indeed, hijackers have been held to have committed a political offence based on the nature of the regime they had fled. See *R. v. Governor of Brixton Prison, ex parte Kolczynski et al.*, High Court of Justice (Queen's Bench Division), [1955] 1 QB 540, [1955] 1 All ER 31; and *In Re Kavic, Bjelanovic and Arsenijevic*, 19 ILR 371 (Swiss Federal Tribunal), 1952.

94 See above n. 21.

95 European Convention on the Suppression of Terrorism, Art. 1 provides:

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:



Furthermore, it gave parties the discretion to exclude a much broader range of *soi-disant* ‘terrorist’ crimes.<sup>96</sup> Nevertheless, the Convention has not been a whole-hearted success,<sup>97</sup> and represents a regional response whereas the 1951 Convention is universal.

The next question pertaining to the interrelationship between Article 1F(b) and extradition law is the fact that it contains no reference to extradition, unlike paragraph 7(d) of the 1950 Statute.<sup>98</sup> There are those who, drawing on parts of the *travaux préparatoires* to the 1951 Convention, assert that Article 1F(b) only applies to those unprosecuted for their crimes who are, thus, extraditable. There is nothing on the face of the Convention to that end and Article 1F(a) and Article 1F(c), *mutatis mutandis*, are not so limited. Article 1F(b) could be used where a person had been convicted of a serious (even if not ‘particularly’ serious) crime and has already served her or his sentence if one simply has regard to the text.<sup>99</sup> Even if one restricts Article 1F(b) to cases where the applicant would be extraditable under the receiving State’s law, then extradition law allows for the surrender of convicted fugitives who have yet to serve out their full sentence.<sup>100</sup> Furthermore, if the drafters were tying

- (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

96 European Convention on the Suppression of Terrorism, Art. 2 provides:

1. For the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.

2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.

3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

See also, Annex 1 to the Commonwealth Scheme, above n. 89.

97 See Gilbert, “‘Law’ and ‘Transnational Terrorism’” above n. 59. Recommendation 1426, above n. 70, para. 15, calls for a modification of the European Convention on Extradition 1957 so that the political offence exemption does not provide a right to asylum for terrorists.

98 See above n. 1.

99 *Tenzin Dhayakpa v. Minister for Immigration and Ethnic Affairs*, Federal Court of Australia, (1995) 62 FCR 556. See also, UNHCR, ‘Exclusion Guidelines’, above n. 26, at para. 56.

100 It is interesting to postulate upon the situation where an offender is released on parole but ordered to remain in the country. If ex-convicts, who might be deemed to constitute a particular

Article 1F(b) to extradition law, why did they not adopt in Article 1F(b) the language of paragraph 7 of the 1950 Statute<sup>101</sup> or just say: ‘He would be extraditable under the asylum State’s extradition laws’? Such a provision would effectively incorporate the political offence exemption. As it stands, Article 1F(b) does not link denial of refugee status with impending extradition – thus, an applicant could have committed a serious non-political crime in a third State with which the receiving State has no extradition treaty, and the only State to which he or she could be returned following denial of refugee status under Article 1F(b) would be his or her country of origin where he or she would face persecution.<sup>102</sup> In addition, if Article 1F(b) is to be tied to extraditability, would there be a different approach where the crime was one of universal jurisdiction? And what about a serious non-political crime that had no equivalent in the receiving State’s laws, thus failing the requirement of double criminality, or if the applicant could claim immunity for the crimes? There cannot be that direct a link between Article 1F(b) and the law of extradition.<sup>103</sup>

On the other hand, Article 1F(b) should be ‘related to’,<sup>104</sup> although not limited by, the jurisprudence developed with respect to the political offence exemption. It needs to be borne in mind that the political offence exemption is only about 150 years old, there have not been that many cases in extradition law where its meaning could be developed, and its interpretation is dynamic. The United States approach focuses on the existence of a political uprising and then whether the crime for which the fugitive is requested is part of that uprising. As such, it has even protected Nazi war criminals.<sup>105</sup> The United Kingdom approach used to be based solely on the remoteness of the crime from the ultimate goal of the fugitive’s organization.<sup>106</sup> The Swiss approach, to which the United Kingdom now also subscribes, adopts the

social group, suffer discrimination in the employment market and the State does not protect them, following *Gashi and Nikshiqi v. Secretary of State for the Home Department*, Immigration Appeal Tribunal, Appeal No. HX/ 75677/95 (13695), 22 July 1996, [1997] INLR 96, would Art. 1F(b) deny her or him refugee status that would otherwise be accorded?

101 See above n. 1.

102 Namely, UNHCR, ‘Exclusion Guidelines’, above n. 26, para. 57.

103 See also the Yugoslav representative at the Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.24, SR.29, 27–28 Nov. 1951, above n. 6: ‘Mr. Bozovic (Yugoslavia) said that the point at issue was whether criminals should be granted refugee status, not the problem of extradition.’

104 For those who grew up where the English educational system held sway, it is a three-legged race – extradition law and refugee law advance the jurisprudence relating to political offences in tandem. For those from other educational systems, on school sports days at primary schools in England, there will always be a ‘three-legged race’ where two children, their adjacent legs tied together at the ankle, run down the course as one person with ‘three’ legs. The trick is to keep pace with each other, for if one’s strides are far longer, they both fall over. It is a symbiotic relationship.

105 *In the Matter of Artukovic*, 140 F Supp 245 (1956); 247 F 2d 198 (1957); 355 US 393 (1958); 170 F Supp 383 (1959). Artukovic was eventually extradited thirty years later: 628 F Supp 1370 (1985); 784 F 2d 1354 (1986).

106 *R. v. Governor of Pentonville Prison, ex parte Tzu-Tsai Cheng*, High Court (Queen’s Bench Division), [1973] AC 931 at 945, 24 Jan. 1973, per Lord Diplock.

predominance test, that is, having regard to the ultimate goal of the fugitive's organization and the act's proximity thereto, was it proportionate or was the crime too heinous.<sup>107</sup> The case of *T. v. Secretary of State for the Home Department*,<sup>108</sup> a case concerning an application for refugee status, refined the United Kingdom test. There, the applicant, as a member of the Islamic Salvation Front (FIS), an organization seeking to overthrow the Algerian Government, had been involved in the planning of a bomb attack on Algiers airport as a result of which ten people had been killed, and in a raid on a military depot in which one person had been killed. The majority of the House of Lords held that, in determining whether there is a sufficiently close and direct link between the crime and the organization's goal, one had to have regard to the means used and to the target of the offence, whether, on the one hand, it was a military or government target or, on the other, whether it was a civilian target, 'and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public'.<sup>109</sup> The case highlights the symbiotic relationship between extradition law and Article 1F(b) – political offence cases are so rare that judges cannot let the law ossify when a refugee case presents an ideal opportunity to refine legal understanding.<sup>110</sup>

Not all non-political crimes fall within Article 1F(b), only serious ones. The UNHCR *Handbook*<sup>111</sup> states that it should be a capital crime or a very grave, punishable act, but without authority in domestic or international law for this particular assertion. In some States, the death penalty is available with respect to a wide list of crimes, and therefore capital crimes may not in and of themselves be a sufficient test, but offences of sufficient seriousness to attract very long periods of custodial punishment might suffice to guide States as to what might fulfil the Article 1F(b) criteria. Van Krieken, on the other hand, equally without rigorous authority, implies that all extradition crimes are serious.<sup>112</sup> Those crimes that are within United Nations multilateral anti-terrorist conventions<sup>113</sup> can safely be assumed to be serious. However, theft of \$1 million is a serious crime, theft of a bar of chocolate

107 *Watin v. Ministère Public Fédéral*, Swiss Federal Tribunal, 72 ILR 614, 1964; *Ktir v. Ministère Public Fédéral*, Swiss Federal Tribunal, 34 ILR 143, 1961; *In Re Pavan*, [1927–28] Ann. Dig. 347 at 349. 'Homicide, assassination and murder, is one of the most heinous crimes. It can only be justified where *no other method* exists of protecting the final rights or humanity.'

108 [1996] 2 All ER 865. See also, *Ahani v. Canada*, Canadian Federal Court (Trial Division), [1995] 3 FC 669; and *Singh v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, [2000] FCA 1125.

109 See above n. 108, p. 899. Lord Lloyd, in part, built on the provisions of the European Convention on the Suppression of Terrorism, above n. 21.

110 See also, *Gil v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada, [1995] 1 FC 508 (CA); (1994) 174 NR 292; (1994) 119 DLR (4th) 497.

111 UNHCR, *Handbook*, above n. 7, para. 155.

112 See above n. 11, § Extradition. Under the UK Extradition Act 1989, acting as a fraudulent medium is an extradition crime, but hardly serious!

113 See above n. 20. See also, UNHCR, 'Exclusion Guidelines', above n. 26, at paras. 67 and 68. There may, however, be a special case for hijacking: see UNHCR, 'Guidelines', at paras. 69 and 70; *Antonin L.* above n. 60; and *Abdul Hussain*, above n. 60.

is not. It is probably easier to conclude that minor crimes do not exclude, even if the applicant for refugee status was a regular reoffender.<sup>114</sup> Furthermore, the seriousness of certain offences varies from State to State.<sup>115</sup> Each case must be viewed on its own facts,<sup>116</sup> which calls into question the very existence of automatic bars to refugee status based on the severity of any penalty already meted out.<sup>117</sup> The UNHCR 'Guidelines on Exclusion'<sup>118</sup> suggest that the worse the persecution feared if the applicant were to be returned, the greater must be the seriousness of the crime committed. While it will be considered below whether the threat of persecution is one of the factors to be considered in an Article 1F determination, it is undoubtedly the case that the seriousness of the crime does provide the courts with a discretion as to whether it is sufficiently so in order to justify exclusion from refugee status.

The final issue pertaining to Article 1F(b) for discussion here is proportionality. Should the fear of persecution in the country of origin affect the decision whether or not to exclude from refugee status under Article 1F(b)? The view ordinarily adopted by several States is that whether the applicant would be persecuted if denied refugee status and forced to return to his country of origin is of no consequence when applying Article 1F. Article 1F is the first hurdle an applicant must clear and no protection is to be afforded to anyone falling within subparagraphs (a), (b), or (c).<sup>119</sup> This view can be seen in *Pushpanathan*,<sup>120</sup> a Canadian Supreme Court case from 1998 under Article 1F(c) dealing with drug smuggling, and in *Aguirre-Aguirre*,<sup>121</sup> a 1999 US

114 *Brzezinski v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), [1998] 4 FC 525, where it was held that shoplifting, no matter how recidivist the applicant might be, was not serious.

115 See UK Home Affairs Select Committee, Seventh Report, 'Practical Police Co-operation in the European Community', House of Commons Paper 363 (1989–90), vol. 1, para. 96: 'There are clear problems when laws differ between EC countries. Simple examples are the permissive attitude towards cannabis use in the Netherlands, the greater tolerance of certain types of pornography in Germany . . . and the absence on the Continent of the English concept of conspiracy.' Belgium legalized the personal use of cannabis in Jan. 2001: *The Guardian*, 22 Jan. 2001, p. 14.

116 *Betskoshbeh v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (1998) 157 ALR 95.

117 E.g. the US category of 'aggravated felonies'. See 8 USC §§ 1101(a)(43), 1251(b)(3)(B)(ii) and 1253(h)(2); the Antiterrorism and Effective Death Penalty Act 1996, Pub. L. 104-32; and the Illegal Immigration Reform and Immigrant Responsibility Act 1996, Pub. L. 104-208. See also, *In Re Q.T.M.T.*, 23 Dec. 1996, BIA, Interim Decision No. 3300, 639–71.

118 See above n. 26, at para. 53.

119 Art. 1F refers in general to a 'person' with respect to whom there are serious reasons for considering he or she has violated subparas. (a), (b), or (c), but subpara. (b) goes on to state that the serious non-political crime was committed before he entered the country 'as a refugee'. It may be that a special case can be made for determining refugee status before seeing whether Art. 1F(b) excludes the applicant.

120 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982. See also, J. Rikhof, 'Purposes, Principles and Pushpanathan: The Parameters of Exclusion Ground 1F(c) of the 1951 Convention as Seen by the Supreme Court of Canada' (paper submitted as part of the responses to the UNHCR Global Consultations on Refugee Protection, 2001).

121 *Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 US 415, 119 S.Ct 1439, 143 L.Ed (2d) 590 (1999); see also, T., above n. 108.

Supreme Court case dealing with violent political protest in Guatemala and relying on the domestic law equivalent of Article 1F(b).<sup>122</sup> *Pushpanathan*<sup>123</sup> draws on Article 1F(b), but it is always easier to take the traditional line that there ought to be no balancing when dealing with an obviously non-political offence such as drug smuggling. Terrorism, as stated above, is a matter of political choice and will inevitably produce controversial results.<sup>124</sup>

Moreover, the traditionalists are not as traditional as they claim. Denmark, participating in the drafting process, argued that one needed to balance the seriousness of the crime against the persecution feared.<sup>125</sup> Paragraph 156 of the 1979 *Handbook* talks of balancing the nature of the crime and the degree of persecution feared.<sup>126</sup> Practice in continental Europe does indicate some examples of courts not excluding where there was a fear of persecution on return.<sup>127</sup> Even if it is accepted, however, that the threat of persecution is a factor of which account must be taken, it seems inappropriate to balance it against the seriousness of the crime as if a very serious crime might merit a certain degree of persecution. The fear of persecution should prevent *refoulement* no matter what the crime – a very serious crime should be prosecuted in the State where the applicant seeks refugee status.<sup>128</sup>

Furthermore, the nature of public international law is that a purposive interpretation must always be applied to treaty interpretation that supplies flexibility.<sup>129</sup> In *Gonzalez*,<sup>130</sup> the Canadian Federal Court of Appeal, basing itself on Goodwin-Gill but limiting his analysis to Article 1F(b) alone,<sup>131</sup> found that there was room for balancing where the court had to determine whether the applicant had committed

122 8 USC § 1253(h)(2)(C). 123 See above n. 120.

124 For instance, as mentioned above at n. 5, care must be taken to ensure that no appearance of partiality develops. The difference in treatment received in some Western States by members of an armed group fighting one country and the members of another armed group fighting another country in the Middle East has led to criticism from some quarters.

125 UN doc. A/CONF.2/SR.24 at p. 13. However, this is not the present Scandinavian stance.

126 See also, paras. 9 and 53 of the UNHCR, 'Exclusion Guidelines', above n. 26.

127 See S. Kapferer, 'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom', 12 *International Journal of Refugee Law* (Supp.) 2000, p. 195 at p. 217; and *S.A.M. v. B.F.F.*, Swiss Asylum Appeals Board, 27 Nov. 1992.

128 Art. 1F crimes will often be the subject of permissive universal jurisdiction through multilateral treaty, above n. 20. It is also arguable that, by granting asylum, the State is permitted by international law to assume jurisdiction over the previously committed serious crime. See the *Universal Jurisdiction (Austria)* case, below n. 212, and the *Hungarian Deserter (Austria)* case, below n. 213.

129 Although probably not as flexible as the English Court of Appeal in *R. v. Abdul Hussain*, above n. 60, where it was held that duress was a defence to hijacking and fear of potential persecution in Iraq provided that duress. The analogy to Anne Frank stealing a car in Amsterdam ignores the fact that the UN has never made car-jacking an international crime. See also, UNHCR, *Handbook*, above n. 7, at paras. 157–61.

130 *Gonzalez v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada, [1994] 3 FC 646 (CA); (1994) 115 DLR (4th) 403 at 410–11. Not cited in *Pushpanathan*.

131 Citing what is now Goodwin-Gill, above n. 4, at pp. 106–7. It seems to this author that Goodwin-Gill had restricted his views on balancing to Art. 1F(b) alone.

a serious non-political crime, but not where he or she was accused of war crimes. In addition, against the initial rigid view must be set the fact that all the United Nations-sponsored multilateral, anti-terrorist conventions include a clause permitting the requested State to refuse extradition where the fugitive would be prejudiced or punished on account of his race, religion, nationality, or political opinion. That persons suspected of such serious crimes may still be protected from extradition on grounds derived from the 1951 Convention shows that the issue is not at all clear-cut. The judges are being given mixed messages. Article 1F(b) looks to be absolute, yet if it were an extradition request for a crime deemed non-political by convention, the judges could protect the fugitive using principles derived from Article 1A(2) of the 1951 Convention. If extradition law is trying to find a balance between limiting the political offence exemption and the fugitive's fear of persecution in the requesting State, then it is hardly surprising that the same judges use the same principles when applying Article 1F(b). Even the Canadian case of *Gil* implicitly suggests the court could in appropriate circumstances balance the nature of the crime and the fear of persecution.<sup>132</sup> The General Assembly has reaffirmed that all measures to counter terrorism must be in conformity with international human rights standards.<sup>133</sup> Thus, if the serious non-political criminal would face, for example, torture if he or she were to be returned, then refugee status should still be available with the concomitant guarantee of *non-refoulement*.

Article 1F(b) cannot be confined by the *travaux*. It needs to be flexible, dynamic, and developed.<sup>134</sup> Article 1F is not obsolete, for there are situations where the crimes are so heinous that balancing them against the fear of persecution does compromise the nature of refugee status,<sup>135</sup> and the perpetrator can be informally protected if the State of refuge is concerned, but Article 1F, particularly subparagraph (b), has to be reconsidered in the light of developments since 1951. While the Convention Against Torture<sup>136</sup> provides an independent means of protection, the interpretation of the 1951 Convention has to reflect the elements of custom bound up therein. The broader understanding of *non-refoulement* needs to be reflected in the interpretation of Article 1F(b) and the traditional attitude should be seen as no longer in line with current international thinking. The obligation

132 Above n. 110, (1994) 119 DLR (4th) 497 at 517 (footnotes omitted). '[Canada] is apparently prepared to extradite criminals to face the death penalty and, at least for a crime of the nature of that which the appellant has admitted committing, I can see no reason why we should take any different attitude to a refugee claimant' (emphasis added). On the extradition of criminals to face the death penalty, see now, *Burns*, below n. 255.

133 UNGA Res. 50/186, 6 March 1996, para. 3 and preamble.

134 See R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford, 1994).

135 See above n. 24. It is hard to conceive of a situation where someone who had committed genocide or grave breaches of the Geneva Conventions or extermination, rape, sexual slavery, or torture in connection with persecution based on race, religion, nationality, ethnicity, culture, or gender, ever being granted refugee status.

136 23 ILM 1027, 1984, and 24 ILM 535, 1985.

within Europe at least towards all those within the jurisdiction of a member State of the Council of Europe not to return them to a State where their rights under Articles 2 (right to life) and 3 (freedom from torture or inhuman or degrading treatment or punishment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>137</sup> might be violated, regardless of all other factors,<sup>138</sup> indicates the ever-increasing importance attached to protection of the individual over the past half-century. Even if the fear of persecution was originally irrelevant to the interpretation of the exclusion clause, that can no longer be the case. Secondly, in the near future there will exist a permanent International Criminal Court in The Hague. If impunity was one of the factors that shaped Article 1F, then the establishment of the ICC will ensure that there is a court with jurisdiction over Article 1F crimes<sup>139</sup> where there is no need to return someone to a place where they would face persecution contrary to the principle of *non-refoulement*. In a similar vein, the last half-century has seen the rapid expansion of extraterritorial jurisdiction over crimes of a heinous nature. Where United Nations multilateral anti-terrorist conventions provide ordinarily for the extradition of those committing serious non-political crimes, the right to refuse extradition where it is feared the requested person would face persecution on grounds of race, religion, nationality, or political opinion is coupled with a duty to submit the case to the State of refuge's prosecutorial authorities – *aut dedere, aut judicare*.<sup>140</sup>

Article 1F(b) already includes one balancing test: is the non-political crime sufficiently serious so as to justify exclusion? The remaining question is whether there is a double balancing test permitting the applicant to raise the fear of persecution to outweigh exclusion from refugee status as being a disproportionate consequence of that exclusion. Given that refugee status consists of more than *non-refoulement*, there are good grounds for stating that certain crimes, particularly those within Article 1F(a), should always lead to exclusion no matter how well founded the fear of persecution. However, Article 1F(b) provides in its very wording more scope for the exercise of discretion. In those countries where the courts have refused to apply this proposed double balancing test,<sup>141</sup> there existed the safety net of protection provided by Article 3 of the Convention Against Torture<sup>142</sup> or Article 3 of the

137 European Treaty Series, No. 5, 1950.

138 *Chahal v. United Kingdom* (70/1995/576/662), 15 Nov. 1996, (1997) 23 EHRR 413.

139 See Arts. 6, 7, and 8 of the Rome Statute, above n. 35, which would cover crimes within Art. 1F(a) and (c) and, in certain cases, subpara. (b).

140 In *R. v. Moussa Membar et al.*, Court of Appeal (Criminal Division), [1983] *Criminal Law Review* 618, although the hijack ended in London giving the English courts jurisdiction under the Hague and Montreal Conventions, the fugitives were not returned to Tanzania where the hijack had commenced.

141 The USA, the UK, and Canada.

142 Cf. *Manickavasagam Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada*, Federal Court of Canada, [2000] 2 FC 592 (CA), A-415-99, 18 Jan. 2000, paras. 26

European Human Rights Convention. Nevertheless, that does not mean that Article 1F(b) could not be developed, drawing on those self-same ideas as are evidenced in the Torture Convention and the European Human Rights Convention, to incorporate this second level of balancing where necessary, nor that such would not better reflect the need to reinforce refugee status.

Justification for a reconsideration of the approach to the implementation of Article 1F(b) might be found in Article 62 of the Vienna Convention on the Law of Treaties.<sup>143</sup> It can be argued that there has been such a fundamental change of circumstances since 1951 in terms of human rights guarantees and restrictions on extradition where persecution is feared in the requesting State, that Article 1F(b) can no longer be deemed absolute with respect to the denial *ab initio* of refugee status. The absurd situation would be reached that, if a person committed a serious non-political crime in Arcadia and fled to Ruritania, the Ruritanian authorities could deport that person even if the only State to which he or she could return would be Arcadia where her or his life or freedom would be threatened, but if the Arcadian authorities submitted an extradition request, then Ruritania could refuse to surrender on the ground that he or she would fear persecution in Arcadia. Remaining within the realm of international law pertaining to the protection of refugees and displaced persons, as has been seen, there is a strong case to be made that since 1951 *non-refoulement* has become customary international law, indeed, a peremptory norm.<sup>144</sup> If so, then reading Article 64 with Article 44(2) of the Vienna Convention on the Law of Treaties,<sup>145</sup> it can be argued that any provision of the 1951 Convention that would allow for *refoulement* would be void.<sup>146</sup> Nevertheless, that would not permit one to incorporate into Article 1F a balancing test where the nature of prior acts might be outweighed by the fear of persecution if denied refugee status. Article 64 of the Vienna Convention deems the superseded provision void.<sup>147</sup>

In sum, refugee law should not lag behind human rights law and it needs to be more fully recognized that the Preamble to the 1951 Convention speaks of refugees

*et seq.*; Supreme Court of Canada, 22 May 2001, judgment delivered 11 Jan. 2002; see also below n. 255. For a more detailed analysis of *Suresh* and other related Canadian jurisprudence, see S. J. Aiken, 'Manufacturing "Terrorists": Refugees, National Security and Canadian Law – Part II', 19(4) *Refuge*, 2001, pp. 116–33.

143 See above n. 3, especially subpara. 3 dealing with suspending the operation of a treaty. Reading Art. 62 with Art. 44(3) of the Vienna Convention on the Law of Treaties, one can limit the suspension to a particular clause, in this case, Art. 1F(b).

144 E.g. Goodwin-Gill, above n. 4, pp. 167 *et seq.* See also the paper on *non-refoulement* by E. Lauterpacht and D. Bethlehem in Part 2.1 of this volume.

145 See above n. 3.

146 Even accepting that *non-refoulement* is a peremptory norm of international law, questions remain as to its scope.

147 As such, war criminals and other serious criminals might escape justice if there were to be too great a fear of persecution in their country of origin, except in so far as they might be tried before courts in the State of refuge under principles of extraterritorial criminal jurisdiction or before the International Criminal Court.



benefiting from international human rights law.<sup>148</sup> In the twenty-first century, the two systems need to be better harmonized.

### C. Article 1F(c)<sup>149</sup>

Article 1F(c) provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: . . .

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.<sup>150</sup>

While paragraphs (a) and (b) specifically refer to crimes, paragraph (c) talks of ‘acts contrary to the purposes and principles of the United Nations’. Nevertheless, it still requires that the applicant be ‘guilty’ of such acts. Not all purposes and principles of the United Nations, as set out in Articles 1 and 2 of the UN Charter,<sup>151</sup> give rise to individual criminal responsibility for their violation. It was suggested by the drafters that it would cover violations of human rights that fell short of crimes against humanity.<sup>152</sup> There is a danger that the phrase is so imprecise as to allow

148 See above n. 1.

The High Contracting Parties,

Considering that [the General Assembly has] affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms . . .

See also, *R. v. Secretary of State for the Home Department, ex parte Adan and ex parte Aitseguer*, English Court of Appeal, [1999] 3 WLR 1274 at 1296: ‘It is clear that the signatory States intended that the [1951] Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view, the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the [ECHR] is so regarded.’ This part of the judgment was subsequently also cited by Lord Hutton in his consideration of the appeal in the House of Lords, 19 Dec. 2000, [2001] 1 All ER 593, above n. 2.

149 See UNHCR, ‘Exclusion Guidelines’, above n. 26, at paras. 59 *et seq.* See also, E. Kwakwa, ‘Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations’, 12 *International Journal of Refugee Law*, 2000 (Supp.), p. 79.

150 Art. I(5)(c) of the 1969 OAU Refugee Convention, above n. 1, adds acts contrary to the purposes and principles of the OAU.

151 See R. Wolfrum, ‘Purposes and Principles’, in *The Charter of the United Nations: A Commentary* (ed. B. Simma, Oxford University Press, 1995), pp. 49 *et seq.* Cf. the text above at n. 66.

152 See UNHCR, ‘Exclusion Guidelines’, above n. 26, at para. 62 and n. 48. NB. Given that Art. 14(2) of the Universal Declaration of Human Rights (UDHR), 1948, includes a similar phrase, there is some merit in this argument. See also, *Pushpanathan*, above n. 120, at p. 983, which suggests that the purpose of Art. 1F(c) ‘is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting’.

States to exclude applicants without adequate justification. What is clear after 11 September 2001 and the subsequent Security Council resolutions, particularly Resolution 1377,<sup>153</sup> is that acts of international terrorism constituting a threat to international peace and security are contrary to the purposes and principles of the United Nations. Nevertheless, the guiding principle has to be that all limitations on rights have to be interpreted restrictively.<sup>154</sup>

If the acts covered by Article 1F(c) are less than clear, there are also questions as to who can perpetrate them. On the basis that the UN Charter applies to States, the argument is made that only people extremely high in the hierarchy of the State can be guilty of acts contrary to the purposes and principles of the United Nations.<sup>155</sup> Nevertheless, although the application of Article 1F(c) is rare, it has been the basis for decisions against a wider group than those in high office. The UNHCR Guidelines refer to its use in the 1950s against persons who had denounced individuals to the occupying authorities with extreme consequences including death.<sup>156</sup> In the *Georg K.* case,<sup>157</sup> refugee status was denied under Article 1F(c) to someone who had carried out a bombing campaign to reunite South Tyrol with Austria; an individual whose actions affect the relations of nations, in this case Austria and Italy, could be in breach of the United Nations Charter. Van Krieken argues that one of the main issues for international law is the peaceful settlement of inter-State disputes, although the right to self-determination raises a variety of questions as to whether the same analysis can be straightforwardly applied to conflicts internal to the State.<sup>158</sup> Does a member of an armed opposition group seeking self-determination have the right to use violence and so be outside the exclusionary remit of Article 1F(c)?<sup>159</sup> Nevertheless, van Krieken explicitly accepts that all individuals could be excluded under Article 1F(c), not just high office holders.<sup>160</sup> In the Canadian Supreme Court case of *Pushpanathan*,<sup>161</sup> it was argued that drug-related crimes were excludable on the basis that they were contrary to the purposes and principles of the United Nations. The majority of the court found that the crimes

153 12 Nov. 2001. The Security Council called upon States to deny safe haven to terrorists.

154 See Statement to the Sixth Committee by S. Jessen Petersen, 14 Nov. 1996, pointing out that Art. 1F(c) is rarely used and overlaps with Art. 1F(a).

155 Namely, *Brahim*, Commission française des recours des réfugiés (CRR, French refugee appeals board), Decision No. 228601, 29 Oct. 1993, where the former Director of National Security in Chad during the Hissène Habré regime was excluded under Art. 1F(c).

156 UNHCR, 'Exclusion Guidelines', above n. 26, at para. 61.

157 *Georg K. v. Ministry of the Interior*, 71 ILR 284, 1969 (Austrian Administrative Court).

158 Van Krieken, above n. 11, § Purposes and Principles.

159 Cf. *Avetisan*, CRR (France), Decision No. 303164, 4 April 1997, where someone who had attempted to overthrow the democratically elected Shevardnadze regime in Georgia was deemed excluded under Art. 1F(c). See also, *Suresh*, above n. 142, at para. 36.

160 Although basing the argument on Art. 29(3) of the UDHR, 1948, is less than convincing. In *Muntumusi Mpemba*, CRR (France), Decision No. 238444, 29 Oct. 1993, a member of the Zairean Civil Guard who had engaged in human rights violations was excluded under Art. 1F(c).

161 See above n. 120.

were not within Article 1F(c). However, it was recognized that in appropriate circumstances non-State actors could fall within Article 1F(c):

Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the State thereby implicitly adopting those acts, the possibility should not be excluded *a priori*.<sup>162</sup>

Security Council Resolution 1377 assumes a non-State actor can fall within Article 1F(c), but it does not automatically follow that any member of such an international terrorist organization could be within Article 1F(c).

Article 1F(c) is vague and is open to abuse by States.<sup>163</sup> It is clear that there is State practice interpreting it widely, but there is as yet no internationally accepted understanding of all those 'acts contrary to the purposes and principles of the United Nations'. Given that Article 1F(c) is a limitation on a fundamental right, there is strong reason to restrict its ambit, and, since acts contrary to the purposes and principles of the United Nations are those perpetrated by States, it would promote consistency within international law to confine the scope of Article 1F(c) to acts committed by persons in high office in government or in a rebel movement that controls territory within the State or in a group perpetrating international terrorism that threatens international peace and security. Those perpetrating acts of international terrorism constituting a threat to international peace and security who are not high-ranking members of the organization should be excluded under Article 1F(b).

#### D. The relationship between Article 1F and Article 33(2)

Article 33(2) provides:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>164</sup>

<sup>162</sup> See above n. 120, at p. 984.

<sup>163</sup> The Netherlands Ministry of Justice has held that it will not use Art. 1F(c) as an independent ground for exclusion. 'The provisions of [Art.] 1F(a) and 1F(b) provide enough starting points at present for exclusion in cases where it is indicated'. Information supplied by Immigration Policy Department in the Ministry of Justice, 'Section 1F of the 1951 Geneva Convention', 630201/97/DVB, 19 Nov. 1997, text at note 16, published as Netherlands State Secretary of Justice, 'Note on Article 1F to Parliament, November 1997', in *Refugee Law in Context: The Exclusion Clause*, above n. 15, at p. 308.

<sup>164</sup> Cf. Arts. II and III of the OAU 1969 Convention, above n. 1, which has no precise equivalent to Art. 33(2).

The domestic legislation and procedure in certain countries<sup>165</sup> already subsumes concepts from both Article 1F and Article 33(2) into a single stage in the process. Therefore, the relationship between Articles 1F and 33(2) is confused in practice. State practice with regard to Article 33(2) shows its joint use with Article 1F. In Canada, a mixture of Articles 1F and 33(2) is used at the ‘eligibility stage’, that is, where the Department of Citizenship and Immigration (CIC) determines if a claim is eligible to be referred to the Immigration and Refugee Board (IRB). Nevertheless, in 98–99 per cent of cases, the CIC finds refugees’ claims to be eligible for a refugee status determination hearing before the IRB on the merits. Before the IRB, only Article 1F is used to exclude.<sup>166</sup> In Germany, however, asylum seekers who have either been convicted and sentenced to three or more years in prison and are thus deemed a danger to the community or who are a danger to national security are excluded from *non-refoulement* protection. In three recent cases, the Federal Administrative Court has found that activities deemed ‘terrorist’ render the asylum seeker a danger to national security.<sup>167</sup> However, it was only high officials in the terrorist organization who were subject to this deemed loss of *non-refoulement* protection.

In other parts of Europe, rather than use Article 33(2), with its higher demands, States would prefer to use Article 1F where a refugee commits a terrorist act in the country of refuge<sup>168</sup> or where serious non-political crimes committed prior to entry come to light only after refugee status has been granted. The former is clearly a case specifically within Article 33(2) and ought to be decided with respect to that provision’s requirements. The latter is acceptable, since it can be argued that the false or inadequate information originally supplied vitiates the grant of refugee status and so it is as if one is considering refugee status and exclusion *ab initio*.<sup>169</sup> It should also be noted, though, that the grounds listed in Article 1F are not grounds for cessation under Article 1C. Article 33(2) is the proper route where a refugee commits a particularly serious crime in the country of refuge and constitutes a danger to the

165 Such as Canada and Germany. See Meeting on ‘asylum, terrorism and extradition’, above n. 87.

166 *Ibid.*

167 Section 51 of the Aliens Act (*Ausländergesetz*) is subject to a terrorism caveat (*Terrorismusvorbehalt*). See BVerwG 9 C 22.98, 23.98, 31.98, 30 March 1999. Headnotes may be found at <http://www.asyl.net/homeNS.html>. On the facts, the asylum seekers had been engaged in terrorism abroad and it was feared they would continue their campaign from Germany.

168 Cf. *Rajkumar*, Conseil d’Etat, SSR (France), 28 Sept. 1998.

169 See para. 117 of the *Handbook*, above n. 7. See also, EU, ‘Joint Position defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees’ (Annex 1), OJ 1996 L63/2, 13 March 1996, para. 13: ‘The clauses in Article 1F . . . may also be applied where the acts become known after the grant of refugee status.’ In addition, see Netherlands State Secretary of Justice, ‘Section 1F of the Convention on Refugees’, above n. 15, at p. 47; cf. Slovakian law, where Art. 1F is not identified as a ground for revoking refugee status. See, Amsterdam Seminar, ‘Conclusions and Recommendations’, § 7, ‘Action to be taken if Article 1F is determined to be applicable after the refugee status has been granted’, above n. 11.

community of that country, although even in this situation refugee status does not cease, only the protection of *non-refoulement*.<sup>170</sup>

Having briefly noted the confused relationship between Articles 1F and 33(2), it is necessary to consider Article 33(2) on its own. Whereas Article 1F excludes applicants from refugee status, Article 33(2) applies to those who are recognized as refugees and who would otherwise benefit from *non-refoulement* protection. However, they must either be a danger to the security of the country of refuge or, having been convicted by a final court of a particularly serious crime, they constitute a danger to the community of that country. Generally, the view is that Article 33(2) applies to crimes committed in the country of refuge. In most cases, such a person can be dealt with in the same way as any other criminal. Moreover, extradition laws apply to him or her in exactly the same way as anyone else for post-status crimes committed in other countries. Article 33(2) is only applicable where the country of refuge is preparing to act so as to return or extradite<sup>171</sup> the refugee to a country where his or her life or freedom would be threatened. Ordinarily, an Article 1A refugee cannot be returned as a consequence of Article 33(1), but a Convention refugee loses the guarantee of *non-refoulement* if Article 33(2) supervenes. That will only be permitted where issues of the security of the State are deemed to take priority over *non-refoulement*. If a terrorist is only a threat to her or his usual State of residence because of her or his opposition to that regime, she or he is not a danger to the country of refuge. It would take a very expansive view of Article 33(2) to

170 *Pham*, Conseil d'Etat SSR (France), Decision No. 148997, 21 May 1997.

171 The current, although not universal, view is best expressed in French *Conseil d'Etat* decision in *Bereciartua-Echarri*, Decision No. 85234, 1 April 1988, *Recueil Lebon.*, where the fugitive, a Spanish Basque, had been granted refugee status in 1973. The *Cour de Cassation* held that since Art. 33 did not expressly mention extradition, it could not be prohibited under the 1951 Convention. The *Conseil d'Etat* reversed, holding extradition should be refused, not because of Art. 33, but on the basis of the general principles of refugee law derived from Art. 1A(2). A State that recognizes a fugitive offender's refugee status is forbidden from returning her or him by any means, method, or mechanism whatsoever to a State where she or he might face persecution. Accordingly, extradition law should be subject to the humanitarian principles to be found in the 1951 Convention. See also the Italian case reported at para. 206 of the High Commissioner's Report to the General Assembly in 1956, 11th session, Supp. No. 11, A/3123/Rev.1. 'In Italy, two cases of extradition were dealt with by my Branch Office in 1955. Evidence of the eligibility of a refugee under the mandate of UNHCR proved to be sufficient to prevent extradition of the refugee from taking place.' See further, Executive Committee, 'Note on International Protection', 40th session, UN doc. A/AC.96/728, 2 Aug. 1989, para. 27:

Given the position of certain States that Article 33 cannot be automatically interpreted as embracing – and thereby protecting refugees from – extradition, the exemption from extradition of political offenders (even though not every refugee is a political offender and vice-versa) and the protection against extradition where there is the danger of discrimination on the basis of race, religion, colour or ethnic origin, together become all the more important to safeguard the security of refugees. The omission of these protections or safeguards from, or their qualification in, extradition arrangements could have potentially serious repercussions for the welfare and security of the individual refugee threatened with return through extradition.

suggest that a refugee who supports a political cause in a foreign State, even where violence is endemic, poses a danger to the security of the country of refuge.<sup>172</sup> Raising funds to buy arms to further the violence in a foreign State might indicate the refugee is a danger to the security of the country of refuge, but simply being a supporter of an armed opposition group in another State ought to fall within guarantees of freedom of expression and leave the refugee protected by the guarantee of *non-refoulement*.<sup>173</sup>

There is no prescribed method for determining whether *non-refoulement* protection can be withdrawn under Article 33(2). This position contrasts with Article 32, which provides:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Given that national security is a broader concept than ‘danger to the security of the country [of refuge]’,<sup>174</sup> and that loss of *non-refoulement* protection is more far-reaching and dangerous than expulsion, it is clearly justifiable to require that determinations with respect to Article 33(2) apply not only the procedural safeguards

172 Although the Financing of Terrorism Convention, above n. 20, is based in part on such a premise. The English Court of Appeal, relying on a new definition of terrorism in English law, decided in *Secretary of State for the Home Department v. Rehman*, above n. 73, that anyone considered a threat to any of the UK’s allies was a threat to national security. Rehman had allegedly been engaged in fund-raising and recruiting for the conflict in Kashmir against India. The House of Lords later dismissed the appeal against this ruling in *Secretary of State for the Home Department v. Rehman*, UK House of Lords, [2001] UKHL 47, 11 Oct. 2001. See also, *Suresh*, above n. 142. Practice in Africa includes admitting people not as refugees, but as political exiles, that is, those who have left a country with the avowed intention of taking action to overthrow the country of origin (cf. Art. III of the OAU 1969 Refugee Convention, above n. 1). See meeting on ‘asylum, terrorism and extradition’, above n. 87. Moreover, States ought not to let their territory be used as a base for aggression against other States. See Principle 1, paras. 8 and 9, of the General Assembly Declaration on Principles of Friendly Relations, 1970, UNGA Res. 2625 (XXV), 24 Oct. 1970, and Art. 2(4) of the UN Charter. See also, the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (1986) ICJ Reports p. 14, paras. 183–6 and especially para. 189. Nevertheless, neither the wording of the Charter nor the Declaration would authorize the surrender of an individual to a State where he or she would face persecution; they should simply be a guide to setting State policy.

173 Leader, ‘Free Speech and the Advocacy of Illegal Action in Law and Political Theory’, 82 *Columbia Law Review*, 1982, p. 412 at p. 428; see also, Kälin and Künzli, above n. 57.

174 On the meaning of national security, see L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon, Oxford, 1994).

of Article 32, but do so with heightened care.<sup>175</sup> Further, due process demands that the refugee should have access to the evidence against her or him. Although the State may well argue that national security issues require that its evidence should be withheld on the basis of public policy, it cannot be proper or in keeping with human rights standards that a person's life or freedom could be threatened without a chance to challenge the evidence produced by the State.<sup>176</sup> In sum, however, if Article 32 procedures were adopted with respect to Article 33(2), then its application would be less problematic.

Additionally, although domestic courts have spoken in terms of 'national security', it is Article 32 which deals with national security, while Article 33(2) deals with the more demanding idea of a 'danger to the security of the country' or 'a danger to the community of that country'. While it would mark a change in the jurisprudence relating to Article 33(2), it is undoubtedly arguable that, rather than the presence of the refugee giving rise to an issue of national security, a broad concept, loss of *non-refoulement* protection should only arise where the refugee represents a danger to the security of the country of refuge, a concept more akin to the threshold necessary to derogate from human rights obligations.<sup>177</sup> Furthermore, derogation is

175 See also, *Chahal*, above n. 138, para. 153:

In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security . . . It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 of the Convention.

Access to legal advice is also of importance from the very earliest stages of the applicant entering the status determination process. M. Timmer, M. Soffers, and J. Handmaker, 'Perspectives on the Legal Basis and Practice of the Netherlands Government Regarding Exclusion of Refugees in Terms of s. 1F of the 1951 United Nations Convention Relating to the Status of Refugees' (written submission to UNHCR Global Consultations on International Protection, 2001), § 3, Access to Legal Advice.

176 Cf. the right to a fair trial within Art. 6 of the ECHR is not applicable to refugee status determination hearings. See *Maaouia v. France*, Application No. 39652/98, European Court of Human Rights, 5 Oct. 2000. In Canada, a summary of the evidence has to be prepared for the refugee. However, in the USA the refugee has no right of access: *Avila v. Rivkind*, US District Court for the Southern District of Florida, 724 F Supp 945 at 947–50 (1989); 'An alien who is found by the Attorney-General to be a threat to national security is not entitled to an asylum hearing' (*ibid.*, p. 950); *Ali v. Reno*, US District Court for the Southern District of New York, 829 F Supp 1415 at 1434 *et seq.* (1993); although the agency supplying the classified information can make a summary available to the applicant/petitioner (*ibid.*, p. 1436); *Azzouka v. Meese*, US Court of Appeals (2nd Circuit), 820 F 2d 585 at 586–7 (1987), where a member of the Palestine Liberation Organization was denied asylum on the basis he presented a danger to the people and security of the USA, based in part on 'confidential information, the disclosure of which would be prejudicial to the public interest, safety, and security of the United States' (*ibid.*, p. 587). See also, Bliss, below n. 215, at pp. 101 and 120 *et seq.*

177 See International Covenant on Civil and Political Rights, Art. 4, UNGA Res. 2200 A (XXI), UN GAOR, 21st Session, Supp. No. 16, p. 52, 1966; 999 UNTS 171; 6 ILM 368, 1967; 61 AJIL,

only permitted to meet the exigencies of the situation and is monitored by the relevant human rights body in order to see if it exceeds what is necessary. Given the nature of the effect of Article 33(2), where a peremptory norm of international law is being restricted, such a construction would be fitting and appropriate in the circumstances. A strict view on the use of Article 33(2) would better reflect the idea that the refugee is a danger to the security of the country.

The final Article 33(2) issue concerns whether one can balance the refugee's fear of persecution against the danger he or she represents to the security of the country or to the community of the country where he or she has been convicted of a particularly serious crime.<sup>178</sup> The courts possess a discretion as to whether the refugee represents a danger to the security of the country of refuge or whether, given that the crime is *particularly* serious, that he or she represents a danger to the community of that country. Furthermore, mere conviction of a particularly serious crime in the country of refuge, unless there is also evidence that the refugee poses a danger to the community in the future, should not satisfy Article 33(2).<sup>179</sup>

What is in issue here is whether, if all those issues are answered affirmatively by the court, the court is permitted to factor in the refugee's fear of death or loss of liberty if he or she were to lose protection from *refoulement*. The *Handbook*<sup>180</sup> unequivocally assumes that such balancing is part of the Article 33(2) process. Furthermore, while guarantees of human rights protection to all, regardless of whether they qualify as Article 1A refugees or not, will be examined below, the ambit of *non-refoulement* within Article 33 has developed since 1951 and is now argued to be a peremptory norm of international law.<sup>181</sup> In addition, international human rights law has also progressed.<sup>182</sup> Given that *non-refoulement* is to be understood as a form of human rights protection for a specific type of person, the refugee, combining the enhanced status of *non-refoulement* and its broader interpretation in the light of human rights developments, then this second level of balancing should be part of Article 33(2). In *Q.T.M.T.*,<sup>183</sup> however, the respondent, who had entered the

1967, p. 870: 'In time of public emergency which threatens the life of the nation . . .'. See equally, ECHR, Art. 15, above n. 137: 'In time of war or other public emergency threatening the life of the nation . . .'. It is possible that derogation is only permissible where the State is required to implement common Art. 3 of the four Geneva Conventions because the level of violence has reached a certain minimum, so that, although human rights standards are derogated from, the common Art. 3 guarantees provide an alternative means of protection.

178 *Barrera v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada, [1993] 2 FC 3 (CA); (1992) 99 DLR (4th) 264; (1992) 18 Imm LR (2d) 81; (1992) 151 NR 28 (CA), also relying on s. 12 of the Canadian Charter of Rights and Freedoms.

179 Cf. *Re Q.T.M.T.*, above n. 117, p. 656. Suppose, for example, that a refugee under intense provocation and possibly even racial abuse were to lose self-control and hit out at someone who dies as a consequence – culpable homicide. The crime is particularly serious, but does the refugee pose a danger to the community of the country of refuge in the future after her or his release from prison?

180 See above n. 7, at para. 156.

181 E.g. Goodwin-Gill, above n. 4, pp. 167 *et seq.*

182 See *Chahal*, above n. 138.

183 See above n. 117.



United States from Vietnam in 1991, had been convicted of conspiracy to deal in firearms. The United States then instituted deportation proceedings and the respondent sought asylum as a means of preventing deportation. The conviction was for an 'aggravated felony'<sup>184</sup> and so under US law the respondent was ineligible for asylum; furthermore, the immigration judge also found that the aggravated felony constituted a particularly serious crime, thus barring the respondent from withholding of deportation under Article 33(2). The majority in the Board of Immigration Appeals found that under US law the statutory bar to withholding deportation is based on the nature of the crime 'and does not vary with the nature of the evidence of persecution'.<sup>185</sup> In *Suresh*,<sup>186</sup> on the other hand, the Canadian Federal Court of Appeal held that there was a constitutional guarantee of balancing by the Minister which could be reviewed by the courts:

165. Turning now to the constitutional standard of review of the Minister's exercise of her discretion, the test articulated by the Supreme Court may be recast as follows: would the deportation of the appellant to Sri Lanka in the circumstances of this case violate the principles of fundamental justice such that it could be said that the proposed governmental action would shock the conscience of the Canadian people? If the standard of review were held to be correctness, then in my opinion it is of significance that Sri Lanka is still a member of the Commonwealth and a democratic state with an independent judiciary. The fact that the appellant's case has attracted national and international attention, as well as that of the Sri Lankan government, undermines the chances of torture being inflicted on the appellant if detained on his return to Sri Lanka. These factors, when balanced against the appellant's degree of involvement with a terrorist organization, lead one to conclude that the state interests outweigh those of the appellant in the sense that the Canadian conscience is not shocked by the Minister's decision.

There is nothing express in the 1951 Convention to stipulate that there must be a judicial balancing of the refugee's danger to the country of refuge or its community and the consequences of *refoulement*, although the fact that the guarantee of *non-refoulement* is being withdrawn from a recognized refugee suggests that there are even stronger arguments than exist with respect to Article 1F where the applicant

184 As defined by 8 USC § 1101(a)(43), 1994.

185 See above n. 117, p. 656 and the authorities cited there. Cf. the concurring and dissenting opinion by Rosenberg, Board Member at p. 664:

[It] seems to me incorrect, and unreasonable, to interpret the statutory language to permit blanket determinations of ineligibility, where the international instrument on which our statute is modeled contemplates not only an extraordinary exception to a mandatory form of relief, but specifically refers to due process and individual consideration in determining when that exception may be invoked.

186 See above n. 142, at paras. 70 *et seq.*; the Supreme Court of Canada upheld this approach at paras. 45–7.

is excluded from entry to the protection regime.<sup>187</sup> Moreover, if the Article 32 requirement of due process is truly part of denial of *non-refoulement* protection under Article 33(2), then the right to present and dispute evidence on a central issue to the determination, is undeniable.

In sum, the second level of balancing, where the fear of persecution is taken into account before Article 1F or Article 33(2) are applied, has been called into question in recent years in courts in different States. However, much of this reflects domestic legislation which fails to implement the 1951 Convention as it stands and introduces other concepts. There is also a lack of willingness to apply international norms in those domestic courts when interpreting the domestic legislation. Nevertheless, none of that detracts from the requirements of the 1951 Convention as they have developed in the light of custom and related international human rights law. It is, however, for UNHCR to take a robust stance on balancing with States, both at the diplomatic level and in *amicus curiae* briefs, if the arguments presented here are to succeed.

## V. Procedural issues and other areas of interest

### A. Inclusion before exclusion?

Does Article 1F have priority in status determination, such that Article 1A is redundant if grounds for exclusion under Article 1F are proven? Is it akin to an admissibility test applied to those seeking to apply for refugee status? The view held by a significant number of States is that application of Article 1F precedes refugee status determination under Article 1A(2). The Federal Court of Canada has held that there is no need to consider whether the claimant falls within Article 1A(2) if she or he falls within Article 1F.<sup>188</sup> Extrapolating this approach, EC Ministers agreed in 1992 that exclusion cases could be considered under accelerated

187 The apparent illogicality that, having decided that national interests override threats to the refugee's life or freedom, one then has to balance the refugee's fear of persecution in the State to which he or she would return, is only apparent. Art. 33(2) is not applied as a second stage in a *non-refoulement* 'process' – the individual will already have refugee status and the concomitant guarantee of *non-refoulement* and will subsequently be deemed a danger to the security of the country of refuge or a danger to its community after conviction for a particularly serious crime so as to be 'refoulable'. It is only proper, having regard to the proposed limitation of a fundamental right, that the presently perceived danger be balanced against the ongoing threat to life or freedom of the refugee.

188 See *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 (CA); *Gonzalez*, above n. 130. See also, Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', above n. 15, at p. 48; Timmer, Soffers, and Handmaker, above n. 175, § 2; and s. 34 of the UK Anti-Terrorism, Crime and Security Act 2001. The corollary must be that, without s. 34, inclusion must precede exclusion.

procedures, when they approved their non-binding 'Resolution on Manifestly Unfounded Applications for Asylum'. Paragraph 11 stated:

This Resolution does not affect national provisions of Member States for considering under accelerated procedures, where they exist, other cases where an urgent resolution of the claim is necessary, in which it is established that the applicant has committed a serious offence in the territory of the Member States, if a case manifestly falls within the situations mentioned in Article 1F of the 1951 Geneva Convention, or for serious reasons of public security, even where the cases are not manifestly unfounded.<sup>189</sup>

On the other hand, paragraph 141 of the UNHCR *Handbook*<sup>190</sup> propounds that it will *normally* be during the determination process under Article 1A(2) that the exclusionary factors will come to light, but there is nothing to stop a State dispensing with determination where it is aware that the person would not qualify as a result of Article 1F.<sup>191</sup> Cases where a State is certain in advance that exclusion applies will be rare, however. As UNHCR has stated, applications which may involve the exclusion clauses 'can give rise to complex issues of substance and credibility which are not given appropriate consideration under admissibility or accelerated procedures'.<sup>192</sup> In order to avoid consideration of suspected exclusion cases in accelerated procedures, UNHCR has proposed the establishment of specialized exclusion units.<sup>193</sup> The UNHCR Exclusion Guidelines also presume that the exclusion clauses will only be applied 'after the adjudicator is satisfied that the individual fulfils the criteria for refugee status'.<sup>194</sup> In 2000, the European Commission's

189 EC Council of (Immigration) Ministers, 'Resolution on Manifestly Unfounded Applications for Asylum', 30 Nov./1 Dec. 1992. See R. Plender (ed.), *Basic Documents on International Migration Law* (Martinus Nijhoff, The Hague, 1999), pp. 474–7.

190 See above n. 7.

191 E.g. where arrival in the State is by means of the perpetration of a hijack. Given the exceptional circumstances of the case, UNHCR excluded twenty Rwandans indicted by the ICTR: information supplied at meeting on 'asylum, terrorism and extradition', above n. 87. See also, para. 17 of UNHCR, 'Security Concerns', above n. 25, which states that an indictment from an international criminal tribunal provides serious reasons for believing the accused is excludable under Art. 1F. UNSC Res. 1127 (1997) para. 4 (reaffirmed in UNSC Res. 1295 (2000), paras. 22–4, and Res. 1336 (2001)) also prohibits under Chapter VII the entry of all senior officials of the National Union for the Total Independence of Angola (UNITA) into all other States. Consequently, it is arguable that, as a result of the relationship of the Security Council to all other organs of the UN, such officials could be excluded from refugee status automatically. On the other hand, the Security Council resolution merely prohibits entry to other States and says nothing about refugee status, such that an argument could be made that refugee status, as an aspect of 'respect for human rights' (Art. 1(3) of the UN Charter), might override the prohibition and that each case would have to be examined on its own facts.

192 UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', UN doc. EC/GC/01/12, 31 May 2001, para. 29. See also, UNHCR, 'Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', 1(3) *European Series*, 1995, p. 10.

193 See, UNHCR, 'Security Concerns', above n. 25, paras. 7 and 16.

194 See above n. 26, at para. 9. See also, UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 64,

draft Directive on asylum procedures likewise stated that, where ‘there are serious reasons for considering that the grounds of Article 1(F) . . . apply’, Member States shall not consider this as ‘grounds for the dismissal of applications for asylum as manifestly unfounded’.<sup>195</sup>

The inherently complex nature of Article 1F cases, involving examination of the crime and the applicant’s participation therein, requires full knowledge of all the facts. Furthermore, Article 1F assumes that, but for the exclusionary provision, the applicant would otherwise be an arguable case for refugee status.<sup>196</sup> Indeed, to apply Article 1F before Article 1A(2) indicates a presumption that all applicants for refugee status are potentially excludable.<sup>197</sup> Given that Article 1F speaks of ‘crimes’ and ‘guilt’, one would expect the immigration authorities to adopt a presumption of innocence and apply Article 1A(2) first. In practice, where UNHCR carries out the determination, its status determination officers will assess the applicant under Article 1A(2) right up to the point where the next step would be to accord refugee status and only then see if he or she is excluded by Article 1F.<sup>198</sup>

Nevertheless, if it is felt necessary, a distinction might be drawn between subparagraph (b) of Article 1F and subparagraphs (a) and (c).<sup>199</sup> Whereas Article 1F refers in general to a ‘person’ with respect to whom there are serious reasons for considering he or she has violated subparagraphs (a), (b), or (c), only subparagraph (b) goes on to state that the serious non-political crime was committed before he or she entered the country ‘as a refugee’. It may be that a special case can be made for always determining refugee status before seeing whether Article 1F(b) excludes the applicant.<sup>200</sup>

para. 4. This is not to say that there could not be specialized exclusion units that could swiftly determine the applicant’s status while at the same time carrying out a proper factual and legal assessment. See UNHCR, ‘Security Concerns’, above n. 25, at paras. 7 and 16.

195 See European Commission, ‘Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, COM(2000) 578 final, 20 Sept. 2000, Art. 28(2).

196 There is an argument based on Art. 14(2) of the UDHR, that in those cases where prosecutions genuinely arise from non-political crimes or from acts contrary to the purposes and principles of the UN, those persons are prevented from seeking asylum under Art. 14(1) and thus they cannot even be considered for refugee status under Art. 1A(2) of the 1951 Convention. However, such an argument is fallacious, partly on the basis that Art. 1A(2) is a legally binding convention whereas the UDHR is a mere aspiration, and partly because it is trying to read Art. 1F into Art. 14(2) – if everything is being determined by reference to Art. 14(2), then not only Art. 1A(2), but also Art. 1F is pre-empted. Reliance on the UDHR to deny people legal ‘rights’ is also intellectually dishonest.

197 *Quære* automatic bars on refugee status with respect to certain crimes, namely, *Re Q.T.M.T.*, above n. 117.

198 See meeting on ‘asylum, terrorism and extradition’, above n. 87.

199 NB. *Gonzalez*, above n. 130, concerned Art. 1F(a).

200 In *Re S.K.*, Refugee Appeal No. 29/91, New Zealand Refugee Status Appeals Authority, 17 Feb. 1992, it was implicit in the reasoning of the Appeals Authority that Art. 1F(b) was only to be applied after the applicant had been found to be a refugee.

## B. Situations of mass influx<sup>201</sup>

During situations of mass influx, where individual determination is a practical impossibility, the priority is to provide assistance and emergency protection measures so as to preserve life. Of necessity, assistance might be provided to a person who would be excluded under Article 1F. UNHCR gives priority to assistance and emergency protection measures in such situations.<sup>202</sup> That, however, is based on the presumption that status determination will ensue as swiftly as is practicable. That practicability must include the question of whether it is possible to ensure the security of unarmed UNHCR staff as they carry out status determination and exclusion.

Often, UNHCR will be in the field dealing with the mass trans-border influx weeks before any Security Council-sponsored peace support operation may be deployed. If the security forces of the host State cannot be used to disarm those in the camps, then status determination with consequent exclusion may be a practical impossibility, but UNHCR could still, subject to satisfying the safety needs of its staff, start interviewing those in the camps in order to obtain information that might be of use in the future when circumstances have improved. Even in situations of mass trans-border influx, UNHCR should not act as if it were solely a humanitarian relief organization and should engage as far as possible in its primary function of protection of refugees.<sup>203</sup> Another difficult problem arises where the Security Council proscribes a certain organization and demands that States refuse entry to its senior members, as has happened with the UNITA rebel movement in Angola.<sup>204</sup>

201 See M. Bliss, ‘“Serious Reasons for Considering”: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses’, 12 *International Journal of Refugee Law*, 2000 (Supp.), pp. 129 *et seq.*

202 See UNHCR, ‘Note on the Exclusion Clauses’, above n. 5, paras. 22 *et seq.* See also above n. 24. Arguably, if everyone crossing the border is treated as a *prima facie* refugee, then it should not be possible subsequently to exclude under Art. 1F; regard would have to be had to the danger the refugee posed to the country of refuge under Art. 33(2). However, since it is only an initial, presumptive assessment of refugee status, then a full and proper evaluation should be held later, at which point exclusion under Art. 1F is permitted.

203 See UNHCR, ‘The Civilian Character of Asylum: Separating Armed Elements from Refugees’, Global Consultations on International Protection, 1st meeting, UN doc. EC/GC/01/5, 19 Feb. 2001; and C. Beyani, ‘International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States’, 12 *International Journal of Refugee Law*, 2002 (Supp.), p. 251. Note that separation is not exclusion.

204 UNSC Res. 1127 (1997), para. 4 (reaffirmed in UNSC Res. 1295 (2000), paras. 22–24, and Res. 1336 (2001)) prohibit under Chapter VII of the UN Charter the entry of all senior officials of the National Union for the Total Independence of Angola (UNITA) into all other States. Consequently, it is arguable that, as a result of the relationship of the Security Council with all other organs of the United Nations, such officials could be excluded from refugee status automatically. On the other hand, the Security Council resolution merely prohibits entry to other States and says nothing about refugee status, such that an argument could be made that refugee status, as an aspect of ‘respect for human rights’ (Art. 1(3) of the UN Charter), might override the prohibition and that each case would have to be examined on its own facts.

Nevertheless, in situations of mass influx, proscribed persons will be mixed up in a more general population movement, often including those obviously not excluded. Therefore, the *prima facie* assumption of inclusion to be followed by status determination can still operate.

### C. Prosecution of Article 1F crimes

Whereas in 1951 only the traditional heads of jurisdiction existed to allow for prosecution of crimes in domestic criminal courts,<sup>205</sup> developments since then provide for the prosecution of those committing Article 1F crimes in many more situations. The most prominent international intervention to ensure that major international crimes do not go unpunished is seen in the ICTY and ICTR,<sup>206</sup> although, given the geographical and temporal limitations to which they are subject, they are a small contribution to the avoidance of impunity. The International Criminal Court may well prove to be an effective institution for the prosecution of Article 1F crimes, depending on how many States ratify the Statute.<sup>207</sup> While Article 12 ordinarily requires that the International Criminal Court will only have jurisdiction where the State on whose territory the Article 5 crime occurred or whose national is accused is a party to the Statute, Article 12(3) provides that a State ‘may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question’.

The Security Council can refer cases to the Prosecutor as can States parties, but the Prosecutor can act *proprio motu* on the basis of information, and that information could come from non-governmental organizations or individuals. The International Criminal Court is not the universal panacea for ensuring non-impunity with respect to Article 1F crimes, but it represents an alternative route to prosecution, rather than returning someone to a State where her or his life or freedom would be threatened.<sup>208</sup>

205 That would be the territorial principle, the active personality principle, the protective principle, the representational principle and universal jurisdiction. Some States would also recognize the passive personality principle. See generally, Gilbert 1998, above n. 59, ch. 3.

206 See above n. 33.

207 See above n. 35. Having achieved the requisite sixty ratifications (Art. 126), the Statute is due to come into force on 1 July 2002.

208 Technically, the ICC has to defer to States with jurisdiction under the principle of complementarity (preambular para. 10 and Arts. 1 and 17), but if such a State is unable ‘*genuinely* to carry out the investigation or prosecution’, then the ICC can take primacy. A finding that a trial would be contrary to the rules of natural justice and due process in the State would suggest the State was ‘otherwise unable to carry out its proceedings’ (Art. 17(3)). See also the broad reading of unwilling States and Art. 17(2)(c): ‘The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to *justice*’ (emphasis added). See generally, Art. 21. It would be strange if, in abiding by a narrow interpretation

Furthermore, the obligation on States to prosecute international crimes has undergone radical development, particularly in the last thirty years. In 1951, only grave breaches of the 1949 Geneva Conventions imposed universal jurisdiction.<sup>209</sup> Since then, the United Nations multilateral anti-terrorist conventions have wholeheartedly adopted the principle of *aut dedere, aut judicare*.<sup>210</sup> More interestingly, though, extradition law, reflecting a more humanitarian concern than international refugee law, has long been prepared to refuse surrender where the fate of the fugitive offender would not have been in accordance with human rights and fundamental freedoms.<sup>211</sup> In the *Universal Jurisdiction (Austria)* case,<sup>212</sup> the Supreme Court of Austria held that it could assume jurisdiction in a representational capacity:

The extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State.

The *Hungarian Deserter (Austria)* case<sup>213</sup> involved the shooting of a border guard by a Hungarian soldier deserting to the West during the Cold War. Again, the Supreme Court of Austria exercised jurisdiction over the fugitive, extradition having been refused partly because he would be in danger of life and liberty if surrendered after having fled for political reasons. Fears of impunity should not be used as an excuse for *refoulement*. If it were to be generally accepted that where an Article 1F case comes to light during refugee status determination it should be referred to the State's prosecutorial authorities,<sup>214</sup> then the assumption of jurisdiction to

of Art. 17, the ICC were to refuse jurisdiction with respect to a case because the State where the crime was committed asserted its primacy, even though it was apparent that no fair trial of the individual could ever take place. Given that the State where the fugitive accused is found would not surrender her or him for fear of the treatment she or he would receive, the ICC would be colluding in an unfair trial and possibly a crime against humanity if it deferred to the jurisdiction of the State where the crime occurred (Art. 7(1)(e) and (h)).

209 See above n. 49. Although arguably piracy *iure gentium* was equally prosecutable by all States, even if it was not a mandatory obligation as was the case with the Geneva Conventions. See G. E. White, 'The Marshall Court and International Law: The Piracy Cases', 83 *American Journal of International Law*, 1989, p. 727. The Genocide Convention 1948, above n. 31, was premised on territorial jurisdiction and the expectation that an international criminal tribunal would be established for the purpose of prosecuting the Convention crimes (see Art. VI).

210 See above n. 20.

211 *R. v. Governor of Brixton Prison, ex parte Kolczynski et al.*, above n. 93, at p. 551 *per* Lord Goddard CJ: 'reasons of common humanity'.

212 Supreme Court of Austria (*Oberster Gerichtshof*), OGH Serie Strafsachen XXIX No. 32; 28 ILR 341 at 342, 1958.

213 Supreme Court of Austria (*Oberster Gerichtshof*), ÖR 38 (1960) p. 96; 28 ILR 343, 1959.

214 See, for instance, the Amsterdam Seminar, above n. 11, 'Conclusions and Recommendations', section 5, 'Legal/Criminal Proceedings to be Applied if Article 1F is Applied', and Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', above n. 15, at p. 46. Cf. Timmer, Soffers, and Handmaker, above n. 175, section 7.

prosecute where return ought not to take place would not violate principles of comity in international law.

#### D. Standard of proof for Article 1F and membership of the group<sup>215</sup>

Article 1F demands that there be ‘*serious reasons for considering*’ that one or more of the subparagraphs has been satisfied.<sup>216</sup> Implicitly, therefore, Article 1F prohibits the application of automatic bars to refugee status based on a list of excluded crimes;<sup>217</sup> Article 1F as a whole demands individual determination on a case-by-case basis. Automatic bars do not allow for an effective legal remedy against a restriction on a guarantee of fundamental human rights. Nevertheless, that does not require that the status determination hearing should receive sufficient evidence to justify a finding of guilt at a criminal trial. By analogy with Article 33(2) which merely requires reasonable grounds for regarding the refugee as a danger to the security of the country of refuge, where that is based on a particularly serious crime having been committed by the refugee in that country there must be a conviction by a final judgment, that is, the refugee must have been found guilty in a criminal trial. ‘*Serious reasons for considering*’ that the applicant has committed a crime or is guilty of an act within Article 1F must, therefore, at least approach the level of proof necessary for a criminal conviction of the individual.<sup>218</sup> Equally, it cannot be doubted but that the burden of proof lies on the State to show that there are serious reasons for considering that the applicant should be excluded.<sup>219</sup>

215 See M. Bliss, “‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses”, 12 *International Journal of Refugee Law*, 2000 (Supp.) p. 92, especially at pp. 99–100 and 115–17.

216 Cf. Art. 33(2), which only requires that there be ‘reasonable grounds’ for regarding the refugee as a danger.

217 See *Q.T.M.T.*, above n. 117.

218 Of course, Art. 33(2) requires that the refugee has been found guilty in a criminal trial of a particularly serious crime, but the ‘reasonable grounds’ test goes to the danger to the community, that is, the refugee has committed a particularly serious crime *and* there are reasonable grounds for considering her or him to be a danger to the community of the country of refuge – i.e. reasonable grounds that she or he is a danger to the security of the country. Art. 1F, on the other hand, requires ‘serious reasons for considering that’ the applicant has violated one of subparas. (a), (b), or (c). First, it is impossible to conceive how one might have serious reasons without at least reasonable grounds. More importantly, however, it reveals the danger of relying too heavily on extradition law for an interpretation of Art. 1F. Extradition law might only require prima facie evidence in order to permit surrender (and even that is only in common law jurisdictions), but that is because the object is to return the fugitive to face a criminal trial in the requesting State – the extradition hearing is not to usurp the function of the full trial. However, before an applicant is excluded under Art. 1F, the court must find that there are serious reasons for considering that she or he has committed that crime – there may be no subsequent trial after exclusion, just persecution. The difference is that refugee status determination is the final judgment, so reasoning by analogy with extradition hearings is unwarranted and inappropriate.

219 Timmer, Soffers, and Handmaker, above n. 175, section 4.



Difficulties arise where mere membership of a group whose activities fall within Article 1F is enough to exclude the applicant. UNHCR has favoured an internationally agreed list of international terrorist organizations in contrast to lists established by individual countries, so as to facilitate consistent application between the different domestic decision takers.<sup>220</sup> If membership is accepted to be a relevant criterion in Article 1F determinations, then membership per se cannot be adequate on its own.<sup>221</sup> UNHCR speaks of the applicant having to have ‘direct responsibility’ or being ‘actively associated with acts, albeit committed by others’ before membership will suffice to exclude.<sup>222</sup> In *Ramirez*,<sup>223</sup> it was held by the Canadian Federal Court of Appeal that one needs ‘personal and knowing participation’. In *Suresh*,<sup>224</sup> Robertson JA, giving the judgment of the Federal Court of Appeal, held that:

I am satisfied that one can reasonably conclude that an individual is a ‘member’ of an organization if one devotes one’s full time to the organization or almost one’s full time, if one is associated with members of the organization and if one collects funds for the organization.

What detailed information exists suggests that courts have been easily satisfied that there are serious reasons for considering that the applicant should be excluded. Although a status determination hearing can never replicate a criminal trial, exclusion is only justified where there is strong evidence<sup>225</sup> that the applicant has committed a crime under Article 1F(a) or (b) or is guilty of an act contrary to the purposes and principles of the United Nations – there needs to be high proof of individual criminal responsibility. In many ways, it is laxity with the standard of proof that calls into question how States have implemented Article 1F. The interpretation of Article 1F is open to debate, but if the required standard of proof were demanded in individual cases, then there would be fewer concerns over abuse of the exclusion clauses.

220 UNHCR, ‘Security Concerns’, above n. 25, at para. 18. See the EU anti-terrorism measures, above n. 77, 2001/931/CFSP, Annex section 2.

221 See Amsterdam Seminar, above n. 11, ‘Conclusions and Recommendations’, section 2 ‘Burden of Proof’, para. III. Note that singling out a group of persons because of their race, religion, or country of origin would be discriminatory and contrary to Art. 3 of the 1951 Convention.

222 See, UNHCR, ‘Determination of Refugee Status of Persons Connected with Organizations or Groups Which Advocate and/or Practise Violence’, above n. 64, at para. 16. However, in the wake of the tragic events of 11 Sept. 2001, UNHCR has indicated that there could be a rebuttable presumption of individual liability where the applicant belongs to an ‘extremist international terrorist group’ (UNHCR, ‘Security Concerns’, above n. 25, at para. 18; cf. para. 19). Such a stance is unnecessary, potentially ambiguous, and difficult to justify when one is looking at a restriction on human rights.

223 See above n. 188. See s. 19(1)(e)(iv), (f)(iii) and (g) of the Immigration Act.

224 See above n. 142, at para. 8. In the Supreme Court of Canada, the focus was on what is terrorism in the light of the Canadian domestic legislation. See paras. 98, 108, and 110.

225 The phrase is that of P. White, a refugee law judge in Australia and a member of the International Association of Refugee Law Judges.

## E. Defences to exclusion

Where Article 1F crimes have been committed knowingly and with a moral choice,<sup>226</sup> it is hard to imagine that in practice the applicant could find a defence for her or his conduct. In this context, a defence is a reason for excusing conduct that would otherwise provide evidence of guilt – where the necessary *mens rea* is not present, then the crime has not been committed so it is inappropriate to talk of defences.<sup>227</sup> Superior orders is not a defence to war crimes.<sup>228</sup> It is equally impossible to conceive of how genocide or crimes against humanity could ever be, for example, a necessity. However, duress has on occasion been recognized as a legitimate defence to some Article 1F crimes.<sup>229</sup> If a criminal court can find that hijacking is excused by duress, then a hijacker should not be excluded under Article 1F in those self-same circumstances, although such a finding will be rare.<sup>230</sup>

A related issue is the effect of an amnesty. In extradition law, amnesties declared by the requesting State are a defence to a request for surrender. On the other hand, inasmuch as there could never be an amnesty for those perpetrating genocide, all amnesties if they are to be recognized ought to have been voluntarily granted by a legitimate, representative government.<sup>231</sup>

Given the nature of the crimes in Article 1F and the desire to avoid impunity, it is less than surprising that there are few defences that are *practically* available.

## F. Passage of time and exclusion

Does lapse of time annul Article 1F? If someone who has committed Article 1F crimes in the past renounces such methods, will he or she qualify for refugee status after the passage of a sufficient interval? UNHCR contemplates that, where the Article 1F crimes are sufficiently distant in the past and the applicant's

226 See UNHCR, 'Exclusion Guidelines', above n. 26, at paras. 41 *et seq.* The position of child soldiers who have committed war crimes is difficult: see below.

227 See Arts. 31 and 32 of the Rome Statute, above n. 35.

228 See Principle IV of the Nuremberg Principles, UNGAOR, V, Supp. 12 (A/1316), pp. 11–14, 1950, paras. 119–24. See also, above n. 56 and associated text.

229 See UNHCR, 'Exclusion Guidelines', above n. 26, at para. 78. See also *Abdul Hussain*, above n. 60 and the discussion above at n. 129.

230 The position is confused because there is a line of political offence exemption cases from extradition law where those escaping from repressive regimes were held to have committed political crimes. Thus, on that analysis, hijacking may, in certain circumstances, be outside Art. 1F(b). See *Kolczynski* and *Kavic*, both above n. 93, although both predate the UN anti-hijacking conventions. See also, UNHCR, 'Exclusion Guidelines', above n. 26, at paras. 69 and 70.

231 *Quaere* the amnesty granted by the Pinochet regime with respect to crimes committed in the 1970s in Chile. See *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet*; *R. v. Evans and Another and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, [1999] 2 WLR 827. Cf. Art. 6.5 of Protocol II, 1977, above n. 18, and UNHCR, 'Exclusion Guidelines', above n. 26, para. 56.

conditions of life have changed, then he or she may be able to claim refugee status.<sup>232</sup> According to paragraph 157 of the *Handbook*,<sup>233</sup> the central question should be whether the applicant's criminal character still predominates – some crimes are so heinous that the perpetrator's criminality will always predominate. The State contemplating granting refugee status should also bear in mind that, if the applicant is still supporting the activities of an organization fighting the government of another State, the latter might see refugee status as support for the rebels.<sup>234</sup>

### G. Exclusion and minors<sup>235</sup>

There is no internationally accepted minimum age of criminal responsibility.<sup>236</sup> Equally, there is no equivalent to Article 1F in Article 22 of the Convention on the Rights of the Child.<sup>237</sup> The Rome Statute eschews jurisdiction over 'any person who was under the age of eighteen at the time of the alleged commission of a crime'.<sup>238</sup> Nevertheless, it would be possible to exclude applicants who were under that age when they acted contrary to Article 1F.<sup>239</sup> Child soldiers could be excluded for their participation in genocide, war crimes, or crimes against humanity unless one could show a lack of *mens rea*. However, UNHCR has argued that, even if one applies Article 1F to a child, he or she should still be protected from *refoulement*, partly because 'the fact that a child has been a combatant may enhance the likelihood and aggravate the degree of persecution he or she may face upon return'.<sup>240</sup> Responses to child applicants who would be excludable under Article 1F need to be age-sensitive. It is not for UNHCR to devise mechanisms and processes to meet the needs of children who may well have committed heinous offences, and States should not contribute to the traumatization of the child by washing their hands of them through the process of exclusion from refugee status.

232 See UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 64, paras. 18 and 19.

233 See above n. 7.

234 In 1998–9, Angola alleged Zambia was supporting the UNITA rebel movement because it allowed the establishment of refugee camps within its borders. See also, *Nicaragua* case, above n. 172.

235 For a Canadian perspective, see J. Rikhof, 'Criminal Responsibility of Child Soldiers', Citizenship and Immigration Canada, Internal Memorandum, 1 May 2000, submitted to UNHCR Global Consultations on International Protection.

236 See Art. 40 of the Convention on the Rights of the Child, above n. 54.

237 See above n. 54.

238 Art. 26. Cf. *Prosecutor v. Drazen Erdemovic*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber judgment, Case No. IT-96-22-A, 7 Oct. 1997.

239 See the UNHCR, 'Exclusion Guidelines', above n. 26, para. 14.

240 See the letter from UNHCR, ref. HO/98/23 – 50/7, 25 Sept. 1998, to the Netherlands State Secretary for Justice.

## H. Implications of exclusion for family members

Ordinarily, where a head of family is given refugee status, the principle of family unity allows the rest of the family to obtain ‘derivative’ refugee status. The corollary should not arise, however, that, where the head of family is excluded, the rest of the family is excluded. Article 1F speaks of those committing crimes or guilty of acts contrary to the purposes and principles of the United Nations, and there should be no exclusion by association.<sup>241</sup> Other members of the family should be entitled to prove they qualify in their own right.<sup>242</sup> Indeed, the fact that the head of family has been excluded may well be further evidence that other members of the family would suffer persecution. Cross-reference should also be made to the various guidelines on gender-sensitive interpretation of the 1951 Convention. In most cases, the excluded person will be male, either a husband, father, or brother. It may be that the State of nationality is a repressive regime where women have no means of expressing their views in public with the consequence that they would fail to be recognized as traditional refugees. A gender-sensitive approach to status determination would acknowledge persecution by association and, indeed, persecution as a consequence of the sexist structure of the society.<sup>243</sup>

## VI. Alternative mechanisms for protection

To the extent that *non-refoulement* under Article 33 of the 1951 Convention draws on principles from international human rights law, developments in that field should necessarily feed into the interpretation of the 1951 Convention. The decision that international human rights law is broader and more protective than Article 33, therefore, should lead to a reconsideration of the restrictive definition given to *non-refoulement* under the Convention. However, since the 1951 Convention confers a status in international law on the individual that is much more wide-ranging than simple non-return,<sup>244</sup> it should not be surprising that international human rights law will protect the applicant where refugee status is denied. What is important is that international human rights law should not draw too far ahead of *non-refoulement*, which should always be informed by those very

241 See also, Art. 10 of the Convention on the Rights of the Child, above n. 54.

242 See Amsterdam Seminar, above n. 11, ‘Conclusions and Recommendations’, section 6, ‘Spouses of Excluded Persons’. Note that the excluded person would not be able to avoid exclusion by relying on the principle of family unity. Even though Pakistan deported the former Taliban ambassador, Abdul Salam Zaeef, to Afghanistan on 5 Jan. 2002, his two wives and six children may be permitted to stay: *The Guardian*, 7 Jan. 2002, p. 12.

243 Namely, *Islam and Shah v. Secretary of State for the Home Department*, UK House of Lords, [1999] 2 AC 629.

244 See Arts. 3–30 of the 1951 Convention, above n. 1. On this indeterminate status of non-return, see Amsterdam Seminar, above n. 11, ‘Conclusions and Recommendations’, section 4, ‘Further Action and Status of Cases for Which Exclusion under Art. 1F is Applied’.

same developments.<sup>245</sup> States should not defend a narrow and ungenerous interpretation of the 1951 Convention on the ground that applicants are protected by international human rights instruments.<sup>246</sup>

The major guarantees of non-return in international human rights law are to be found in Article 3 of the Convention Against Torture<sup>247</sup> and Article 3 of the European Human Rights Convention.<sup>248</sup> Everyone within the jurisdiction of a State party to those treaties shall not be returned to a place where their right to be free from torture<sup>249</sup> will not be respected.<sup>250</sup> The human rights treaties protect all persons:

where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.<sup>251</sup>

245 No attempt is made here to investigate the scope and ambit of customary *non-refoulement*. See Goodwin-Gill, above n. 4, at pp. 167–71; and the paper on *non-refoulement* by E. Lauterpacht and D. Bethlehem in this volume. In many cases where refugee status is denied by reference to Art. 1F, the State of refuge still grants complementary forms of protection. Exclusion in the case of temporary protection rather than refugee status must, however, still comply with human rights standards on non-return. The Afghan hijackers who came to the UK in 1999 are for the most part being denied refugee status, but are not being returned to Afghanistan: *The Guardian*, 28 July 2000, p. 7. Several were convicted of hijacking; see *The Guardian*, 7 Dec. 2001, p. 10, and 19 Jan. 2002, p. 9.

246 E.g. the Convention Against Torture is now part of US domestic law and absolute in its protection. There is an additional difficult question related to the way this ungenerous interpretation is exported to States where there is no fall-back position predicated on international human rights guarantees. It is always open to States parties to the 1951 Convention to apply their own analysis and grant refugee status where States in Western Europe and North America seem now to rely on human rights guarantees. Tanzania, a party to the 1969 OAU Refugee Convention, gave refugee status during the Great Lakes Crisis because of the knowledge that Rwandese would be killed if returned. Where the State has not ratified the 1951 Convention, refugee status determination will usually be handled by UNHCR with a view to resettlement in a third country, often in Western Europe or North America. UNHCR will, therefore, be faced with the dilemma that the States of resettlement would reject the applicant, yet if refugee status is denied then the State of refuge will send the person back to where their life or freedom would be threatened. Once again, the sacred duty to protect refugees is broader than the narrow, protectionist response of certain States.

247 See above n. 136.

248 See above n. 137. See also, Art. 7 of the ICCPR, above n. 177; Art. 5 of the 1969 American Convention on Human Rights, 9 ILM 673, 1970; Art. 5 of the 1981 African Charter on Human and Peoples' Rights, 21 ILM 59, 1982.

249 And, in the case of the ECHR, their right to be free from 'inhuman or degrading treatment or punishment', as well. On the meaning of torture, see Art. 1 of the Convention Against Torture, above n. 136, and *Selmouni v. France*, Application No. 25803/94, 28 July 1999, *Labita v. Italy*, Application No. 26772/95, 6 April 2000 (both European Court of Human Rights).

250 See *Mutombo v. Switzerland*, Communication No. 13/1993, CAT/C/12/D/13/1993, 27 April 1994, para. 9.3; *Khan v. Canada*, Communication No. 15/1994, CAT/C/13/D/15/1994, 18 Nov. 1994, para. 12.2; *Chahal*, above n. 138.

251 *Chahal*, above n. 138, at para. 74, see generally, paras. 74–80. See also, *Jabari v. Turkey*, Appeal No. 40035/98, 11 July 2000 (European Court of Human Rights).

Even if one were to find that the refugee was a threat to national security, *Chahal*<sup>252</sup> has held that such issues cannot be a factor for consideration where there is a real danger of torture or inhuman or degrading treatment or punishment on return:

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

Thus, even if international refugee law will not provide protection for serious non-political criminals, international human rights law is still available.<sup>253</sup> Nevertheless, someone who would be excluded under Article 1F of the 1951 Convention need not be accorded a permanent right of residence if return is prohibited as a consequence of Article 3 of either the Convention Against Torture or the European Human Rights Convention.<sup>254</sup> However, protection from torture under human rights instruments is absolute and non-derogable.<sup>255</sup>

252 See above n. 138. Cf. *Agee v. United Kingdom*, European Commission of Human Rights, Application No. 7729/76, 17 Dec. 1976; 7 DR 164, 1977.

253 Namely, *Soering v. United Kingdom*, Series A, No. 161, 1989, an extradition case, but one that formed the basis for *Chahal*, above n. 138. Namely, 'Case of M. Singh and P. Singh', *The Guardian*, 1 Aug. 2000, p. 5, where the Special Immigration Appeals Commission found the applicants did not qualify for refugee status, but should not be returned for fear of torture in India. Even UNSC Res. 1373 states that international human rights standards must be met even when acting against terrorists.

254 Namely, Netherlands State Secretary of Justice, 'Section 1F of the Convention on Refugees', above n. 15, at pp. 54–5. Cf. Timmer, Soffers, and Handmaker, above n. 175, section 6.

255 It is to be welcomed that the Supreme Court of Canada took the opportunity to reverse the wayward judgment of the Federal Court of Appeals in *Suresh*, above n. 142. The FCA judgment restricted the ambit of the right to be free from torture found in the ICCPR (para. 25) and proposed that Art. 3 of the Convention Against Torture is derogable (para. 27). Ignoring the express wording of the Human Rights Committee's General Comment on Art. 7 (20/37, CCPR/C/21/Add.3, 1982, para. 6), the FCA held that that Article was only non-derogable with respect to the treatment a person might receive within the jurisdiction of the State where he was now to be found and that one could derogate if the torture would only occur in the State to which a person would be returned. This part of the decision was nothing less than perverse, ignoring, for example, *Ng v. Canada*, UN doc. CCPR/C/49/D/469/1991 at paras. 16.2–16.4, 1994, where the Committee held that death by cyanide gas asphyxiation, since it may cause prolonged suffering and agony and might take up to ten minutes, violated Art. 7 of the ICCPR, and thus that extradition to the US would amount to a breach of the Covenant by Canada (see also, the Supreme Court of Canada in *United States v. Burns*, 2001 SCC 7 File No. 26129, 15 Feb. 2001). The Supreme Court of Canada rejected the reasoning of the FCA: 'The clear import of the ICCPR, read together with the General Comments, is to foreclose a State from expelling a person to face torture elsewhere' (para. 67). If anything, the FCA's reading of Art. 3 of the Convention Against Torture was possibly worse. Relying on Art. 16, which is designed to deal with

## VII. Conclusion

The original drafters, while they did not speak with one clear voice on this issue, were concerned that *non-refoulement* should not provide a means of impunity to serious non-political criminals. There are now a variety of mechanisms that will allow for prosecution of serious non-political criminals, even if they are not extradited to the *locus delicti*.

1. *Aut dedere, aut judicare* is more firmly embedded in international criminal law and procedure, being recognized as a treaty duty of States, not just a power.<sup>256</sup>

where references to torture can be read to include 'cruel, inhuman or degrading treatment or punishment' and to provide broader protection through other international instruments than is to be found in the Convention Against Torture (Art. 16.2), the FCA held that, since Art. 33(2) of the 1951 Convention permits *refoulement* in certain circumstances, so must the Convention Against Torture in those self-same circumstances. This opinion flatly ignored the Preamble to the Convention Against Torture and decisions of the Committee Against Torture. In *Paez v. Sweden* (CAT/C/18/D/39/1996), the applicant was a member of the Sendero Luminoso and on 1 Nov. 1989 participated in a demonstration where he handed out leaflets and distributed handmade bombs. Nevertheless:

14.5 The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.

See also, *Khan*, above n. 250, at para. 12.1, and *Ayas v. Sweden*, (CAT/C/21/D/97/1997) 12 Nov. 1998, at para. 7. The Supreme Court of Canada rejected the stance of the FCA (para. 71):

75. We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the [Canadian Charter of Rights and Freedoms].

As regards treaty interpretation in *Suresh*, the FCA failed to have proper regard to Art. 30(3) and (4) of the Vienna Convention on the Law of Treaties 1969, above n. 3. Art. 30(1) of that Convention states that it is subject to Art. 103 of the UN Charter which requires that, where there is a conflict between Charter obligations and obligations under other international agreements, the Charter shall prevail. It is arguable that the Art. 56 pledge to cooperate with the UN in promoting observance of human rights and fundamental freedoms under Art. 55(c) of the Charter should entail that States give priority to the protection of refugees in international law. Finally, Canada is on record that the fight against terrorism must be consistent with the broader commitments to human rights and the rule of law. The institutions entrusted to fight terrorism would attract public support by respecting those principles (see R. R. Fowler in the Security Council, Press Release SC/6741, 19 Oct. 1999). For a fuller analysis of *Suresh* in the FCA and related jurisprudence, see Aiken, above n. 142.

<sup>256</sup> See M. C. Bassiouni and E. M. Wise, *Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, Dordrecht, 1995). See also, M. C. Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law', 15 *Case Western Reserve Journal of International Law*, 1983, p. 27 at pp. 28–31 and 34 *et seq.*

2. The priority of fair trial outside the jurisdiction of the *locus delicti* has been endorsed by the Security Council in the *Lockerbie* case and the subsequent ‘Scottish’ trial in the Netherlands.<sup>257</sup>
3. In the 1990s, the Security Council showed itself willing to create ad hoc tribunals to ensure the prosecution of those perpetrating gross human rights violations in times of armed conflict.
4. The international community will soon have at its disposal the International Criminal Court to deal with all crimes that would fall within Article 1F that would not otherwise be suitable for trial in the State of refuge.

The true fear that finds voice in Article 1F is not that refugee status might be besmirched if it were to be applied to those falling within Article 1F, it is that the receiving State will be a safe haven.<sup>258</sup> The new mechanisms of international criminal law render that fear less substantial than it was in 1951. Moreover, a State that simply denied refugee status and returned an applicant falling within Article 1F may well be failing in its international obligations with respect to ensuring the prosecution of war criminals and serious non-political criminals.

More importantly, however, ignoring the developments in international human rights law since 1951 renders international refugee law peripheral. Protection of the individual is an overriding principle in the implementation of international law and for international refugee law to maintain a policy based on an anachronistic understanding thereof, leaves it open to a charge of redundancy.

257 See *The Guardian*, 1 Feb. 2001, pp. 1–5.

258 Namely, *Suresh*, above nn. 142 and 255.



## 7.2 Summary Conclusions: exclusion from refugee status

*Expert roundtable organized by the United Nations High Commissioner for Refugees and the Carnegie Endowment for International Peace, hosted by the Luso-American Foundation for Development, Lisbon, Portugal, 3–4 May 2001*



The first day of the Lisbon expert roundtable addressed the question of the exclusion clauses of the 1951 Convention Relating to the Status of Refugees, basing the discussion on a background paper by Professor Geoff Gilbert, University of Essex, 'Current Issues in the Application of the Exclusion Clauses'. In addition, roundtable participants were provided with the UNHCR Guidelines on the Exclusion Clauses and written contributions from the Government of the Netherlands and the Government of Turkey. Subsequently, written contributions were received from government experts of Canada, France, Turkey, and the United Kingdom and will be reflected in the report. Participants included thirty-two experts from twenty-five countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Professor Georges Abi-Saab, former Justice of the International Criminal Tribunal for the former Yugoslavia, moderated the discussion.

In view of the limited time available, the discussion focused on those aspects of the background paper and the UNHCR Guidelines that were considered to be in need of clarification. The paragraphs below, while not representing the individual views of each participant or necessarily of UNHCR, reflect broadly the issues emerging from the discussion.

### **General considerations**

1. In the wake of the Second World War, the drafters of the Convention contemplated certain types of crime to be so horrendous that they justified the exclusion of the perpetrators from the benefits of refugee status. In this sense, the perpetrators are considered 'undeserving of refugee protection'. Other reasons for the exclusion clauses include the need to ensure that fugitives from justice do not avoid prosecution by resorting to the

protection provided by the 1951 Convention, and to protect the host community from serious criminals. The purpose of the exclusion clauses is therefore to deny refugee protection to certain individuals while leaving law enforcement to other legal processes.

2. The interpretation and application of Article 1F should take an 'evolutionary approach', and draw on developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law.
3. Refugee law, extradition, international criminal law, and international human rights law provide complementary principles and mechanisms to bridge the tension between the need to avoid impunity and the need for protection.
4. Exclusion clauses are of an exceptional nature and should be applied scrupulously and restrictively because of the potentially serious consequences of exclusion from refugee status for the individual concerned.

### **Article 1F(a): crimes against peace, crimes against humanity, war crimes**

5. Article 1F(a) is a dynamic provision to be interpreted in the light of a number of different rapidly evolving sources of international criminal law.
6. The Rome Statute establishing the International Criminal Court and the Statutes of the two ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), constitute the latest comprehensive instruments informing the interpretation of Article 1F(a) crimes. These, together with provisions in other international humanitarian law instruments, clarify the interpretation of crimes covered by Article 1F(a). The forthcoming publication by the International Committee of the Red Cross of a study on customary rules of international humanitarian law may be another source of interpretation.

### **Article 1F(b): serious non-political crimes**

7. State practice on the interpretation of the term 'serious non-political offence' in Article 1F(b) varies.
8. It is difficult to achieve consensus on the precise meaning of 'political', not least because a certain margin of interpretation of the term remains a sovereign prerogative. In this context, it should be noted that extradition treaties specify that certain crimes, notably certain terrorist acts, are

to be regarded as non-political, although such treaties typically also contain non-persecution clauses.

9. It was acknowledged that there is no generally accepted definition of terrorism. Many perpetrators of terrorist acts may fear prosecution and not persecution, and so would in fact not qualify for inclusion. If they did, Article 1F(b) would be sufficient to exclude them in most instances.
10. The context, methods, motivation, and proportionality of a crime to its objectives are important in determining whether it is political or not. The 'predominance' test (i.e. whether the offence could be considered to have a predominantly political character and in this sense might be proportionate to the political objective) is used in most jurisdictions to define 'political' crimes.
11. A 'serious' offence is one that would on the facts attract a long period of imprisonment, and should include direct and personal involvement. The term 'serious' is also linked to the principle of proportionality, the question being whether the consequence (eventual return to persecution) is proportionate to the type of crime that was committed. Each case must be viewed on its own facts, calling into question the existence of automatic bars to refugee status based on the severity of any penalty already meted out.
12. There was considerable debate on the question of proportionality and balancing. In considering this question:
  - (i) State practice indicates that the balancing test is no longer being used in common law and in some civil law jurisdictions.
  - (ii) In these jurisdictions, other protection against return is, however, available under human rights law.
  - (iii) Where no such protection is available or effective, for instance in the determination of refugee status under UNHCR's mandate in a country which is not party to the relevant human rights instruments, the application of exclusion should take into account fundamental human rights law standards as a factor in applying the balancing test.The meeting did not reach consensus on point (iii), although some support for it was expressed. It is suggested that this be examined further at the second roundtable in the context of the discussion on Article 33 of the 1951 Convention.

### **Article 1F(c): acts contrary to the purposes and principles of the United Nations**

13. Article 1F(c) is not redundant, although most exclusion cases can be covered by the other provisions. Some States have used it as a residual category, for instance, in relation to certain terrorist acts or trafficking

in narcotics. The exclusion of terrorists under Article 1F(c) attracted considerable debate. There was, however, no agreement on the types of crimes Article 1F(c) would usefully cover.

14. In view of its vague and imprecise language, it should be interpreted restrictively and with caution. It should be limited to acts contrary to the purposes and principles of the United Nations, as defined by the UN.

### **Inclusion before exclusion**

15. A holistic approach to refugee status determination should be taken, and in principle the inclusion elements of the refugee definition should be considered before exclusion. There are a number of reasons of a policy, legal, and practical nature, for doing this:
  - exclusion before inclusion risks criminalizing refugees;
  - exclusion is exceptional and it is not appropriate to consider an exception first;
  - non-inclusion, without having to address the question of exclusion, is possible in a number of cases, thereby avoiding complex issues;
  - inclusion first enables consideration to be given to protection obligations to family members;
  - inclusion before exclusion allows proper distinction to be drawn between prosecution and persecution;
  - textually, the 1951 Convention would appear to provide more clearly for inclusion before exclusion, such an interpretation being consistent in particular with the language of Article 1F(b); and
  - interviews which look at the whole refugee definition allow for information to be collected more broadly and accurately.
16. It is possible for exclusion to come first in the case of indictments by international tribunals and in the case of appeal proceedings. An alternative option in the face of an indictment is to defer status determination procedures until after criminal proceedings have been completed. The outcome of the criminal proceedings would then inform the refugee status determination decision.

### **Standard of proof**

17. Exclusion proceedings do not amount to a full criminal trial. In determining the applicable standard of proof in exclusion procedures, 'serious reasons' should be interpreted as a minimum to mean clear evidence sufficient to indict, bearing in mind international standards. Appropriate

procedural safeguards derived from human rights law should be put in place in view of the seriousness of the issues and of the consequences of an incorrect decision. In particular, the benefit of the doubt should be available in exclusion cases.

18. Association with or membership of a group practising violence or committing serious human rights abuse is, *per se*, not sufficient to provide the basis for a decision to exclude. However, depending on the nature of the organization, it is conceivable that membership of a certain organization might be sufficient to provide a basis for exclusion in some instances.
19. Expertise of a very special nature is frequently required where exclusion questions arise. More attention should be given to training of decision makers in laws relevant to the question of exclusion, particularly in international human rights law and international criminal law.

### **Defences**

20. In general, the defences as outlined in the UNHCR Guidelines and which are normally available under national and international criminal law should be available in the context of examining the applicability of the exclusion clauses. The absence of *mens rea* is not a defence as such, but indicates the lack of an element of the offence.
21. There is no room for the defence of superior orders in considering the applicability of the exclusion clauses. Duress, on the other hand, which is a different defence, may apply. The question of whether amnesty laws might raise a defence would depend on the facts of the particular case.

### **Family members**

22. Where a family head is excluded from refugee protection, family members' qualification for refugee status should be considered in their own right. There should be no exclusion by association.

### **Minors**

23. Under Article 40(3)(a) of the Convention on the Rights of the Child, States have an obligation to set a minimum age for criminal liability. Children below that age must not be considered for exclusion.
24. Minors should not be excluded where the necessary *mens rea* cannot be established.

25. As noted in the UNHCR Guidelines on Exclusion, even if Article 1F is applied to a child, s/he should be protected against *refoulement*.

### **Exclusion in mass influx situations**

26. In situations of mass influx, there are two key guiding principles:  
 (i) the exclusion clauses apply in mass influx situations; and  
 (ii) exclusion needs to be examined in individual procedures.
27. A clear distinction should be made between operational arrangements to separate armed elements from the refugee population on the one hand and individual procedures in relation to certain suspected groups for the purpose of exclusion from refugee status on the other.
28. Armed elements, while protected under the relevant provisions of international humanitarian law, are not to be considered as asylum seekers unless they lay down their arms. Their identification and separation is the responsibility of the host State but it often presents a plethora of operational problems, the resolution of which is only successful if the international community, including the Security Council, provides the necessary support, including a safe and secure environment.
29. The issue of those excluded from refugee status in mass influx situations should also be addressed, as developing countries confronted with these problems do not have the capacity or resources to deal with these cases.
30. More in-depth examination and analysis is required of the application of the exclusion clause in situations of mass influx, including on the relevance of inclusion before exclusion where there is *prima facie* recognition of refugees, as well as other substantive, procedural, and evidentiary problems. In view of the policy, legal, and operational aspects of these problems, UNHCR should undertake further study of the subject in cooperation with States, NGOs, and scholars.

### **Final observations**

31. There is a need to examine further the relevance of exclusion in the context of those benefiting from *non-refoulement* as a principle of customary international law. This issue could be discussed at the Cambridge roundtable on Article 33.
32. Non-returnability under human rights law is much wider than the protection afforded under the 1951 Convention. Such non-returnability could be available to those excluded from refugee status.

33. The exclusion clauses in the 1951 Convention are exhaustively enumerated. No other exclusion provisions can therefore be incorporated into national legislation.
34. In developing the interpretation and application of the exclusion clauses, the central tenet must remain protection-oriented while ensuring that fugitives from justice do not avoid prosecution by resorting to the protection provided by the 1951 Convention. Where appropriate, States should prosecute excludable persons who are not returned in accordance with international and national law. The goal should be towards developing a normative system that integrates the different applicable legal regimes in a coherent and consistent manner.

### 7.3 List of participants

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# 8.1 Cessation of refugee protection

JOAN FITZPATRICK AND RAFAEL BONOAN\*

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\* Joan Fitzpatrick gratefully acknowledges the support of the Carnegie Endowment for International Peace and UNHCR, and the research assistance of Emily Headings. Rafael Bonoan's research was supported by the Andrew W. Mellon Foundation, under the Mellon–MIT Program on Non-Governmental Organizations and Forced Migration, and sponsored by the Protection Policy and Legal Advice Section, Department of International Protection, UNHCR. He thanks the many UNHCR staff members whom he interviewed for this study and the UNHCR Archives and the New York Liaison Office staff for their assistance. This paper synthesizes two papers prepared by the authors for an expert roundtable of the Global Consultations on International Protection, organized by UNHCR in the context of the fiftieth anniversary of the 1951 Convention Relating to the Status of Refugees. The roundtable took place in Lisbon on 3–4 May 2001.

## I. Introduction

The experience of being a refugee can be a defining moment in a person's life, but refugee status is not necessarily intended to be permanent. The cessation of refugee protection poses policy and administrative challenges for States and the Office of the United Nations High Commissioner for Refugees (UNHCR), as well as risks for refugees.

The cessation clauses of the 1951 Convention Relating to the Status of Refugees<sup>1</sup> and parallel provisions in other international refugee instruments were long neglected as a subject of refugee law. In recent years, several developments have increased interest in their interpretation and application. These factors include: democratization in some formerly repressive States; a concern to prevent asylum from becoming a backdoor to immigration; experiments with temporary protection during mass influx; a stress upon voluntary repatriation as the optimal durable solution to displacement; the development of standards for voluntary repatriation; frustration with protracted refugee emergencies; and dilemmas posed by return to situations of conflict, danger, and instability. Cessation occurs in several distinct situations, and refugees may be placed at risk if important distinctions are overlooked.

Section II of this paper focuses on 'ceased circumstances' cessation<sup>2</sup> under paragraph 6(A)(ii)(e) and (f) of the UNHCR Statute,<sup>3</sup> Article 1C(5) and (6) of the 1951 Convention, and Article I.4(e) of the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>4</sup> The ceased circumstances clauses operate in five different contexts, sometimes only by analogy: (i) cessation of UNHCR protection under the Statute; (ii) cessation of State protection of refugees previously recognized on a group basis; (iii) individualized cessation for recognized refugees; (iv) withdrawal of temporary protection; and (v) denial of initial claims to asylum based upon changed conditions between flight and status determination.

While ceased circumstances cessation is presently of great concern to decision makers, section III of the paper also addresses the four bases for cessation premised upon changes in the individual circumstances of recognized refugees, as defined in Article 1C(1)–(4) of the 1951 Convention and Article I.4(a)–(d) of the OAU Refugee Convention. These four circumstances are: (i) re-availment of national protection; (ii) re-acquisition of nationality; (iii) acquisition of a new nationality; and (iv) re-establishment in the State of origin. This section suggests standards for interpretation, with a focus upon voluntariness, intent, and effective protection.

1 189 UNTS 150 (hereinafter the '1951 Convention').

2 The term 'ceased circumstances' denotes a change in conditions in the State of origin that eliminates the persecutory causes that formed the basis of the refugee's claim to international protection.

3 A/RES/428 (V), 14 Dec. 1950 (hereinafter 'the Statute').

4 1001 UNTS 3 (hereinafter 'OAU Refugee Convention').

Formal cessation requires careful attention to the applicability of cessation criteria to the individual in question, procedural fairness, and exceptions for persons presenting compelling reasons to be given a continued legal status that preserves rights enjoyed as a refugee.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*<sup>5</sup> provides guidance on the application of the six cessation clauses of the 1951 Convention. In 1991, the Executive Committee of the High Commissioner's Programme highlighted cessation, resulting in the following year in Executive Committee Conclusion No. 69 (XLIII),<sup>6</sup> which provides important guidance on the ceased circumstances cessation clauses in Article 1C(5) and (6). As concern among States and UNHCR shifted to mass influx later in the 1990s, UNHCR produced a 'Note on the Cessation Clauses' in 1997<sup>7</sup> and 'Guidelines on the Application of the Cessation Clauses' in 1999.<sup>8</sup>

Section IV of the paper examines briefly the problems which may arise where elements usually associated with cessation are applied during the refugee status determination procedure. In section V, the authors make a number of recommendations regarding both UNHCR and State practice in the application of the cessation clauses. In this context, the necessity to construe the cessation clauses narrowly deserves re-emphasis, because of the potential that genuine refugees will be exposed to risk if protection is prematurely terminated.<sup>9</sup> The paper ends with a conclusion in section VI.

## II. Ceased circumstances cessation

Substantial similarity exists among the ceased circumstances clauses of the Statue, the 1951 Convention, and the OAU Refugee Convention. As set forth in Article 1C of the 1951 Convention, the Convention ceases to apply to a refugee if:

- (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of

5 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992) (hereinafter 'UNHCR *Handbook*'), paras. 111–39.

6 Executive Committee of the High Commissioner's Programme, Conclusion No. 69 (XLIII), 1992, UN doc. A/AC.96/804.

7 UNHCR, 'Note on the Cessation Clauses', UN doc. EC/47/SC/CRP.30, 30 May 1997.

8 UNHCR, 'The Cessation Clauses: Guidelines on their Application', April 1999 (hereinafter 'UNHCR Guidelines on Cessation').

9 The UNHCR *Handbook*, above n. 5, cautions that the cessation clauses are 'negative in character . . . [.] exhaustively enumerated [and] . . . should therefore be interpreted restrictively', para. 116.

previous persecution for refusing to avail himself of the protection of the country of nationality; [or]

- (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his formal habitual residence.

States Parties to the 1951 Convention possess the authority to invoke Article 1C(5) and (6), while UNHCR can ‘declare that its competence ceases to apply in regard to persons falling within situations spelled out in the Statute’.<sup>10</sup> This legal distinction, however, belies the extent of cooperation between UNHCR and States Parties in the interpretation and implementation of the ceased circumstances provisions.

When States are considering the application of the cessation clauses, UNHCR has recommended that it be ‘appropriately involved’ in the process pursuant to its supervisory role in the implementation of the Convention, as evidenced in Article 35 of the 1951 Convention.<sup>11</sup> UNHCR can assist States by ‘evaluating the impact of changes in the country of origin or in advising on the implications of cessation of refugee status in relation to large groups of refugees in their territory’.<sup>12</sup> In addition, a declaration of cessation by the Office of the High Commissioner ‘may be useful to States in connection with the application of the cessation clauses as well as the 1951 Convention’.<sup>13</sup> At the same time, however, UNHCR requires the cooperation of States Parties to apply the cessation clauses. Countries of origin and asylum play a critical role in the implementation of the ceased circumstances provisions and they may have specific concerns that need to be taken into account when UNHCR is considering the cessation of refugee status.

Five aspects of ceased circumstances cessation are examined here: (a) the interpretation of the clauses by UNHCR and States Parties; (b) UNHCR practice between 1973 and 1999 pursuant to its Statute; (c) cessation declared by States of refuge; (d) withdrawal of temporary protection; and (e) the impact of declarations of cessation on initial refugee status determination.

## A. Interpreting the ceased circumstances clauses

The *Handbook* articulates a concept of ‘fundamental changes in the country [of origin], which can be assumed to remove the basis of the fear of persecution’.<sup>14</sup> The status of a refugee ‘should not in principle be subject to frequent review to the

10 ‘Note on the Cessation Clauses’, above n. 7, para. 31. 11 *Ibid.* 12 *Ibid.*, para. 34.

13 Executive Committee, Conclusion No. 69, above n. 6, third preambular paragraph.

14 UNHCR *Handbook*, above n. 5, para. 135.

detriment of his sense of security'.<sup>15</sup> The *Handbook* also explains in greater detail the exception to the cessation clause based on 'compelling reasons arising out of previous persecution'.<sup>16</sup>

UNHCR and States Parties have subsequently elaborated upon these concepts and developed a set of standards for ascertaining whether events in a country of origin may be sufficient to warrant the application of Article 1C(5) and (6). These guidelines have focused on the extent and durability of developments in the country of origin as the key components of fundamental change. UNHCR and the Executive Committee have used various terms to describe the degree of change necessary to justify a declaration of general cessation, but they all intimate that such developments must be comprehensive in nature and scope. According to Executive Committee Conclusion No. 69 (XLIII):

States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.<sup>17</sup>

A fundamental change in circumstances has typically involved developments in governance and human rights that result in a complete political transformation of a country of origin.<sup>18</sup> Evidence of such a transformation may include 'significant reforms altering the basic legal or social structure of the State... [or] democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services'.<sup>19</sup> In addition, the 'annulment of judgments against political opponents and, generally, the re-establishment of legal protections and guarantees offering security against the reoccurrence of the discriminatory actions which had caused the refugees to leave' may also be considered.<sup>20</sup> Changes in these areas must also be 'effective' in the sense that they 'remove the basis of the fear of persecution'.<sup>21</sup> It is therefore necessary to assess these developments 'in light of the particular cause of fear'.<sup>22</sup>

How should the general human rights situation in a country of origin be evaluated? UNHCR has cited adherence to international human rights instruments in law and practice and the ability of national and international organizations to

15 Ibid. 16 Ibid., para. 136.

17 Executive Committee, Conclusion No. 69, above n. 6, para. (a).

18 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Discussion Note on the Application of the "Ceased Circumstances" Cessation Clause in the 1951 Convention', UN doc. EC/SCP/1992/CRP.1, para. 11, 20 Dec. 1991.

19 'Note on the Cessation Clauses', above n. 7, para. 20.

20 'Discussion Note', above n. 18, para. 11.

21 'Note on the Cessation Clauses', above n. 7, para. 19. 22 Ibid.

verify and supervise respect for human rights as important factors to consider. More specific indicators include the

right to life and liberty and to non-discrimination, independence of the judiciary and fair and open trials which presume innocence, the upholding of various basic rights and fundamental freedoms such as the right to freedom of expression, association, peaceful assembly, movement and access to courts, and the rule of law generally.<sup>23</sup>

Although observance of these rights need not be ‘exemplary’, ‘significant improvements’ in these areas and progress towards the development of national institutions to protect human rights are necessary to provide a basis for concluding that a fundamental change in circumstances has occurred.<sup>24</sup> Standards for voluntary repatriation and withdrawal of temporary protection envision a similar examination of the general human rights situation in the State of origin, with a focus upon the prospects for return in safety and with dignity.<sup>25</sup> The relationship between cessation and withdrawal of temporary protection, or other forms of subsidiary protection, is examined below in section II.D.

Large-scale successful voluntary repatriation may also provide evidence of a fundamental change in circumstances.<sup>26</sup> The repatriation and reintegration of refugees can promote the consolidation of such developments.<sup>27</sup> However, refugees may choose to return to their country of origin well before fundamental and durable changes have occurred. Therefore, voluntary repatriation may be considered in an evaluation of conditions in the country of origin, but it cannot be taken as evidence that changes of a fundamental nature have occurred.

Positive developments in a country of origin must also be stable and durable. As noted by UNHCR: ‘A situation which has changed, but which also continues to change or shows signs of volatility is not by definition stable, and cannot be described as durable.’<sup>28</sup> Time is required to allow improvements to consolidate. UNHCR has thus advocated a minimum ‘waiting period’ of twelve to eighteen months before assessing developments in a country of origin.<sup>29</sup> The practice of some States Parties is consistent with this recommendation. For example, the Swiss Government observes a minimum two-year ‘waiting period’,<sup>30</sup> while Netherlands

23 *Ibid.*, para. 23.      24 *Ibid.*

25 UNHCR, ‘Handbook: Voluntary Repatriation: International Protection’, chapters 2.2 and 2.4, 1996; UNHCR, ‘Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It’, UN doc. EC/47/SC/CRP.27, 1997, para. 4(n); J. Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’, 94 *American Journal of International Law*, 2000, pp. 279 and 300–2.

26 ‘Note on the Cessation Clauses’, above n. 7, paras. 21 and 29.

27 *Ibid.*, para. 29.      28 *Ibid.*, para. 21.

29 ‘Discussion Note’, above n. 18, para. 12; ‘Note on the Cessation Clauses’, above n. 7, para. 21.

30 Comments of B. Tellenbach, Judge of the Swiss Asylum Appeal Commission, for the Lisbon Expert Roundtable, p. 5.



policy considers a period of three years necessary to establish the durability of a change in circumstances in the country of origin.<sup>31</sup>

More recently, UNHCR has indicated that the length of the waiting period can vary depending on the process of change in the country of origin. An evaluation within a relatively brief period may be possible when such changes 'take place peacefully under a constitutional, democratic process with respect for human rights and legal guarantees for fundamental freedoms, and where the rule of law prevails'.<sup>32</sup> Conversely, when developments in the country of origin occur in the context of violence, unreconciled warring groups, ineffective governance, and the absence of human rights guarantees, a longer waiting period will be necessary to confirm the durability of change.<sup>33</sup>

The issue of measuring the extent and durability of change in situations of internal conflict has been examined in recent UNHCR memoranda on cessation. According to these documents, close monitoring of the implementation of any peace agreement is necessary, including provisions such as the restoration of land or property rights, as well as overall economic and social stability in the country of origin. In addition, a longer waiting period may be necessary to establish the durability of changes in circumstances in post-conflict situations.<sup>34</sup> Seemingly conflicting guidelines regarding the applicability of Article 1C(5) and (6) when peace, security, and effective national protection have been restored to portions of a country of origin have also been issued.<sup>35</sup>

The development of the preceding guidelines has involved extensive dialogue between UNHCR and States Parties, especially through meetings of the Executive Committee and its Subcommittee of the Whole on International Protection (SCIP). Outside proceedings of the Executive Committee and the Subcommittee, States Parties have reiterated the need to interpret the ceased circumstances provisions in a cautious manner.

31 Ministry of Justice of the Netherlands, Directorate-General for International and Aliens Affairs, Policy on Refugees, Annex to the letter of 6 May 1999 to the Lower House of the States General, Session 1998–9, doc. No. 19637, 'Memorandum on the Withdrawal of Refugee Status', section 2.2 (document submitted to the expert roundtable meeting on cessation in May 2001).

32 'Note on the Cessation Clauses', above n. 7, para. 22.

33 Ibid. See also 'UNHCR Guidelines on Cessation', above n. 8, para. 28.

34 Interestingly, UNHCR has invoked the cessation clauses more rapidly in the two cases of post-conflict settlement (Sudan, 1973, and Mozambique, 1996) than in situations involving a transition to democracy. See below section II.B.

35 The 1997 'Note on the Cessation Clauses', above n. 7, states that the cessation clauses may be applicable to certain regions of a country of origin if: (1) refugees are able to avail themselves of national protection (which involves not only peace and security, but also access to basic governmental, judicial, and economic institutions); and (2) the developments in these areas constitute a fundamental, effective, and durable change in circumstances: above n. 7 at paras. 25–6. The UNHCR 'Guidelines on Cessation' issued in April 1999 suggest, however, that '[c]hanges in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status', above n. 8, at para. 29.

The Commission of the European Communities, for example, has drafted a proposed Directive harmonizing minimum standards for refugee status within the European Union, which includes cessation provisions.<sup>36</sup> The Commission's explanatory memorandum to the draft Directive suggests the following standards for assessing a change of circumstances in the State of origin:

[A] change [must be] of such a profound and durable nature that it eliminates the refugee's well-founded fear of being persecuted. A profound change of circumstances is not the same as an improvement in conditions in the country of origin. The relevant inquiry is whether there has been a fundamental change of substantial political or social significance that has produced a stable power structure different from that under which the original well-founded fear of being persecuted was produced. A complete political change is the most obvious example of a profound change of circumstances, although the holding of democratic elections, the declaration of an amnesty, repeal of oppressive laws, or dismantling of former [security] services may also be evidence of such a transition.

A situation which has changed, but which also continues to show signs of volatility, is by definition not durable. There must be objective and verifiable evidence that human rights are generally respected in that country, and in particular that the factors which gave rise to the refugee's well-founded fear of being persecuted are durably suppressed or eliminated. Practical developments such as organised repatriation and the experience of returnees, as well as the reports of independent observers should be given considerable weight.<sup>37</sup>

Similarly, the Australian Government has recommended that the cessation of refugee status based on ceased circumstances should only be considered when developments in the country of origin are:

- substantial, in the sense that the power structure under which persecution was deemed a real possibility no longer exists;
- effective, in the sense that they exist in fact, rather than simply promise, and reflect a genuine ability and willingness on the part of the home country's authorities to protect the refugee; and
- durable, rather than transitory shifts which last only a few weeks or months.<sup>38</sup>

36 Commission of the European Communities, 'Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection', COM (2001) 510 final, 12 Sept. 2001 (hereinafter 'Draft Directive on Minimum Standards for Qualification and Status as Refugees'), Art. 13.

37 *Ibid.*, explanatory memorandum, Art. 13(1)(e).

38 Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs, Australia, 'The Cessation Clauses (Article 1C): An Australian Perspective', Oct. 2001, p. 16.

According to Netherlands government policy, indicators of 'fundamental change' include:

successful changes to the constitution, the conduct of democratic elections, the establishment of a democratic administration or a multi-party system, successful large-scale repatriation, the introduction and application of amnesty schemes, a general improvement in the human rights situation or the implementation of other social developments marking the end of systematic repressive government action...<sup>39</sup>

The consistency between UNHCR guidelines and the official positions of States Parties suggests that there exists substantial agreement on the interpretation of the 'ceased circumstances' cessation clauses. Perhaps most importantly, States Parties and UNHCR appear to share the view that Article 1C(5) and (6) should be applied carefully and only when comprehensive and lasting changes have occurred in the country of origin. Processes for applying the ceased circumstances clauses are not well developed, however, and are examined below.

## B. UNHCR practice under its Statute, 1973–1999

Consideration of the ceased circumstances provisions within UNHCR has arisen through several different procedures. Changes of a potentially fundamental and durable nature in a country of origin have frequently led UNHCR to explore the possibility of applying the cessation clauses to refugee populations under its mandate. Occasionally, UNHCR has also taken a proactive approach, surveying conditions in countries of origin worldwide to determine whether the cessation clauses should be applied to refugee populations under its mandate. Finally, favourable developments in a country of origin have often led asylum countries to consult UNHCR regarding the applicability of the ceased circumstances provisions.

In some cases, positive changes in a country of origin have enabled UNHCR to promote the voluntary repatriation of refugees and terminate its assistance programs. UNHCR has then considered invoking Article 1C(5) and (6) to facilitate its withdrawal and resolve the status of a residual caseload. For example, in July 1988, UNHCR explored issuing a declaration of general cessation for Ethiopian refugees after Ethiopia and Somalia reached a settlement in April of that year ending the conflict over the Ogaden.<sup>40</sup> Similarly, the end of the civil war in Chad and the consolidation of President Habré's government enabled UNHCR to examine the possibility of applying the ceased circumstances provisions to Chadian refugees

39 'Memorandum on the Withdrawal of Refugee Status', above n. 31, section 2.2.

40 UNHCR Somalia, to UNHCR Headquarters Geneva, 3 Aug. 1988; 1986–91 Protection; Fonds 17, Protection; Archives of the United Nations High Commissioner for Refugees (hereinafter Fonds UNHCR 17).

in 1990.<sup>41</sup> The administration of the cessation clauses to Albanian refugees was considered in 1994 after improvements in the human rights situation and progress towards democratic reform.<sup>42</sup>

On several occasions, UNHCR has also conducted a comprehensive review of refugee caseloads under its mandate to identify situations in which the cessation clauses might be applicable based on changed circumstances. A 1994 internal review, for example, concluded that Article 1C(5) and (6) could be invoked with regard to refugees from South Africa, Slovakia, Albania, Bulgaria, and Romania.<sup>43</sup> Further deliberations over the course of 1995 led to the decision to declare general cessation for South African, as well as Namibian, refugees and to defer final judgments on the other cases.<sup>44</sup>

UNHCR has frequently advised the governments of asylum countries about the applicability of Article 1C(5) and (6) to specific refugee populations. In some cases, it has taken the initiative to provide asylum States with an assessment of whether changes in a country of origin warrant the use of the ceased circumstances provisions. In June 1996, for example, UNHCR contributed to deliberations within the Panamanian Government regarding the application of the cessation clauses to Haitian refugees.<sup>45</sup>

In addition, UNHCR has regularly responded to inquiries from the governments of asylum countries. Often, such inquiries have been received shortly after the occurrence of major developments in a country of origin. In January 1983, three months after the establishment of a democratic government in Bolivia, the Peruvian Government asked UNHCR to apply the ceased circumstances provisions to Bolivian refugees.<sup>46</sup> UNHCR received a similar inquiry from the Government of South Africa in November 1999 about the status of Nigerian refugees, six months after the transition to civilian rule in Nigeria.<sup>47</sup>

41 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 21 Nov. 2000.

42 HCR/USA/1126, 3 Oct. 1994; UNHCR Department of International Protection (DIP) staff personal files.

43 UNHCR Division of International Protection, 'Application of Cessation Clause, Article 1C(5) of 1951 Convention and para. 6(A) of the Statute', memo, 2 Dec. 1994, UNHCR DIP staff personal files. Division of International Protection to Directors of Bureaux, Regional Legal Advisors, 20 Feb. 1995; 91/95 Cessation Clauses, Americas; Sub-fonds 2, Americas Bureau; Fonds 19, Regional Bureaux; Archives of the United Nations High Commissioner for Refugees (hereinafter Fonds UNHCR 19). UNHCR Division of International Protection, 'Survey of the Application of Cessation Clauses', memo, 16 Aug. 1995, UNHCR DIP staff personal files.

44 UNHCR Division of International Protection, to All Directors of Operations, 'Cessation Clause', memo, 22 Nov. 1996, UNHCR DIP staff personal files. 'Survey of the Application of Cessation Clause . . .', above n. 43.

45 UNHCR Regional Bureau for the Americas and Caribbean (RBAC), to UNHCR Regional Office Costa Rica, 6 June 1996, UNHCR RBAC staff personal files.

46 UNHCR Americas Bureau, to Division of International Protection, 6 Jan. 1983; 1986–91 Protection; Fonds UNHCR 17.

47 UNHCR Branch Office South Africa, Pretoria, to Department of International Protection, 'Application of Cessation Clause to Nigerian Refugees in South Africa', memo, 25 Nov. 1999, UNHCR

Finally, UNHCR has evaluated the significance of developments in refugee-sending countries in the context of the status determination procedures of asylum countries. In response to requests from governments and asylum seekers, UNHCR has provided its assessment of improvements in a country of origin and their implications, if any, for claims of refugee status. For instance, in recent years, UNHCR has advised US government agencies and asylum seekers in this manner in status determination proceedings for asylum seekers from the Democratic Republic of the Congo, Haiti, and Guatemala, among others.<sup>48</sup>

Despite receiving regular consideration within the organization, the ceased circumstances provisions have only been applied by UNHCR to refugee populations under its mandate on twenty-one occasions during the period from 1973 to 1999 (see Table 8.1 overleaf). According to UNHCR, the cessation clauses have not been used extensively for two reasons.<sup>49</sup> First, the availability of alternative solutions, such as voluntary repatriation, has usually obviated the need to invoke the cessation clauses. Secondly, it has often been difficult to determine whether developments in a country of origin warranted the application of the cessation clauses. Rather, UNHCR has issued declarations of cessation mainly to 'provide a legal framework for the discontinuation of UNHCR's protection and material assistance to refugees and to promote with States of asylum concerned the provision of an alternative residence status to the former refugees'.<sup>50</sup>

The cases in which UNHCR has ultimately invoked Article 1C(5) and (6) on a group basis can be organized according to the kind of change that has occurred in the country of origin. Three basic types of change in circumstances can be identified: (i) accession to independent statehood; (ii) achievement of a successful transition to democracy; and (iii) resolution of a civil conflict.

In seven cases, the application of Article 1C(5) and (6) was related to the achievement of independence by the country of origin (Mozambique, Guinea-Bissau, São Tomé and Príncipe, Cape Verde, Angola, Zimbabwe, and Namibia). Such independence cases account for six of the ten instances in which UNHCR invoked the ceased circumstances provisions prior to 1991 (the exception being Namibia in 1995).

In twelve cases, UNHCR has invoked the ceased circumstances provisions based upon a change in the regime (typically involving a transition to democracy) in the country of origin. These cases, which occurred over the period 1980–99, were often associated with the end of the Cold War. The application of the cessation clauses to refugees from Chile (1994), Romania (1997), and Ethiopia (1999) is examined below in greater detail. In these cases, invoking the ceased circumstances provisions has

DIP staff personal files. See also, Department of International Protection, to UNHCR Branch Office South Africa, Pretoria, 20 Dec. 1999; AF05 PRL3/3.1/3.2/3.3; Sub-fonds 1, Africa Bureau; Fonds UNHCR 19.

48 UNHCR staff, interview by R. Bonoan, Washington, DC, 9 Jan. 2001.

49 'Discussion Note', above n. 18, paras. 3 and 11.

50 'Note on the Cessation Clauses', above n. 7, para. 31.

Table 8.1 'Ceased circumstances' cessation cases

Country of origin	Date of IOM/FOM*	IOM No.	Nature of fundamental change
Sudan	12 July 1973	26/73	Settlement of civil conflict
Mozambique	14 November 1975	36/75	Independence
Guinea-Bissau	1 December 1975	38/75	Independence
São Tomé and Príncipe	16 August 1976	7/76	Independence
Cape Verde	16 August 1976	21/76	Independence
Angola	15 June 1979	22/79	Independence
Equatorial Guinea	16 July 1980	44/80	Regime change/ democratization
Zimbabwe	14 January 1981	4/81	Independence
Argentina	13 November 1984	84/84	Regime change/ democratization
Uruguay	7 November 1985	55/85	Regime change/ democratization
Poland	15 November 1991	83/91	Regime change/ democratization
Czechoslovakia	15 November 1991	83/91	Regime change/ democratization
Hungary	15 November 1991	83/91	Regime change/ democratization
Chile	28 March 1994	31/94	Regime change/ democratization
Namibia	18 April 1995	29/95	Independence
South Africa	18 April 1995	29/95	Regime change/ democratization
Mozambique	31 December 1996	88/96	Settlement of civil conflict
Malawi	31 December 1996	88/96	Regime change/ democratization
Bulgaria	1 October 1997	71/97	Regime change/ democratization
Romania	1 October 1997	71/97	Regime change/ democratization
Ethiopia	23 September 1999	91/99	Regime change/ democratization

\* Internal Office Memorandum/Field Office Memorandum

involved a three-stage process of: (i) consulting with the country of origin and/or asylum countries; (ii) conducting a comprehensive evaluation of conditions in the country of origin; and (iii) issuing a memorandum declaring the application of Article 1C(5) and (6) to refugees from the country of origin in question.

In Chile, a 1988 plebiscite and national elections in 1989 culminated in the transfer of power from the military regime led by General Augusto Pinochet to the elected government of President Patricio Aylwin in March 1990. This event marked the return of democracy to Chile after seventeen years of military rule. Shortly after the Aylwin administration took office, UNHCR began to receive inquiries from governments of asylum countries regarding the application of the cessation clause to Chilean refugees. Responding to such inquiries in November 1990 and October 1991, UNHCR argued that it was premature to invoke Article 1C(5) and (6) because the transition to democracy was still underway and more time was needed to determine the durability of the change in circumstances in Chile.<sup>51</sup>

By 1992, however, sufficient time had elapsed for these changes to consolidate and for UNHCR to initiate consideration of the application of the ceased circumstances provisions to Chilean refugees. In March 1992, consultations were held with the Chilean Government and local advocacy groups regarding a declaration of general cessation.<sup>52</sup> Chilean policymakers and human rights activists both expressed support for such a declaration. UNHCR also modified its position on the application of the ceased circumstances provisions by asylum countries, advising the French Government in July 1992 that it would not object to the application of the cessation clause to Chilean refugees.<sup>53</sup>

Deliberations within UNHCR regarding a declaration of general cessation continued throughout 1993. During this period, UNHCR sought to ascertain the significance and durability of developments in Chile and to address, in cooperation with the Chilean Government, the problem of refugees with pending legal proceedings before military or civilian tribunals.<sup>54</sup> The latter issue had emerged as the principal obstacle to a declaration of general cessation for Chilean refugees.<sup>55</sup> Attempts to resolve the issue by developing a comprehensive list of refugees who faced such

51 Regional Bureau for Latin America and the Caribbean and Division of International Protection to Branch Offices Argentina, Chile, and Venezuela, 2 Nov. 1990; 91/95 Cessation Clauses, Americas; Sub-fonds 2, Americas Bureau; Fonds UNHCR 19. UNHCR Chile to UNHCR Geneva, UNHCR Canada, CHL/HCR/0306, CHL/CAN/HCR/0248, 22 Oct. 1991; 91/95 Cessation Clauses, Americas; Sub-fonds 2, Americas Bureau; Fonds UNHCR 19.

52 UNHCR Santiago de Chile, to Regional Bureau for Latin America and the Caribbean and Division of International Protection, 24 June 1992; 91/95 Cessation Clauses, Americas; Sub-fonds 2 Americas; Fonds UNHCR 19.

53 UNHCR Regional Bureau for Latin America and Caribbean/Division of International Protection, to HRC/France, HRC/Chile, and HRC/Argentina, 8 July 1992; 560.CHL; Series 3, Classified Subject Files; Fonds 11, Records of the Central Registry; Archives of the United Nations High Commissioner for Refugees.

54 UNHCR Santiago de Chile, above n. 52.

55 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 30 Nov. 2000.

proceedings, however, were unsuccessful.<sup>56</sup> UNHCR therefore decided to proceed with a declaration of general cessation, including a specific provision for Chilean refugees facing the possibility of detention or prosecution upon their return.<sup>57</sup> The general issue of exceptions to cessation is discussed in further detail below in section II.C.3.

Specific human rights concerns also played an important role in the case of Romania. The collapse of the Ceausescu regime in 1989 was followed by several years of political instability and mixed progress on human rights issues. Although significant improvements occurred in some areas, discriminatory measures and practices from the Ceausescu era persisted. These included deficiencies in the protection of the rights of minority groups (particularly the Roma and Hungarian minorities), homosexuals, and detainees.<sup>58</sup>

In May 1995, however, the French Government notified UNHCR of its intention to apply the ceased circumstances provisions to Romanian refugees.<sup>59</sup> France had continued to receive large numbers of asylum seekers from Romania since 1989. According to the French authorities, many of the applicants' claims were manifestly unfounded and primarily of an economic nature and the influx had begun to undermine public support for the institution of asylum.<sup>60</sup> French officials may have therefore viewed a declaration of general cessation as an important political signal as well as a potentially effective method of deterring additional flows of refugees from Romania.<sup>61</sup> The problems posed by the importation of 'cessation' concepts into initial refugee status determination are examined below in section IV.

The French Government assured UNHCR that those recognized as refugees would neither lose their status automatically nor be forcibly returned to Romania, and that new asylum seekers would continue to have their claims evaluated on an

56 Liaison Office Chile to Regional Bureau for the Americas and Caribbean, 14 Jan. 1994; 91/95 Cessation Clauses, Americas; Sub-fonds 2, Americas Bureau; Fonds UNHCR 19.

57 The exemption stated:

Special attention should be given to the cases of refugees who have reason to believe they may still be the subject of arrest warrants or convictions *in absentia* for acts related to the situation which led to recognition of refugee status. Such cases should be referred to Headquarters in order to examine the merits of the case and advise the country of asylum accordingly.

UNHCR, 'Applicability of the Cessation Clauses to Refugees from Chile', 28 March 1994.

58 HCR/USA/0510, 25 May 1994, UNHCR DIP staff personal files.

59 UNHCR Regional Bureau for Europe, 'France's Intention to Declare General Cessation in Respect of Romanian Refugees', Note for the File, 7 June 1995, UNHCR DIP staff personal files.

60 *Ibid.*

61 According to one UNHCR staff member, the number of Romanian asylum seekers decreased significantly following the declaration of general cessation by the French Government. This decline was probably the result of numerous factors, the most significant likely being the gradual improvement of conditions in Romania, although the application of the cessation clause may have contributed to the decline by deterring additional flows of asylum seekers from Romania.



individual basis.<sup>62</sup> UNHCR expressed no objection to the cessation of status for pre-1989 Romanian refugees on an individual basis, but maintained its position that concerns about the rights of minorities and other vulnerable groups precluded a declaration of general cessation.<sup>63</sup> UNHCR also indicated, however, that it would continue to monitor the situation in Romania and consider the application of the ceased circumstances clauses if progress were made in these areas.<sup>64</sup>

In June 1995, France proceeded to apply the cessation clauses to Romanian refugees. UNHCR publicly expressed satisfaction with its consultations with the French Government and with the safeguards that had been adopted by the French authorities to protect the rights of refugees and asylum seekers.<sup>65</sup> UNHCR also reiterated its willingness to consider the application of the ceased circumstances provisions if the situation in Romania improved.<sup>66</sup>

By 1997, a number of positive developments had occurred in Romania. These included a second round of national elections in November 1996 that had generally been recognized as free and fair, as well as efforts by the new Romanian Government to strengthen guarantees for the rights of minorities. In July 1997, a comprehensive review of circumstances in Romania by UNHCR found that the ceased circumstances provisions could be applied to Romanian refugees.<sup>67</sup> The resulting declaration of cessation issued by UNHCR in October 1997 included a special provision for refugees who had lost their personal documentation.<sup>68</sup>

In the case of Ethiopia, the application of the ceased circumstances provisions was complicated by the need to address the concerns of the country of origin and an important asylum country. The military regime of Lt.Col. Mengistu Haile Mariam had collapsed in 1991 after seventeen years in power. From 1993 to 1998, UNHCR conducted a voluntary repatriation programme for Ethiopian refugees who had fled persecution by the Mengistu regime. As the voluntary repatriation programme drew to a close, UNHCR began to consider the application of the cessation clauses to the remaining caseload of Ethiopian refugees. Such a recommendation was first made in 1998, and was subsequently endorsed at a Standing Committee meeting in February 1999.<sup>69</sup>

62 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 14 Nov. 2000.

63 'France's Intention to Declare General Cessation', above n. 59.

64 Ibid.

65 UNHCR Branch Office for France, 'Press Statement by UNHCR on the Invocation by the French Authorities of the Cessation Clause in Respect of the Romanian Asylum-seekers', 21 June 1995, UNHCR DIP staff personal files.

66 Ibid.

67 UNHCR Liaison Office for Romania, 'Application of General Cessation to Romanian Refugees', Discussion Paper, June 1997, UNHCR DIP staff personal files.

68 UNHCR, 'Applicability of the Cessation Clauses to Refugees from Bulgaria and Romania', 1 Oct. 1997.

69 UNHCR Branch Office Sudan, to UNHCR Regional Office East and Horn of Africa and the Great Lakes, *et al.*, 'Application of the Cessation Clause Pre-91 Ethiopian Refugees', memo, undated, UNHCR DIP staff personal files.

A comprehensive review of developments in Ethiopia since 1991 concluded that the invocation of Article 1C(5) and (6) was justified,<sup>70</sup> although continued political instability and human rights abuses, followed by the outbreak of war between Ethiopia and Eritrea in May 1998, raised the possibility that Ethiopians who had sought international protection *after* 1991 could possess valid claims for refugee status.<sup>71</sup> To avoid jeopardizing the claims or status of these refugees, UNHCR therefore limited the application of the cessation clauses to those who had fled persecution by the Mengistu regime (or pre-1991 refugees).<sup>72</sup>

The governments of Ethiopia and Sudan both sought, however, to postpone the application of the cessation clauses to pre-1991 Ethiopian refugees. The Ethiopian Government expressed concerns about the reintegration of large numbers of returnees, given the internal population displacement and destruction wrought by the war with Eritrea.<sup>73</sup> The reluctance of the Sudanese Government reflected fears about the loss of international financial assistance, as well as the large remaining caseload of Ethiopian refugees in Sudan to whom the cessation clauses did not apply.<sup>74</sup>

While continuing to insist that the application of the cessation clauses proceed as planned, UNHCR sought to address the issues raised by both governments. It agreed to assist the Sudanese Government with the conduct of refugee status determination procedures for the entire caseload of pre-1991 Ethiopian refugees.<sup>75</sup> In response to the concerns of the Ethiopian Government about the absorption of returnees, UNHCR consented to phasing the implementation of the cessation clauses and the repatriation of refugees from Sudan.<sup>76</sup>

The third and final category of circumstances in which UNHCR has invoked Article 1C(5) and (6) involves the settlement of a civil conflict. There have only been two such cases to date: Sudan (1973) and Mozambique (1996). These cases merit further consideration because they represent the most likely situation in which the application of the ceased circumstances provisions will be considered in the future.

In March 1972, a peace agreement was reached between the Government of Sudan and the South Sudan Liberation Movement ending the civil war in Sudan. The conflict had generated some 180,000 refugees (in Uganda, Zaire, the Central African Republic, and Ethiopia) as well as 500,000 internally displaced persons.<sup>77</sup>

70 UNHCR staff, personal communication with R. Bonoan, 10 Nov. 2000.

71 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 15 and 24 Nov. 2000, and 1 Dec. 2000.

72 According to one UNHCR staff member, this precaution has proven ineffective in the case of Sudan, which has proceeded to deny automatically the claims of asylum seekers from Ethiopia.

73 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 24 Nov. 2000.

74 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 24 Nov. 2000 and 1 Dec. 2000.

75 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 1 Dec. 2000.

76 *Ibid.*

77 UNHCR, 'The Southern Sudan: The Ceasefire and After', Aug. 1973; 7/2/3/SSO Reports from Various Sources – Southern Sudan Operation – Reports on the Situation in the Southern Region;

UNHCR was formally assigned responsibility for the voluntary repatriation, relief, and resettlement of refugees from July 1972 to June 1973.<sup>78</sup> The reconstruction and development phase of the United Nations emergency relief programme was then to begin in July 1973 under the leadership of the United Nations Development Programme (UNDP).<sup>79</sup>

By July 1973, the voluntary repatriation of Sudanese refugees from the Central African Republic and Ethiopia had been completed. Furthermore, UNHCR expected to finish repatriating Sudanese refugees from Zaire and Uganda by October of that year. UNHCR therefore proceeded to issue a declaration of general cessation, arguing that the circumstances upon which the group recognition of Sudanese refugees had been based no longer existed.<sup>80</sup> Refugees who wished to maintain their status would therefore be required to demonstrate that the end of the civil war and national reconciliation in Sudan had not affected the basis of their fear of persecution or that they could not be expected to return to Sudan because of the severity of the persecution that they had suffered. Given the 'reality of national reconciliation' in Sudan, however, UNHCR called for a restrictive approach to the granting of such exemptions.

The Sudanese Government nevertheless requested that UNHCR extend its role as coordinator of the UN emergency relief programme for southern Sudan until the end of 1973.<sup>81</sup> The request raised concerns within UNHCR that any delay would complicate the transition from the relief to the development phase of the UN programme and mire the organization in development activities outside its competence and mandate.<sup>82</sup> The High Commissioner therefore limited the extension of UNHCR involvement to October 1973, when the voluntary repatriation operation was scheduled for completion, and called for the launch of the development phase on 1 July 1973 as originally planned.<sup>83</sup>

In December 1996, UNHCR issued its second declaration of general cessation for Mozambican refugees. In 1992, the Government of Mozambique and the Mozambique National Resistance Movement (Renamo) had signed a peace accord, bringing an end to a long-running civil war. In October 1994, successful multiparty elections were then held. Finally, the voluntary repatriation and reintegration of 1.7 million Mozambican refugees was completed in June 1996. UNHCR cited these

Series 1, Classified Subject Files; Fonds 11, Records of the Central Registry; Archives of the United Nations High Commissioner for Refugees (hereinafter Series 1, Fonds UNHCR 11).

78 Ibid. 79 Ibid.

80 UNHCR, 'Protection and Assistance for Sudanese Refugees', 12 July 1973.

81 UNHCR, 'Note to the File', 23 June 1973; 1/9/1/SSO Relations with Governments – Southern Sudan Operations – Relations with Sudanese Government on the Southern Region; Series 1, Fonds UNHCR 11.

82 Ibid.

83 UN High Commissioner for Refugees, to Vice-President of the Democratic Republic of Sudan, 10 July 1973; 1/9/1/SSO Relations with Governments – Southern Sudan Operations – Relations with Sudanese Government on the Southern Region; Series 1, Fonds UNHCR 11.

developments as evidence of a 'fundamental' and 'durable' change in circumstances in Mozambique warranting the application of the ceased circumstances provisions to refugees from Mozambique.<sup>84</sup>

The application of the cessation clauses had already been envisioned, however, before the October 1994 elections. In June 1994, the High Commissioner had announced at an informal Executive Committee meeting that UNHCR would terminate its repatriation and reintegration operation by the middle of 1996.<sup>85</sup> In September 1994, UNHCR had stated its expectation that

[g]iven a successfully run election, the establishment of a new Government as well as a stable and secure environment, Mozambican refugees who still wish to live outside their country [would], after a suitable period, have to regularize their status with the relevant authorities and [would] no longer be regarded as persons of concern to UNHCR.<sup>86</sup>

The successful October 1994 elections led UNHCR to suggest in March 1995 that the cessation clauses would be invoked in the near future, although an August 1995 analysis recommended that UNHCR wait a minimum of an additional twelve months before proceeding with a declaration of general cessation.<sup>87</sup> The study cited the extensive presence of landmines, inadequate food supplies, and the limited availability of land for cultivation as important constraints on the security of returnees that required additional monitoring.<sup>88</sup> The application of the ceased circumstances provisions to Mozambican refugees was thus deferred until November 1996, when the decision was reached to proceed with a declaration of general cessation.

The cases examined in the preceding paragraphs have involved the formal application of Article 1C(5) and (6) to an entire group of refugees by UNHCR. With regard to other refugee populations, UNHCR has demurred from issuing a declaration of general cessation despite improvements in their countries of origin. In some cases, UNHCR has found that such developments simply fail to meet the standard of a fundamental and durable change in circumstances. For example, in August 1997, UNHCR advised the US Government that the application of the cessation clauses generally to all Haitian refugees was premature because of continued concerns about the human rights situation in Haiti.<sup>89</sup> Similarly, in November 1998,

84 UNHCR, 'Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique', 31 Dec. 1996, para. 2.

85 UNHCR, 'Mozambique: Repatriation and Reintegration of Mozambican Refugees, Progress Report and 1995 Reintegration Strategy, Addendum: UNHCR Reintegration Strategy for 1995', Sept. 1994, para. 20.

86 *Ibid.*, para. 43.

87 'Survey of the Application of Cessation Clauses . . .', above n. 43.

88 *Ibid.*

89 UNHCR Regional Office for the Americas and the Caribbean (RBAC), to Resource Information Center, US Immigration and Naturalization Service, 'Current Country Conditions in Haiti', letter, 14 Aug. 1997, UNHCR RBAC staff personal files.

UNHCR counselled the Netherlands Government against the application of the ceased circumstances provisions to Bosnian refugees because of the absence of fundamental and durable change in Bosnia and Herzegovina.<sup>90</sup>

Occasionally, UNHCR has supported the application of Article 1C(5) and (6) on an individual rather than a group basis. UNHCR employed this approach in 1992 for Albanian refugees under its care in the Federal Republic of Yugoslavia.<sup>91</sup> In 1996, UNHCR advised the Government of Panama that Article 1C(5) and (6) could be invoked on an individual basis with regard to Haitian refugees.<sup>92</sup> Similarly, in response to a 1997 inquiry from the Swedish Government, UNHCR suggested that the cessation clauses could be applied individually to Vietnamese refugees.<sup>93</sup>

UNHCR has also endorsed the use of Article 1C(5) and (6) on a group basis by asylum countries rather than invoke the ceased circumstances provisions themselves, especially when a declaration of general cessation by UNHCR could affect the claims of asylum seekers waiting to have their status determined. The cases of El Salvador and Nicaragua illustrate this approach. Consideration within UNHCR of a declaration of general cessation for El Salvadorean and Nicaraguan refugees began in 1995, following the successful conclusion of the International Conference on Central American Refugees (CIREFCA) in June 1994.<sup>94</sup> A review of conditions in El Salvador and Nicaragua and subsequent consultations inside and outside UNHCR identified several factors that militated against a declaration of general cessation at that time.<sup>95</sup> These included fragile economic conditions in both countries as well as continued concerns about the human rights situation in El Salvador. Moreover, the status determination process for El Salvadorean and Nicaraguan asylum seekers in the United States had been delayed by litigation to ensure that the claims of El Salvadorean refugees were fairly adjudicated and by legislative efforts to protect Central American refugees.<sup>96</sup> A declaration of general cessation by UNHCR could unduly influence these proceedings.<sup>97</sup>

UNHCR therefore elected not to apply the ceased circumstances provisions to refugees from El Salvador and Nicaragua. In May 2000, however, not least because of changed circumstances, UNHCR did provide technical assistance to the Panamanian Government regarding the application of Article 1C(5) and (6) to El Salvadorean and Nicaraguan refugees. This included the submission of a

90 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 30 Nov. 2000.

91 HCR/HRV/0731, HCR/YUG/1578, 2 Dec. 1992, UNHCR DIP staff personal files.

92 UNHCR Regional Bureau for the Americas and Caribbean, above n. 45.

93 UNHCR memo, 'Information on the Application of Cessation Clauses – Reply', 3 March 1997, UNHCR DIP staff personal files.

94 The CIREFCA process was a comprehensive, regional programme for the repatriation and reintegration of refugees and the removal of the root causes of displacement.

95 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 22, 27, and 30 Nov. 2000.

96 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 23 Nov. 2000 and Washington DC, USA, 9 Jan. 2001.

97 *Ibid.*

comprehensive evaluation of developments in El Salvador and Nicaragua that drew on previous UNHCR assessments.<sup>98</sup> This study found that conditions in both countries now satisfied the standard of fundamental and durable change necessary for Panama to proceed with a declaration of cessation for refugees from El Salvador and Nicaragua.<sup>99</sup>

Finally, the issue of cessation has arisen when improving conditions in refugee-sending countries have led asylum countries to pursue efforts to return refugees to their country of origin. Such developments have not been sufficient to warrant a declaration of general cessation by UNHCR. UNHCR has sought, however, to identify those in continued need of international protection, while acknowledging that certain groups may no longer require refugee status. In the case of Bosnia and Herzegovina, people who remain in need of international protection include persons of mixed ethnicity or in mixed marriages, deserters and draft-evaders of the Bosnian Serb army, and members of the Roma communities. Conversely, individuals who may no longer require international protection and for whom return may be feasible include those who originally resided in areas in which they constituted a majority and, more recently, those from specific minority areas.<sup>100</sup>

In the case of Afghanistan, the collapse of the Soviet-backed Najibullah regime in 1992 and the gradual establishment of Taliban control over most of the country by the mid-1990s suggested that certain groups of Afghan refugees might no longer require international protection (these included individuals who had fled persecution by the Najibullah government or those of Pashtun ethnicity, the majority of whom had fled to Pakistan).<sup>101</sup> The absence of effective national protection,<sup>102</sup> an ongoing civil war, extensive human rights problems, and economic collapse, however, precluded a declaration of general cessation by UNHCR. Nevertheless, the Iranian Government proceeded with efforts to return Afghan asylum seekers residing within its territory, prompting UNHCR to conclude a voluntary repatriation agreement with Iran in February 2000. The agreement established a screening procedure to identify those Afghans who required international protection as well as those who did not require refugee status.<sup>103</sup> The

98 UNHCR Regional Office Mexico, Central America, Belize, and Cuba, 'UNHCR's Assessment of the Change of Circumstances in Nicaragua and El Salvador', 5 May 2000, UNHCR RBAC staff personal files.

99 Ibid.

100 UNHCR, 'Update of UNHCR's Position on Categories of Persons from Bosnia and Herzegovina in Need of International Protection', Aug. 2000, p. 2, UNHCR South Eastern Europe Operation staff personal files. The report states that '[d]ue to the overall improved situation in [Bosnia and Herzegovina], it can no longer be upheld that belonging to a numerical minority group upon return *per se* renders a person in need of international protection'.

101 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 20 Nov. 2000.

102 The Taliban was not recognized by the international community as the legitimate government of Afghanistan.

103 'Joint Programme for the Voluntary Repatriation of Afghan Refugees Between the Government of the Islamic Republic of Iran and the United Nations High Commissioner for Refugees',

subsequent overthrow of the Taliban in 2001 and uncertainty surrounding the future governance of Afghanistan illustrate both the difficulty and importance of correctly ascertaining the extent and durability of changes in circumstances in a country of origin, particularly when a protracted, complex refugee situation is involved.

UNHCR has encountered a similar situation involving Cambodian refugees in Thailand. In 1999, the Government of Thailand approached UNHCR about resolving the status of a small group of Cambodian refugees who had remained in Bangkok after the completion of a UNHCR voluntary repatriation programme.<sup>104</sup> This group consisted of political leaders, activists, students, and military personnel who had fled the outbreak of violence in July 1997 between the supporters of the two Cambodian prime ministers, Prince Ranariddh and Hun Sen.<sup>105</sup> Monitoring of returnees in Cambodia indicated that those who had voluntarily repatriated had been able to reintegrate successfully.<sup>106</sup> While extensive consultations with the local Center for Human Rights and other organizations suggested that most of these individuals were no longer in need of international protection and could return in safety to Cambodia, other refugee advocates in the region contested this evaluation.<sup>107</sup>

Since these refugees had been individually recognized by UNHCR, standard procedure called for an overall assessment of the human rights situation in Cambodia, as stipulated in Executive Committee Conclusion No. 69, and a formal declaration of cessation. Such an assessment was unlikely to conclude, however, that a fundamental and durable change in circumstances had occurred in Cambodia. At the same time, UNHCR possessed extensive information indicating that the refugees belonging to this residual caseload might no longer require international protection.<sup>108</sup>

Rather than formally invoke the cessation clauses, UNHCR launched a 'status review' exercise for this group of Cambodian refugees in March 1999.<sup>109</sup> Individuals who wished to maintain their refugee status were required to register with UNHCR, and those who failed to do so would no longer be considered under

Tehran, Feb. 2000, UNHCR Bureau of Central Asia, South-West Asia, North Africa, and the Middle East (CASWANAME) staff personal files.

104 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 1 Dec. 2000.

105 Ibid. See also, UNHCR Regional Office Thailand, 'Cambodia Urban Caseload Update', 19 Oct. 1998, UNHCR Evaluation and Policy Analysis Unit (EPAU) staff personal files.

106 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 1 Dec. 2000.

107 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 15 and 23 Nov. 2000, and 1 Dec. 2000. See also, UNHCR Regional Office Thailand, 'Mission Report, Phnom Penh, 7–9 September 1999', 12 Sept. 1999, UNHCR EPAU staff personal files.

108 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 1 Dec. 2000.

109 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 15 and 23 Nov. 2000, and 1 Dec. 2000. See also, Department of International Protection, 'Note on the Application of the Cessation Clause 1C(5) Concerning the Residual Cambodian Caseload in Thailand', 1 July 1999, UNHCR EPAU staff personal files.

UNHCR protection.<sup>110</sup> Refugees who wished to return to Cambodia could do so on their own or request UNHCR assistance.<sup>111</sup> Some 150 applications were received from refugees seeking to maintain their status.<sup>112</sup> Drawing again on its extensive contacts with human rights organizations working in Cambodia, UNHCR screened these applications and identified some thirty to forty individuals who still required international protection.<sup>113</sup> Individuals who were screened out were given the opportunity to appeal the results of the process.<sup>114</sup>

In September 1999, further consultations with human rights organizations in Cambodia revealed that the political situation had again deteriorated.<sup>115</sup> The status review process was suspended and the thirty to forty individual cases previously screened in were designated for resettlement.<sup>116</sup> UNHCR also decided to postpone an evaluation of the human rights situation in Cambodia to determine whether the ceased circumstances provisions could be invoked.<sup>117</sup>

### C. State practice regarding ceased circumstances cessation

Although frequently considered by UNHCR, the ceased circumstances cessation clauses are ‘little used’ by States.<sup>118</sup> The reasons vary, but they include the administrative costs of terminating individual grants of refugee status based upon a review of general human rights conditions in the State of origin, the recognition that termination of refugee status may not result in repatriation where the refugee is eligible to remain with another legal status, and State facilitation of naturalization pursuant to Article 34 of the 1951 Convention.<sup>119</sup> In the case of group-based refugee protection, States of refuge may hesitate to declare cessation because of the instability of conditions in the State of origin and because assistance from the international community may be adversely affected.

The texts of Article 1C(5) and (6) of the 1951 Convention and Article I.4(e) of the OAU Refugee Convention have a distinctly individualized aspect. They refer, not to general political or human rights conditions, but to ‘the circumstances in connection with which he has been recognized as a refugee’ and to individual attitudes and conduct ([h]e can no longer . . . refuse to avail himself of the protection [of the State of nationality or habitual residence]’). Asylum States that

110 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 23 Nov. 2000.

111 *Ibid.* 112 *Ibid.*

113 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 23 Nov. 2000 and 1 Dec. 2000.

114 UNHCR staff, interview by R. Bonoan, Geneva, Switzerland, 1 Dec. 2000.

115 *Ibid.*

116 *Ibid.* See also, ‘Mission Report, Phnom Penh, 7–9 September 1999’, above n. 107.

117 *Ibid.*

118 UNHCR, ‘Summary Conclusions – Cessation of Refugee Status, Lisbon Expert Roundtable 3–4 May 2001’ (hereinafter ‘Lisbon Summary Conclusions’), 4 May 2001, para. 1.

119 *Ibid.*, para. 2.



provide individual status determination rarely apply ceased circumstances cessation, and when they do the objective appears to be, not necessarily repatriation, but the administrative transfer of responsibility for the refugees from one government entity to another, or the acceleration of status determination for new asylum applicants from the State of origin. The Summary Conclusions of the expert roundtable on cessation in 2001 note the rarity of individualized cessation and recognize the need to ‘respect a basic degree of stability for individual refugees’.<sup>120</sup>

Article 1C has been incorporated into some national asylum laws, especially those enacted within the past decade. Unfortunately, these statutes sometimes combine cessation provisions with others concerning revocation (cancellation) of refugee status on grounds of fraudulent procurement, exclusion under Article 1F, and expulsion under Article 33(2). Similar confusion characterizes statutes in some African States implementing Article I.4 of the OAU Refugee Convention. The better practice is to treat cessation separately, and not to combine it with provisions concerning persons undeserving of protection. Distinct treatment of cessation in national law facilitates careful attention to procedural fairness and to compelling circumstances that justify non-return.

Ceased circumstances cessation poses serious difficulties for States Parties, particularly in regard to: (i) assessment of fundamental, durable, and effective change in the State of origin; (ii) fair process; and (iii) provision for exceptions to cessation or to return.

### 1. *Assessment of conditions in the State of persecution*

Since asylum States do not appear to have applied Article 1C(5) and (6) to recognized refugees frequently, the process for assessing changed circumstances remains underdeveloped. The Summary Conclusions of the expert roundtable on cessation identified the following elements as crucial to a proper application of ceased circumstances cessation:

- (i) assessment of the situation in the country of origin . . . (ii) involvement of refugees in the process (perhaps including visits by refugees to the country of origin to examine conditions); (iii) examination of the circumstances of refugees who have voluntarily returned to the country of origin; (iv) analysis of the potential consequences of cessation for the refugee population in the host country; and (v) clarification of categories of persons who continue to be in need of international protection and of criteria for recognizing exceptions to cessation.<sup>121</sup>

Where an asylum State declares cessation for refugees of a particular nationality, the sources of evidence upon which it draws should be broad and should include

120 Ibid., para. 17. 121 Ibid., para. 12.

information from its foreign ministry, from other diplomatic sources, from non-governmental organizations (NGOs), from specialized bodies (especially UNHCR), from scholars, and from the press. This point is stressed in Executive Committee Conclusion No. 69 (XLIII)<sup>122</sup> and in UNHCR's Guidelines.<sup>123</sup> In the Netherlands, for example, before a declaration of cessation is issued, the Ministry of Foreign Affairs prepares an official report summarizing the changes in the country of origin, an official position is requested from UNHCR, and authorities investigate whether neighbouring countries are applying the cessation clause to refugees of the nationality in question.<sup>124</sup>

Precipitous imposition of ceased circumstances cessation in potentially volatile situations may endanger refugees still in need of international protection. Since predictions of the consequences of political changes often prove overly optimistic, assessment visits by refugees contemplating voluntary repatriation, as well as 'escape clauses' for returned refugees who face renewed persecution or severe privation following return, may provide important information and lessen risks. These 'escape clauses' might take the form of a delay or a set period between return and formal cessation of refugee status, or accelerated procedures for revival of refugee status in the case of renewed flight.

In UNHCR's view, time-limited grants of Convention refugee status would be incompatible with the 1951 Convention. Such measures significantly burden refugees by requiring them to repeatedly prove their continued eligibility for protection. Cessation presupposes open-ended grants of refugee status until a defined set of events has occurred, either specific to the refugee or relating to conditions in the State of origin.

## 2. *Fair process*

Where an asylum State applies the ceased circumstances clauses to a recognized refugee, an individual process is required. Evidence of general political and human rights conditions is relevant, but the focus must be upon the causes of the individual's flight, whether post-flight change has eliminated the risk of persecution, and whether effective protection from the State of nationality or habitual residence is now actually available in the individual case. Only if such conditions exist is it unreasonable for the refugee to refuse protection from the State of nationality or habitual residence, and to insist upon continued international protection. The refugee may introduce general evidence on country conditions, as well as evidence concerning his or her own situation, such as personal testimony and testimony or letters from friends and family members. The individualized hearing also provides

122 Executive Committee, Conclusion No. 69, above n. 6, para. b.

123 'UNHCR Guidelines on Cessation', above n. 8, para. 35.

124 'Memorandum on the Withdrawal of Refugee Status', above n. 31, section 1.4.

an opportunity to determine whether the refugee is eligible for an exception from the general application of cessation, for complementary protection, or for another legal status in the State of refuge, as noted in section II.C.3 below.

The process for cessation of refugee status should be as formal as the process for grant of status, given the stakes for the individual. This is true both where the refugee's own conduct causes the asylum State to initiate cessation, and where general political change raises the possibility that the refugee's fear of persecution is no longer well-founded.

The minimum requirements of fair process in cessation cases are notice to appear, provided in a language understandable by the refugee; a neutral decision maker; a hearing or interview at which the refugee may present evidence of continued eligibility for refugee status and rebut or explain evidence that one of the cessation grounds applies; interpretation during the interview, if necessary; an opportunity to seek either a continuation of refugee status or alternative relief where compelling reasons exist to avoid repatriation or where the refugee qualifies for another lawful status; and the possibility of appeal. Refugees should be spared 'frequent review' of their continued eligibility, as this may undermine their 'sense of security, which international protection is intended to provide'.<sup>125</sup>

The burden of proof rests with the asylum State authorities where the cessation clauses are applied to an individual recognized refugee.<sup>126</sup> This allocation is justified because of the importance of the refugee's settled expectations of protection, and because the authorities may have greater access to relevant information, especially in ceased circumstances cases.

Notice of intent to apply the cessation clauses should be communicated to individually recognized refugees and a hearing or interview should be provided, wherever feasible. The draft Council Directive on minimum standards for asylum procedures, presented in September 2000 by the European Commission, suggests that procedural minima may be derogated from 'in cases [among others of withdrawal (cessation) of refugee status] where it is impossible for the determining authority to comply'.<sup>127</sup> Where a refugee is reliably believed to have re-established himself in the State of origin but his address cannot be determined, genuine impossibility may exist. Where a refugee has naturalized in the State of refuge or has applied for and received a residence permit, knowing that by operation of law acquisition of these legal benefits terminates his refugee status, then the procedural formalities may be dispensed with. In other cases, however, notice and hearing should be provided, for instance where the authorities can determine the refugee's location in the State of origin or where the refugee is believed to have re-acquired his

125 UNHCR *Handbook*, above n. 5, para. 135.

126 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), p. 87.

127 Commission of the European Communities, 'Draft Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM (2000) 578 final, 20 Sept. 2000, Art. 26(3).

nationality or acquired the nationality of a third State. There may be serious ambiguity concerning voluntariness, intent, and effective protection in such cases, and imposition of cessation without a solid factual grounding is improper. The restrictive interpretation of the cessation clauses demands that an opportunity to contest their applicability be provided unless genuinely impossible.

The allocation of the burden of proof may vary in other circumstances where cessation concepts figure. Two other cessation-related situations may arise: (i) cessation of group-based refugee status, with provision for individualized reconsideration of claims of continued persecutory risk; and (ii) withdrawal of temporary protection, with provision for access to the refugee status determination procedure. In these settings, repatriation should be suspended until those unwilling to return have been given an opportunity to establish that they are entitled to continued international protection because of their particular situation. This situation may involve a specific well-founded fear of persecution, eligibility for exemption from cessation, or eligibility for complementary protection or other lawful status. In the context of group declarations of cessation, it can be fair to impose the burden of initiative upon resistant individuals to seek reconsideration of their status.<sup>128</sup>

When UNHCR invokes cessation of its protection role under paragraph 6 of the Statute, it normally gives members of the nationality group in question a chance to show that cessation does not apply to them. UNHCR refers to a ‘rebuttable presumption’<sup>129</sup> that the risk of persecution has ceased and to the possibility that individual members of the group might seek ‘reconsideration’ of their cases, during which they may present evidence that they face a continuing risk.

Religious and ethnic minorities may, for instance, experience lingering hostility and discrimination, despite a formal change of regime. Indeed, the exemption for so-called ‘statutory’ refugees recognized before 1951, as set out in Article 1A(1) of the 1951 Convention, was specifically intended to cover those who had suffered atrocious forms of persecution by fascist regimes and could not due to trauma reasonably be expected to return to their country of origin.<sup>130</sup> It was also partly intended to make provision for the social reality that formal regime change does not necessarily erase deep-seated prejudices, nor eliminate the risk that persecution will continue at the hands of rogue officials and non-State actors.<sup>131</sup> Where general

128 Executive Committee Conclusion No. 69, above n. 6, para. d.

129 ‘UNHCR Guidelines on Cessation’, above n. 8, para. 33.

130 *Ibid.*, para. 30.

131 A. Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff, Leyden, 1966), p. 410:

What the drafters of the Convention had in mind was the situation of refugees from Germany and Austria, who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly. The fact was appreciated that the persons in question might have developed a certain distrust of the country itself and a disinclination to be associated with it as its national.

political developments do not eliminate an individual's fear of persecution, cessation is improper regardless of whether the refugee qualifies for an exemption or some alternate form of international protection or durable status. The person's refugee status remains intact and he or she continues to enjoy the benefits of that status undisturbed.

Political change, whether democratic or violent, may simply substitute a new risk of persecution for a recognized refugee. From an administrative perspective, it makes little sense to expend substantial resources to impose cessation and subsequently to adjudicate a new claim to protection. UNHCR asserts that cessation is improper in this context (citing the situation of Afghanistan),<sup>132</sup> and this is true in the sense that cessation followed by deportation to the State of origin violates the refugee conventions where the individual has a well-founded fear of persecution, whether the fear is of long-standing or new. It would be bad practice to expend resources on formal cessation simply to extend refugee status on new grounds, even if the cessation were technically correct. Such empty rituals expose refugees to 'unnecessary review' discouraged by Executive Committee Conclusion No. 69.

### 3. *Exceptions*

Where political conditions in the State of origin have been fundamentally transformed, refugees may eagerly embrace an opportunity to return to a democratic and non-persecutory homeland. Cessation in such cases is a formality, but not all refugees whose States of origin have experienced political change will regard repatriation as an appropriate durable solution.

It is worth emphasizing that cessation of individual or group-based status does not automatically result in repatriation. The refugee may obtain another lawful status in the State of refuge or in a third State in some instances. Cessation thus should not be viewed as a device to trigger automatic return. While refugees cannot be involuntarily repatriated prior to proper cessation, the application of the cessation clauses should be treated as an issue separate from standards for repatriation.

There are several distinct types of 'residual' cases that must be evaluated by States of refuge in deciding whether to apply cessation and, if so, whether to provide some other form of leave to remain. First, there are individuals whose personal risk of persecution has not ceased, despite general changes in the State of origin. These persons remain refugees and may not be subject to cessation of protection by the State of refuge or by UNHCR. Secondly, there are persons who have 'compelling reasons' arising out of previous persecution to avoid cessation. As discussed below, practice has extended the 'compelling reasons' exception beyond its original textual reach to include not only statutory refugees but also Convention refugees. 'Compelling reasons' is a term of variable meaning and continued refugee status is

132 'Note on the Cessation Clauses', above n. 7, para. 20.

not necessarily the only proper disposition of such cases. Continuation of refugee status (non-cessation) is nevertheless the preferable approach because it is simplest and adheres most closely to the Convention text. Thirdly, certain refugees subject to cessation may be eligible for protection against involuntary repatriation under human rights treaties, and States must provide them leave to remain, preferably in a legal status.<sup>133</sup> Fourthly, certain humanitarian claims may be accommodated by States of refuge, including especially vulnerable persons, persons who have developed close family ties in the State of refuge,<sup>134</sup> and persons who would suffer serious economic harm if repatriated.

Articles 1C(5) and 1C(6) refer to ‘compelling reasons arising out of previous persecution for refusing to return’ to the country of nationality or habitual residence. Article I.4(e) of the OAU Refugee Convention includes no similar exception clause. The textual inadequacies of Articles 1C(5) and 1C(6) concerning residual cases are glaring and, in Guy Goodwin-Gill’s description, perverse.<sup>135</sup> Articles 1C(5) and 1C(6) specifically refer to statutory refugees defined in Article 1A(1), rather than to Convention refugees under Article 1A(2). The proviso envisions continuation of refugee status (that is, non-cessation). The severity of persecution that the victims of fascism had suffered was known to the drafters of the 1951 Convention. Statutory refugees comprised the majority of those covered initially by the 1951 Convention.

Practice and principle support the recognition of exceptions to cessation for Convention refugees. Executive Committee Conclusion No. 69 suggests relief for two groups: (i) ‘persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country’; and (ii) ‘persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there’.<sup>136</sup> The Conclusion does not mandate that the proper solution is to continue refugee

133 Prominent among the human rights bars to *refoulement* or provisions that may prevent deportation are Art. 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN doc. A/RES/39/46; Arts. 3 and 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5; Arts. 7 and 17 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171; and Arts. 5 and 11 of the 1969 American Convention on Human Rights, OAS Treaty Series No. 35.

134 In some cases, deportation of persons with close family ties in the State of refuge may violate human rights treaties, such as Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such persons fall within the third category, and States have a legal obligation to permit them to remain. Their cases are not ‘humanitarian’ in the sense that States have discretion to accommodate them, or not. The European Commission’s ‘Draft Directive on Minimum Standards for Qualification and Status as Refugees’, above n. 36, has proposed to extend to persons eligible for ‘subsidiary protection’ under human rights treaties minimum standards of treatment that are similar to the treatment of recognized refugees, although with shorter residence permits and delayed access to employment, employment-related training, and integration measures (Arts. 21, 24, and 31 of the draft Directive).

135 Goodwin-Gill, above n. 126, p. 87.

136 Executive Committee Conclusion No. 69, above n. 6, para. (e).

status (in other words, that formal cessation not be imposed). Instead, it calls upon States to ‘seriously consider an appropriate status, preserving previously acquired rights’ for such residual cases, which could include continuation of refugee status.<sup>137</sup> Paragraph 136 of the UNHCR *Handbook* argues that the exception for statutory refugees reflects a ‘more general humanitarian principle’ for egregious cases of past persecution involving Article 1A(2) refugees. The UNHCR Guidelines correctly observe that ‘there is nothing to prevent [the exception from cessation] being applied on humanitarian grounds to other than statutory refugees’.<sup>138</sup> The Summary Conclusions of the expert roundtable on cessation state:

Application of the ‘compelling reasons’ exception to general cessation contained in Article 1C(5)–(6) is interpreted to extend beyond the actual words of the provision and is recognized to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice.<sup>139</sup>

Statutes implementing the cessation clauses make provision for exceptions concerning severe past persecution.<sup>140</sup> In Switzerland, where the cessation clauses are more frequently applied than in some other States, the exception for persons who suffered severe trauma is often the focus of the case.<sup>141</sup>

Three distinct questions are posed: (i) whether exceptions from cessation should be defined only in terms of severity of past persecution; (ii) if not, how to define additional categories; and (iii) what relief should be accorded to members of these various groups (that is, whether the exception is to formal cessation or gives rise to a claim to some other lawful status and protection against involuntary repatriation).

‘Compelling reasons arising out of past persecution’ at the very least covers victims suffering from post-traumatic stress whose forced return could trigger debilitating flashbacks. Repatriated refugees might also suffer secondary trauma as a result of family members’ past egregious persecution.

The relevant textual exception in the UNHCR Statute is much broader than those contained in Article 1C(5) and (6). It refers to persons who present ‘grounds other than personal convenience for continuing to refuse’ repatriation, ‘[r]easons of a purely economic character’ being excluded.<sup>142</sup> Thus, traumatized individuals, persons with family ties in the State of refuge, and especially vulnerable persons may be spared cessation of UNHCR protection.<sup>143</sup> The Statute does not limit this exception

137 *Ibid.*

138 ‘UNHCR Guidelines on Cessation’, above n. 8, para. 31.

139 ‘Lisbon Summary Conclusions’, above n. 118, para. 18.

140 Examples include Germany, Ireland, the Slovak Republic, Ghana, Liberia, Malawi, Zimbabwe, Azerbaijan, Lithuania, Canada, and the United States.

141 Comments of Judge Tellenbach, above n. 30. 142 Statute, above n. 3, Art. 6(e).

143 Grahl-Madsen suggests that some economic-related reasons may suffice, because it cannot be fairly called personal convenience to resist return to a State where the refugee has no abode, no vocation, and no other ties to the State of origin: above n. 131, p. 408.

to refugees as defined in Article 1A(1) of the 1951 Convention, but also extends it to all refugees subject to UNHCR protection.

In the 1996 cessation of protection for refugees from Malawi and Mozambique,<sup>144</sup> UNHCR suggested, first, that UNHCR representatives should endeavour to avoid unnecessary individual hardship that would result from loss of residence and disruption of integration. Secondly, it was suggested that asylum States should ‘consider new arrangements for those persons who cannot be expected to leave the country of asylum due to long stay . . . resulting in strong family, social or economic links there. Such arrangements may include the granting of legal immigrant status or naturalization.’ Thirdly, it was proposed that UNHCR field offices should grant reconsideration under the Statute to persons with a continuing well-founded fear of persecution, and to persons who have compelling reasons arising out of previous persecution to refuse to re-avail themselves of the protection of their country of origin.

One model for relief is the continuation of refugee status for persons who presently lack a well-founded fear of persecution because their situation falls within one of the cessation grounds, but who are victims of severe past persecution or harm. This is the preferred solution, because it is simplest and hews most closely to the textual exception for Article 1A(1) refugees. State practice, although not entirely uniform, supports this model.<sup>145</sup>

Continuation of refugee status could also be extended to a broader set of humanitarian categories, but in such cases the provision of subsidiary/complementary protection is also an option. For example, a refugee might be subject to cessation and ineligible for an exception based on severe past persecution or harm. If, however, it becomes apparent during the consideration of cessation that the refugee is eligible for a human rights bar to *refoulement*, for example because of a present risk of torture (outside the scope of the Convention) or because of an unjustifiable interference with the right to family life, subsidiary/complementary protection must be extended.<sup>146</sup> Executive Committee Conclusion No. 69 refers to an ‘appropriate arrangement, which would not put into jeopardy their established situation . . . for those persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there’.

144 UNHCR, ‘Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique’, 31 Dec. 1996, paras. 6–8.

145 For examples of States codifying such an exception for Art. 1A(2) refugees, see above n. 140; and for Judge Tellenbach’s comments on the extensive Swiss practice in this regard, see above n. 30. As an example of best practice, new Canadian legislation continues refugee status for persons with compelling reasons ‘arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment’ (Immigration and Refugee Protection Act, Part 2, Refugee Protection, Division 2, Convention Refugees and Persons in Need of Protection, Cessation of Refugee Protection, SC 2001, c. 27, s. 108, effective since 28 June 2002).

146 See above, n. 133.



For such persons, subsidiary/complementary protection could at the very least be granted in the course of imposing cessation of refugee status, assuming that previously acquired rights are preserved.

State practice on subsidiary/complementary protection is quite disparate, although the European Union is presently contemplating a significant harmonization of policy that would establish minimum standards for qualification as a refugee or as a beneficiary of subsidiary protection and minimum standards of treatment for the latter which are similar though less than for those with refugee status.<sup>147</sup> The European Commission's Draft Directive also proposes minimum standards for qualification for refugee status, including provisions for cessation. In its commentary on the Draft Directive, the Commission states:

The Member State invoking [the ceased circumstances] cessation clause should ensure that an appropriate status, preserving previously acquired rights, is granted to persons who are unwilling to leave the country for compelling reasons arising out of previous persecution or experiences of serious and unjustified harm, as well as persons who cannot be expected to leave the Member State due to a long stay resulting in strong family, social and economic links in that country.<sup>148</sup>

Where the cessation clauses are applied, the better practice is to grant relief under an appropriate exception, if the person is eligible, during the same proceeding. Where the refugee is able to secure a residence permit because of the passage of time or family ties, the purposes of a cessation exception may be accomplished (that is, the individual is spared return to the State of persecution and enjoys benefits equivalent to those of a refugee). Refugee status should not terminate, however, if the residence permit could be quickly revoked and the refugee involuntarily repatriated without consideration of continuing risks or hardship.

Codification of exceptions to cessation is desirable, with clear specification of grounds of eligibility for various categories as delineated above. Cessation is distinct from initial status determination, as noted in section IV, but hardship relief for persons who formerly met the refugee definition may be necessary in both contexts. Some asylum seekers whose circumstances have changed since flight, so as

147 'Draft Directive on Minimum Standards for Qualification and Status as Refugees', above n. 36. Art. 15 of the proposed Directive identifies three groups of beneficiaries: persons at risk of torture or inhuman or degrading treatment or punishment; persons at risk of other human rights violations 'sufficiently severe to engage the Member State's international obligations'; and persons facing a threat to life, safety, or freedom from armed conflict or systematic or generalized violations of human rights. See also, European Council on Refugees and Exiles (ECRE), 'Complementary/Subsidiary Forms of Protection in the EU States', April 1999; ECRE, 'Position on Complementary Protection', Sept. 2000; UNHCR, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', UN doc. EC/50/SC/CRP.18, 2000.

148 'Draft Directive on Minimum Standards for Qualification and Status as Refugees', above n. 36, Explanatory Memorandum, Art. 13(1)(e).

to eliminate their well-founded fear of persecution, also deserve to be spared deportation to the State of origin and to be granted a secure legal status. Recognized refugees are, however, situated differently from asylum seekers as a result of their settled expectations and the fact that a long stay in the State of refuge may result in strong family, social, and economic ties that deserve – or the case of family unity require – protection against separation and return.

#### D. Withdrawal of temporary protection

Where group-based temporary protection has been extended to a mass influx of persons, withdrawal of protection should be governed by the ceased circumstances clauses.<sup>149</sup> Under the OAU Refugee Convention, those menaced by generalized violence qualify for refugee status. Outside the OAU, temporary protection is often extended in situations of mass influx where arrivals include many 1951 Convention refugees.

The process for cessation of temporary protection requires clarification. Sufficient evidence of changed circumstances must be available, and it must be determined who bears the burden of proof. In recent practice, individual States have withdrawn temporary protection at different times, creating an impression that the assessment process is not determined by objective criteria.

The EU has adopted a Directive that establishes a collective mechanism for introducing and terminating temporary protection.<sup>150</sup> The Directive envisions that information received from member States, the European Commission, UNHCR, and other relevant organizations will be considered in decisions on the introduction and ending of temporary protection measures, which will be taken by a qualified majority of the Council.<sup>151</sup> A decision to withdraw temporary protection must be based on an assessment that ‘the situation in the country of origin is such as to permit safe and durable return . . . with due respect for human rights and fundamental freedoms and Member States’ obligations regarding *non-refoulement*’.<sup>152</sup>

Access to the refugee status determination procedure is sometimes suspended while persons enjoy temporary protection, although State practice varies. When temporary protection is terminated because of general changed conditions in the State of origin, an opportunity to file applications for refugee status and

149 The Lisbon Summary Conclusions observe: ‘Since temporary protection is built upon the 1951 Convention framework, it is crucial that in such situations the cessation clauses are respected’: above n. 118, para. 20.

150 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L212/12, 7 Aug. 2001.

151 *Ibid.*, Arts. 5 and 6.

152 *Ibid.*, Art. 6(2). The European Parliament shall be informed of the Council Decision.

complementary protection, including the human rights bars to *refoulement*, should be provided.<sup>153</sup> Asylum States tend to regularize the residence of temporary protection beneficiaries after the passage of time. The most difficult of residual temporary protection cases may be those where the right to family life is potentially impaired or where economic hardship will result from repatriation.

Temporary protection has sometimes been granted in lieu of refugee status in order to avoid the costs of individual status determination and in the belief that it could easily be withdrawn in the State's discretion. Where withdrawal of temporary protection is followed by the prospect of mass involuntary repatriation, the prohibition on mass expulsion of aliens must, however, be respected. This norm prohibits discrimination and imposes minimal procedural requirements. Those facing expulsion, including persons who had enjoyed temporary protection, must have the opportunity to give reasons why they should not be expelled. Such reasons would include eligibility for refugee status, the human rights bars to *refoulement*, or other humanitarian exceptions.

### III. Cessation based on change in personal circumstances

With respect to Article 1C(1)–(4) of the 1951 Refugee Convention (and the parallel Article I.4(a)–(d) of the OAU Refugee Convention), the elements of *voluntariness*, *intent*, and *effective protection* are crucial, and require careful analysis of the individual's motivations and assessment of the bona fides and capacities of State authorities. Procedural mechanisms requiring States to prove the elimination of persecutory risk prior to cessation will protect against unfounded termination of refugee status. Situations arising under Article 1C(1)–(4) are often characterized by ambiguity. Granting the benefit of the doubt to refugees is consistent with the restrictive interpretation of the cessation clauses. Articles I.4(f) and (g) of the OAU Refugee Convention are essentially expulsion provisions and require separate analysis. They may be applied to refugees who face undiminished, or even heightened, fear of persecution or danger in their State of origin.

#### A. Re-availment of national protection

Acquisition or renewal of a passport from the State of origin may raise questions about the refugee's continued need for international protection, and is

153 The EU temporary protection Directive ensures access to the asylum procedure (to use the phraseology of the Directive) no later than the end of temporary protection, the maximum duration of which is limited to three years: above n. 150, Arts. 4(1) and 17. The Directive also requires member States to 'consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases': *ibid.*, Art. 22(2).

addressed in the UNHCR *Handbook* and in the 1999 UNHCR Guidelines.<sup>154</sup> Such acts may create false impressions, especially where the reasons for flight remain undiminished. Collateral reasons (such as a demand by the State of refuge that the refugee obtain travel documents, or a desire to travel for family reunification) may predominate over a subjective intent to re-avail oneself of national protection. A renewed passport may not always permit re-entry into the State of origin, as was true of some Chilean refugees under orders of banishment. In such cases, cessation would be both inappropriate and even ineffectual in securing repatriation. Especially in light of the extensive use of carrier sanctions, possession of a passport may be a modern necessity that does not signal a desired link to the State of origin.<sup>155</sup> This may be true whether the passport is obtained to facilitate flight from the State of origin or after obtaining refuge, especially where alternative travel documents are not available or the refugee is unaware of how to procure them.<sup>156</sup> Genuine refugees may not possess the same fear of consular authorities in their State of refuge that they have towards other officials in the State of origin.<sup>157</sup>

Paragraph 119 of the *Handbook* sets out an appropriate analytical framework for the consideration of such cases, identifying three essential factors for analysis of cases arising under Article 1C(1): *voluntariness*, *intent*, and *actual re-availment*. Other contact with State of origin diplomatic missions should also be analyzed under this framework.<sup>158</sup> Since Article 1C(1) anticipates that return to the State of origin may result, the stakes are high for a recognized refugee who has had contact with diplomatic representatives of the State of origin. Proof of the act can permissibly impose an obligation on the refugee to explain his or her conduct, because voluntariness and intent are largely unknowable without the testimony of the individual concerned. The refugee may also possess crucial evidence pertaining to the availability (or not) of effective national protection in the State of origin.

Paragraph 121 of the *Handbook* states that, where a refugee has obtained or renewed a passport ‘it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality’. Paragraph 122 similarly refers to ‘absence of proof to the contrary’ in relation to the

154 UNHCR *Handbook*, above n. 5, paras. 49–50 and 120–5; ‘UNHCR Guidelines on Cessation’, above n. 8, paras. 6–11.

155 J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), p. 192.

156 Art. 28 of the 1951 Convention and Art. VI of the OAU Refugee Convention provide for the issuance of travel documents by asylum States.

157 Grahl-Madsen, above n. 131, p. 379.

158 For example, a choice by a refugee to marry at the diplomatic mission of his State of origin, rather than before officials of the State of refuge, should not result in automatic cessation. The surrounding circumstances, including the person’s knowledge of the existence of alternatives and the degree of attachment to the State of origin, should be explored. The UNHCR *Handbook*, above n. 5, para. 120, offers the example of a refugee who must contact officials of the State of origin in order to obtain a legally recognizable divorce. Again, the intent of the refugee and actual availability of national protection from the State of origin should predominate in the analysis of whether refugee protection should be terminated as a consequence of such acts.

actual obtaining of ‘an entry permit or a national passport for the purposes of returning’. It should be clarified that, while the refugee may reasonably be expected to explain his conduct, States initiating cessation procedures against recognized Convention refugees should bear the burden of proving re-availment. The benefit of the doubt must be given to the refugee, as is consistent with the restrictive interpretation appropriate to the cessation clauses. The refugee’s voluntary acts, intent, and attitudes may be considered, but they cannot predominate over political reality. The cessation clauses should not be transformed into a trap for the unwary or a penalty for risky or naive conduct.

On the other hand, it is dubious to assert that acts such as renewal of passports are not ‘voluntary’, even if required by the asylum State.<sup>159</sup> The reason why cessation is inappropriate in such cases is because the refugee’s act does not provide reliable proof that effective national protection is now available.

Where a refugee travels through third States on the passport of his or her State of origin, it is inherent in the State system that those States implicitly acknowledge the national protection role of the State of origin. This tacit understanding should not suffice to establish re-availment of protection. The State seeking to impose cessation of refugee status must prove that the refugee in question intended to avail him or herself of national protection and that effective protection is in fact available from the State of origin. Thus, for example, in a rare case a refugee might seek assistance from consular authorities of the State of origin on his travels. If the refugee sought and actually received such protection, re-availment could be established depending on the circumstances, but simple travel on the passport without assistance from the State of origin would not suffice to justify cessation.

## B. Re-acquisition of nationality

Re-acquisition of nationality under Article 1C(2) of the 1951 Convention and Article I.4(b) of the OAU Refugee Convention has a contemporary relevance, in light of statelessness resulting from the break-up of States in recent years. Paragraphs 126–8 of the *Handbook* stress voluntariness, but the refugee’s intent and the availability of effective protection may also be relevant. Unlike re-availment of national protection, re-acquisition of nationality may be initiated by the State of origin, where a nationality law of broad application is adopted, rather than by the refugee. The same scenario may occur under Article 1C(3) where a third State adopts nationality legislation potentially applicable to a recognized refugee.

Paragraph 128 of the *Handbook* suggests that nationality must be ‘expressly or impliedly accepted’ before cessation under Article 1C(2) would be appropriate. The UNHCR Guidelines on the application of the cessation clauses similarly suggest

159 ‘UNHCR Guidelines on Cessation’, above n. 8, para. 9.

that ‘the mere possibility of re-acquiring the lost nationality by exercising a right of option [is not] sufficient to put an end to refugee status’.<sup>160</sup> These interpretations are consistent with the requirement that the refugee voluntarily re-acquire his lost nationality. Paragraph 128 of the *Handbook* places a burden on refugees to signal their rejection of an offer of restored nationality, if they have full knowledge that it will operate automatically unless they opt out. The authorities in the State of refuge should nevertheless also consider whether the refugee will enjoy effective national protection (and thus may safely be deprived of international protection) prior to applying cessation under Article 1C(2).<sup>161</sup>

Where a refugee has the option of re-acquiring a lost nationality, (whether the loss was due to State disintegration or punitive deprivation of citizenship), and he declines to do so (because he prefers to build a new life in the State of refuge, or he fears that return to his State of origin may be traumatic or that political conditions might worsen there), Article 1C(2) does not permit cessation. The element of voluntary re-acquisition is absent.

A refugee has a right to return to his or her own country, under human rights norms.<sup>162</sup> This right should not be seen as imposing an obligation to do so, especially for those who have been forced to flee from persecution and have been deprived of their citizenship. The voluntariness element of Article 1C(2) suggests that refugees do not have a duty to facilitate their repatriation by re-acquiring a lost nationality they no longer desire to possess. As a practical matter, cessation under Article 1C(6) may not be followed by repatriation if a stateless refugee refuses to comply with the administrative protocol for re-acquisition of the nationality of the State of origin. The legal status of stateless persons experiencing cessation under Article 1C(6) could thus become undesirably irregular, if they cannot be repatriated or sent to a third State, and they are ineligible for human rights bars to expulsion or other forms of complementary or subsidiary protection.

### C. Acquisition of a new nationality

Perhaps the least problematic cessation scenario is naturalization in the State of refuge.<sup>163</sup> This alteration in legal status may occur without formal

160 *Ibid.*, para. 14.

161 Grahl-Madsen, above n. 131, pp. 394–5, suggests that placing the burden on the refugee to opt out of such nationality legislation is inappropriate. The process of re-acquisition of nationality by operation of law is sometimes referred to as reintegration.

162 Universal Declaration of Human Rights, Art. 13(2), UNGA Resolution 217 A (III), 10 Dec. 1948, and International Covenant on Civil and Political Rights, Art. 12(4).

163 National law sometimes makes specific provision for this development, for example in Austria (Federal Law Concerning the Granting of Asylum 1997, Art. 14(5)); Bulgaria (Ordinance for Granting and Regulating the Refugee Status 1994, Art. 14(4)); and Ghana (Refugee Act 1992, Part IV, Art. 16(b)).

cessation.<sup>164</sup> Following naturalization, former refugees may engage, without adverse consequence, in activities (such as frequent visits or part-time residence in the State of origin) that previously might have resulted in cessation of their refugee status.

Article 1C(3) includes no explicit requirement of voluntariness. Its application hinges upon the fact that a new nationality has been acquired and a finding that effective national protection is now available. A traditional example concerns women who automatically acquire their husband's nationality upon marriage, even though they do not wish it and have taken no steps to acquire it other than through the marriage itself. Cessation in such cases is questionable under modern human rights norms, including prohibitions on gender-based discrimination. UNHCR properly cautions that cessation should not be ordered if there is no genuine link between the refugee and the third State conferring its nationality by operation of law, drawing upon basic principles of international law.<sup>165</sup>

Article 1C(3) may prove especially troublesome where the third State is a successor State to the refugee's State of origin, and the refugee involuntarily acquires its nationality through passage of a general law. Article 1C(2) envisions that a refugee may avoid cessation simply by refusing the restoration of nationality. Article 1C(3) might be read to permit cessation and presumably deportation to the successor State, if authorities in the State of refuge are satisfied that the refugee will enjoy effective protection there. Fair processes are essential to prevent cessation from resulting in exposure to persecution in the successor State. Just as with ceased circumstances cessation, political conditions in a successor State may be unstable. In assessing whether the refugee will enjoy protection in a successor State, status determination officials should inquire whether the nationality law reflects political change that is fundamental, durable, and effective. The benefit of the doubt should

164 For example, under US law asylees and refugees (persons admitted from a foreign State to the USA on the basis of a fear of persecution) may apply to adjust their status to that of lawful permanent residents after a period of one year, 8 United States Code (USC) §§ 1101(a)(42), and 1157–9. Once they adjust, they no longer possess legal status as asylees or refugees, but they may remain eligible for certain social benefits that are not available to other lawful permanent residents: 8 USC §§ 1613(b)(1), 1622(b)(1), and 1641. Thus, adjustment of status operates as cessation, but without any examination of the grounds set out in Art. 1C of the 1951 Convention and frequently under circumstances where those grounds do not apply. Asylees must in fact prove that they continue to meet the statutory definition of refugee in order to obtain adjustment: 8 USC §§ 1101(a)(42)(A) and 1159(b)(3). Denial of an application for adjustment of status, on grounds that an asylee has ceased to satisfy the refugee definition, could theoretically provide US authorities with an opportunity to terminate the indefinite grant of asylum by invoking procedures under 8 USC § 1158(c), but this does not appear to happen. After a period of lawful permanent residence, former asylees and refugees may become eligible to naturalize: 8 USC §§ 1159 and 1427. The 'Note on the Cessation Clauses', above n. 7, paras. 15–16, observes that in both the cessation and status determination contexts, whether a refugee has the full rights and benefits of a national of the State of refuge should be assessed prior to cessation or initial denial of refugee status premised upon Art. 1C(3).

165 'UNHCR Guidelines on Cessation', above n. 8, para. 17.

be extended to the refugee, especially where he or she belongs to a racial, ethnic, political, or social group that is in a minority in the successor State, and this minority status is asserted as an explanation for resisting acquisition of the new nationality.

Tension may exist between the impulse to impose cessation and States Parties' responsibilities under Article 34 of the 1951 Convention 'as far as possible to facilitate the... naturalization of refugees'. This tension is resolved in those Article 1C(3) cases where the refugee naturalizes in the State of refuge – both provisions are simultaneously respected, and the refugee gains durable protection. The historical willingness of asylum States to naturalize or to grant other durable legal status to recognized refugees created the sometimes criticized 'exilic bias' of the refugee regime. Article 34 and the social and economic guarantees of the international refugee instruments strongly suggest that integration of recognized refugees is desirable. The possibility of cessation does not negate or contradict in any way the suitability of local integration as a durable solution.

Time-limited refugee status, with a requirement that status be renewed within a timeframe shorter than that necessary to qualify for naturalization, could seriously undermine refugee protection. Fair application of the cessation clauses in a time of political instability is extremely difficult, and refugees should not bear the burden of repeatedly proving their fear of persecution.

#### D. Re-establishment

Paragraphs 133–4 of the *Handbook* address Article 1C(4) in spare terms. What constitutes re-establishment in the State of origin has taken on increasing contemporary importance, as refugees participate in organized repatriations into situations of instability and danger. New outflows or renewed flight may result.<sup>166</sup> While Article 1C(4) turns on the actions and intentions of the individual refugee, the potential volatility of the political situation and the danger of continuing persecutory risk are also important factors that cause application of this provision to resemble that of the ceased circumstances clauses in some respects.

As Grahl-Madsen notes, refugee status could logically terminate upon re-establishment in the State of origin, simply because the individual no longer meets the criterion in Article 1A(2) of being outside one's country of origin.<sup>167</sup> Automatic termination as a penalty for any physical return to the State of persecution is,

166 For example, Sweden has attracted Bosnian asylum seekers who have either been repatriated by other States (specifically Germany and Switzerland that have terminated temporary protection for Bosnians and deny asylum applications on the premise of an internal flight alternative), despite the fact that they cannot return safely to their own homes in Republika Srpska, or who have been displaced from temporary housing in Bosnia and Herzegovina by other repatriated refugees and who similarly cannot return to their original homes. See 'Sweden Has Become Attractive for Bosnians', *Migration News Sheet*, No. 215/2001-2, Feb. 2001, p. 15.

167 Grahl-Madsen, above n. 131, pp. 370–1 ('If he abandons his flight and goes home, it is only natural that he ceases to be considered a refugee').



however, inappropriate. Article 1C(4) requires proof that return is voluntary, and re-establishment denotes both a subjective reaffiliation as well as an objectively durable presence.

Cases in which cessation is inappropriate include those involving situations where the refugee does not voluntarily choose to return, such as deportation, extradition, kidnapping, or unexpected travel routes by transport services. Similarly, where a refugee anticipates a brief visit that was prolonged for reasons beyond his control (most obviously, where he is imprisoned in the State of persecution but also for lesser reasons), cessation is inapplicable. A murkier group of cases involves brief but repeated visits by a refugee to the State of origin, with no adverse consequences. These visits may be for family, political, or economic reasons, or a combination thereof. So long as the visits are of short duration and the refugee's primary residence remains in the asylum State, invocation of Article 1C(4) is inappropriate.

Article 1C(4) should not be invoked unless the refugee has shifted his primary residence to the State of persecution with an intent to do so. Refugees may choose such a path even where the risk of persecution has not been reliably eliminated. Re-establishment in the State of origin in such circumstances poses serious difficulties for an asylum State which seeks to fulfil its international protection role. These can be overcome if the refugee maintains a primary residence in the asylum State and makes only brief visits to the State of persecution. Where Article 1C(4) has been invoked and the choice to re-establish goes badly for the former refugee (in that he or she is again at risk of persecution), renewed flight may permit the filing of a new claim to refugee status. Alternatively, if the refugee returns to the former asylum State, refugee status could be revived under an accelerated procedure.

Since the situation in States of origin is frequently volatile, asylum States should factor delay into procedures for invoking Article 1C(4). The practice of permitting or even promoting assessment visits envisions that refugees may physically return to their State of origin for the purpose of gathering information that will enable them to make an informed and reasoned choice concerning voluntary repatriation. Such visits clearly provide no basis for the immediate application of Article 1C(4). An 'escape clause' for repatriated refugees, granting repatriation assistance but extending or renewing refugee status if an attempt at re-establishment fails for valid reasons, is highly desirable and may encourage voluntary repatriation. Formal cessation should be suspended until the durability and safety of re-establishment can be determined. Delay in cessation under Article 1C(4) is consistent with the normal sequence of events of flight: status determination, recognition, voluntary repatriation, cessation.

## E. Cessation issues specific to the OAU Refugee Convention

Although structurally treated as cessation clauses, Articles I.4(f) and (g) of the OAU Refugee Convention functionally impose expulsion, because they apply

without regard to the cessation of the risks of persecution or violence in the State of origin. Little can be discerned regarding State practice, aside from the occasional incorporation of these provisions into national law.<sup>168</sup>

Article I.4(f) imposes cessation where the refugee commits a serious non-political crime in another State after his recognition as a refugee. This provision seems quite anomalous as a ground for cessation, and imports a concept borrowed from the exclusion clauses (with an alteration in the timing of the crime). It appears designed to strip refugee status from the undeserving, and perhaps also to reduce tension among OAU States by facilitating removal of criminal elements enjoying residence as refugees. It is doubtful that return to persecution or serious danger is the optimal response to such criminal activity, especially if the refugee has been duly punished by the State where the crime was committed.

Article I.4(g) is perhaps best interpreted as an implementation measure for the rule of conduct imposed by Article III of the OAU Refugee Convention, prohibiting subversive activities against other OAU States. Article III appears to envision direct control by the asylum State of certain activities by refugees, through criminalization and other limits on violent or expressive activities. Article I.4(g) would permit cessation of refugee status as a consequence of this prohibited conduct, although it needs to be interpreted in a manner complementary to the 1951 Convention.

The terminology of Article I.4(g) is reminiscent of exclusion concepts, such as those reflected in Articles I.5(c) and (d), which suffer from vagueness and should be given a narrow interpretation. The operation of Article I.4(g), however, resembles that of expulsion, with some differences. While the references to national security in Articles 32(1) and 33(2) of the 1951 Convention pertain to the security of the asylum State, the concern of Article III of the OAU Refugee Convention is the security of other States. And expulsion under Articles 32 and 33 of the 1951 Convention does not entail cessation of refugee status, but simply loss of protection against *refoulement*. Persons subject to cessation under Articles I.4(f) and (g) may be entitled to the human rights bars to *refoulement*.

#### IV. Cessation concepts and initial refugee status determination

Serious confusion may arise where elements usually associated with cessation figure during refugee status determination. In some asylum States that generally do not impose cessation on recognized refugees, the volume of recent cases involving changed circumstances between flight and initial adjudication is extensive.<sup>169</sup> As the Summary Conclusions of the expert roundtable on cessation

168 For example, Liberia's Refugee Act 1993, section 3(5)(f); and Tanzania's Refugees Act 1998, Art. 3(f) and (g).

169 The cases cited by Hathaway, above n. 155, pp. 199–205, generally arise in the initial status determination context. The Immigration and Refugee Board of Canada issued guidelines in

state, 'refugee status determination and cessation procedures should be seen as separate and distinct processes'.<sup>170</sup>

One disturbing development is the allocation of asylum claims to an accelerated procedure, when presented by nationals of a State under a declaration of cessation, even though cessation applies to recognized refugees.<sup>171</sup> In addition, under the accelerated procedures, the applicant may have insufficient time to gather evidence, consideration by authorities may be cursory and without an interview, and deportation is not suspended during appeal.<sup>172</sup>

Where changed conditions are relevant, the focus of the inquiry is whether political and social changes are fundamental, durable, and effective in eliminating the well-founded fear of persecution possessed by the asylum seeker at the time of flight. Whether or not he or she is a refugee depends upon whether in reality he or she meets the Convention definition, which encompasses not just the inclusion but also the cessation clauses.

National practice suggests that confusion exists between cessation proper and the application of cessation concepts during initial status determination. The term cessation should be restricted to the termination of status of recognized refugees. The asylum State bears the onus of initiation and the burden of proof where cessation is applied to a recognized refugee.

In States that regard the refugee definition as exclusively forward looking, the asylum seeker bears the burden of proving that he or she has a well-founded fear of persecution. States vary in their treatment of cases involving victims of past persecution who may no longer possess a well-founded fear of persecution because of post-flight changed conditions in the State of origin. Some, for example the United States, establish a presumption of continuing persecution and require the authorities to prove that changed conditions have eliminated the applicant's risk of persecution.<sup>173</sup> The Summary Conclusions of the expert roundtable on cessation

Sept. 1992 on 'Change in Circumstances in a Refugee Claimant's Country of Origin: Suggested Framework of Analysis'. See also J. Fitzpatrick, 'The End of Protection: Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection', 13 *Georgetown Immigration Law Journal*, 1999, pp. 343, 356–63 (discussing changed circumstances cases from the USA).

170 'Lisbon Summary Conclusions', above n. 118, para. 26.

171 Under the Law on Entry and Residence of Aliens and Right to Asylum of 11 May 1998, French authorities have subjected a growing number of asylum seekers to accelerated procedures on the basis that their State of origin is subject to a declaration of cessation. In 1998, 2,225 asylum applicants were so treated and 2,232 on provisional figures for 1999. P. Delouvin, 'The Evolution of Asylum in France', 13 *Journal of Refugee Studies*, 2000, pp. 61, 65–6. Many of those affected are Romanian.

172 *Ibid.*, p. 66.

173 The USA is a noteworthy example of a State that sometimes grants asylum or *non-refoulement* (withholding of removal) on the basis of past persecution. The circumstances under which asylum will be granted in the absence of a continued risk of persecution are the subject of recently revised regulations at 8 CFR, paras. 208.13 and 208.16. Essentially, these regulations create a presumption of continuing persecution that the immigration authorities may rebut by proof of a fundamental change in circumstances that eliminates the original well-founded fear or by

similarly recommend that ‘the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable’.<sup>174</sup>

A separate issue is whether compelling reasons arising out of past persecution justify granting refugee status, or whether some alternate protection should be provided to those whose return to the State of origin would cause significant hardship. The United States is a noteworthy example of a State that sometimes grants asylum on the basis of past persecution, and in the absence of a continuing well-founded fear of persecution. To qualify for asylum based on past persecution, the applicant must demonstrate an unwillingness to return arising out of the severity of past persecution or a reasonable possibility that he or she may suffer ‘other serious harm’ upon repatriation.

For those States that apply exclusively a forward-looking definition of eligibility of refugee status, this option does not appear to be available. This may be the case even where the asylum seeker qualified for refugee status at the time of flight but ceased to have a well-founded fear prior to status determination, and even where the past persecution was severe. An asylum seeker denied refugee status might nevertheless qualify for subsidiary/complementary protection if the individual would face significant hardship upon return.

As UNHCR has noted, the safe country of origin concept is not congruent with cessation.<sup>175</sup> The safe country of origin concept is raised by some States of refuge during initial status determination. While it may involve an assessment of general conditions in the State of origin, it is not linked to change (as are the ceased circumstances cessation clauses). Nor is it applicable to recognized refugees.

## V. Recommendations regarding UNHCR and State practice

The recommendations which follow concern both UNHCR practice and State practice with regard to cessation. The latter involves ceased circumstances cessation, withdrawal of temporary protection, and cessation based on the refugee’s actions. Issues relating to fair processes and exceptions to cessation will be summarized in relation to State practice under the ceased circumstances clauses.

proof that the applicant has a reasonable internal flight alternative. The applicant bears the burden of proof concerning a well-founded fear of persecution that arises following fundamental political change (e.g. in the Afghan situation where one persecutor is replaced by another). Asylum may, however, also be granted under 8 CFR para. 208.13(b)(1)(iii) if the applicant demonstrates an unwillingness to return arising out of the severity of past persecution or a reasonable possibility that he or she may suffer ‘other serious harm’ upon repatriation. 174 ‘Lisbon Summary Conclusions’, above n. 118, para. 27. 175 ‘Note on the Cessation Clauses’, above n. 7, para. 7. For more information on the safe country of origin concept and its application, see UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures)’, UN doc. EC/GC/01/12, 31 May 2001, paras. 38–40; and J. van Selm, ‘Access to Procedures: “Safe Third Countries”, “Safe Countries of Origin” and “Time Limits”’, June 2001, pp. 35–41; both documents are available at <http://www.unhcr.org>.

## A. UNHCR practice

Certain procedural mechanisms may enable UNHCR to administer the cessation clauses more flexibly without undermining the international refugee protection regime. For example, UNHCR regularly receives inquiries from the governments of asylum countries regarding developments in States of origin and the applicability of the ceased circumstances provisions. This represents a reactive approach to considering changes in circumstances in a country of origin and the implications of such changes for the status of refugees from that country. Instead, UNHCR could adopt a more proactive strategy, formulating and presenting its assessment of improvements in conditions in countries of origin and their implications for the relevance of Article 1C(5) and (6) at meetings of the Standing Committee. UNHCR could pursue such a strategy through an annual review, similar to the surveys of refugee situations it conducted in the mid-1990s.

UNHCR could also make greater use of its authority under its Statute and in conjunction with Article 35 of the 1951 Convention to assist asylum States with the application of the ceased circumstances provisions on an individual or group basis. This approach poses less risk of jeopardizing the status or claims of refugees in other asylum countries than a more proactive effort by UNHCR itself to employ Article 1C(5) and (6). Governments that invoked the cessation clauses with respect to Chilean refugees did so responsibly from the perspective of UNHCR. Whether other countries of asylum would also pursue a careful approach to cessation on a group basis, however, is less clear. Indeed, some asylum States have sought to use the cessation clauses to bypass status determination procedures for new claims.

When advising asylum countries on the use of Article 1C(5) and (6), UNHCR can provide a more detailed explanation of its position. UNHCR could specify the additional measures needed to satisfy the standard of fundamental and durable change, as it did in the case of Romania, when developments in a country of origin are insufficient to justify the administration of the ceased circumstances provisions. In addition, UNHCR could suggest an appropriate timeframe in a given situation for evaluating circumstances in the country of origin. Asylum countries may be willing and able to help promote the changes in the country of origin necessary to justify the application of the cessation clauses.

UNHCR can also develop additional methods of applying the ceased circumstances provisions. The cases of Bosnia and Herzegovina, Afghanistan, and Cambodia described above suggest that the traditional approach of administering Article 1C(5) and (6) on a group basis remains too blunt an instrument for such complex refugee situations. New practices for invoking Article 1C(5) and (6) can, however, facilitate UNHCR efforts to achieve durable solutions for specific caseloads of refugees under its mandate who may no longer require international protection,

as well as to respond to States' concerns about safeguarding the right of asylum for those who truly need it.

First, UNHCR could target the cessation clauses at a specific group of refugees within a larger refugee population by specifying precise dates and particular changes in circumstances, as it did in the case of pre-1991 refugees from Ethiopia. Targeting specific groups of refugees still raises the risk of jeopardizing the status or claims of asylum seekers residing in some host countries. Given the protracted nature of many refugee emergencies and the complexity of post-conflict situations, it may nevertheless represent the most viable approach to the application of Article 1C(5) and (6) by UNHCR in the future.

Secondly, UNHCR could develop the practice of individual cessation. Although the ceased circumstances provisions have traditionally been invoked by UNHCR on a group basis, their application to individuals is not precluded by the Convention or the Statute. UNHCR has occasionally supported the application of Article 1C(5) and (6) on an individual basis by its own offices as well as by countries of asylum. Individual cessation also poses less risk of unduly influencing status determination procedures in asylum countries than a declaration of general cessation for an entire group of refugees.

The situation involving the residual caseload of Cambodian refugees described above illustrates the potential utility and risks of establishing procedures for individual cessation. The 'status review' exercise in Cambodia provides some useful lessons in this regard. One such lesson is the need for detailed information about developments in the country of origin and their implications for individual cases. Another is the importance of the procedure for notifying refugees that their status may be re-examined in light of changes in circumstances in the country of origin. Refugees who may have their status withdrawn through the application of Article 1C(5) and (6) on an individual basis should be informed in advance of the process of individual cessation and provided with an opportunity to present their cases. These cases can be heard and, if necessary, alternative durable solutions found for these individuals. Individuals who no longer require international protection can then be given time to regularize their status and/or receive voluntary repatriation assistance.

Thirdly, the cessation clauses could be employed as part of a comprehensive response to a mass influx situation. Given the rights and benefits that are associated with refugee status, situations of mass influx can and should be addressed within the framework of the 1951 Convention. UNHCR should therefore seek to encourage the group recognition of refugees in these situations. UNHCR could commit to review the status of such refugees and consider the application of the ceased circumstances provisions when changes in the country of origin suggest that international protection may no longer be warranted.<sup>176</sup> Drawing such an explicit

176 UNHCR staff, interviews by R. Bonoan, Geneva, Switzerland, 27 and 30 Nov. 2000.

linkage between recognition and cessation can demonstrate to asylum countries that refugee status in situations of mass influx may be temporary, depending of course on the circumstances of the situation in question.<sup>177</sup>

Additional standards for the use of Article 1C(5) and (6) may also need to be formulated. The authors of the 1951 Convention seem to have envisioned a transition to democracy as the archetypal change in circumstances that would lead to the cessation of refugee status.<sup>178</sup> Subsequent UNHCR and Executive Committee guidelines on the cessation clauses have reflected this interpretation of the ceased circumstances provisions, tending to associate fundamental change with developments at the national level that remove the basis of a refugee's fear of persecution. UNHCR has implemented these guidelines by conducting comprehensive assessments of conditions in a country of origin focusing on national political and judicial institutions and the degree of compliance with international human rights principles.

Current guidelines and standards for evaluating change in a country of origin reflect a 'top-down' view of democratization. Targeted or individual cessation, however, would require a 'bottom-up' perspective. An evaluation of conditions in the country of origin would focus on local and provincial ordinances, elections, political institutions, courts, and law enforcement agencies, as well as the treatment of political parties and social groups under such laws and institutions. Evidence of fundamental and durable change at the local and regional level would then be balanced against improvements in the human rights situation at the national level.

The UNHCR *Handbook* asserts that the status of refugees should not be subject to arbitrary or frequent review. Measures can be taken, however, to ensure that new standards and procedures for administering the ceased circumstances provisions do not infringe upon this principle. For example, UNHCR could develop a 'checklist' outlining the conditions under which it could consider targeted or individual cessation. Based on the cases examined above, some of the questions that might be included on such a checklist include:

1. Can the affected individual refugees or group of refugees be distinguished from a larger refugee population?
2. Are durable solutions available to those who would be affected by the application of the cessation clauses?
3. Have other refugees similarly affected by the changes in circumstances in the country of origin already repatriated voluntarily and, if so, what is their status?
4. How extensive is the information available about the developments in the country of origin?

<sup>177</sup> Ibid.

<sup>178</sup> See UNGA, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Eighth Meeting', UN doc. CONF.2/SR.28, 19 July 1951.

5. Is there general agreement among local and international observers about the significance of these developments and their implications for the protection needs of affected refugees?
6. Are the changes (national, regional, or local) that affect the refugees in question fundamental and durable?
7. To what extent is the international community supporting and promoting the consolidation of these changes?
8. Can the situation in the country of origin be independently monitored by UNHCR, other international agencies, and/or NGOs?
9. Can the cooperation of asylum States and the country of origin be obtained?
10. Will the application of the cessation clauses to these individuals unduly influence the claims or status of asylum seekers who do not belong to the targeted group?

A broader interpretation of fundamental change would also help close the gap between the standards of voluntary repatriation and cessation. UNHCR has maintained the position that the standards for voluntary repatriation and cessation are different and that the former may occur at a lower level of change than is sufficient to warrant a declaration of general cessation. Questions have been raised, however, about the discrepancy between the conditions in which UNHCR is prepared to *promote* voluntary repatriation and the changes needed to justify the application of the ceased circumstances provisions. This gap may be exaggerated by the emphasis on developments at the national level in determining the applicability of Article 1C(5) and (6). A more inclusive notion of fundamental change, however, may help reduce any perceived discrepancy between UNHCR principles and practice in these areas.

Finally, UNHCR should further develop existing guidelines regarding the application of Article 1C(5) and (6) in cases involving the settlement of civil wars. Efforts by UNHCR to establish a framework of principles for evaluating post-conflict situations implicitly acknowledge that the traditional interpretation of the concept of fundamental change as a transition to democracy is inadequate in such cases. For example, the recommendation that a longer waiting period is necessary to determine the durability of change in countries that have experienced civil war seems valid, especially when viewed from the perspective of developments at the national level. Given the complexity of these situations, however, circumstances at the sub-national level may also deserve consideration and may require less time to consolidate than those at the national level. In this regard, it is noteworthy that UNHCR has moved more quickly to declare cessation in the two cases of post-conflict settlement (Sudan in 1973 and Mozambique in 1996) compared to situations of democratic transition (such as Chile in 1994).

More generally, an approach to cessation based solely on a transition to democracy may overlook important differences in the nature of persecution in situations



of internal conflict and state-sponsored repression. In the case of the former, persecution may be broader and more intense over a shorter time period and may affect large groups of people, but such persecution may be less systematic and institutionalized than in the case of state-sponsored repression. These differences in the breadth and depth of persecution suggest the need to develop supplemental standards for evaluating changes in circumstances following the settlement of civil conflicts.

In formulating additional guidelines for evaluating post-conflict situations, UNHCR may wish to draw on a growing body of literature on internal conflicts. The latter may offer some additional indicators for determining the significance and durability of change in the aftermath of civil wars. Such research has found, for example, that outside intervention plays an important role in shaping the outcome of negotiated settlements of internal conflicts.<sup>179</sup>

More 'flexible' procedures, approaches, and standards for administering the ceased circumstances provisions are sometimes suggested as a device to mitigate the perception of refugee status as a permanent condition and to reduce the incentives for asylum countries to employ complementary forms of international protection. The Global Consultations expert roundtable meeting in May 2001 nevertheless concluded that:

State practice indicates that there is not necessarily a basis for the view that more flexible interpretation and/or more active use of the 'ceased circumstances' cessation clauses would lead States to extend full Convention refugee status to those who would otherwise benefit from temporary protection.<sup>180</sup>

The Summary Conclusions also caution against targeted or partial application of ceased circumstances cessation, noting that, although this approach might be suitable for discrete groups such as victims of the former Mengistu regime in Ethiopia, its use to return refugees to safe areas in the State of origin could create or aggravate situations of internal displacement.<sup>181</sup>

Carefully targeting the application of the ceased circumstances provisions and clearly identifying any necessary exemptions can mitigate some of these risks. Apprehension about the potential effects of cessation on status determination procedures remains warranted, however, and UNHCR must continue to practise cessation in a careful manner. Countries of asylum have tended to inquire about cessation almost immediately after positive developments have occurred in a country of origin. In addition, some governments have inappropriately cited such developments to justify the rejection of pending claims as well as the automatic denial of refugee status to new applicants.

179 B. Walter, 'The Critical Barrier to Civil War Settlement', 51 *International Organization*, 1997, pp. 335–64.

180 'Lisbon Summary Conclusions', above n. 118, para. 7.

181 *Ibid.*, paras. 15–16.

## B. State practice

The disinclination of asylum States to apply the cessation clauses to recognized refugees has persisted despite renewed interest in the concept and its statutory codification in some States. Attitudes towards the link between asylum and immigration and towards the desirability of full integration of non-citizen residents also shape cessation practice.

The incentives for an asylum State to terminate refugee protection, with or without a solid factual basis, may be heightened where it is heavily burdened by a mass influx. Details concerning individuals in a mass influx may be largely unknown to asylum State authorities, and thus harm may result from generalizations concerning changed conditions. An acute need exists to refine substantive benchmarks for withdrawal of protection, to establish an objective and preferably collective process for assessing relevant political and/or social change, and to provide continued protection to individuals facing persecution and to other vulnerable persons.

Separate provision should be made in national law and in regional standards for cessation of recognized refugee status. Matters such as revocation for fraudulent procurement, exclusion, and expulsion should be addressed separately.

Fair process should include:

1. notice;
2. hearing or interview;
3. a neutral decision maker;
4. examination of evidence from a wide range of sources;
5. consideration of potential threats to the refugee's fundamental rights;
6. burden of proof on the asylum State;
7. particularized inquiry into the relevance of changed conditions to the refugee's personal situation; and
8. a delay for the purposes of assessing the durability of change.

A general finding of changed circumstances in the State of origin does not justify a blanket pronouncement of cessation, shifting the burden to individual recognized refugees to seek reconsideration of their claims and an opportunity to prove that they face a continuing risk of persecution or that they qualify for an exemption. Only where refugee status has been granted on a group basis may it be terminated on such a basis, and only where procedures exist to permit individuals to establish continued eligibility for international protection either as refugees or as candidates for some other lawful status or complementary/subsidiary protection.

Where a new persecutor has displaced the old in the State of origin, it is theoretically permissible to cease refugee status and provide a new status determination procedure. Termination of refugee status in such cases is inappropriate unless an

immediate grant of new status is provided. Such refugees continue to be entitled to international protection, by virtue of the new risk. To terminate an existing grant of refugee status, simply to issue that status anew, is administratively wasteful and should be discouraged.

States should be encouraged to codify exceptions to cessation. The preferred, and most consistent, legal approach is to permit continuation of refugee status for persons with compelling reasons, arising out of previous persecution or other serious harm, to refuse to return to their State of origin. Where cessation is imposed, persons eligible for human rights protection against return must be given an appropriate legal status. Those with special vulnerabilities, family ties, or risk of economic loss should at the very least also be eligible for a humanitarian status.

States should be encouraged to codify exceptions and to integrate an approval process into the cessation procedure. Those suffering severe past persecution or the prospect of return to serious human rights violations should receive status and standards of treatment at least equivalent to refugee status, in substance if not in name. Those with special vulnerabilities, family ties, or risk of economic loss should be treated humanely and not be forced into a quasi-legal status, but treatment as refugees may not be necessary.

The differences between cessation proper and denial of refugee status because post-flight developments have undermined an asylum claim should be emphasized. The tendency of asylum States to apply cessation concepts during initial status determination creates confusion that may undermine the development of clear and fair substantive and procedural standards for cessation.

Where a post-flight change of circumstances figures in initial status determination, some States have announced 'cessation' declarations for applicants of certain nationalities. The result is a transfer of cases to an accelerated procedure disadvantageous to the applicant (involving a presumption against persecution, the lack of suspensive effect during appeal, and so forth). This misuse of the cessation concept should be discouraged. Functionally, these measures resemble the controversial safe country of origin concept, which also may place genuine refugees at risk and add unnecessary complexity to the status determination process.

Some States establish a presumption of continuing fear of persecution upon proof of past persecution. This may have the effect of shifting the burden of proof concerning the relevance of post-flight change in circumstances from the asylum applicant to the asylum State officials. In such cases, asylum may be granted if the applicant has suffered severe past persecution or has reason to fear other serious harm. These are not actual cessation cases, but this practice illustrates two policies that should be encouraged in cessation: (i) placement of the burden of proof of the existence and relevance of changed circumstances in the State of origin on the asylum State officials, giving the refugee/asylum applicant the benefit of the doubt in these uncertain situations; and (ii) explicit statutory provision for exceptional cases, with relief commensurate to that enjoyed as a refugee.

With respect to cessation premised upon changes in personal circumstances under Articles 1C(1)–(4) of the 1951 Convention and Article I.4(a)–(d) of the OAU Refugee Convention, the key criteria are *voluntariness*, *intent*, and *effective protection*.

Refugees should receive notice and a hearing or interview prior to cessation, unless it is genuinely impossible to locate them or they have obtained another secure status in the asylum State (citizenship or durable residence with rights at least equivalent to those enjoyed as a refugee) and cessation is a mere formality. During cessation proceedings, refugees may be required to explain ambiguous conduct, and adverse inferences may be drawn from unreasonable silence or non-cooperation.

Concerning re-availment of national protection (generally, the acquisition or renewal of a passport, other contact with diplomatic and consular authorities of the State of origin, or travel to third States on a State of origin passport), the refugee's conduct will generally be voluntary. The focus should instead be placed upon the refugee's intent, to determine if he or she has signalled a desire to re-establish a formal link to the State of persecution. The refugee's ignorance of alternatives (such as asylum State travel documents, possibilities to marry or divorce without resort to State of origin officials, etc.) is relevant to intent. An objective inquiry into the prospect that the State of persecution will now provide effective protection is also necessary.

Paragraphs 121–2 of the *Handbook* suggest that conduct such as acquisition or renewal of a State of origin passport creates a presumption of intent to re-avail oneself of national protection. This phrasing is unfortunate, as it may suggest that the burden of proof concerning the inapplicability of cessation is on the refugee. Rather, since conduct and conditions are so frequently ambiguous or uncertain, refugees should be given the benefit of the doubt in cessation matters.

The three criteria of voluntariness, intent, and effective protection also govern the application of Article 1C(2) of the 1951 Convention and Article I.4(b) of the OAU Refugee Convention, relating to re-acquisition of nationality. Where the restoration of nationality occurs as a result of conduct initiated by the refugee, the analysis is very similar to that in cases involving re-availment of protection. Where restoration of nationality through action or legislation initiated by the State of origin occurs, careful analysis of the situation is required. Voluntariness is crucial, as a refugee may not be stripped of international protection if he or she refuses to re-acquire the lost nationality of the persecuting State. Paragraph 128 of the *Handbook* suggests that, where refugees are given the choice to opt out of general nationality-restoration measures, cessation may be applied if they fail to act. Such a categorical approach is not justified, because an inquiry into the third element, the likelihood that the State will actually provide effective protection, is also necessary.

The least problematic cessation scenario is acquisition of the nationality of the State of refuge, as provided for in Article 1C(3) of the 1951 Convention and Article I.4(c) of the OAU Refugee Convention. The refugee enjoys legal rights at least

equivalent to those guaranteed by these conventions and is secure against forced return to the State of persecution. In many cases, the grant of naturalization will result in cessation of refugee status without the necessity of a separate and formal cessation proceeding. Where a non-refugee residence permit, rather than citizenship, is granted, a similar automatic loss of refugee status may result. In this second situation, States must take care to ensure that legal rights at least equivalent to those guaranteed by the 1951 and OAU refugee conventions are conferred with the residence permit in order to justify automatic cessation. If this is not the case, refugee status should be maintained until the conclusion of a formal cessation proceeding and a finding that one of the cessation grounds applies to the individual.

Acquisition of third State nationality is also envisioned as a basis for cessation under Article 1C(3) of the 1951 Convention and Article I.4(c) of the OAU Refugee Convention. Where legal rights at least equivalent to those enjoyed as a refugee and security against forced return to the State of persecution accompany the acquisition of the third State nationality, cessation may be imposed. Article 1C(3) and Article I.4(c) notably do not include a requirement of voluntariness. In situations where nationality is conferred without specific application by the refugee, asylum States must engage in three inquiries prior to the imposition of cessation: (i) whether effective protection is available from the new State of nationality; (ii) whether there is a genuine and effective link between that State and the new citizen; and (iii) whether the nationality law itself contravenes human rights norms, for example concerning gender discrimination.

Where the new State of nationality is a successor State to the State of persecution, inquiries into the prospects for effective protection are crucial and automatic cessation would pose unacceptable risks. Since conditions in the successor State may be unstable, the benefit of the doubt should be given to the refugee who resists acquisition of successor State nationality. Fair hearings will ensure that, for example, members of racial, ethnic, and religious minorities are not forcibly sent to a successor State willing to confer its nationality by operation of law but unlikely to offer effective protection.

The risk that country conditions may be volatile is present in many cases involving re-establishment in the State of origin under Article 1C(4) and Article I.4(d). Fair proceedings, granting the benefit of the doubt to refugees, and built-in delay in the application of the cessation clauses are appropriate. Prospects for sustainable voluntary repatriation are enhanced where refugees have the option to undertake assessment visits or to attempt re-establishment into uncertain conditions, without having to forfeit their refugee status upon departure. The elements of voluntariness, intent, and effective protection are vital in re-establishment cases. Re-establishment denotes transfer of primary residence with a subjective re-affiliation to the State of origin, rather than brief visits.

Articles I.4(f) and (g) of the OAU Refugee Convention are treated structurally as cessation clauses but they operate functionally as expulsion clauses because they apply without regard to the cessation of the risks of persecution or violence in the

State of origin. Article I.4(f) (commission of a serious non-political crime in a third State following grant of refugee status) appears to be intended to deter abuse of asylum by criminal elements. Return to persecution appears an ill-suited response, however, especially where the refugee has been duly punished by the State in which the crime was committed. Where the refugee has escaped punishment, extradition to the third State may represent a possible solution to avoid return to an unchanged risk of persecution or other violence. Moreover, refugees may be entitled to the human rights bars to expulsion. Article I.4(g) (serious infringement of the purposes and objectives of the OAU Refugee Convention) could nevertheless be appropriate in some circumstances, for instance, where militarized elements have infiltrated refugee camps, although it would need to be applied in a manner complementary to the 1951 Convention. It likewise needs to be given a narrow interpretation when used as a vehicle to implement the Article III ban on subversive activities against other OAU States.<sup>182</sup>

## VI. Conclusions

Application of the cessation clauses involves the loss of protection for previously recognized refugees, depriving them of existing rights and possibly resulting in their return to a State in which they experienced persecution. There seems to be substantial agreement among UNHCR and States Parties that the cessation clauses should be interpreted in a restrictive manner and administered with great caution.

In consultation with States Parties, UNHCR has developed a series of guidelines for the application of the ceased circumstances provisions. They outline an exhaustive set of criteria for determining whether developments in the country of origin constitute a fundamental and durable change in the conditions that led to the provision of international protection. UNHCR procedures for applying the ceased circumstances provisions are similarly comprehensive, involving a detailed evaluation of the situation in the country of origin and extensive dialogue with the country of origin, countries of asylum, and local and international NGOs. Thus, even in cases that readily seem to meet the standards of fundamental and durable change, UNHCR has taken a cautious approach towards declaring cessation based on ceased

182 Art. III of the OAU Refugee Convention needs likewise be interpreted narrowly in order to prevent violations of refugees' freedom of expression. The 'Key Conclusions/Recommendations of the UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum, Refugee Status, Camps and other Locations (26–27 Feb. 2001, Pretoria, South Africa)', UN doc. EC/GC/01/9, 30 May 2001, suggested the following list of prohibited subversive activities: (i) propaganda for war; (ii) incitement to imminent violence; and (iii) hate speech. Suggested responses to such activities included informing refugees of their obligations under international law, working regionally to stem subversive influences, and promoting democracy and peace in the region.

circumstances. A careful interpretation and application of the cessation clauses has not, however, precluded UNHCR from actively considering the use of the ceased circumstances provisions in Article 1C(5) and (6) in a timely manner when positive developments have occurred in countries of origin.

Although Article 1C envisions cessation based both on the individual acts of a recognized refugee and also on a general change in conditions in the State of origin, it is ceased circumstances cessation that has been the focus of UNHCR practice and appears to be of greatest contemporary concern to States. As the preceding review of UNHCR and State practice suggests, UNHCR and asylum States may be confronted with situations in which refugee populations – or particular segments of those populations – under their care may no longer require international protection, but to whom Article 1C(5) and (6) cannot be applied under existing standards and procedures. New approaches to cessation may be able to address this problem and ensure that refugee status is reserved for those who truly need it. These might include targeted cessation for discrete groups of refugees whose specific shared risk of persecution has been eliminated by durable changes in political conditions in the State of origin. Clearer standards concerning exceptions to cessation may provide reassurance that cessation will not inflict undue trauma on refugees, result in violations of their human rights, or impose excessive hardship relating to such matters as separation of family members. Any new procedures must still be designed to mitigate the risk of undermining international protection and continue to be administered with great caution.

The cessation clauses do not negate the importance of facilitating naturalization under Article 34, nor undermine the suitability of local integration as a durable solution for refugees. Recognition of the settled expectations of refugees is reflected in the continuing paucity of State practice regarding the termination of individual grants of refugee status. The best assimilated and long-resident refugees do not present a likely target for public discontent, and the termination of their protection would entail a substantial drain on scarce enforcement resources. The administrative costs of instituting proceedings against refugees before they have acquired some alternate durable legal status, the obligation to prove that general changed circumstances enable safe return for the individual refugee, and the probability that safe conditions may independently induce voluntary return, combine to deprioritize individualized cessation. The difficulties States have faced in removing failed asylum seekers suggest that cessation is even less likely to result in automatic return.<sup>183</sup>

Nevertheless, a refinement of standards to guide State cessation practice is both feasible and desirable. Group-based refugee protection has been terminated by

183 G. Noll, 'Rejected Asylum Seekers: The Problem of Return', in *Migration and Development* (ed. R. Appleyard, United Nations Population Fund/International Organization for Migration, Geneva, 1999), pp. 267–87.

States of refuge, often in collaboration with UNHCR declarations of cessation under its Statute. Criteria for evaluating fundamental, durable, and effective change in the State of origin are shared by UNHCR and States in applying the similar ceased circumstances clauses of the Statute and Convention. Refugees who face cessation of group-based refugee status must be permitted to contest whether a general change in conditions in the State of origin has eliminated their own well-founded fear of persecution. While States rarely apply ceased circumstances cessation to individual recognized refugees, States must, in an objective and verifiable manner, establish that the situation that justified the granting of refugee status has ceased to exist. The burden is on the State of asylum to demonstrate that the criteria for cessation have been met.

Cessation premised on the individual acts and situations of recognized refugees pursuant to Articles 1C(1)–(4) is guided by the elements of voluntariness, intent, and effective protection. State practice involving termination of previously granted refugee status remains rare under these Articles.

Procedures for cessation by States must include safeguards based on ordinary rules of fairness and natural justice. The elements of a fair cessation process include notice, an opportunity to present and to contest evidence, and placement of the burden of proof on the State seeking to impose cessation.

Refugees must be given an opportunity not only to contest the applicability of cessation criteria to their situation, but also for consideration of their eligibility for exceptions to cessation. State practice as well as a dynamic interpretation of the exception in light of the object and purpose of the 1951 Convention support an extension of the proviso of Article 1C(5) and (6) to refugees facing cessation under any of the cessation clauses. Severe past persecution justifies the continuation of refugee status. Cessation does not equate with return, where refugees qualify for complementary/subsidiary protection or where their long stay resulting in strong family, social, and economic links calls for appropriate arrangements to be made on their behalf, as recommended by Executive Committee Conclusion No. 69.

Termination of temporary protection calls for application of cessation criteria, especially where the beneficiaries include many Convention refugees whose determination of status has been delayed. They must be given an opportunity to apply for refugee status and to establish their eligibility for the exception to cessation or other forms of protection against involuntary return.



## 8.2 Summary Conclusions: cessation of refugee status

*Expert roundtable organized by the United Nations High Commissioner for Refugees and the Carnegie Endowment for International Peace, hosted by the Luso-American Foundation for Development, Lisbon, Portugal, 3–4 May 2001*



The second day of the expert roundtable addressed the cessation clauses of the 1951 Convention relating to the Status of Refugees, based on two discussion papers, 'Current Issues in Cessation of Protection under Article 1C of the 1951 Convention and Article I.4 of the 1969 OAU Convention', by Professor Joan Fitzpatrick and 'When is International Protection No Longer Necessary? The "Ceased Circumstances" Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973–99', by Rafael Bonoan. Participants were also provided with the UNHCR Guidelines on the Application of the Cessation Clauses and written contributions from: the Government of the Netherlands; Judge Bendicht Tellenbach, Swiss Asylum Appeal Commission; and Dr Penelope Mathew, Australian National University. NGO and other input was fed into the process in the course of the discussion. Professor Walter Kälin moderated the discussion.

The following Summary Conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the issues emerging from the discussion.

### **A. State and UNHCR practice with respect to the cessation clauses**

1. One of the objectives of the discussion was to understand why, overall, the cessation clauses under the 1951 Convention are little-used provisions by States. There was therefore considerable discussion across the range of issues which impact on the application of the cessation clauses. The emergent focus of the discussion was on the more complex issue of the application of Articles 1C(5) and (6). For this reason, and in view of the fact that Articles 1C(1)–(4) are less used, these conclusions reflect the greater emphasis in the discussion on the application of Articles 1C(5) and (6).

2. A number of countries do not invoke the cessation clauses at least in part because of the administrative costs involved, including the costs of implementing review procedures; the recognized likelihood that even where cessation results, it may not lead to return because those whose refugee status has ceased will have the possibility to remain under another status; and/or a State preference for naturalization under Article 34 of the Convention.
3. Cessation has, on occasion, been a formality used for administrative reasons, that is, to transfer both administrative and fiscal responsibility from one government entity to another. In this sense, it may not have any direct impact on the life of the individual(s) concerned.
4. In some States a declaration of general cessation has been made in relation to refugees from a specific country not for the purpose of reviewing the status of those recognized as refugees but with a view to limiting applications of asylum seekers coming from that country. In some instances cessation appears to have been used to designate a country of origin as generally 'safe' in the context of refugee status determination. In a similar light, recent legislation in some States providing for the periodic review of refugee status may lead to an increased interest in invoking the cessation clauses. These examples indicate that there is a need to clarify applicable standards in the application of the cessation clauses.
5. UNHCR has, in certain specific situations involving large numbers of refugees, invoked the cessation clauses by publicly issuing declarations of general cessation.

### **B. Application of the 'ceased circumstances' cessation clause (Articles 1C(5)–(6) of the 1951 Convention)**

#### **(a) Cessation as a flexible tool**

6. The 'ceased circumstances' cessation provisions pose a number of legal and operational questions and are most in need of expert examination and practical guidance.
7. State practice indicates that there is not necessarily a basis for the view that more flexible interpretation and/or more active use of the 'ceased circumstances' cessation clauses would lead States to extend full Convention refugee status to those who would otherwise benefit from temporary protection.
8. In considering a flexible approach to cessation, it is helpful to distinguish between operational procedures and normative standards. At the operational level, a flexible approach is needed. This would include such measures as consultations between the affected parties, including refugee communities, and phased implementation that takes into account the

needs of the host country, the country of return, and the refugees themselves. On the other hand, at the normative level, a flexible application of the cessation clauses should not be taken to mean that protection standards may be diminished.

#### (b) Criteria and process

9. The process of arriving at a declaration of general cessation requires coherence, consultation, and transparency.
10. The criteria for declaring general cessation as set out in Executive Committee Conclusion No. 69 (1992) on cessation of status and in UNHCR's Guidelines are generally adequate. This being said, there is a need for further development of the guidelines which should focus on procedures for assessing ceased circumstances. This should include broader consideration of a range of factors including human security, the sustainability of return, and the general human rights situation.
11. The criteria for cessation should be applied carefully, not in purely formalistic terms, with full awareness of the situation in the country of origin as well as the country of asylum.
12. In determining whether general cessation can be invoked with regard to a specific group of refugees, the following elements are crucial: (i) assessment of the situation in the country of origin against the criteria mentioned above in paras. 10 and 11 on the basis of all available information from a variety of sources; (ii) involvement of refugees in the process (perhaps including visits by refugees to the country of origin to examine conditions); (iii) examination of the circumstances of refugees who have voluntarily returned to the country of origin; (iv) analysis of the potential consequences of cessation for the refugee population in the host country; and (v) clarification of categories of persons who continue to be in need of international protection and of criteria for recognizing exceptions to cessation.
13. Following a declaration of general cessation, procedures should be implemented in a flexible, consultative, and phased manner, particularly in developing countries hosting large numbers of refugees.
14. Factors critical to the success of implementing general cessation include agreement on implementation procedures and timeframes among States, UNHCR, NGOs, and refugees, counselling of refugees, information sharing, and the provision of assistance to returnees.

#### (c) Targeted/partial application of the 'ceased circumstances' clause

15. Possible criteria for targeted, or partial, application of the cessation clauses require further examination. Two situations may arise. In the first,

a certain sub-group, rather than an entire refugee caseload, from a specific country of origin might be targeted for cessation. This approach has been taken by UNHCR on one occasion, in relation to declaring general cessation for Ethiopian refugees from the Mengistu regime, but not for Ethiopian refugees who had fled subsequently. In some circumstances it might be possible to use a similar approach.

16. The second possible use of partial cessation would be with respect to persons from a particular area of the country of origin. Consideration should be given to the importance of not subjecting refugees to unnecessary review in light of changes which may in fact be temporary. The notion of eventual return to safe areas in the country of origin would need further careful examination in the context of cessation. Importing the idea of relocation/internal flight alternative from refugee status determination is, for instance, not appropriate in relation to cessation and would raise human rights concerns, most notably the creation or expansion of situations of internal displacement.

#### (d) Individual application of the ceased circumstances cessation clause

17. The practice under Article 1C(5)–(6) has hitherto been for cessation to be declared on a group basis, and not applied to individual cases selected from among a larger group of the same nationality. While nothing in the Convention precludes its use with respect to an individual refugee, such an approach would require further analysis if it were to be used, not least because of the need to respect a basic degree of stability for individual refugees.

#### (e) Compelling reasons

18. Application of the ‘compelling reasons’ exception to general cessation contained in Article 1C(5)–(6) is interpreted to extend beyond the actual words of the provision and is recognized to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well grounded in State practice.
19. In addition, Executive Committee Conclusion No. 69 sets out a further humanitarian exception for persons whose long stay in the host country has resulted in strong family, social, and economic ties. These and other similar categories of cases should benefit from a secure legal status.

### (f) Cessation in situations of mass influx

20. The use of cessation in mass influx depends on the situation in the country of origin and on the status of the refugees in the host countries. It can be categorized as follows:
- *Prima facie group determination under the 1951 Convention and/or the OAU Convention.*<sup>1</sup> The Conventions' cessation clauses apply.
  - *Temporary protection in the wake of mass influx, which includes persons covered by the 1951 Convention.* Since temporary protection is built upon the 1951 Convention framework, it is crucial that in such situations the cessation clauses are respected. This can be achieved, for instance, by promoting voluntary repatriation in safety and dignity when conditions so allow, and by providing access to refugee status determination procedures when temporary protection is lifted, if not sooner. Access to status determination procedures after lifting temporary protection would need to take into account humanitarian and human rights exceptions and in particular compelling reasons arising out of previous persecution.
  - *Complementary protection/broader notion of temporary protection.* A different set of procedures and criteria would avail, linked to the reasons for recognition, given that it applies to those who are not covered by the 1951 Convention. Such standards would still need to be developed, depending on the situation.

### (g) Relationship to durable solutions

21. As a guiding principle, cessation of refugee status should lead to a durable solution. It should not result in people residing in a host State with an uncertain status. Nor would cessation necessarily lead to return.
22. While voluntary repatriation and cessation may both be elements in a comprehensive approach to address specific refugee situations, the standards and policies appropriate for each are different. An analysis of the circumstances of refugees who repatriate voluntarily may be an important element in determining whether a general declaration of cessation would follow.
23. Residual caseloads remaining after the ending of a voluntary repatriation programme can be divided broadly into two categories. Where there has been an individual status determination, the cessation clauses might be

<sup>1</sup> **Editorial note:** Refers to 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45.

applied if the circumstances so warrant. Where there has been no individual determination (either because of a prima facie determination of refugee status or because of the granting of temporary protection), individuals not choosing voluntary repatriation should be entitled to seek individual determinations which, in addition to the principles that would ordinarily apply to such determinations, might also include a review of whether their circumstances have changed in the particular case, or there are compelling reasons arising out of previous persecution.

24. In those cases where return is not a viable option, naturalization or at the very least some form of permanent residence is necessary.

### **C. Change in personal circumstances under 1951 Convention, Article 1C (1)–(4) and OAU Convention, Article I.4(a)–(d)**

25. Cessation based on changes in personal circumstances should be assessed under the criteria of voluntariness, intent, and effective protection, which should not be applied in a formalistic manner. The conclusions contained under this heading in Professor Fitzpatrick's paper were broadly endorsed.

### **D. Relationship of cessation to determination of refugee status**

26. In principle, refugee status determination and cessation procedures should be seen as separate and distinct processes, and should not be confused.
27. If in the course of the asylum procedure there are fundamental changes in the country of origin, the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable. Humanitarian exceptions would need to be properly accommodated in such a context, that is, for instance, in cases where individuals had previously suffered severe forms of persecution.

### **E. Final observations**

28. It was considered that UNHCR's Guidelines on Cessation were generally well crafted but should be updated on the basis of the findings of this meeting. Particular attention should be paid to ensuring that cessation is undertaken only following full consultation and open communication with all affected parties.

### 8.3 List of participants

*Expert roundtable, Lisbon, Portugal, 3–4 May 2001 (cessation, exclusion)*

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Iain Cameron, Uppsala University, Sweden  
Towa Chaiwila, Government of Zambia  
B. S. Chimni, Jawaharlal Nehru University, India  
Deirdre Clancy, Lawyers' Committee for Human Rights, New York, United States  
Jean-Marie Cravero, Government of France  
Alberto D'Alotto, Government of Argentina  
Andrea Faberova, Government of the Czech Republic  
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## 9.1 Family unity and refugee protection

KATE JASTRAM AND KATHLEEN NEWLAND\*

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\* This paper benefited from the input of numerous UNHCR field offices.

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## I. Introduction

The family is universally recognized as the fundamental group unit of society and as entitled to protection and assistance from society and the State. The right to family life is recognized in universal and regional as well as in many national legal instruments. The right to family unity is inherent in the right to family life. This right applies to all human beings, regardless of their status.

Few human rights instruments, however, are explicit about how and where this right is to be effected in relation to families that have been separated across international borders. For refugees and those who seek to protect them, the right to family unity implies a right to family reunification in a country of asylum, because refugees cannot safely return to their countries of origin in order to enjoy the right to family life there. The integrity of the refugee family is both a legal right and a humanitarian principle; it is also an essential framework of protection and a key to the success of durable solutions for refugees that can restore to them something approximating a normal life.

Refugees run multiple risks in the process of fleeing from persecution, one of which is the very real risk of separation from their families. For individuals who, as refugees, are without the protection of their own countries, the loss of contact with family members may disrupt their major remaining source of protection and care or, equally distressing, put out of reach those for whose protection a refugee feels most deeply responsible.

This paper, after introducing the issues that arise in discussions of family unity (section II) and examining the role of the family in refugee protection (section III),

reviews the position of the refugee family in international law, both in relation to the right to family unity and the issue of family reunification (section IV). It then examines how these legal norms have been reflected in State practice, through the legal framework on the one hand (section V), and policy and practice on the other (section VI). The paper concludes by reviewing the emerging consensus on family reunification as a right of refugees (section VII).

## II. Refugee family unity in context

Although the right to seek and enjoy asylum in another country is an individual human right,<sup>1</sup> the individual refugee should not be seen in isolation from his or her family. The role of the family as the central unit of human society is entrenched in virtually all cultures and traditions, including the modern, universal legal ‘culture’ of human rights. The drafters of the 1951 Convention Relating to the Status of Refugees<sup>2</sup> linked a protection regime premised on the individual’s fear of persecution to the refugee’s family in a strongly worded recommendation in the Final Act of the diplomatic conference that adopted the Convention. In Recommendation B, the conference urged governments to ‘take the necessary measures for the protection of the refugee’s family’, and declared that ‘the unity of the family . . . is an essential right of the refugee’.<sup>3</sup> The States that are members of the Executive Committee of UNHCR have repeatedly emphasized the importance of family unity and reunification.

Protection at its most basic level derives from and builds on the material and psychological support that family members can give to one another. The trauma and deprivation of persecution and flight make this support particularly critical for refugees. Refugees repeatedly demonstrate remarkable powers of resilience in adversity, but the solitary refugee must of necessity rely more heavily on external providers of assistance and protection. The self-help efforts of the refugee family multiply the efforts of external actors, as recognized by UNHCR’s Executive Committee, in calling for ‘programmes to promote the self-sufficiency of adult [refugee] family members so as to enhance their capacity to support dependent family members’.<sup>4</sup>

Implementation of the right to family unity in the refugee context requires not only that the State refrain from actions that would disrupt an intact family, but

1 ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’ Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 Dec. 1948 (hereinafter ‘Universal Declaration’), Art. 14(1).

2 Convention Relating to the Status of Refugees, 1951, 189 UNTS 150 (hereinafter ‘1951 Convention’).

3 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952, Recommendation B.

4 Executive Committee, Conclusion No. 88 (L), 1999, para. b(v), ‘Protection of the Refugee’s Family’.

also that it take action to allow a dispersed family to reunite without returning to a country where they would face danger. Such policies, codified in domestic law and regulation, lower the costs and enhance the effectiveness of protection programmes as refugee families provide mutual assistance to their members. Host countries benefit when their own policies, procedures and programmes strengthen the unity of the refugee family, helping individuals to function in countries of asylum or resettlement, facilitating their integration into the host society, and promoting social and economic self-sufficiency. As noted at a 2001 international conference on resettlement: 'A flexible and expansive approach to family reunification therefore not only benefits refugees and their communities, but also resettlement [and other host] countries by enhancing integration prospects and lowering social costs in the long term.'<sup>5</sup>

The international community has accepted the obligation of protecting people who cannot look to their own countries to safeguard their fundamental rights, which include the right to family life. It has also taken on the obligation to search for durable solutions to the plight of refugees, which can hardly be achieved while the members of a family are scattered and fearful for their own and each other's well-being.

Given current concerns of governments about migration control, it is perhaps not surprising that implementation of the right to family unity is fraught with obstacles. The importance of maintaining or restoring the unity of the refugee family is well understood and accepted by most countries of asylum, for humanitarian as well as practical reasons, but the actions of States are sometimes at odds with acknowledged obligations. The special situation of refugees notwithstanding, family unity – particularly when it requires action in the form of family reunification – is commonly seen through the lens of immigration, which many countries are trying to control or reduce. For the last two decades or so, the majority of legal immigrants to the member countries of the Organization for Economic Cooperation and Development (OECD) have immigrated under family reunion provisions.<sup>6</sup>

Attempts to control and narrow the stream of family migration have led many countries into more restrictive interpretations of their obligations to protect the refugee family. States are concerned both with the multiplier effect of 'chain migration' of legitimate family members, and with fraud. Concerns about fraud are directed at migrants as well, but are particularly marked in the refugee context, since refugees often lack documents attesting to the veracity of their claims of a family relationship.

5 UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and non-governmental organizations (NGOs), Geneva, 20–21 June 2001, para. 1(e).

6 Organization for Economic Cooperation and Development, Continuous Reporting System on Migration (SOPEMI), *Trends in International Migration* (Annual Report, OECD, Paris, 2001), pp. 20–1 and *passim*.

The challenge for States is to balance their migration concerns with their humanitarian obligations in a manner more suited to protecting families (and rights) and less likely to exacerbate the problem of unauthorized arrivals that they are trying to address.

It is common knowledge, for example, that because of the lack of legal means to enter many countries of asylum, many husbands (it is usually, although not always, the husband) will leave their wives and children at home or in a country of first asylum in order to attempt the journey alone.<sup>7</sup> If they are stopped in a country of transit, they are often unable to return to the country of first asylum. The families concerned are usually left in desperate straits. Barring the possibility of reunification in the country of transit or first asylum, where the level of protection afforded may not be sufficient, the only legal means of reunification then becomes resettlement, a lengthy and expensive process, which is difficult for the separated family members and resource-intensive for UNHCR, non-governmental organizations (NGOs), and the affected governments.<sup>8</sup> It also distorts the resettlement process by directing resources away from other protection concerns in order to solve family reunification problems that States have, to some extent, brought upon themselves.

The gender implications of this common scenario are that, since it is primarily women and children who are left behind in the country of origin or transit, they are at greater risk from a protection perspective. This is not only because of their fear of persecution in the country of origin but also because they are then without the support of male family members. To make matters worse, they are unable to work towards a durable solution, since they cannot initiate family reunification procedures and can therefore play at best only a passive role in the procedure, unless they too expose themselves to the dangers of clandestine travel.<sup>9</sup>

Reunification, even when successful, often takes much longer than refugees expect because of the length of asylum procedures for the principal applicant and resettlement/reunification/immigration procedures for the family thereafter. The passage of time alone is damaging to the family, and costly to States, since the likelihood of social problems and even family breakdown is higher with longer periods of separation and this may result in increased costs for States in welfare and other support services. In some cases, husbands eventually 'disappear' or stop

7 Cost is a related factor, which goes up with the distance, difficulty, and illegality of the journey. Asylum seekers advised one UNHCR office, for example, that the going rate to be trafficked from the Russian Federation to Central or Western Europe was US\$3,000–5,000 per person. E-mail from UNHCR field office to authors, 6 Aug. 2001.

8 The numbers involved are not small, e.g. there are at present approximately 1,500 family members in Indonesia awaiting resettlement in order to be reunited with other family members.

9 See e.g., Refugee Council of Australia, 'Discussion Paper on Family Unity and Family Reunification', Aug. 2001, available on <http://www.refugeecouncil.org.au/position082001.htm>, section 7. See also, G. Sadoway, 'Canada's Treatment of Separated Refugee Children', 3 *European Journal of Migration and Law*, 2001, pp. 348–50.

transferring funds back to their families, either of which causes an increase in the numbers of stranded family members requiring financial and social assistance. In other cases, after one or two years living as a single mother in difficult conditions without the means to support her family adequately, a woman may decide to return to the country of origin, even if it is not safe. Her risk in returning may be heightened in traditional communities by suspicions about her sojourn abroad without her husband, and she may face persecution or even death for her perceived immoral behaviour.<sup>10</sup> Long waiting periods also increase the risk of family members becoming victims of traffickers.

In a different and all too common scenario, a child may arrive alone in a country of asylum. These compelling cases can be extremely complex. In some instances, desperate parents have sent children abroad for their own protection, for example, to avoid forced recruitment by armed groups. In other cases, the parents are hoping for a better life for their child, or for themselves, and have not necessarily acted in the child's best interests by sending him or her alone. Some children are escaping from their families in situations that may well qualify them for refugee status, for example in cases of forced marriage or female genital mutilation. In still other cases, the child was already separated from his or her family in the country of origin or a country of transit.

The obligation to resolve these cases in the best interests of the child, whether or not he or she is recognized as a refugee, requires States to undertake a careful investigation into the facts and circumstances of each child and family. Some countries, such as Canada and Poland, do not allow unaccompanied and separated children recognized as refugees to apply for family reunification with their parents, in part to discourage parents from sending children abroad. Some States that do have provisions for parents to join a minor child impose conditions on reunification so unrealistic as to virtually eliminate the possibility – for example by requiring that minor children meet the income requirements of a sponsor of joining relatives. Children in this situation face an unacceptable choice: either to return to a place where they fear persecution, or to endure long-term separation from their parents. A State's fear of 'anchor children' being used to open a path for the immigration of a family does not justify denial of family reunification to a child who has been found to have a legitimate claim to refugee status, nor does it comport with international obligations relating to family reunification and the best interests of the child.

Some States' efforts to intercept illegal migrants include screening for protection purposes, with resettlement as the durable solution. The intercepting country generally tries to find other countries to offer the necessary resettlement spaces to the refugees thus identified. Leaving aside the question of whether such schemes are a positive example of balancing migration concerns with protection responsibilities, or of burden-sharing, it should be recognized that at least some of the intercepted

10 E-mail from UNHCR field office to authors, 3 Aug. 2001.

refugees will have family ties in the country they were trying to reach and should be allowed to proceed to join their relatives there.

In addition to migration control concerns, in some countries there is still a lack of information or awareness of State responsibilities regarding family unity. Where, for example, legislation relating to family reunification imposes the additional requirement that the family members must independently meet the refugee definition, the purpose of the right to family unity in the refugee context is defeated.<sup>11</sup>

In other countries, legal or administrative structures are lacking. For example, a refugee law enacted in Romania in 2001 lacked any provision for family reunification, even though previous legislation had allowed asylum applications to be submitted at the country's missions abroad, a procedure that had been instrumental in family reunification cases. This procedure was not retained in the 2001 law, which instead required that all applicants for asylum appear in person on the territory of the country.<sup>12</sup>

Resource constraints also have an impact on refugee family unity. In some cases, countries are not able or willing to allocate the necessary human or material resources to support the process of restoring family unity. In other situations, countries may be concerned at the prospect of additional costs posed by arriving family members, and so limit their possibilities for entry or require refugees to meet the same tests of income and accommodation that are required of immigrants. In particular, a number of countries retain the possibility of barring refugees' family members who may on account of health problems represent a drain on public resources, although it is becoming less common for States to exercise this option.<sup>13</sup>

11 See, e.g., Estonia's Law on Refugees, 9 July 1997, ch. I (General Provisions), Art. 5, 'Granting Asylum', para. 3 (unofficial translation, accessed on 1998 UNHCR RefWorld CD-ROM, Legal Information, REFLEG, Estonia).

12 Ordinance 102/2000 on the Status and Regime of Refugees in Romania, Nov. 2000, ch. II, section 1, Art. 7(1). Law 323/2001 approving this Ordinance was approved by the Romanian parliament in June 2001 and entered into force on 27 June 2001. Since then, the absence of procedures to effect family reunification has been remedied at least in part by a Feb. 2002 ordinance permitting the National Refugee Office to receive applications for family reunification and to issue travel documents for those permitted to reunite with their families to the relevant embassy or consulate abroad allowing them to enter on a family visa (Romanian Ministry of Interior and the Ministry of Foreign Affairs, Order No. 213/A/2.918, 11 Feb. 2002). There remain concerns that the new ordinance applies only to those with refugee status, not complementary statuses, does not contain a waiver for visa and/or travel fees for persons in need, and only applies to nuclear family members. The ordinance also presupposes the existence of original documents necessary to verify the relationship, which may not be readily available or could endanger those concerned if applied for.

13 For example, in Australia in 2001, a refugee man set himself ablaze (and later died) outside the parliament building after his wife and children, one of whom was disabled, were refused permission to join him in Australia 'on grounds of substantial health care costs to the Australian community', according to the Minister for Immigration: *Sydney Morning Herald*, 3 April 2001. The US may bar entrants who suffer from infectious diseases such as HIV/AIDS or tuberculosis, unless they can qualify for a waiver based on three criteria: private medical insurance, no danger to public health or safety, and commitment to avoid spreading the disease. There is, however, a

In the light of heightened security concerns following the 11 September 2001 terrorist attacks in the United States, family reunification procedures have become stricter and more protracted as more concrete evidence of family relationships and identity are demanded.<sup>14</sup> Background checks on family members are already a common source of delays in processing family reunification cases. Given that many refugees come from regions in turmoil that may also harbour terrorists, intense scrutiny is bound to be directed towards people trying to enter western States through all channels, including asylum systems and family reunification programmes. Use of the exclusion clauses of the 1951 Convention may become more prevalent to prevent entry of relatives who are suspected of terrorist or criminal involvement.

### III. The family as a source of protection

#### A. The role of the family in protection and assistance

In the face of persecution, families adopt a variety of protective strategies, some of which may necessitate temporary separation. Such strategies include sending a politically active adult into hiding, helping a son to escape forcible recruitment by militia forces, or sending abroad a woman at risk of attack or abduction. Family members may be forced to take different routes out of the country or to leave at different times as resources or opportunities permit.

Whether as a chosen strategy or an unintended consequence of the chaos of forcible displacement, the separation of a refugee family is rarely intended to be permanent. Refugees commonly go to great lengths to reassemble the family group, but often encounter enormous practical and legal obstacles in the process. The powerful motivation to maintain or restore family unity attests to the sense of safety and well-being that for many people resides uniquely within the family.

The most fundamental functions of physical care (particularly to the young, old, and sick), protection, and emotional support take place within the family unit. The weaker public institutions of social protection are, the more reliant individuals are on family structures. While many families fall short of idealized notions of functioning in the best interests of each of their members, involuntary separation from the family creates particular vulnerabilities. When other institutions of

<sup>14</sup> ‘Special Medical Case Management Program’ (SMCMP) in the US Resettlement Program, which provides government funding to communities to assist with the medical care and management of refugees living with HIV/AIDS. This programme is available both to family reunion cases and to ‘free cases’ (SMCMP, interview with programme manager at Immigration and Refugee Services of America, 23 May 2002).

<sup>14</sup> See generally, UNHCR, ‘Addressing Security Concerns without Undermining Refugee Protection’, Nov. 2001.



society break down or are unavailable, as is so often the case in refugee situations, the family assumes a greater than usual importance. Refugees who are alone are more at risk of exploitation and attack, and may find themselves forced into servitude or prostitution in order to survive. Protection of the refugee family is thus a primary means to protect individual refugees.

The function of the family as a channel of distribution of resources from primary earners or producers to caregivers and dependants is commonly replicated in the methods used to provide assistance to refugees. The household remains the most basic cell in the distribution network for food and other goods provided by international and national relief agencies. Isolated individuals may have difficulty gaining access to basic necessities. Organizations that provide assistance seek to reunite families for humanitarian as well as protection reasons, but also find that it makes the task of distributing assistance easier. Both within the context of organized assistance programmes and outside them, the family is for many refugees the most reliable means of assistance and may spread its resources along channels of mutual obligation that can include even quite distant relatives.

The protection of the family is most essential to the members who are least able to protect themselves individually, in particular, children and the elderly. Tracing and reunification programmes for these and other vulnerable groups are matters of particular urgency. Protections for children separated from their families during flight have begun to be elaborated in recent years,<sup>15</sup> but specific provisions for the elderly are much less developed.<sup>16</sup> While minor children are almost universally permitted to reunify with parents, elderly relatives face greater obstacles both in principle and in practice. Some States limit family reunification possibilities to spouses and minor children, while others accept aged parents but insist on strict dependency criteria. More distant elderly relatives, such as aunts, uncles, or cousins, are admitted to join family members only exceptionally in most receiving States.<sup>17</sup> The vulnerability of elderly refugees, and elderly relatives left behind by refugees, should be recognized in the criteria governing eligibility for family reunification.

15 See e.g., UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR, Geneva, 1994), ch. 10; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', 1 Feb. 1997; Separated Children in Europe Programme (a joint initiative of UNHCR and International Save the Children Alliance), 'Statement of Good Practice', Oct. 2000; Action for the Rights of Children, CD-ROM resource pack, Aug. 2001; UN General Assembly, 'Protection and Assistance to Unaccompanied and Separated Refugee Children', UN doc. A/56/333, 7 Sept. 2001.

16 See Standing Committee of the Executive Committee, 'The Situation of Older Refugees', UN doc. EC/48/SC/CRP.39, 14 Aug. 1998; Standing Committee of the Executive Committee, 'Older Refugees: Looking Beyond the International Year of Older Persons', UN doc. EC/50/SC/CRP.8, 7 Feb. 2000; and more generally, Helpage International, 'Older People in Disasters and Humanitarian Crises: Guidelines for Best Practice', 2000, available on <http://www.helpage.org/dev/images/pdfs/bpg.pdf>.

17 See Secretariat of the Inter-Governmental Consultations, 'Report on Family Reunification: Overview of Policies and Practices in IGC Participating States', March 1997, p. 420.

## B. Durable solutions

An intact family unit is an invaluable asset to refugees in the process of achieving durable solutions to refugees' plight, whether this be through voluntary repatriation, local integration, or resettlement. Return to the country of origin commonly presents profound challenges as repatriating refugees attempt to reconstruct their lives and livelihoods. Single-parent or child-headed households may have difficulty establishing title to land, houses, and other property. While some refugee families may find it desirable for one or more members to precede others on the return journey, true reintegration is unlikely to gain momentum until the family unit is reassembled. Governments and agencies that assist repatriation should, therefore, devise plans that reinforce family unity.

Family reunification issues can also arise in situations of voluntary repatriation in less than ideal circumstances, for example, when a decision must be made whether to reunite an unaccompanied/separated child with parents in an unstable country of origin where conflict could resume at any time, or to let the child remain with foster parents in a refugee camp. Determining the best interest of the child in such circumstances is a difficult task.<sup>18</sup> A related issue is cessation: how and when can a minor voluntarily re-avail him or herself of the protection of the country of nationality? No matter what the circumstances are, the right to family unity and reunification applies in voluntary repatriation situations, and both the country of origin and the country of asylum must ensure that it is respected.

In situations of local integration, questions may arise for instance as to when an adolescent, who may have spent all of his or her life in a country of asylum, should be able to choose to remain there, even when the rest of the family is returning to their country of origin. Conversely, how can it be ensured that all the members of a refugee household living together in a country of first asylum are given permission to settle in that country? To what extent should other relations be permitted to join them from another asylum country or the country of origin? Experience has shown that giving refugees the opportunity to sustain family unity will enhance the prospects for successful local integration.

Resettlement is a powerful tool for family reunification, in some cases bringing together family members who have been stranded in different countries of transit or asylum, or who have been unable to leave the country of origin. Most of the countries that cooperate with UNHCR through resettlement programmes for refugees will accept an entire household unit together from a country of first asylum or, in limited cases on humanitarian grounds, directly from the country of origin. Some resettlement countries are more flexible than others about accepting non-traditional or complex family structures, going beyond the nuclear family. The

<sup>18</sup> Inter-Agency Guidelines on Separated Children, including a section on long-term durable solutions, are currently being finalized.

June 2001 Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and NGOs endorsed 'flexible and expansive' definitions of the family that are 'culturally sensitive and situation specific'.<sup>19</sup>

Provided that all members of the family are included on the resettlement application form (whether or not they are then present in the same country as the applicant for resettlement), UNHCR finds that there are normally no difficulties with family members joining resettled relatives, even at later stages. NGO resettlement agencies, however, report that, in some cases, rigid application of rules by States can lead to unnecessary hardship. For example, a refugee family from Sudan with four children was granted visas to a resettlement country, but four days before departure the woman gave birth. This fifth child had to stay behind in the refugee camp because there was no visa and it took more than four months to resolve the case.<sup>20</sup>

The importance for resettled refugees of family unity and reunification is widely acknowledged. It was emphasized strongly at an international conference on the reception and integration of resettled refugees, held in Sweden in April 2001.<sup>21</sup> Refugees who are separated from close family members may be prevented by their distress and preoccupation from devoting themselves fully to building a new life in the country of resettlement. The positive corollary is that a unified family is the strongest and most effective support system for a refugee integrating into the social and economic life of a new country.

#### **IV. The refugee family in international law**

In surveying the right to family unity for refugees in international law, it is important to distinguish between family unity and family reunification, and also between close family members and more distant ones. It is important, as well, to differentiate between 1951 Convention refugees, persons benefiting from other types of protection, and asylum seekers. This section briefly sets out the right of family unity under international law, then examines its application in the refugee context. It follows the same approach for family reunification, then discusses which family members may benefit, and where and when the right must be implemented.

19 Annual Tripartite Consultations on Resettlement, UNHCR, Geneva, June 2001.

20 Refugee Council of Australia, 'Discussion Paper', above n. 9, p. 6.

21 See J. Fredriksson, 'Protecting the Family: Challenges in Implementing Policy in the Resettlement Context', background paper prepared for the UNHCR international conference on the reception and integration of resettled refugees, hosted by the Swedish National Integration Office, Norrköping, Sweden, 25–27 April 2001. See also more generally, International Conference on the Reception and Integration of Resettled Refugees, 'Proceedings Report', 25–27 April 2001, Norrköping, Sweden.

## A. Family unity

The right of the family to live as an integral whole is protected by a variety of internationally recognized rights under both international human rights law and international humanitarian law. As the foundation, there is universal consensus that, as the fundamental unit of society, the family is entitled to respect and protection.<sup>22</sup> A right to family unity is inherent in recognizing the family as a 'group' unit: if members of the family did not have a right to live together, there would not be a 'group' to respect or protect.<sup>23</sup> In addition, the right to marry and found a family<sup>24</sup> includes the right to maintain a family life together.<sup>25</sup> The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family<sup>26</sup> and from the special family rights accorded to children under international law.<sup>27</sup>

Over the past fifty years, States have shown an increasing willingness to extend the scope of their responsibilities with respect to the family at both the international and regional levels. States have undertaken a duty, for example, not only to protect but also to assist and support the family.<sup>28</sup> States have agreed

22 The Universal Declaration, above n. 1, Art. 16(3), International Covenant on Civil and Political Rights, 1966, 999 UNTS 171 (hereinafter 'ICCPR'), Art. 23(1), and American Convention on Human Rights or 'Pact of San José, Costa Rica', 1969, Organization of American States (OAS) Treaty Series No. 35 (hereinafter 'ACHR'), Art. 17(1), each state: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' African Charter on Human and Peoples' Rights, 1981, 21 ILM, 1982, p. 58, Art. 18(1), states: 'The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.' European Social Charter, 1996 (ETS 163, revising the 1961 European Social Charter), Art. 16, states: 'The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.'

23 Human Rights Committee (hereinafter 'HRC'), 39th Session, 1990, General Comment No. 19 on Article 23(5).

24 Universal Declaration, above n. 1, Art. 16(1); ICCPR, above n. 22, Art. 23(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, European Treaty Series No. 5 (hereinafter 'ECHR'), Art. 12; ACHR, above n. 22, Art. 17(2).

25 HRC, General Comment No. 19, above n. 23, para. 5. See also, Caritas Europa-Migration Commission/Churches' Commission for Migrants in Europe/Commission of the Bishops' Conferences of the European Community/International Catholic Migration Commission/Jesuit Refugee Service Europe, 'Position on the Amended EU Commission Proposal for a Council Directive on the Right to Family Reunification', Nov. 2000, para. 2.3; and E. F. Abram, 'The Child's Right to Family Unity in International Immigration Law,' 17(4) *Law and Policy*, 1995, p. 407.

26 Universal Declaration, Art. 12; ECHR, Art. 8; ICCPR, Art. 17; ACHR, Art. 11(2); Convention on the Rights of the Child, 1989, UNGA Res. 44/25, 20 Dec. 1989 (hereinafter 'CRC'), Art. 16.

27 CRC, Arts. 3, 9, and 10.

28 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 220 A (XXI), 16 Dec. 1966, 993 UNTS 3 (hereinafter 'ICESCR'), Art. 10(1), reads: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children . . .'. The African Charter on Human and Peoples' Rights, above n. 22, Art. 18(2), reads: 'The State shall have the duty to assist the family . . .'. The African Charter

to special provisions protecting the unity and promoting the reunification of families affected by armed conflict,<sup>29</sup> and those with a member working in a foreign country.<sup>30</sup> States have recognized the common responsibilities of both men and women as parents, irrespective of their marital status, thus underscoring their right and responsibility to participate equally in the upbringing and development of their children.<sup>31</sup> Most notably, States have agreed with unprecedented speed and unanimity<sup>32</sup> to an extensive codification of children's rights, including their right to live with their parents.<sup>33</sup>

Perhaps because the right to family unity is also well established under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, it has been suggested that outside Europe there is no universally applicable express right to family unity or reunification that overrides the sovereign right of States to decide whether and on what terms non-nationals may enter

on the Rights and Welfare of the Child, 1990, UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. II, pp. 65–83, Art. XVIII(1), reads: 'The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.' See also, CRC, fifth preambular paragraph.

29 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287, Arts. 25, 26, 49(3), and 82(2); Additional Protocol I, 1977, 1125 UNTS 4, Arts. 74 and 75(5); Additional Protocol II, 1977, 1125 UNTS 610, Art. 4(3)(b).

30 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, UN doc. A/RES/45/158 (hereinafter 'Migrant Workers' Convention'), Art. 44(1), reads: 'States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.' As of 31 Dec. 2002, this Convention had nineteen of the twenty ratifications required to enter into force.

31 Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13 (hereinafter 'CEDAW'), Art. 5(b), reads: 'States Parties shall take all appropriate measures . . . to ensure . . . the recognition of the common responsibility of men and women in the upbringing and development of their children . . .'; Art. 16(1) reads: 'States Parties shall . . . ensure . . . (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children . . .'; CRC, Art. 18(1) states that: '[B]oth parents have common responsibilities for the upbringing and development of the child . . .'. See also, HRC, General Comment No. 28 on Article 3, UN doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 25.

32 The CRC had 191 States Parties as of 9 April 2002. By comparison, CEDAW, above n. 31, had 168; the Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195, had 162; the ICCPR had 148; the ICESCR had 145; the 1951 Convention and/or its 1967 Protocol had 144; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, A/RES/39/46, 10 Dec. 1984 (hereinafter 'Torture Convention'), had 128.

33 CRC, Art. 9(1), reads: 'States Parties shall ensure that a child shall not be separated from his or her parents against their will.' See also, African Charter on the Rights and Welfare of the Child, above n. 28, Art. XIX(1), which reads: 'Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.' The Vienna Declaration and Programme of Action from the UN World Conference on Human Rights, 1993, 32 ILM 1661, 1993, 14 *Human Rights Law Journal*, 1993, p. 352, para. 21, reads: '[T]he child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.'

or stay. Family unity in this view is instead an admirable but non-binding humanitarian ‘principle’. Such a position fails to take into account, however, the extensive and unequivocal rights and standards which apply to all individuals and are found in international treaty law, specifically the International Covenant on Civil and Political Rights (together with the General Comments and Views of the Human Rights Committee), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child (together with the Concluding Observations on State Reports of the Committee on the Rights of the Child), and the 1949 Geneva Conventions and their Additional Protocols. The question of the right to family unity as customary international law is outside the scope of this paper, but there is in addition a strong argument to be made to that effect.<sup>34</sup>

To be sure, no one would submit that the right to family unity in the refugee context is as straightforward as, say, the right of the refugee to be free from torture. The rights on which family unity is based are often qualified, with provisions for the State to limit the right under certain circumstances. It should be noted, however, that the most important, and sometimes only, ‘qualifier’ is the imperative to act in the best interests of the child. The right to family unity for refugees intersects with the right of States to make decisions on the entry or stay of non-nationals. The right to family unity is also shaped by the nature of the family relationship involved, with minor dependent children and their parents having the strongest claim. These complexities do not detract from the existence of the right; rather they indicate that it must be carefully elucidated from a legal, and not a political, perspective. Scholarly inquiry is overwhelmingly devoted to analysis of the scope of the right, not denial of its existence.<sup>35</sup>

34 For example, a federal district court in the US, which is not a State Party to the CRC, recently ruled that the government must take into account customary international law principles regarding the best interests of the child in the case of an immigrant man slated for deportation for a criminal offence, who was also the father of a seven-year-old US citizen daughter. *Beharry v. Reno*, US Dist. Ct., Eastern District of New York, 2002 US Dist. Lexis 757, 8 Jan. 2002.

35 See e.g., C. S. Anderfuhren-Wayne, ‘Family Unity in Immigration and Refugee Matters: United States and European Approaches’, 8(3) *International Journal of Refugee Law*, 1996, p. 347 at p. 354, which reads: ‘Hence, under both US and European laws the right to family unity is a limited one.’ See also, H. Lambert, ‘The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion’, 11(3) *International Journal of Refugee Law*, 1999, p. 427 at p. 431: ‘[F]amily reunion is considered a basic human right. . . .’, and p. 428: ‘Thus, the right enshrined in article 8 [of the ECHR] is not an absolute right for individuals, but it does impose certain obligations on States.’ See additionally, J. Apap and N. Sitaropoulos, ‘The Right to Family Unity and Reunification of Third Country Migrants in Host States: Aspects of International and European Law’, in *Proceedings of the First European Congress for Specialist Lawyers in the Area of Immigration and Asylum in Europe (Odysseus Network)*, Brussels 1–2.12.2000 (Bruylant, Brussels, 2002, forthcoming); Abram, above n. 25. For a somewhat differing view, see P. J. van Krieken, ‘Family Reunification’, in *The Migration Acquis Handbook* (ed. P. J. van Krieken, T. M. C. Asser Press, The Hague, 2001), p. 116.

## B. The ‘essential right’ to family unity in the refugee context

There is a general appreciation that refugee law principles, even those with a textual basis in the 1951 Convention such as *non-refoulement* (Article 33), exclusion (Article 1F), and non-penalization for illegal entry (Article 31), must be interpreted in light of the evolution of international law and State practice in the past half-century.<sup>36</sup> The 1951 Convention itself provides that nothing in it shall impair any rights or benefits granted to refugees apart from the Convention.<sup>37</sup>

The need for a contextual analysis is even greater with respect to refugee family unity and reunification, which are not mentioned in the 1951 Convention. Since the right to family unity has developed in general international law, it cannot be limited by provisions, or lack thereof, in the refugee field. The right to family unity applies to all human beings, regardless of their status.<sup>38</sup> A perspective broader than that of the 1951 Convention is essential to understanding the scope and content of the right to family unity for refugees.<sup>39</sup> The Human Rights Committee, for example, clearly includes refugees in discussing the need for appropriate measures ‘to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons’.<sup>40</sup> It also follows that the right to family unity for refugees is not dependent on the State concerned being a party to the 1951 Convention.

The absence from the 1951 Convention of a specific provision on family unity does not mean that the drafters failed to see protection of the refugee family as an obligation. It should be noted at the outset that the 1951 Convention does provide protection for the refugee family in a number of Articles.<sup>41</sup> In addition, refugees’ ‘essential right’ to family unity was the subject of a recommendation approved unanimously by the Conference of Plenipotentiaries that adopted the final text of the 1951 Convention. This reads:

36 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art. 31(3). On these three issues, see respectively the Legal Opinion by E. Lauterpacht and D. Bethlehem, the paper on exclusion by G. Gilbert, and the paper on Article 31 by G. S. Goodwin-Gill, Parts 2.1, 7.1, and 3.1 respectively, in this volume.

37 1951 Convention, Art. 5.

38 See e.g., HRC, 27th session, 1986, General Comment No. 15 on the Position of Aliens under the Covenant, para. 7.

39 G. S. Goodwin-Gill, ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’, in *Children on the Move: How to Implement their Right to Family Life* (eds. J. Doek, H. van Loon, P. Vlaardingerbroek, Martinus Nijhoff, The Hague, 1996), p. 97.

40 HRC, General Comment No. 19, above n. 23, para. 5.

41 The 1951 Convention, Art. 4, refers to refugees’ ‘freedom as regards the religious education of their children’; Art. 12(2) provides that ‘rights attaching to marriage, shall be respected; Art. 22 concerns the public education of children in elementary school and beyond’; Art. 24 concerns family allowances and other related social security as may be offered to nationals; para. 2 of the annexed schedule concerning travel documents notes that children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.

*Considering* that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

*Noting* with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to the members of his family,

*Recommends* Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

1. Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
2. The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.<sup>42</sup>

The representative of the Holy See who submitted the recommendation on family unity noted that, although it was an 'obvious proposition' that assistance to refugees automatically implied assistance to their families, it would be wise to include a specific reference.<sup>43</sup> Debate on this recommendation, one of only five adopted by the Conference, centered on ensuring that it did not detract from the 'categorical view' of the preparatory ad hoc Committee on Refugees and Stateless Persons that 'governments were under an obligation to take such action in respect of the refugee's family'.<sup>44</sup>

While the recommendation is non-binding, its characterization of family unity as an 'essential right' at this early stage of the development of international human rights law is evidence of the drafters' object and purpose in formulating the 1951 Convention, and should be read in conjunction with the goal expressed in the Convention's preamble to assure refugees the widest possible exercise of their fundamental rights and freedoms.

The States which are members of UNHCR's Executive Committee have shared this purpose and carried it forward. Executive Committee Conclusions have repeatedly emphasized the importance of State action to maintain or re-establish refugee family unity, beginning with the first Conclusion adopted in 1975.<sup>45</sup> The Executive Committee has also situated the issue of family unity squarely in its proper international law context. Particularly significant in this regard was the acknowledgment of the importance of the Convention on the Rights of the Child to the legal framework for protecting refugee children and adolescents.<sup>46</sup> The Executive

42 Final Act, above n. 3, Recommendation B.

43 P. Weis (ed.), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* (Cambridge University Press, 1995), p. 380.

44 *Ibid.*, p. 381 (statement of the representative of the UK).

45 See Executive Committee, Conclusions Nos. 1 (XXVI), 1975, para. f. See also, Conclusions Nos. 9 (XXVIII), 1977; 24 (XXXII), 1981; 84 (XLVIII), 1997; 85 (XLIX), 1998, paras. u-x; 88 (L), 1999.

46 Executive Committee, Conclusion No. 84 (XLVIII), 1997, fourth preambular paragraph.



Committee has also encouraged all States to adopt legislation implementing ‘a right to family unity for all refugees, taking into account the human rights of the refugees and their families’.<sup>47</sup> It should be recalled that Executive Committee conclusions are the consensus outcome of deliberations by sovereign States most interested in and affected by refugee problems, that is, by States which are not necessarily even party to the 1951 Convention and/or Protocol.<sup>48</sup>

Although an explicit right to family unity in the refugee context is not found in the 1951 Convention itself, it, like refugee law generally, must be understood in light of subsequent developments in international law, including related treaties and agreements, State practice, and *opinio juris*.

### 1. *Family unity and derivative or other status*

Refugee family unity in practice means that States should not separate an intact family and should take measures to maintain the family as a unit. At the point of refugee status determination, it means that accompanying family members of a recognized refugee should as a result also receive refugee status, sometimes called derivative status, or a similarly secure status with the same rights.<sup>49</sup>

Failure to ensure family unity can lead to many problems. In Canada, for example, administrative and judicial authorities generally reject the concept of family unity in the context of refugee status determination.<sup>50</sup> As a result, there are cases of one spouse and a dependent child being granted refugee status while the other spouse is not,<sup>51</sup> or one parent being recognized while the dependent children are not,<sup>52</sup> or even a child being recognized but the parents and other siblings are not.<sup>53</sup> The leading Federal Court case on the issue rejected family unity as a basis for recognizing the family member’s claim, and instead analyzed the claim in terms of Article 1A of the 1951 Convention, specifically membership in a particular social group consisting of the family.<sup>54</sup>

47 Executive Committee, Conclusion No. 85 (XLIX), 1998, para. x (emphasis added).

48 P. van Krieken, ‘Cairo and Family Reunification’, 42(2)–(3) *AWR Bulletin: Quarterly on Refugee Problems*, 1995, p. 62, notes that Executive Committee Conclusions are not a result of UNHCR’s ‘wishful thinking’.

49 Executive Committee, Conclusions Nos. 88 (L), 1999, para. b(iii); 85 (XLIX), 1998, para. v; 47 (XXXXVIII), 1987, para. h; and 24 (XXXII), 1981, para. 8. See also, UNHCR, ‘Background Note’, above n. 5, para. 5.

50 See e.g., M99-04586 et al., Moss, Convention Refugee Determination Division (CRDD), 21 Dec. 1999, *RefLex* (digest of Canadian immigration and refugee law decisions), issue No. 133, 1 March 2000; A98-00594 et al., Kagedan, Showler, CRDD, 9 Dec. 1998, *RefLex* issue No. 110, 3 March 1999; V95-01655 et al., Lalonde, CRDD, 6 May 1998, *RefLex*, issue No. 94, 6 July 1998. *RefLex* is available at <http://www.irb.gc.ca/en/decisions/reflex/index.e.htm>.

51 *Y.S.C. (Re)*, CRDD No. 26 (Quicklaw), 1998.

52 *I.P.A. (Re)*, CRDD No. 286 (Quicklaw), 1999; *H.Z.G. (Re)*, CRDD No. 226 (Quicklaw), 1999; *M.V.J. (Re)*, CRDD No. 114 (Quicklaw), 1998.

53 Sadoway, ‘Canada’s Treatment of Separated Refugee Children’, above n. 9, pp. 376–8 and cases cited therein.

54 *Castellanos v. Canada (Solicitor General)*, Federal Court (Trial Division), 2 FC 190 (Quicklaw), 1995.

Family unity or reunification in Canada is instead provided for in an administrative procedure, but potential obstacles in the process abound: the refugee must first obtain permanent resident status, one requirement of which is a valid passport which many refugees do not have and cannot obtain; family members who are in Canada with the refugee but who were not recognized in their own right have no legal status during the administrative processing period; the processing fees are out of reach for many refugees; if the deadline for refugee family unity processing is missed, the only recourse is to file under regular immigration categories which are more restrictive; medical conditions may be imposed, and security checks must be conducted. The cumulative effect of these cumbersome bureaucratic procedures and in some cases unrealistic requirements is that many refugees wait many years for family reunification, or even for a secure status for family members already with them. One consequence is that many children ‘age out’ and are no longer eligible, thus creating further obstacles to family reunification.

There are a number of ways to accomplish family unity goals in status determination procedures. Either all family members over a certain age, such as fifteen, may be interviewed, or a ‘principal applicant’ may be designated. With increasing awareness of the prevalence of gender-related persecution<sup>55</sup> and child-specific forms of harm, it is now understood that the principal applicant need not necessarily be the male head of household.<sup>56</sup> All members of the family are entitled to an individual hearing.<sup>57</sup> Respect for this right becomes crucial if the claim of the first family member is rejected. In any case, as soon as one member of the family has been found to have a valid claim, the others should be granted derivative refugee status.

It is worth noting that the principle of a derivative or otherwise refugee-linked status operates only in favour of recognition, not in favour of rejection. In other words, if even one family member is recognized and all others are rejected on the merits of their individual claims, each member of the family is entitled to the benefit of derivative status.<sup>58</sup>

## 2. *Family unity and the ‘internal flight alternative’*

One issue that may arise in status determination is the possibility of the claimant being able to return to a different area of the country of origin, the so-called internal flight alternative.<sup>59</sup> An integral part of this analysis, if indeed there is a safe area

55 See the papers by R. Haines on Gender-related persecution and by A. Edwards on Age and gender dimensions in international refugee law in this book.

56 UNHCR, ‘Background Note’, above n. 5, para. 6; UNHCR Standing Committee, ‘Family Protection Issues’, UN doc. EC/49/SC/CRP.14, 4 June 1999, para. 10.

57 Executive Committee, Conclusion No. 88 (L), 1999, para. b(iii).

58 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992) (hereinafter ‘UNHCR, *Handbook*’), para. 185.

59 See Part 6.1 of this book by J. C. Hathaway and M. Foster; UNHCR, ‘Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called “Internal Flight Alternative” or “Relocation Principle”’, 1999.

in the country, is whether it would be reasonable to expect the claimant to relocate there. One factor to be taken into account is the importance of maintaining family unity.<sup>60</sup> Since international law requires State protection of the family, even against threats from non-State actors,<sup>61</sup> and prohibits in particularly strong terms the involuntary separation of children from their parents,<sup>62</sup> it is not reasonable to ask that a person in need of protection relocate internally at the cost of separation from close family members.

### 3. *Family unity and exclusion*

In cases of actual or potential exclusion from refugee status under Article 1F of the 1951 Convention,<sup>63</sup> the situation of each family member must be determined on an individual basis. When one family member is found to meet the refugee definition, but is excludable, the claims of other family members must be examined closely not only in light of the reasons giving rise to the excludable family member's claim or their own independent reasons, but also in light of their risk in being related to someone who took part in an excludable act. In other words, there is no derivative exclusion.

If recognized, family members cannot, however, 'overcome' the exclusion of another family member. That is to say, each member of the family in such cases must be non-excludable in his or her own right.<sup>64</sup> A practical question arises as to whether the admissible family member should return to the country of origin with the excludable member, bearing in mind that both may be at risk upon return due to the activities of the excludable member. Given the compelling cases that can arise, particularly in the context of resettlement, UNHCR should consider developing more detailed guidelines for situations where the principles of family unity and the exclusion clause conflict.<sup>65</sup>

The impact of exclusion on family unity underscores the need to ensure there is not an overly expansive interpretation of the exclusion grounds under the 1951 Convention and/or other immigration-related grounds of inadmissibility, as this can result in families being split, or kept apart, due to a minor infraction on the part of one member. This is particularly an issue in countries, such as the United States and Canada, where legislation subsumes concepts from both Article 1F and Article 33(2)

60 UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, para. 13.

61 HRC, 32nd Session, 1988, General Comment No. 16 on Article 17, para. 1.

62 CRC, Art. 9(1). See also, Abram, above n. 25, pp. 417–21.

63 See Gilbert, above n. 36.

64 Standing Committee, 'Family Protection Issues', above n. 56, para. 9.

65 One example given was of a family with one excludable spouse. The other spouse was, however, in need of urgent medical assistance and resettlement on medical grounds. In these circumstances, should no one in the family be resettled with possible serious medical consequences for the spouse, or should the family be split, with everyone except the principal applicant resettled, or should the entire family be resettled? UNHCR field office e-mail to the authors, 6 Aug. 2001.

of the 1951 Convention into a single stage in the process which allows claims to be denied without full consideration of the merits.<sup>66</sup> Grounds of exclusion or inadmissibility should be construed as narrowly as possible. If minor crimes are (wrongly) considered to invoke exclusion or inadmissibility, humanitarian considerations suggest that the bar to entry be waived, at least when it would result in the separation of close family members. This is particularly the case when the grounds of inadmissibility relate to falsified travel documents or other immigration violations, due to the need of refugees to resort to such means to escape their countries and find protection. In view of the increased interception efforts on the part of a number of countries, and the corresponding increase in people smuggling, such cases can be expected to become more numerous and are likely to pose more serious challenges to countries of asylum and resettlement in arriving at durable solutions.

#### 4. *Family unity and expulsion*

With regard to the deportation or expulsion<sup>67</sup> of one member of an intact refugee family already in a country of asylum, a number of rights and considerations must be balanced, which together place a heavy burden on the State wishing to separate the family. If the family member is a refugee or otherwise in need of international protection, there are the protections against *refoulement* found in international and regional treaty law, as well as customary international law.<sup>68</sup> Limitations on State power to expel are found in Article 32 of the 1951 Convention and Article 13 of the International Covenant on Civil and Political Rights, while in 1977 UNHCR's Executive Committee expressed its concern over the serious consequences expulsion may have for family members.<sup>69</sup>

For example, the Human Rights Committee recently found that Australia's proposed removal of the stateless (formerly Indonesian) parents of a thirteen-year-old Australian citizen would violate a number of provisions of the International Covenant, including freedom from arbitrary or unlawful interference with the family, the entitlement of the family to protection by the State, and the right of the child to protection without discrimination.<sup>70</sup> The Committee noted that Australia

66 See also the paper on exclusion by G. Gilbert in Part 7.1 of this volume, section IV.D, 'The relationship between Article 1F and Article 33(2)'. In North America, the terms 'admissible' and 'non-excludable' are used interchangeably, whereas in Europe admissibility procedures do not, at least in theory, involve a substantive assessment of the claim but determine whether a claim will be considered in substance in the country where it has been made or whether another State is responsible for doing so.

67 The HRC has stated that Art. 13 of the ICCPR is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. HRC, General Comment No. 15, above n. 38, para. 9.

68 See, Lauterpacht and Bethlehem, above n. 36.

69 Executive Committee, Conclusion No. 7 (XXVIII), 1977, para. b.

70 HRC, *Winata and Li v. Australia*, Communication No. 930/2000, UN doc. CCPR/C/72/D/930/2000, 16 Aug. 2001, para. 8.

is under an obligation to ensure that violations of the Covenant in similar situations do not occur in the future.<sup>71</sup>

The greatest protection for families threatened with separation through deportation is found in the Convention on the Rights of the Child. This requires in Article 9 that States ‘*shall* ensure that a child *shall* not be separated from his or her parents against their will, except when . . . such separation is *necessary for the best interests of the child*’ (emphasis added). The *only* exception allowed therefore is when separation is necessary for the best interests of the child. In sharp contrast to the International Covenant, which prohibits only ‘arbitrary and unlawful’ interference with the family (Article 17(1)), and the European Convention on Human Rights, which provides a number of exceptions to the prohibition on interference with family life (Article 8(2)), the Convention on the Rights of the Child does not recognize a public interest to be weighed against the involuntary separation of the family. As pointed out by Abram:

Thus, a competent state authority may decide to deport a parent in accordance with municipal law for carefully weighed and relevant reasons, yet the separation of the child from the parent may violate the state’s obligations and the child’s right to family unity under article 9.<sup>72</sup>

In addition to the near-universal adherence to the Convention on the Rights of the Child, a binding treaty, State commitment to family unity as expressed in Article 9 has recently been reiterated at the political level by the Commission on Human Rights.<sup>73</sup>

On the regional level, Article 8 of the European Convention on Human Rights provides protection from deportation or expulsion under certain circumstances. There is not yet an Article 8 decision concerning a refugee claimant, since such claims are often decided under Article 3 and do not address the question of interference with family life,<sup>74</sup> but there have been a number of cases relating to long-term residents and second-generation immigrants.

The European Court of Human Rights must first satisfy itself that there is a ‘private and family life’ within the meaning of Article 8. The category of the ‘family’ that can claim protection is broader than that under the Convention on the Rights of the Child, since a minor child–parent relationship is not necessarily required.<sup>75</sup> Same-sex relationships may also be protected, although under the rubric of private,

71 *Ibid.*, para. 9.      72 Abram, above n. 25, p. 418.

73 Commission on Human Rights, Resolution 2001/75 on the Rights of the Child, UN doc. E/CN.4/2001/75, para. 11(c). Commission on Human Rights, Resolution 2000/85 on the Rights of the Child, UN doc. E/CN.4/2000/85, para. 15(d).

74 Lambert, above n. 35, p. 448. For recent analyses of ECHR Art. 8 jurisprudence in the refugee context, see Lambert, above n. 35, as well as Apap and Sitaropoulos, above n. 35, and Anderfuhren-Wayne, above n. 35.

75 *Marckx v. Belgium*, for example, recognized the ties between near relatives such as grandparents and their grandchildren as being included in family life, Series A, No. 31, 27 April 1979.

rather than family, life.<sup>76</sup> The Court then determines whether there is an interference with the right to respect for private and family life. If so, it will examine whether the interference can be justified as necessary in a democratic society under Article 8(2). The jurisprudence of the Court recognizes a wide margin of appreciation for the State in applying the terms of this Article and it has declined to specify guiding criteria. Instead, claims are balanced on a case-by-case basis.

The Court distinguishes between aliens seeking to avoid family separation as a result of expulsion and aliens seeking entry for the purposes of family reunion. In cases involving expulsion of long-term residents, the Court has balanced the individual's rights against the community's interests at the later stage of determining whether removal was 'necessary in a democratic society', instead of at the earlier stage of determining whether there is an interference with the right to respect for family life. This approach places a greater burden of justification on States, and the Court has tended to side with the aliens wishing to prevent family separation.<sup>77</sup>

### C. Family reunification

Family reunification across borders is shaped, but not entirely defined, by the State's sovereign power to control the entry of non-nationals. As with the right to family unity, there has been a progressive development in the international law of family reunification over the past fifty or so years. It is now widely recognized that the State has an obligation to reunite close family members who are unable to enjoy the right to family unity elsewhere.

#### 1. *Family reunification in international law*

The most detailed family unification provisions in general international law are found in international humanitarian law. The Fourth Geneva Convention of 1949 devoted considerable attention to the problems of 'families dispersed owing to the war'.<sup>78</sup> In addition to provisions aimed at maintaining family unity during internment<sup>79</sup> or evacuation,<sup>80</sup> the Fourth Geneva Convention provides for mechanisms such as family messages,<sup>81</sup> tracing of family members,<sup>82</sup> and registration of

76 *X. and Y. v. UK*, European Commission on Human Rights, Application No. 9369/81, Admissibility Decision of 3 May 1983.

77 E.g., *Berrehab v. The Netherlands*, Application No. 10730/84, judgment of 21 June 1988; *Moustaquim v. Belgium*, Application No. 12313/86, judgment of 25 Jan. 1991.

78 Fourth Geneva Convention, 1949, above n. 29, Art. 26. See also, Abram, above n. 25, pp. 413–14; and S. Jaquemet, *Refugees in Armed Conflict: International Humanitarian Law and Refugee Protection* (UNHCR, Geneva, draft, 1999), pp. 102–7.

79 Fourth Geneva Convention, 1949, above n. 29, Art. 82. 80 *Ibid.*, Art. 49.

81 *Ibid.*, Art. 25. 82 *Ibid.*, Art. 140.

children<sup>83</sup> to enable family communication and, 'if possible', reunification. By the time of the first Additional Protocol in 1977, States were willing to strengthen their responsibility towards separated families by accepting the obligation to facilitate family reunification 'in every possible way'.<sup>84</sup>

Family reunification also featured in the 1975 Helsinki Accords, albeit in the form of a principle and not an obligation. Long-standing Cold War tensions and Western concern with Soviet bloc violations of the right to leave one's country encouraged the link between family reunification and freedom of movement to such an extent that, in 1989, States participating in a meeting of the Conference on Security and Cooperation in Europe (CSCE) agreed to decide family reunification applications in normal practice within three months.<sup>85</sup> Such alacrity would be welcome in today's political climate.

## 2. *Family reunification in international human rights law*

As noted above, the Human Rights Committee has made it clear that refugees are included in the International Covenant's family protection provisions and that their right to family reunification may under some circumstances give rise to a State obligation outweighing its interest in control of borders.<sup>86</sup> Under the migrant workers convention, not yet in force, States shall 'take measures that they deem appropriate' to facilitate reunification.<sup>87</sup> The relatively wide margin of discretion retained by States in the case of migrant workers is perhaps not surprising, since States can justifiably expect them to return to their home countries if they wish to reunify, although in practice they can face numerous obstacles in doing so.

The core of the right to family reunification in international human rights law is found in the Convention on the Rights of the Child, Article 10(1) of which codifies the right to family reunification for minor children and their parents as follows:

83 *Ibid.*, Art. 50.

84 Additional Protocol I, 1977, above n. 29, Art. 74. In addition to the provisions cited above, see also Protocol II, 1977, above n. 29, Art. 4(3)(b).

85 Abram, above n. 25, pp. 414–15.

86 HRC, General Comment No. 19, above n. 23, para. 5.

87 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, above n. 30, Art. 44, reads:

2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to the applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

In accordance with the obligations of States Parties under article 9, paragraph 1 [a child shall not be separated from his or her parents against their will], applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner . . .

Several elements of this provision are worthy of note.<sup>88</sup> First, the explicit link to Article 9 of the Convention means that the obligation there imposed to ensure the unity of families within the State also determines the State's action regarding families divided by its borders. Secondly, while the obligation to allow departure draws on the well-established right to leave any country, one of the Convention's achievements is the recognition of the commonsense corollary of departure: that family reunification may require a corresponding duty to allow entry. Thirdly, children and parents have equal status in a mutual right; either may be entitled to join the other. Unaccompanied and separated children should be able to enjoy reunification with their families in the country where they have found asylum if it is in their best interest to do so. Nor is it sufficient that the child be with only one parent in an otherwise previously intact family; the right is to be with both parents.

Finally, the obligation of States to deal with family reunification requests in a 'positive' manner in effect means *affirmative* action. This formulation is considerably stronger than language commonly used to allow significant State discretion, such as 'consider favourably', 'take appropriate measures', or 'in accordance with national law'. The only limitation allowed is the one permissible under Article 9(1), if reunification would not be in the best interests of the child, or when the reunification will occur in another country. While Article 10 does not expressly mandate approval of a reunification application, it clearly contemplates that there is at least a presumption in favour of approval.<sup>89</sup> Although Anderfuhren-Wayne asserts that States enjoy 'extensive discretion' under Article 10,<sup>90</sup> she does not say what the basis for that discretion would be; van Krieken acknowledges that Article 10 does not 'leave much room for machination and manipulation'.<sup>91</sup>

States cannot maintain generally restrictive laws or practices regarding the entry of aliens for reunification purposes without violating the Convention on the Rights of the Child. As pointed out by Abram:

A state cannot as a matter of law or policy determine that family reunification for a category of sundered families will take place somewhere else in the world, and that family unity will be respected only by ushering the local child or parent to the airport. There is no true observation of a right

88 For a fuller discussion of the CRC, see Abram, above n. 25, pp. 421–5.

89 Vienna Convention on the Law of Treaties, Art. 31(1).

90 Anderfuhren-Wayne, above n. 35, p. 351. 91 Van Krieken, 2001, above n. 35, p. 123.



if that right cannot be realized except abroad. States do not normally have the power to ensure the realization of a right outside of their own jurisdiction. A policy to reject most requests of any category of persons to enter a country for the purposes of family reunification, except under restrictive conditions or exceptional circumstances, violates the Convention.<sup>92</sup>

That a small number of States have made reservations to the reunification provision provides additional confirmation that the Convention indeed imposes a general duty to allow entry for family reunification purposes.<sup>93</sup> Anderfuhren-Wayne observes that State practice is not uniform, although failures to allow reunification are more properly seen as violations of the right, not evidence that there is no right.<sup>94</sup> They are certainly treated as such by the Committee on the Rights of the Child. The Committee has indeed used almost peremptory language in this regard, recommending for example that Australia introduce legislation and policy reform ‘to *guarantee* that children of asylum seekers and refugees *are* reunified with their parents in a speedy manner’.<sup>95</sup>

Finally, as with the right to family unity, scholars are generally in agreement that there is at present a right under international law to family reunification.<sup>96</sup> It has also been characterized as a self-evident corollary to the right to family unity<sup>97</sup> and the right to found a family,<sup>98</sup> and has been linked to freedom of movement.<sup>99</sup> While there may be different ways to describe the antecedents of the right, it should also be noted on a practical level that many observers feel existing instruments provide an adequate and appropriate legal framework, at least for reunification of unaccompanied/separated children and their parents. The problem in their

92 Abram, above n. 25, pp. 423–4.

93 Abram, above n. 25, p. 424; Goodwin-Gill, above n. 39, p. 103. Some eight States have made reservations which may affect the application of Art. 10, the most notable of which, not otherwise covered by the family reunification jurisprudence of the European Court of Human Rights, are Japan and New Zealand.

94 Anderfuhren-Wayne, above n. 35, pp. 351–2.

95 Committee on the Rights of the Child, Concluding Observations on Australia, UN doc. CRC/C/15/Add.79, 10 Oct. 1997, para. 30.

96 In addition to Abram, above n. 25, see e.g., Apap and Sitaropoulos, above n. 35, section 2: ‘An express right to family reunification is uniquely enshrined in Article 10.1 of the [CRC].’ See also, R. Perruchoud, ‘Family Reunification’, 27(4) *International Migration*, 1989, p. 519. See also, the Summary Conclusions of the Expert Roundtable discussed later in this paper.

97 See e.g., HRC, General Comment No. 15, above n. 38, para. 5. See also, Executive Committee, Conclusion No. 24 (XXXII), 1981, para.1: ‘In application of the principle of family unity and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.’

98 HRC, 39th session, 1990, General Comment No. 19, above n. 23, para. 5. See also, XIIIth Round Table on Current Problems in International Humanitarian Law, Conclusions on Family Reunification, International Institute of Humanitarian Law, 1988, para. 2.

99 See Abram, above n. 25, p. 415.

view lies not with the lack of international standards, but rather with their implementation.<sup>100</sup>

The few who see the right as still being in development have not made a persuasive or up-to-date case refuting the significance of the Convention on the Rights of the Child. Anderfuhren-Wayne, for example, writing in 1996, notes the importance of reunification rights and the need for more specific international provisions regarding them, but cites only a 1988 report that predates adoption of the Convention.<sup>101</sup> In van Krieken's view, the concept of reunification 'is now slowly being codified'.<sup>102</sup> His 2001 article is, however, as he notes, based on and often identical to a 1995 piece,<sup>103</sup> which he in turn notes is based on a 1993 paper.<sup>104</sup> His main objection seems to be the failure of the 1994 UN Conference on Population and Development to agree to express language on 'the right to family reunification' and its decision instead to use the formulation 'consistent with Article 10 of the Convention on the Rights of the Child and all other relevant internationally recognized human rights instruments'.<sup>105</sup> This suggests, however, that, if the Convention on the Rights of the Child created a right to family reunification, then the Conference endorsed it. The non-binding declaration of an international conference cannot in any event modify the binding provisions of an international treaty.

### 3. *Family reunification and the European Court of Human Rights*

As noted in section IV.B.4 above, the European Court of Human Rights distinguishes between family separation through removal and family reunification through entry, and takes a more restrictive approach to the latter.<sup>106</sup> In cases involving aliens seeking entry to join family members, the Court balances the individual's rights against the community's interests at the earlier stage of determining whether there is an interference with the right to respect for family life. To assess interference, the Court examines whether there are obstacles to having a normal family life elsewhere, usually the country of origin. For asylum seekers, the possibility of leading a normal life in the country of origin cannot be presumed.

100 C. Petty, 'Family Tracing and Reunification – Safeguarding Rights and Implementing the Law', *4 International Journal of Children's Rights*, 1996, p. 174, citing in particular the lack of sanctions for enforcement.

101 Anderfuhren-Wayne, above n. 35, p. 351 and accompanying n. 19.

102 Van Krieken, above n. 35, p. 120 and van Krieken, above n. 48, p. 52.

103 Van Krieken, above n. 35, p. 128 and accompanying n. 23.

104 Van Krieken, above n. 48, p. 52 and accompanying n. 5.

105 Van Krieken, above n. 35, p. 129; and van Krieken, above n. 48, p. 61.

106 Although, as Lambert, above n. 35, p. 442, points out, it is regrettable that the Court has not said why it observes such a distinction. Any refusal to allow entry, especially to a child, suggests a strong expectation that the parent will have to return to the country of origin, if family unity is to be achieved.

The Court has tended to uphold State refusals to allow entry,<sup>107</sup> even in *Gül v. Switzerland*, which concerned the son of a holder of a temporary humanitarian permit.<sup>108</sup> Although *Gül* is disappointing, it should be limited to its facts. The Court appeared satisfied that Mr Gül, who had withdrawn his asylum appeal as a requirement for the issue of the humanitarian permits he and his wife had been granted, was not in fact at any kind of risk in Turkey and had indeed visited his sons there on several occasions, including one evidenced by a story in the local newspaper.<sup>109</sup> The importance of *Gül*, *Ahmut v. The Netherlands*, and *Sen*<sup>110</sup> is rather the Court's analysis of the possibility of family life 'elsewhere', which leaves an opening for refugees and other persons in need of international protection seeking family reunion, since they are not able to return to their country of origin.

#### D. The right to family reunification in the refugee context

Recognition as a refugee gives rise to a prima facie reason to admit the refugee's close family members to the country of asylum. Reunification in a country of asylum is the only way to assure the right to family unity for refugees, who cannot by definition return to their country of origin. Despite problems in implementation of this right, it is generally accepted in State practice.<sup>111</sup> As noted above with respect to a right to family unity, there is no specific reference to family reunification in the 1951 Convention.<sup>112</sup> The right arises from the interaction of the 1951 Convention with other law.

There are, in addition, some family reunification principles pertaining specifically to those in need of international protection that have been codified in conventions on the rights of children,<sup>113</sup> in regional protection instruments in Europe and

107 See e.g., *Abdulaziz, Cabales and Balkandali v. UK*, Application Nos. 9214/80, 9473/81, and 9474/81 (spouses seeking entry), 28 May 1985.

108 *Gül v. Switzerland*, Application No. 53/1995/559/645, 19 Feb. 1996.

109 See, Council of Europe, 'Asylum and the European Convention on Human Rights', Human Rights Files No. 9 (revised), 2000, p. 49.

110 See above n. 108; *Ahmut v. The Netherlands*, Application No. 73/1995/579/665 (minor child seeking to join father who was a dual national of the Netherlands and Morocco), 28 Nov. 1996; *Sen v. The Netherlands*, Application No. 31465/96 (allowing entry of Turkish-born daughter to join parents and siblings legally resident in the Netherlands), 21 Dec. 2001.

111 Lambert, above n. 35, p. 449.

112 Although, if reunification was not allowed at all, this would arguably be a violation of Art. 12 of the 1951 Convention.

113 CRC, Art. 22(2), provides: 'States Parties shall provide, as they consider appropriate, cooperation in any efforts . . . to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.' African Charter on the Rights and Welfare of the Child, above n. 28, Art. XXIII(2), provides: 'States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.'

Central America,<sup>114</sup> and in provisions relating to internally displaced persons.<sup>115</sup> UNHCR's Executive Committee has also addressed the issue of refugee family reunification on a number of occasions.<sup>116</sup>

## E. Close family members and the extended family: the scope of the right

### 1. *Degrees of relationship*

The existence of a family is a question of fact, to be determined on a case-by-case basis. There is no one single, internationally accepted definition of the family, and international law recognizes a variety of forms.<sup>117</sup> Certainly the 'nuclear' family is the most widely accepted for family unity and reunification purposes.<sup>118</sup> In the

114 EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L212/12, 7 Aug. 2001 (hereinafter EU Temporary Protection Directive), Art. 15. Council of Europe, Committee of Ministers, Recommendation No. (2001) 18, 27 Nov. 2001, on subsidiary protection, para. 6, and Council of Europe, Committee of Ministers, Recommendation No. R(2000)9, 3 May 2000, on temporary protection, para. 4, both refer to Council of Europe, Committee of Ministers, Recommendation No. R(99)23, 15 Dec. 1999, on family reunion for refugees and other persons in need of international protection. Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), 24 April 1997, on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe, para. 8.vii.(o)–(q). The Cartagena Declaration on Refugees, 1984 (see UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. II, pp. 206–11), Conclusion III (13) reads:

To acknowledge that reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of humanitarian treatment in the country of asylum, as well as for facilities granted in cases of voluntary repatriation.

115 African Charter on the Rights and Welfare of the Child, above n. 28, Art. XXV(2)(b), provides: 'States Parties . . . shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.' 'Guiding Principles on Internal Displacement', presented to the UN Commission on Human Rights, 1998, Principle 17(3).

116 Executive Committee, Conclusions Nos. 1 (XXVI), 1975, para. f; 9 (XXVIII), 1977; 24 (XXXII), 1981; 84 (XLVIII), 1997; 85 (XLIX), 1998, paras. u–x; 88 (L), 1999. See also, UNHCR, *Handbook*, above n. 58, para. 186.

117 See e.g., HRC, General Comment No. 28, above n. 31, para. 27; HRC, General Comment No. 19, above n. 23, para. 2; HRC, General Comment No. 16, above n. 61, para. 5. See also, Apap and Sitaropoulos, above n. 35, section 1, and more generally, G. van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches', 17(4) *Human Rights Quarterly*, 1995, pp. 733–40.

118 See e.g., Council of Europe Committee of Ministers, Recommendation on family reunion for refugees, above n. 114, para. 2. See also, Lambert, above n. 35, p. 430; van Krieken, above n. 35, p. 122; and A. Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment', 11(4) *International Journal of Refugee Law*, 1999, p. 653.

European context, the European Commission's amended proposal for a Council Directive on the right to family reunification would also include unmarried partners living in a durable relationship with the applicant, if the legislation of the Member State concerned treats such a relationship as corresponding to that of married couples.<sup>119</sup>

Despite this widespread agreement, it is nevertheless important to be aware of the impact of cultural differences regarding, for example, what constitutes a bona fide marriage. Some reunification claims of separated spouses are based on a proxy marriage between a refugee in a resettlement country and a partner living in the country of asylum, or on a marriage conducted just days before the departure of one of the spouses to a resettlement country. Authorities in resettlement countries may see these unions as attempts to circumvent resettlement criteria and perhaps also abusive of the partners in an arranged marriage, although such marriages may represent normal custom and practice in the country of origin.<sup>120</sup>

Beyond the core members of the refugee family, there is great variation in the treatment afforded the larger sphere of family relationships. The Executive Committee has shown a willingness by States to promote 'liberal criteria', with a view to 'comprehensive reunification of the family'.<sup>121</sup> There is also extensive support on the European level for a wider acceptance of other family members, including the elderly, infirm, or otherwise dependent.<sup>122</sup> At the national level, a Russian court recently overturned the denial of refugee status to the unmarried adult dependent sister of a refugee, specifically citing the situation of single women and the notion of extended family in the refugee's country of origin.<sup>123</sup> In Canada, fiancés, parents, and grandparents may be in the family class, which has stricter criteria than for immediate family, but not siblings, cousins, aunts or uncles. The processing priorities of the US refugee resettlement programme include parents as well as spouses

119 Commission of the European Communities, 'Amended Proposal for a Council Directive on the Right to Family Reunification', Brussels, COM (2000) 624 final, 1999/0258 (CNS), 10 Oct. 2000, Art. 5.1(a).

120 There are many such cases. Although aware of the implied possibility that such marriages might be conducted with the sole intent to obtain resettlement, UNHCR recognizes these marriages as legally fully binding as long as they are in line with the relevant civil law. It should be recalled that marriages among some refugee communities, Kurds, for example, are contracts between families that have been carefully weighed as to the interests of each family and are not private affairs between two persons. It is thus not unlikely that the spouses do not consummate their marriage until the 'tribal marriage' has been conducted, sometimes well after the legally binding document has been signed before the court. E-mail from UNHCR field office to the authors, 22 July 2001.

121 Executive Committee, Conclusion No. 88 (L), 1999, para. b(ii).

122 Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), above n. 114, para. 8.vii(o); European Commission, Amended Proposal for a Council Directive on the Right to Family Reunification, COM (2000) 624 final, 10 Oct. 2000, Art. 5.1(d)–(e). For jurisprudence of the European Court of Human Rights, see Lambert, above n. 35, pp. 435–6.

123 *S.A.K. v. Moscow and Moscow Region Immigration Control Department*, Civil Case No. 2-3688, Moscow Central Administrative District, Zamoskvoretsky Municipal Court, 10 May 2001.

and unmarried children in the highest family priority (priority three), but only six nationalities were eligible for consideration in this category in fiscal year 2001. Lower processing priorities include more distant relatives such as grandparents, siblings, aunts, and uncles, but have not been open to any nationality for several years. Derivative status is open only to spouses and unmarried minor children. In practice, however, dependent members of extended families may be considered under what is known as the p-3 (priority three) designation. Refugees who become legal permanent residents or citizens may apply to sponsor more distant relatives for immigration, although the waiting periods for extended family members may be very long.<sup>124</sup>

States of asylum or resettlement may well feel justified in placing greater emphasis on migration concerns over humanitarian ones when it comes to more 'distant' family members, but the relative weight assigned to these concerns is not inevitable, nor is it necessarily based on correct premises. It has been suggested, for example, that, as countries develop, their family structures move towards a Western norm where adult children are not responsible for their parents and that policy-makers should therefore not base decisions on an outmoded concept of cultural relativism favouring the extended family.<sup>125</sup> While it is true that traditional societies are changing, it is also important to recognize that family life in every region of the world is evolving in response to new challenges and possibilities, such as the growing numbers of children orphaned by AIDS or armed conflict, shortages of land and housing, the increased prevalence of divorce, greater social and legal acceptance of same-sex unions, advances in reproductive technology, and increased mobility within and between States.<sup>126</sup>

Given the range of variations on the notion of family, a flexible approach is needed.<sup>127</sup> In UNHCR's view, States should adopt a pragmatic interpretation of the family, recognizing economic and emotional dependency factors, as well as cultural variations. Families should be understood to include spouses; those in a customary marriage; long-term cohabitants, including same sex couples; and minor children until at least age eighteen.<sup>128</sup> Under no circumstances should minors 'age out' of the process. The relevant age should be determined by the time when the sponsoring relative obtained status, not the time of the approval of the application for reunification. Under appropriate circumstances, family members such as dependent unmarried children of any age; dependent relatives in the ascending line; other

124 E. A. Dewey, Assistant Secretary of State for Population, Refugees and Migration, US Department of State, in response to question following testimony before the Subcommittee on Immigration, US Senate Judiciary Committee, 12 Feb. 2002.

125 Van Krieken, above n. 35, p. 118.

126 Apap and Sitaropoulos, above n. 35, section 1; Anderfuhren-Wayne, above n. 35, p. 360.

127 UNHCR, 'Background Note', above n. 5, para. 14.

128 The Council of Europe's Committee of Ministers, Recommendation Rec(2002)4, 26 March 2002, defines a child as anyone below the age of eighteen unless, under the law applicable to the child, majority is attained earlier.

dependent relatives, and other dependent members of the family unit, including foster children, as well as fiancé(e)s should be reunited.<sup>129</sup>

## 2. *Dependency*

A useful limiting factor recognized by many States in determining whether more distant family members should be reunited is dependency. While there is no internationally agreed definition of the term, UNHCR's operational definition is that a dependent person is someone who relies for his or her existence substantially and directly on another person, in particular for economic reasons, but also taking emotional dependency into consideration.<sup>130</sup> Sending remittances back to the country of origin might address financial dependency in some cases, but would not of course suffice to replace the emotional and practical aspect of the family relationship. The principle of dependency recognizes that, in most cases, the family is composed of more than its nuclear members.<sup>131</sup> It should be noted that in many cultures young people over the age of majority, particularly young women, are considered part of the nuclear family unit until they are married. Aged parents are also considered part of the family in many societies, and are owed a duty of protection and care by their children.<sup>132</sup>

## 3. *Ties of affection or mutual support*

Refugee families, more so than many others, are likely to be melded from the remnants of conventional families. While some would argue that only the family as it existed before departure should be recognized for reunification purposes, the reality is that very often new families arise out of the refugee experience. The trauma of persecution and flight, the frequency of family separation, and the exigencies of life in exile create many families of choice or circumstance. These groupings should not be assumed to exist for convenience or for immigration purposes only. International humanitarian law recognizes that a family consists of those who consider themselves and are considered by each other to be part of the family, and who wish

129 UNHCR Division of International Protection, *Resettlement Handbook* (revised ed., Geneva, April 1998), ch. 4.6.7(b).

130 *Ibid.*, ch. 4.6.5. 131 UNHCR, 'Background Note', above n. 5, para. 13.

132 See, e.g., African Charter on the Rights and Welfare of the Child, above n. 28, Art. XXXI: 'The child . . . shall have the duty (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in cases of need . . .'. African Charter on Human and Peoples' Rights, above n. 22, Art. 18(4): 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs', and Art. 29(1): 'The individual shall also have the duty . . . to respect his parents at all times, to maintain them in case of need.' ACHR, above n. 22, Art. 32: 'Every person has responsibilities to his family.' American Declaration of the Rights and Duties of Man, 1948, OAS Resolution XXX, Art. XXX: 'it is the duty of children to honor their parents always and to aid, support and protect them when they need it'.

to live together.<sup>133</sup> Economic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions.<sup>134</sup>

## F. Family unity and reunification for 1951 Convention refugees and for others in need of protection: where and when?

The right to family unity and reunification is universally applicable. As noted above, formal recognition of family unity in the refugee context is rooted in the Final Act of the Conference of Plenipotentiaries that adopted the 1951 Convention.<sup>135</sup> Since the right arises from international human rights law, however, it is not dependent on the formal status of the persons seeking it.<sup>136</sup> The question, then, is not whether the right to family unity and reunification is applicable to various categories of persons, but which State(s) must act to ensure the right. The following discussion is organized by category of claimant for ease of analysis, not because of any hierarchy of entitlement.

### 1. 1951 Convention refugees

Refugees recognized under the 1951 Convention are usually in the most advantageous position with respect to family unity or reunification, even given the variation in treatment described below. Since reunification cannot occur in the country of origin, the country of asylum must give effect to the right, at least for close family members.

### 2. Organization of African Unity and Cartagena refugees

The OAU Refugee Convention<sup>137</sup> does not make specific reference to family unity or reunification. The body of African human rights law, however, is a rich source for family rights, including the only regional convention on the rights of the child.<sup>138</sup> With respect to family unity, the situations of mass influx envisaged by the OAU Refugee Convention generally do not involve individual status determination because the objective circumstances in the country of origin make the need

133 *Commentary to the Additional Protocols*, quoted in Secretariat of the Inter-Governmental Consultations, *Report on Family Reunification*, above n. 17, p. 357.

134 UNHCR, 'Background Note', above n. 5, para. 1(c).

135 See section I above and, for the full text of Recommendation B of the Final Act, see the text at n. 42.

136 CRC, Arts. 2 and 22; HRC, General Comment No. 15, above n. 38, para. 1. Related provisions in humanitarian law require the existence of armed conflict before they are applicable.

137 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 3.

138 African Charter on Human and Peoples' Rights, above n. 22; African Charter on the Rights and Welfare of the Child, above n. 28.



for protection obvious and/or because the country of asylum is not able to conduct such an examination due to the large number of people involved. There should not, therefore, be an issue of derivative or other status. All family members, whether together or separated, should be, and in the normal course are, extended recognition on a prima facie basis.

Reunification can become complicated when one member of a family is recognized as a prima facie refugee in one country, while another family member flees to a country of asylum that does not employ an OAU-type definition and is not recognized as a refugee. If the country with the more expansive refugee definition does not provide for family reunification, there may be no possibility for reunification in the country with the less inclusive definition, since that family member may be considered only an asylum seeker, or a beneficiary of a subsidiary form of protection.

Like the OAU Convention, the 1984 Cartagena Declaration<sup>139</sup> guides countries in their response to mass influx, when refugee status is granted on a group basis. The Cartagena Declaration specifically acknowledges family reunification as a fundamental principle that should be the basis for humanitarian treatment in the country of asylum.

### 3. *Complementary forms of protection*

Complementary protection refers to various types of status granted to people whose claims under the 1951 Convention have been rejected after an individual determination, but who have nevertheless been found to be in need of international protection, for example, under Article 3 of the Convention Against Torture or under the OAU/Cartagena definition outside Africa or Central America.<sup>140</sup> Standards of treatment vary, but beneficiaries of complementary protection are entitled to respect for their fundamental human rights including the right to family unity and reunification. The justification for refugee family reunification in a country of asylum derives from the refugee's situation in not being able to return home, and not from the text of 1951 Convention itself. Persons in an analogous situation of inability to return home should benefit from the same application of the right in the country of asylum.

A number of countries extend family reunification rights to beneficiaries of complementary protection. The Committee of Ministers of the Council of Europe specifically recommends that family reunion provisions relating to refugees should apply,<sup>141</sup> but some countries have yet to ensure the right to reunification. The

139 Cartagena Declaration on Refugees, above n. 114.

140 UNHCR, 'Complementary Forms of Protection', UN doc. EC/GC/01/18, 4 Sept. 2001. UNHCR, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', UN doc. EC/50/SC/CRP.18, 9 June 2000.

141 Council of Europe, Committee of Ministers on subsidiary protection, above n. 114, para. 6.

United States, for example, does not provide for family reunification with persons protected under the Convention Against Torture.<sup>142</sup> This is problematic, not least because return is not necessarily envisaged as a durable solution for a person at risk of torture. That some 1951 Convention refugees are erroneously granted only complementary protection is also a concern in countries where there is a wide disparity in family reunification possibilities between the two categories.<sup>143</sup>

#### 4. *Responses to mass influx*

The right to family unity applies in situations of mass influx. Such situations present State authorities with the challenge of preserving family unity in the midst of chaotic and terrifying events. Given the prevalence of family separation in situations of mass influx, keeping or bringing family members together poses enormous practical problems.<sup>144</sup> Whether in a refugee camp or in a situation of spontaneous settlement in rural or urban areas, the members of a family, very broadly defined, should be permitted to stay together and be helped to find each other.

Registration designed to identify separated families,<sup>145</sup> tracing, assistance with communication and transportation, and similar measures may help relatives within a large refugee population to re-establish a family group. Action should be taken as soon as possible, as prospects for reunification diminish as time goes by. In camps for Kosovo Albanian refugees in the former Yugoslav Republic of Macedonia, a telephone centre allowed refugees to try to establish the location of missing relatives; in Rwanda, bus circuits allowed returnee parents to visit centres for unaccompanied/separated children in search of their children. When a refugee settlement must be moved (away from a volatile border region, for example) or consolidated as camp populations decline, care should be taken to ensure that all members of a household are able to move together. Particularly in situations of mass influx, those working to maintain or restore family unity should make the maximum use of refugees' self-help efforts.

Unaccompanied and separated children require special attention in order to be reunited with their parents or guardian and siblings as soon as possible.<sup>146</sup> Tracing

142 Pub. L. 105-277, 112 Stat. 2681-822, Oct. 1998.

143 Van Krieken, above n. 48, pp. 61-2.

144 With respect to the Rwandan exodus, see e.g., International Committee of the Red Cross, UNHCR, UN Children's Fund (UNICEF), and International Federation of Red Crescent and Red Cross Societies (IFRCRCS), 'Joint Statement on the Evacuation of Unaccompanied Children from Rwanda', 27 June 1994; M. Merkelbach, 'Reuniting Children Separated from their Families after the Rwandan Crisis of 1994: The Relative Value of a Centralized Database', 82 *International Review of the Red Cross*, 2000, pp. 351-66; Petty, above n. 100, pp. 165-76.

145 UNHCR, 'Practical Aspects of Physical and Legal Protection with Regard to Registration', UN doc. EC/GC/01/6\*, 19 Feb. 2001. Executive Committee, Conclusion No. 91 (LII), 2001, para. a, also acknowledges 'the importance of registration as a tool of protection, including [for] family reunification of refugees and identification of those in need of special assistance'.

146 UNHCR, *Refugee Children*, above n. 15, ch. 10.

efforts should begin immediately an unaccompanied/separated child is identified, both through the comparison of records on unaccompanied/separated children and those on parents whose children are missing, and through an active investigation of the child's experience and identity. While attempts to locate the child's family proceed, arrangements for care by more distant relatives or foster families must be concluded and carefully monitored from the perspective of protection as well as the best interests of the child.

Most unaccompanied and separated children do in fact have parents or other relatives who are willing and able to care for them and can be located through diligent tracing. Therefore, adoption or alternative arrangements for long-term care should never be contemplated during an emergency, and should only be pursued when exhaustive tracing has proved unsuccessful.<sup>147</sup> Decisions about reunification with parents or other relatives when tracing has been successful, or about alternative arrangements when it has not, should always be based on the best interests of the child.<sup>148</sup>

In situations of mass influx, where the majority of the people seeking international protection will fall within the 1951 Convention refugee definition but individual status determination is not possible, States usually respond by recognizing them as refugees on a prima facie basis or by granting a form of protection known as temporary protection. In principle, all family members present should receive the same prima facie refugee status or temporary protected status. The Executive Committee has specifically concluded that respect for family unity is a 'minimum basic human standard' in situations of large-scale influx<sup>149</sup> and has called for family reunification for persons benefiting from temporary protection.<sup>150</sup>

Temporary protection represents an emergency tool in situations of mass influx, which often suspends individual determination of refugee status and the identification of the appropriate durable solution. It can sometimes result in extended periods in the country of asylum and there is an emerging consensus on the need for prompt reunification during temporary protection. The recent European Union Directive on temporary protection requires member States to reunite from within

147 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993, effective since 1 May 1995. See UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. I, pp. 356–69 and <http://www.hcch.net/e/conventions/menu33e.html>. See also, Hague Conference on Private International Law, Special Commission, 'Recommendation Concerning the Application to Refugee Children and Other Internationally Displaced Children of The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption', 21 Oct. 1994; Executive Committee, Conclusion No. 88 (L), 1999, para. c.

148 CRC, Art. 3; UNHCR, *Refugee Children*, above n. 15, ch. 10; Executive Committee, Conclusion No. 47 (XXXVIII), 1987.

149 Executive Committee, Conclusion No. 22 (XXXII), 1981, para. II.B.2(h).

150 Executive Committee, Conclusion No. 15 (XXX), 1979, para. e: '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.'

the EU close family members, as well as unmarried partners if the State has similar treatment for the latter in its aliens law, and allows them to reunite other close dependent family members. Family members who are not in the EU but wish to be reunited with a sponsoring relative will be able to do so on showing that they are in need of protection.<sup>151</sup>

In the United States, temporary protected status (TPS) does not permit family reunification.<sup>152</sup> This is perhaps because the protection is in the nature of a deferred deportation, and is not the same as temporary protection programmes elsewhere. It is available only to persons already in the United States when their country is designated as experiencing ongoing conflict or natural disasters. Those present in the United States without family members presumably chose to travel without them in the first place. This reasoning, however, does not address the inability of the TPS beneficiary to reunite with his or her family by returning home. It should be noted that most of the countries that participated in the Humanitarian Evacuation Programme for Kosovo Albanian refugees in 1999, including the United States, selected people for evacuation primarily on the basis of family ties in the receiving country, although the definition of family ties was not uniform. The agencies that were implementing the programme attempted to maintain family unity in the process, with considerable success after the first chaotic days.

## 5. *Asylum seekers*

Since a decision has not yet been made as to the legal status of asylum seekers, it may be difficult to determine where they should enjoy the right to family unity and reunification, or which State bears responsibility for giving effect to it. If asylum determination systems were prompt and efficient, this lack of clarity would cause few problems, but asylum systems are notoriously neither prompt nor efficient, and the length of proceedings in many countries causes tremendous hardship, particularly when children are apart from parents.<sup>153</sup>

The obvious answer is to expedite asylum determinations, but this worthy goal seems always to recede into the distance. There is, fortunately, a general recognition at least in principle that unaccompanied and separated children should benefit from expedited procedures, but such measures do not even begin to address the right to family reunification of children left in a country of origin or transit; no State has suggested expedited procedures for asylum-seeking parents separated from

151 EU Temporary Protection Directive, above n. 114, Art. 15.

152 US Immigration and Nationality Act, as amended (INA), section 244, 8 Code of Federal Regulations (CFR), section 244.2.

153 For example, two separated children, recognized by UNHCR in a country outside the European Union as mandate refugees, have been trying to reunite with their mother in an EU Member State since 1997. Their father was recently recognized as a refugee in another EU country, allowing the children to be referred for resettlement. UNHCR field office e-mail to the authors, 25 June 2001.

their children. Resettlement of children separated from their parents and remaining in the country of origin or transit is also difficult since resettlement countries often feel that the country where a family member has an application pending should accept the remaining family members.

Some limited steps have been taken to address the situation. Under the terms of the Dublin Convention, in situations where an asylum seeker has a close family member in an EU State who is a refugee recognized under the 1951 Convention, it is that State which is responsible for assessing the application.<sup>154</sup> Unfortunately, given the length of proceedings and the consequent delays in reunification, family members in different States whose asylum applications are ongoing are not covered.<sup>155</sup>

Proposals presented by the European Commission for a revised Dublin Convention strengthen the provisions on family unity.<sup>156</sup> They add further criteria including that, where an asylum seeker is an unaccompanied minor, responsibility for considering the claim should lie with the member State where there is a member of his or her family who is able to take charge of him or her. There is no stipulation as to the formal status of the other family member. Another criterion allocates responsibility for assessing the claim to a member State where there is another family member who is an asylum seeker and who is awaiting a decision under the normal procedure, as opposed to this only being possible for a recognized refugee.

The Parliamentary Assembly of the Council of Europe has recommended that members of the same family be allowed to reunite during status determination procedures.<sup>157</sup> The European Council on Refugees and Exiles has also recommended that members of a family who have been compelled to seek asylum in different countries be allowed to pursue their claims together in a single country.<sup>158</sup>

It is understandable that States are not eager to process reunification applications for asylum seekers whose asylum applications they are having difficulty processing. Given the scarcity of State resources, however, it would be helpful to pursue possibilities for reuniting members of the same family seeking asylum in various countries, particularly if determination of the claim has been pending for, or is expected to take longer than, six months. The grouping together of at least potentially

154 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community (Dublin Convention), 1990, OJ 1997 L254, 19 Aug. 1997, p. 1, Art. 4. All EU member States are party to the Convention.

155 Hurwitz, above n. 118, p. 653, where other situations are examined in greater detail.

156 European Commission, 'Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National', COM (2001) 447 final, 26 July 2001 (hereinafter 'Dublin II Proposal'), especially preamble paras. 6 and 7 and Arts. 5–8.

157 Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), above n. 114, para. 8.vii(p).

158 European Council on Refugees and Exiles (ECRE), 'Position on Refugee Family Reunification', July 2000.

related claims, witnesses, and evidence would be more cost effective than parallel procedures in different jurisdictions and, as recognized by the European Commission, would be likely to result in more consistent decision making.<sup>159</sup>

## 6. *Internally displaced persons*

Family separation is a feature of internal, as well as external, displacement. In Angola, for example, two-thirds of the approximately 3.8 million internally displaced people are under the age of fifteen. Many of these children are separated from their families, and are at great risk of forced recruitment and abduction. While reunification does not involve problems of obtaining admission to another country, problems can arise when freedom of movement is limited. In Angola, combatants have refused to allow civilians to move from areas of conflict to safer areas.

The growing recognition of State responsibility for family reunification in situations of internal displacement can be seen in the evolution of language from the 1977 Additional Protocol II, which refers to ‘all appropriate steps’ to ‘facilitate’ reunion, to the stronger and more detailed provision of the 1990 African Charter on the Rights and Welfare of the Child, which calls for ‘all necessary measures’ to ‘trace and re-unite’.<sup>160</sup>

## V. State practice: the legal framework

### A. The legal framework for the right to family unity and reunification

UNHCR’s Executive Committee and UNHCR itself have drawn attention to the need to implement the right to family unity and reunification in domestic legislation.<sup>161</sup> The Committee on the Rights of the Child has also recommended to a number of asylum States, including Australia, Finland, Kenya, and Norway, that such a framework be established or improved.<sup>162</sup> Such provisions are an important

159 European Commission, ‘Dublin II Proposal’, above n. 156, p. 13.

160 Additional Protocol II to the Geneva Conventions, above n. 29, Art. 4(3)(b): ‘all appropriate steps shall be taken to facilitate the reunion of families temporarily separated.’ African Charter on the Rights and Welfare of the Child, above n. 28, Art. XXV(2)(b): ‘States Parties shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.’ See also, ‘Guiding Principles on Internal Displacement’, above n. 115, Principle 17(3).

161 Executive Committee, Conclusion No. 85 (XLIX), 1998, para. x; UNHCR ‘Background Note’, above n. 5, para. 1(b): ‘This requires that States take measures, including national legislative efforts, to preserve the unity of the family. It also requires corollary measures to reunite families that have been separated, through programmes of admission, reunification and integration.’

162 Committee on the Rights of the Child, ‘Concluding Observations on Australia’, above n. 95, para. 30. Committee on the Rights of the Child, ‘Concluding Observations on Finland’, UN doc. CRC/C/15/Add.132, 16 Oct. 2000, paras. 37–8. Committee on the Rights of the

method of implementing international standards and represent the best practice in a rights-based approach to protection of the refugee family. States should enact legislation expressly implementing the right to family unity and reunification for refugees and other persons in need of international protection.

In the European Union, a harmonized legal framework for implementing the right to family reunification will come into being upon conclusion of the amended proposal for a Council directive.<sup>163</sup> This document correctly provides more favourable treatment in some respects for refugee families as compared to migrant families, yet also gives rise to concern in a number of other respects.<sup>164</sup> It appears that only reunification with members of the nuclear family (spouse and minor children) will be mandatory, while same-sex couples, unmarried partners, couples in a customary marriage, and members of the extended family will be able to reunite only as a matter of State discretion. A few States would like to set the maximum age for reunification with children as low as twelve, though the age may be higher for refugee children. Further negotiations on the proposal will need to be monitored carefully to ensure that it sets a positive benchmark for implementation of the right to family reunification.

### 1. *States with provisions relating to refugee family unity and reunification*

States that have incorporated family unity and reunification principles have done so with a variety of legislative and administrative provisions.<sup>165</sup> The basic elements can be simply stated, as in the law in Bosnia and Herzegovina:

Refugee status shall in principle be extended to the spouse and minor children as well as other dependants, if they are living in the same household. Entry visas shall be provided to such dependants of persons to whom asylum has been granted.<sup>166</sup>

Child, 'Concluding Observations on Kenya', UN doc. CRC/C/15/Add.160, 7 Nov. 2001, para. 56. Committee on the Rights of the Child, 'Concluding Observations on Norway', UN doc. CRC/C/15/Add.126, 28 June 2000, paras. 32–3.

163 European Commission, 'Amended Proposal for a Council Directive on the Right to Family Reunification', above n. 122.

164 See, e.g., ECRE, 'Position on Refugee Family Reunification', above n. 158; Caritas Europa-Migration Commission and other NGOs, 'Europe's Position on the Amended EU Commission Proposal for a Council Directive on the Right to Family Reunification', above n. 25.

165 See Secretariat of the Inter-Governmental Consultations, *Report on Family Reunification*, above n. 17, for a summary of policies in Australia, Belgium, Canada, Denmark, Finland, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the UK, and the US. See also, UNHCR, 'Integration Rights and Practices with Regard to Recognized Refugees in the Central European Countries', *European Series*, vol. 5, No. 1, 2000, ch. VI, 'Family Unity and Reunification', for a comparative analysis of policies in and country profiles of Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia.

166 Bosnia and Herzegovina, Law on Immigration and Asylum, 1999, Art. 54. The Refugee Act of Iraq, No. 51-1971, Art. 11.3, is even more succinct: 'The person who has been accepted

More complicated formulations can be found, for example, in US law, which provides three different channels for refugee family reunification. First, a priority system gives some refugees with relatives in the US preferential access to resettlement if they themselves are found to have a well-founded fear of persecution.<sup>167</sup> Secondly, a visa programme for relatives of refugees is based on derived status and does not require the joining relatives to demonstrate a fear of persecution. Thirdly, regular family immigration procedures are available to all permanent residents, a status normally available to refugees one year after resettlement in the United States.<sup>168</sup>

Unrealistic or overly rigid documentation requirements are a widespread problem in applying family unity and reunification laws. While States have legitimate concerns about fraud, it must be recalled that refugees are often not in a position to obtain documents such as passports or marriage, divorce, birth, and death certificates. Women and girls from some refugee-producing countries, such as Afghanistan, are much less likely than males to possess valid travel documents. In Belarus, for example, which has family unity provisions in its national legislation, there have been several cases of childless married couples who were requested to provide documentary proof of their marriage.<sup>169</sup>

States should maintain flexibility in documentation requirements, by allowing affidavits and other evidence in place of unavailable documents. A positive finding of identity in the course of status determination should be conclusive for reunification purposes. The country of asylum, upon recognition of refugee status, should provide travel documents to the refugee and all family members present. If travel documents are not available for family members, the country of asylum and any countries of transit should accept a travel document from the International Committee of the Red Cross (ICRC). Travel documents and visas should be issued free of charge.

Some States require a refugee to have been resident for a certain amount of time, or to have attained a certain status, before they are allowed to apply for family reunification. States should confer permanent resident status upon recognition of refugee status and corresponding rights to family reunification.

In many States, an interim status, such as the United Kingdom's 'exceptional leave to remain' (ELR), conveys no right to family reunification, although the UK Home Office will consider an application after a person has held this status for four

as a refugee in Iraq shall be allowed to bring his/her family members legally recognized as dependants.'

167 Of the three family-based priorities (P3, 4 and 5), only the P3 category is currently in use, and that only for six countries, all in Africa. INA, section 207, 8 CFR section 207.

168 INA, sections 207(c)(2) and 208(b)(3), 8 CFR section 207.7 and 8 CFR section 208.20; INA, section 209, 8 CFR section 209.

169 Law of the Republic of Belarus on Refugees, 1995, Art. 10, procedure of status determination of foreigners as refugees. See also, Decree of the President of the Republic of Belarus, No. 229, 24 Nov. 1994, Art. 10: 'On the Approval of Regulations of the Procedure Granting Asylum to Foreign Citizens and Stateless Persons'.



years – less in especially serious ‘compassionate’ circumstances. Applicants must show they have the means to support and accommodate relatives without recourse to public funds. Most ELR holders may be granted indefinite leave to remain after four years, although those with indefinite leave to remain still have to meet the support and accommodation tests in order to bring their relatives to join them.<sup>170</sup>

In an attempt to deter people smuggling, Australia has effectively barred family reunification for recognized refugees who enter without authorization.<sup>171</sup> Nor can these refugees visit their families in a third country, since they would lose their right to re-enter Australia. This policy is clearly in violation of Australia’s treaty obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, as well as the 1951 Convention, and is only questionably effective: one obvious risk is that it could serve to encourage the family members outside to use a smuggler themselves to attempt to join the family member already present.

Unauthorized entry should not preclude family unity or reunification, nor should requests for family reunification be used to re-examine the principal applicant’s claim or status. Interception procedures should allow for asylum in the intercepting country if the refugee has family members there.<sup>172</sup>

## 2. *States with general immigration provisions relating to family unity and reunification*

Some type of legislative arrangement for ensuring family unity and reunification is preferable to none, but immigration provisions are generally not adequate in the refugee context. Implementing the right to family unity and reunification in the refugee context involves an obligation of protection, an orientation towards durable solutions, and a humanitarian commitment to rebuilding refugees’ lives, none of which is normally a part of regular immigration programmes.<sup>173</sup> In the absence of refugee-related legislative or administrative provisions, it is difficult to speak of a rights-based approach to family unity and reunification that takes into account the different situations of refugees and migrants.

170 See Immigration Directorate, ‘Instructions’, Dec. 2000, ch. 11, section 2, exceptional leave to enter/remain, settlement, and family reunion, Art. 14.3.

171 Migration Amendment Regulations 1999 (No. 12) and 1999 (No. 243); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, Part 4. Under this legislation, since Sept. 2001, an asylum seeker arriving independently in Australia who has spent seven days or more in a country where she or he could have sought and obtained effective protection, who is recognized as a refugee, only receives a series of temporary three-year visas. He or she is thus never able to gain secure residency or travel documents, or to reunite with his or her family in Australia. See also, US Committee for Refugees, *Sea Change: Australia’s New Approach to Asylum Seekers* (US Committee for Refugees, Washington DC, Feb. 2002).

172 See also the paper on Article 31 by G. S. Goodwin-Gill in Part 3.1 of this volume.

173 UNHCR, ‘Background Note’, above n. 5, para. 8.

In addition to the obstacles noted in the preceding section, additional problems arise in addressing refugee family issues through immigration legislation. Many of these provisions have restrictive criteria based on types of blood lineage or legal relationships, legal status and length of stay of the petitioner in the host country, numerical limitations, and in some cases the integration potential of the family member.<sup>174</sup> In many countries, there are income and/or residential accommodation requirements for the refugee in order to sponsor a more ‘distant’ relative such as an aged parent; some countries impose these requirements even for close family members. In some countries, recognized refugees face difficulties in obtaining residence permits required to petition for reunification with nuclear family members.

State discretion in dealing with the refugee family is too often exercised in an arbitrary manner inconsistent with international legal principles. The following examples of problematic practices are taken from Germany, but can also be found in other countries: entry visas for family members are sometimes denied by missions erroneously or without explanation; family separation itself is no longer regarded as a sufficient humanitarian reason to justify reunification; income and accommodation requirements are rigidly enforced without inquiry into the individual circumstances and resources of the family; valid passports and original documents are required despite their unavailability; refugees are advised to attempt to reunite with family members in a different country of asylum; and applications for reunification are used to re-examine and sometimes revoke the status of the principal applicant.<sup>175</sup>

### 3. *States with no domestic provisions*

Refugee family unity and reunification is not considered a priority in some States and so policies and procedures have not been put into place. UNHCR offices in such countries attempt to establish procedures with local authorities to find solutions

<sup>174</sup> Ibid., para. 7.

<sup>175</sup> Two recent cases from other countries concerning reunification of recognized refugees with nuclear family members are drawn from UNHCR field office e-mails to the authors. In the first case, an Afghan woman with two daughters was recognized as a refugee in a country of asylum; her husband and their two sons were in a country of transit. Their first application to join the wife and daughters was erroneously rejected on financial grounds, which under that country’s legislation apply only to regular immigration cases, not to refugees. UNHCR branch offices in both countries had to intervene to correct the error. Their second application was then denied because the husband and wife had different family names, although this is the common and well-known tradition in their country. Both UNHCR offices again intervened to clarify. Entry visas were finally issued after a one-year delay on 18 July 2001. In the second case, an Afghan man was recognized as a refugee in a country of asylum. His wife applied for family reunification from her country of first asylum, submitting full documentation including their marriage certificate and a copy of her husband’s identification. The asylum country’s mission erroneously denied the application, questioning, without any reason given, whether the husband had in fact been recognized as a refugee. UNHCR offices in both countries had to intervene. The visa was eventually issued after a seven-month delay, 18 July 2001.

to such issues on a case-by-case basis. One UNHCR office reports that 'such endeavours are indeed time consuming and there is a constant fear of running into a protracted situation'.<sup>176</sup> In others, such as Ecuador, with a small caseload (six spouses reunited in 2000) and an open, flexible, and expeditious policy on the part of the government, family reunification proceeds smoothly.

In States where there is no procedure established for family reunification, family members generally must apply at a diplomatic mission. If there is not one in the country where they are residing, they must mail their applications to a mission elsewhere. This greatly increases the length, difficulty, and expense of the process.

In countries where UNHCR conducts status determination, it promotes family unity through status determination procedures and family reunification processing. With respect to status determination, experience suggests that the best practice is to establish a specific procedure for claims based on family unity with a recognized refugee already in the country of asylum. First, such claims need to be adjudicated quickly for protection purposes and to restore family unity; secondly, the vast majority of them are manifestly founded and can be examined expeditiously.<sup>177</sup> States should consider implementing a similar system.

Refugee claimants should be informed of the possibility of applying for family reunification without going through the standard status determination procedure. In order to identify fraudulent claims, it is important to have objective criteria relating to socioeconomic and personal considerations, and membership of the same household, to determine dependency. Following interviews with both the principal applicant and the newly arrived dependant, the dependant will either be added to the file and enjoy derivative status, or will be denied. A negative decision on the basis of family unity cannot be appealed, although the rejected dependant may submit an asylum application within the framework of the standard status determination procedure.

In countries where the government does not officially recognize UNHCR mandate status, it generally will also fail to acknowledge mandate refugee status of a close family member as a basis for the issuance of a visa or residence permit, thus closing off the possibility for reunification of the family. Resettlement then becomes the only legal option available for a durable solution.

## **VI. State practice: implementation and administrative procedures**

Even in States with specific provisions relating to family unity or reunification, protracted and complicated procedures cause tremendous hardship to

176 UNHCR field office e-mail to the authors, 24 June 2001.

177 The UNHCR Regional Office in Cairo takes such an approach.

the affected families<sup>178</sup> and demand inordinate human resources from UNHCR and other organizations assisting them.<sup>179</sup> As with many matters of high principle, with family unity the devil is in the details of implementation. Despite the framework provided by international law, States reluctant to accept alien entrants have left themselves an ample margin to equivocate on the actual mechanisms for family protection. The previous sections have shown that national refugee, asylum, and immigration legislation in many cases presents obstacles to family unity for refugees. Legislation often leaves room for considerable administrative discretion, which may work either in favour of or against refugee families hoping to reunite.

States should establish streamlined and standardized administrative procedures to ensure family unity and reunification, with expedited procedures for cases involving unaccompanied and separated children. States should allocate adequate resources for staffing, training, tracing, travel costs, fees waivers, testing requirements, and other costs related to family unity and reunification.

#### A. Application procedures

Diplomatic missions abroad are often unaware of or indifferent to the provisions of national refugee law. For instance, the United States permits its embassy staff to refer urgent protection cases for resettlement but finds that this channel is almost never used. UNHCR field offices are frequently called upon to intervene in cases where family unity petitions have been denied incorrectly according to the laws or regulations of the country to which entry is sought. Rectifying such decisions requires close cooperation among the field offices in two or more countries where separated relatives reside.

178 'In daily contact with persons of concern we are confronted with the distressing effects of the broken family unity for the refugees who often fall into deep depression particularly, as is often the case, when the separation from the spouse and children is protracted and there is very limited/no possibility of communication.' E-mail from a UNHCR field office to the authors, 6 Aug. 2001. 'The process of reunification takes a long time, which sometimes causes the situation where the [refugees] lose hope.' E-mail from a UNHCR field office to the authors, 27 July 2001. See also, Refugee Council of Australia, 'Discussion Paper', above n. 9, which includes a number of compelling cases of separated refugee families, all clients of Refugee Council of Australia member organizations.

179 Excerpts from three UNHCR field office e-mails to the authors: '[Branch Office X] is trying to use any possible intervention of other HCR offices in the concerned countries and Red Cross with regard to obstacles occurring with family reunification cases. There has been strong support from them but nonetheless the overall problems are still here', 25 June 2001. 'Family reunification from [country Y is] at times . . . a quite long and sometimes very bureaucratic procedure demanding quite considerable staff resources in order to follow up on individual cases, liaising with embassies, etc.', 6 Aug. 2001. 'UNHCR really spends time with refugees/nationals to explain to them the family reunification procedure, insisting on the fact that it takes time, and on what kind of assistance they can expect from us', 10 July 2001.

Some States, including the Nordic countries, require applications for reunification to be initiated at a diplomatic mission abroad, as is generally also the case in countries with no family reunification procedure (outlined in section V.A.3 above). If there is no embassy or consulate in the first country of asylum, this can cause further difficulty and delays as long-distance communications and shipment of documents takes place. Refugees' families who are not resident in or near the capital city find that the requirement for multiple interviews and presentation of documents at an embassy slows the process of reunification and is very costly. Other countries require that the sponsoring relative initiate the application process. This is usually a more satisfactory process, although communication with the waiting family and with the appropriate consular officials may be difficult.

A number of countries require that applications for family reunification be made when an asylum seeker crosses the border or when a refugee first applies for resettlement – both times when the person applying may not fully understand the application procedure. If the application is not lodged at that time, the family is unlikely to be allowed to reunify. In some cases, however, a petition filed at the border may allow a refugee's relative to circumvent more elaborate and time-consuming requirements that apply if the application is made from abroad. For example, in Poland, if an application for refugee status on the basis of family reunification is not lodged at the border, the family is effectively unable to make use of Article 44 of the 1997 Act on Aliens, which accords refugee status to family members living with a refugee in Poland. In practice, however, family reunification often takes place on a more informal basis, since an ordinance to the Act stipulates that responsible authorities should, according to existing possibilities, help the family to attain the right to enter Poland.<sup>180</sup>

Access to information about family reunification procedures is a common problem. Refugees themselves often do not know where to obtain information on family reunification procedures or how to find out the status of their applications. There is often confusion as to who in the family (those abroad or those in country) should initiate such proceedings, what institution is responsible for effecting family reunification (embassies, UNHCR, ICRC, NGOs), what is required to complete the application, and where sources of information and financial assistance may be found. In general, accurate information about application requirements – and the requisite forms, fee payments, documentation, and so forth – is easier to access in the country where family unification is sought. Permitting a relative already resident in that country to initiate procedures would facilitate family reunification. Consulates and UNHCR field offices should disseminate information about family reunification procedures to eligible people.

Most countries permit minor children to join parents who have been recognized as refugees under the 1951 Convention. Cumbersome procedures, however, have

180 UNHCR Branch Office Warsaw, e-mail to the authors, 28 June 2001.

been known to consume so much time that minor children 'age out' of reunification possibilities before their processing is complete. To avoid this problem, which can have serious consequences for the family concerned, best practice permits a child who is below the age of majority when his or her case is filed to complete the process and join family members regardless of his or her age at completion.

## B. Processing delays

Refugee family members often experience lengthy delays in obtaining entry visas from consular offices. Particularly in diplomatic missions in countries in proximity to significant refugee flows, the processing of such applications by national authorities has typically been slow. One country's mission reported in mid-2001 a six-month waiting period before initial interviews could be carried out in Damascus, Syria, and a one-year wait in Islamabad, Pakistan. After an application had been submitted in this case, it was not unusual for authorities to take up to a year to process the application and reach a decision.<sup>181</sup> Given the processing delays, family members' legal status can often lapse and they thus face additional protection problems. The strain on their financial resources may also be considerable.

The processing for family reunification visas to the United States based on derivative status (VISAS 92 and 93) is currently very slow both because of limited processing capacity in the consulates in the countries where most applications originate, and because the number of applications has increased dramatically in recent years.<sup>182</sup>

Together with the need to obtain travel documents and money for the travel costs (which are most often funded by UNHCR when the refugee family cannot afford it), these factors have resulted in considerable delays, sometimes years, in the procedure. Delays tend to feed upon themselves, as medical screening results go out of date and must be repeated, the validity of fingerprints expires, and so forth. Processing delays are particularly serious in cases involving children, especially unaccompanied and separated children. All such cases should be expedited in every way possible.

## C. High costs

In general, financial difficulties present the most persistent obstacle to family reunification. Some countries require refugees to meet certain income

181 UNHCR field office e-mail to the authors, 25 July 2001.

182 Telephone interview with Bureau of Population, Refugees and Migration, US Department of State, 3 Oct. 2001.

requirements (equal to the minimum wage in one country of asylum; to 125 percent of the 'poverty level' for certain avenues of family unification in another country of asylum). Another State makes family reunion formally conditional on the applicant having accommodation of a sufficient size (although in practice refugees are expected to be exempt from this requirement at least as far as the spouse and minor children are concerned). In many States, however, immigration laws requiring certain levels of income, housing, etc., are not applied to refugees. The amended proposal for a Council Directive on the right to family reunification would harmonize the EU member States' practice to this standard.<sup>183</sup> Requirements pertaining to income, employment, accommodation, length of stay, and health status should be specifically waived for refugee families.

Certain States impose per capita fees on applications for reunification, which many refugees find difficult to pay. Australia has made it possible for the spouse and children of refugees eligible for family reunification to enter under the humanitarian programme, which does not require expensive application fees, rather than under the family reunion programme, which can require fees in excess of A\$3,000 for two children, according to the Refugee Council of Australia.<sup>184</sup> (The disadvantage of this change is that the waiting periods are growing for a visa under the humanitarian programme.) In Canada, if a refugee fails to file for permanent resident status for him or herself and immediate family members within 180 days of being granted asylum (which application involves payment of substantial fees), the remaining alternative is to file for sponsorship after obtaining permanent residence. At that stage, sponsored family members must demonstrate an ability to remain independent of social welfare, and the sponsor must undertake to support the sponsored relatives for ten years.

Another set of expenses that refugee families in pursuit of reunification may face arises from required medical tests. In some cases, these are screening tests for infectious diseases or to establish that the refugee family members will not impose burdens on the public health systems of the countries to which they hope to move. More States seem to be concluding, however, that it is not appropriate to deny family unity to refugees on health grounds, and this would clearly seem to be a desirable international standard.

There is an increasing tendency to use DNA testing to confirm family relationships among refugees and the people with whom they seek reunification, owing to concerns about fraudulent claims. DNA testing is expensive, and many potential receiving States expect refugees to pay for the tests themselves. The requirement for DNA testing is also a source of considerable delays in processing applications. A better approach would be to carry out scientific testing only in exceptional

183 European Commission, 'Amended Proposal for a Council Directive on the Right to Family Reunification', above n. 122.

184 Refugee Council of Australia, 'Discussion Paper', above n. 9.

circumstances with the consent of the refugee and family member, in the context of an interview process. The results should remain confidential, and the costs should be borne by the entity requesting the test, at least in those cases where the tests confirm the relationship alleged by the refugee. Refusal to submit to testing should not automatically result in denial of reunification.

The costs of obtaining documents, travelling to present petitions, and securing visas are often prohibitive, as is the cost of tickets. UNHCR, ICRC, the International Organization for Migration (IOM), and some NGOs provide assistance in some cases to family members who would otherwise be unable to travel. In some cases, States waive fees for refugees, which are otherwise normally required, a practice that should be encouraged.

#### D. Detention

In a number of countries that routinely detain asylum seekers who arrive without proper documentation, families are separated in detention. Separate facilities for men, women, and children sometimes permit very little interaction among family members. One country follows these practices even for cases that have been granted mandate refugee status by UNHCR, until UNHCR finds a durable solution for them.<sup>185</sup> When Australia was under criticism, not least by the Human Rights Committee and the Committee on the Rights of the Child, for conditions in a detention centre that did house families together, it responded by releasing women and children into a supervised release programme while keeping the men in detention as an assurance against flight.<sup>186</sup> Detention practices are one of the rare areas in which States commonly take direct actions that divide intact families.

Asylum seeking families should not normally be detained. If they must be detained, families should be housed together in individual family units. Families should not be split by detaining one member as insurance against the flight of other family members.

### VII. Conclusion

In November 2001, a group of judges, practitioners, NGO representatives, government officials, and academic experts met to take stock of international law on family unity and family reunification issues, as part of UNHCR's Global Consultations on International Protection. The roundtable reached a nearly unanimous

185 UNHCR field office e-mail to the authors, 24 June 2001.

186 HRC, 'Concluding Observations on Australia', UN doc. A/55/40, 24 July 2000, para. 3. Committee on the Rights of the Child, 'Concluding Observations on Australia', above n. 95, para. 20.



consensus that ‘a right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society’.<sup>187</sup> Since this right is embedded in human rights instruments and humanitarian law, the experts noted, it applies to all human beings, including refugees. They concluded that ‘[r]espect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated’.<sup>188</sup>

For families separated by voluntary movement, States may argue that declining to admit family members does not violate the right to family unity because migrants have the option to enjoy family unity in the country of origin. Even in such cases, the legal admission of a migrant for long-term residence implies an obligation to make it possible for that person to exercise his or her right to family life. For refugees, however, the option of family unity in the country of origin does not exist until the point when they are able to repatriate in safety and dignity, or until such fundamental and durable changes have occurred in the country of origin that cessation of their refugee status may be invoked.

Since refugee families frequently become separated owing to the circumstances of their flight, their right to family unity often can be realized only through family reunification in a country of asylum. Thus, the right to family reunification resides at the intersection of established human rights law, humanitarian law, and refugee law. The specifics of the implementation of this right, however, vary greatly among countries. It would help to cut through the resulting inconsistency if UNHCR were to compile procedures for reunification to and/or from any given country, and provide the appropriate contact points in government agencies, UNHCR offices, ICRC, NGOs, and other international organizations. UNHCR should also, in consultation with States, NGOs, and other international organizations, expand its guidelines on various aspects of family unity and reunification, including its relationship to exclusion and to irregular movements, by drawing on the best practices in a range of settings and situations. It is then up to States to draw on these resources to establish more humane and expeditious rules for the protection and restoration of refugee family unity and – most importantly – to implement them with consistency and compassion.

187 UNHCR Global Consultations on International Protection, Summary Conclusions on Family Unity, Geneva Expert Roundtable, 8–9 Nov. 2001.

188 *Ibid.*

## 9.2 Summary Conclusions: family unity

*Expert roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001*



The second day of the Geneva Expert Roundtable addressed the issue of family unity, based on a discussion paper by Kate Jastram and Kathleen Newland, entitled ‘Family Unity and Refugee Protection’. Participants were also provided with written contributions from Judge Katelijne Declerk of the Belgian Permanent Appeals Tribunal for Refugees, Ninette Kelley, a Canadian legal practitioner, Dr Savitri Taylor, La Trobe University, Victoria, Australia, and the Refugee Immigration and Legal Centre, Melbourne, Australia. Participants included twenty-eight experts from eighteen countries, drawn from governments, NGOs, academics, the judiciary, and the legal profession. Professor Vitit Muntarbhorn, from Chulalongkorn University, Thailand, moderated the discussion.

The following summary conclusions do not necessarily represent the individual views of participants or of UNHCR, but reflect broadly the understandings emerging from the discussion.

### **General considerations**

1. A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. This right is entrenched in universal and regional human rights instruments and international humanitarian law, and it applies to all human beings, regardless of their status. It therefore also applies in the refugee context. A small minority of participants, while recognizing the importance of the family, did not refer to family unity as a right but as a principle.
2. The right to family unity is derived from, *inter alia*, Article 16 of the Universal Declaration of Human Rights 1948, Article 8 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 16 of the European Social Charter 1961, Articles 17 and 23 of the International Covenant on Civil and Political Rights 1966, Article 10 of the International Covenant on Economic, Social and Cultural Rights 1966, Article 17 of the American Convention on Human Rights 1969, Article 74 of Additional Protocol 1 of 1977 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War 1949, Article 18 of the African Charter on Human and Peoples' Rights 1981, Articles 9, 10, and 22 of the Convention on the Rights of the Child 1989, and Articles XXIII and XXV of the African Charter on the Rights and Welfare of the Child 1990.

3. Although there is not a specific provision in the 1951 Refugee Convention and its 1967 Protocol, the strongly worded Recommendation in the Final Act of the Conference of Plenipotentiaries reaffirms the 'essential right' of family unity for refugees. Moreover, refugee law as a dynamic body of law, is informed by the broad object and purpose of the 1951 Convention and its 1967 Protocol, as well as by developments in related areas of international law, such as international human rights law and jurisprudence and international humanitarian law. In addition, Executive Committee Conclusions Nos. 1, 9, 24, 84, 85, and 88, each reaffirm States' obligations to take measures which respect family unity and family reunion.
4. The obligation to respect the right of refugees to family unity is a basic human right which applies irrespective of whether or not a country is a party to the 1951 Convention.
5. Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere. Equally, deportation or expulsion could constitute an interference with the right to family unity unless justified in accordance with international standards.
6. The right to family unity is of particular importance in the refugee context, not least in providing the primary means of protection for individual members of the family unit. Maintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being, and economic support of individual refugees and their communities. The protection that family members can give to one another multiplies the efforts of external actors. In host countries, family unity enhances refugee self-sufficiency, and lowers social and economic costs in the long-term. In addition, giving effect to the right to family unity through family

reunification may help to reduce the number of, and dangers associated with, unauthorised or spontaneous arrivals, as well as to reduce unnecessary adjudication of claims for refugee status. Family unity can promote the sustainability of durable solutions for refugees (that is, voluntary repatriation, local integration, and resettlement).

7. The object and purpose of the 1951 Convention implies that its rights are in principle extended to the family members of refugees. In some jurisdictions, this is referred to as derivative status. Thus, family members of a refugee should be allowed to remain with him or her, in the same country and to enjoy the same rights. In addition, in light of increased awareness of gender-related persecution and child-specific forms of harm, each family member should be entitled to the possibility of a separate interview if he or she so wishes, and principles of confidentiality should be respected.
8. International human rights law has not explicitly defined 'family' although there is an emerging body of international jurisprudence on this issue which serves as a useful guide to interpretation. The question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors. For the purposes of family reunification, 'family' includes, at the very minimum, members of the nuclear family (spouses and minor children).

### **Family reunification**

9. The circumstances in which refugees leave their countries of origin frequently involve the separation of families. Consequently, family reunification is often the only way to ensure respect for a refugee's right to family unity. A review of State practice demonstrates that family reunification is generally recognized in relation to refugees and their families, and that practical difficulties related to its implementation in no way diminish a State's obligations thereto.
10. Implementing the right to family unity through family reunification for refugees and other persons in need of international protection has special significance because of the fact that they are not able to return to their country of origin.
11. Requests for family reunification should be dealt with in a positive, humane, and expeditious manner, with particular attention being paid to

the best interests of the child. While it is not considered practical to adopt a formal rule about the duration of acceptable waiting periods, the effective implementation of obligations of States requires that all reasonable steps be taken in good faith at the national level. In this respect, States should seek to reunite refugee families as soon as possible, and in any event without unreasonable delay. Expedited procedures should be adopted in cases involving separated and unaccompanied children, and the applicable age of children for family reunification purposes would need to be determined at the date the sponsoring family member obtains status, not the date of the approval of the reunification application.

12. The requirement to provide documentary evidence of relationships for the purposes of family unity and family reunification should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin. A flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences. An example was given where strict documentation requirements had created a market for forged documents in one host country.

### **Asylum seekers**

13. As regards asylum seekers, since a decision has not yet been made as to their legal status, it may not be possible to determine where they should enjoy this right or which State bears responsibility for giving effect to it. It is, therefore, important to expedite decision-making particularly in cases where separation causes particular hardship, where the 'best interests' of the child come into play, or where there is a likelihood of a positive determination being made. Preparation for possible family reunification in the event of recognition should, in any event, begin in the early stages of an asylum claim, for instance, by ensuring that all family members are listed on the interview form.

### **Mass influx**

14. The right to family unity also applies during situations of mass influx, and temporary evacuation. From an operational perspective, it is important to take practical measures to prevent family separations and ensure family reunification as early as possible in these situations. Otherwise, chances of reunification diminish as time goes by.

**Voluntary repatriation and reintegration**

15. The right to family unity and family reunification also applies, and is particularly important, in the context of voluntary repatriation and reintegration. A unified family unit is better able to re-establish itself in the country of origin and contribute to the rebuilding of the country.

### 9.3 List of participants

*Expert roundtable, Geneva, Switzerland, 8–9 November 2001  
(Article 31 and family unity)*

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# 10.1 Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond

WALTER KÄLIN\*

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\* This is a revised version of the study prepared as a background paper for UNHCR's Global Consultation on International Protection which takes into account the conclusions of the second expert roundtable in Cambridge, UK, 9–10 July 2001.

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## I. Introduction

The expert roundtable process of the Global Consultations on International Protection initiated by the Office of the United Nations High Commissioner for Refugees (UNHCR) is intended to examine selected contemporary issues of international refugee law in detail and provide guidance to UNHCR, States, and other actors. Within this framework, the present study examines UNHCR's supervisory

role under its Statute<sup>1</sup> in conjunction with Article 35 of the 1951 Convention Relating to the Status of Refugees<sup>2</sup> and Article II of the 1967 Protocol Relating to the Status of Refugees.<sup>3</sup> It also looks at ways to make the implementation of these treaties more effective by creating new monitoring mechanisms going beyond the present supervisory regime.

Issues of supervision and implementation of the 1951 Convention have become relevant today not because States would challenge UNHCR's task of providing international protection as such, but because the implementation of the 1951 Convention and the 1967 Protocol is faced with many problems, including a lack of uniformity in the actual application of its provisions. This is true not only for many of the guarantees related to the status of refugees but also for such key provisions as Article 33 of the 1951 Convention on *non-refoulement* or the refugee definition as provided for by Article 1A of the 1951 Convention. UNHCR has repeatedly deplored a trend towards a more restrictive interpretation of the 1951 Convention and its 1967 Protocol in certain countries or even regions of the world.<sup>4</sup> These developments undermine the protection regime created by these instruments. At the same time, they create difficulties for States, for example because restrictive practices turn refugees to countries with a more generous practice.

After the introduction, the second part of this study examines the content of Article 35 of the 1951 Convention and Article II of the 1967 Protocol and their actual application by UNHCR and the States parties to these instruments. The third part of the study is devoted to a discussion of the need to complement UNHCR's supervisory activities with monitoring mechanisms that are linked to but independent of UNHCR. This examination includes a comparative analysis of different supervisory models in different areas of international law, and an assessment of their effectiveness and relevance to the international refugee protection framework. The study ends with a set of recommendations on how to achieve more effective implementation of the 1951 Convention and the 1967 Protocol.

The term 'supervision' as such covers many different activities which range from the protection work UNHCR is carrying out on a daily basis in its field activities on the one hand to the public scrutiny of State practice and the supervision of violations by expert bodies or political organs on the other hand. This makes it necessary to distinguish clearly between *supervision* carried out by UNHCR itself, and *monitoring* by other bodies or organs. The former are covered by Article 35 of the 1951 Convention and Article II of the 1967 Protocol as understood today; the latter may go beyond these provisions even though they would be consistent with their object and purpose. The division of the study into two parts reflects this distinction.

1 Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res. 428(V), 14 Dec. 1950.

2 189 UNTS 150 (hereinafter the '1951 Convention').

3 606 UNTS 267 (hereinafter the '1967 Protocol').

4 On UNHCR's analysis of implementation problems, see the text below at nn. 78–81.

## II. UNHCR's supervisory role under Article 35 of the 1951 Convention

### A. Main content

The next three subsections outline the main content of the obligations of States under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, as well as the duties of States not party to either instrument.

#### 1. *Cooperation duties*

Article 35(1) of the 1951 Convention, subtitled 'Co-operation of the national authorities with the United Nations', reads:

The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

Article II(1) of the 1967 Protocol contains the same obligations in relation to UNHCR's functions, including its 'duty of supervising the application of the present Protocol'.

What is the object and purpose of these provisions? Article 35(1) of the 1951 Convention is directly linked to the sixth preambular paragraph of the Convention,<sup>5</sup> noting

that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

This in turn refers to UNHCR's Statute granting the organization the power 'to assume the function of providing international protection, under the auspices of the United Nations, to refugees', and to exercise this function, among others, by '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' and by '[p]romoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States'.<sup>6</sup> Article 35 is not, however, limited to cooperation in the area of the application of treaties but, as the clear

5 N. Robinson, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation* (Institute of Jewish Affairs, New York, 1953), p. 167.

6 *Ibid.*, paras. 1 and 8(a) and (d).

wording shows, refers to ‘any and all of the functions of the High Commissioner’s office, irrespective of their legal basis’.<sup>7</sup>

As the drafting history of Article 35(1) of the 1951 Convention shows, the significance of this provision was fully realized from the beginning. While the original draft required States to ‘facilitate the work’ of UNHCR,<sup>8</sup> the present stronger wording (‘and shall in particular facilitate its duty of supervising the application of the provisions of this Convention’) goes back to a US proposal submitted in order to ‘remove the hesitant tone of’ the original draft.<sup>9</sup> The fact that Article 35 was regarded as a strong obligation that might be too burdensome for some States led to the adoption of a French proposal to exclude this provision from the list of Articles to which no reservations can be made (Article 42 of the 1951 Convention).<sup>10</sup> The fundamental importance of this provision was also recognized by the High Commissioner when he stressed, in his opening statement to the Conference of Plenipotentiaries, that establishing, in Article 35, a link between the Convention and UNHCR ‘would be of particular value in facilitating the uniform application of the Convention’.<sup>11</sup>

The primary purpose of Article 35(1) of the 1951 Convention and Article II(1) of the 1967 Protocol is thus to link the duty of States Parties to apply the Convention and the Protocol with UNHCR’s task of supervising their application by imposing a treaty obligation on States Parties (i) to respect UNHCR’s supervisory power and not to hinder UNHCR in carrying out this task, and (ii) to cooperate actively with UNHCR in this regard in order to achieve an optimal implementation and harmonized application of all provisions of the Convention and its Protocol. These duties have a highly dynamic and evolutive character. By establishing a duty of States Parties to cooperate with UNHCR ‘in the exercise of its functions’, Article 35(1) of the 1951 Convention does not refer to a specific and limited set of functions but to all tasks that UNHCR has under its mandate or might be entrusted with at a given time.<sup>12</sup> Thus, the cooperation duties follow the changing role of UNHCR.

## 2. *Reporting duties*

Article 35(2) of the 1951 Convention provides:

In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the

7 A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (UNHCR, Geneva, 1997), p. 254.

8 See draft Art. 30 of the Working Group, reprinted in *The Refugee Convention 1951, The Travaux Préparatoires Analysés, with a Commentary by the Late Dr Paul Weis* (Cambridge International Documents Series, Vol. 7, Cambridge University Press, 1995), p. 355. For the discussions at the Conference of Plenipotentiaries, see in particular UN doc. A/CONF.2/SR.25, pp. 10–22.

9 Weis, above n. 8, p. 356, referring to UN doc. E/AC.32/L.40, pp. 59–60.

10 Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.27, pp. 10–16.

11 Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.2, p. 17, Statement by Mr G. van Heuven-Goedhardt.

12 V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR)* (Duncker and Humblot, Berlin, 1992), p. 162.

competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) the condition of refugees,
- (b) the implementation of this Convention, and
- (c) laws, regulations and decrees which are, or may hereinafter be, in force relating to refugees.

Article II(2) of the 1967 Protocol contains an analogous duty for the States Parties to the 1967 Protocol. Both provisions impose reporting obligations on States Parties to facilitate UNHCR's duty to 'report annually to the General Assembly through the Economic and Social Council' as provided for by UNHCR's Statute.<sup>13</sup> This in another area where a link between the Convention and UNHCR's Statute is established.

### 3. *States not party to the 1951 Convention or 1967 Protocol*

Article 35 of the 1951 Convention and Article II of the 1967 Protocol do not, of course, bind States that have not yet become parties to these two instruments. Nevertheless, these States might still have a duty to cooperate with UNHCR. Such a duty has been recognized in Article VIII of the 1969 OAU Refugee Convention<sup>14</sup> and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees.<sup>15</sup> Like the 1951 Convention and the 1967 Protocol, these instruments reflect the wide supervisory powers granted to UNHCR in paragraph 8 of its Statute to provide for protection of all refugees falling under its competence and, in doing so, to supervise the application of international refugee law. The statutory power of UNHCR to supervise thus exists in relation to all States with refugees of concern to the High Commissioner regardless of whether or not the State concerned is a party to any of these instruments. The corollary duty of States to cooperate is reflected in General Assembly Resolution 428(V) on the Statute of UNHCR which called upon governments 'to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions'.<sup>16</sup> Arguably, this duty is not only a moral one,<sup>17</sup> but has a legal basis in Article 56 of the 1945 United Nations Charter on the obligation of

13 UNHCR Statute, above n. 1, para. 11.

14 Organization of African Unity, 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1000 UNTS 46 (hereinafter the 'OAU Refugee Convention').

15 Declaration on Refugees, adopted at a Colloquium entitled 'Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios', held at Cartagena, Colombia, 19–22 Nov. 1984.

16 UNGA Res. 428(V), 14 Dec. 1950.

17 M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff, The Hague, 1997), p. 450.

member States to cooperate with the UN,<sup>18</sup> a duty that extends to UNHCR in its capacity as one of the subsidiary organs of the General Assembly.

## B. Current practice

In current practice, Article 35 of the 1951 Convention and Article II of the 1967 Protocol have three main functions: (i) they provide the legal basis for the obligation of States to accept UNHCR's role of providing international protection to asylum seekers and refugees; (ii) they provide the legal basis for the obligation of States to respond to information requests by UNHCR; and (iii) they support the authoritative character of certain UNHCR statements (for example, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*,<sup>19</sup> policy guidelines, court submissions, and so forth).<sup>20</sup>

### 1. UNHCR's protection role

International protection denotes 'the intercession of an international entity either at the behest of a victim or victims concerned, or by a person on their behalf, or on the volition of the international protecting agency itself to halt a violation of human rights' or 'to keep safe, defend, [or] guard' a person or a thing from or against a danger or injury.<sup>21</sup> International protection on behalf of refugees is UNHCR's core function.<sup>22</sup> It has evolved from a surrogate for consular and diplomatic protection of refugees who can no longer enjoy such protection by their country of origin into a broader concept that includes protection not only of rights provided for by the 1951 Convention and the 1967 Protocol but also of refugees' human rights in

18 See Grahl-Madsen, above n. 7, p. 252, pointing out that 'it seems that the provision contained in Article 35 actually gives effect to the obligation which Member States have entered into by virtue of Article 56 of the Charter'.

19 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992) (hereinafter the 'UNHCR Handbook').

20 In addition, these Articles give a certain foundation to bilateral cooperation agreements. See Agreement Between the Government of the People's Republic of China and the Office of the United Nations High Commissioner for Refugees on the Upgrading of the UNHCR Mission in the People's Republic of China to UNHCR Branch Office in the People's Republic of China of 1 Dec. 1995 (available on *Refworld*, CD-ROM, UNHCR, 8th edn, 1999), and the Agreement Between the Government of the Republic of Ghana and the United Nations High Commissioner for Refugees of 16 Nov. 1994 (available on *Refworld*), explicitly stating in Art. III that cooperation 'in the field of international protection of and humanitarian assistance to refugees and other persons of concern to UNHCR shall be carried out on the basis', among others, of Art. 35 of the 1951 Convention.

21 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (Martinus Nijhoff, Dordrecht, 1989), pp. 17 and 20–1.

22 UNHCR Statute, above n. 1, para. 8. See n. 27 below for text of para. 8.

general.<sup>23</sup> It can be defined as the totality of its activities aimed at ‘ensuring the basic rights of refugees, and increasingly their physical safety and security’,<sup>24</sup> beginning ‘with securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*, without which the safety and even survival of the refugee is in jeopardy’ and ending ‘only with the attainment of a durable solution, ideally through the restoration of protection by the refugee’s own country’.<sup>25</sup> As has been recognized by the UN General Assembly, such international protection is a dynamic and action-oriented function.<sup>26</sup>

UNHCR’s protection activities are listed in some detail in paragraph 8 of its Statute.<sup>27</sup> For the topic of this study, paragraph (a) regarding UNHCR’s task

23 V. Türk, ‘UNHCR’s Supervisory Responsibility’, 14(1) *Revue Québécoise de Droit International*, 2001, p. 135 at p. 138.

24 UNHCR, ‘Note on International Protection’, UN doc. A/AC.96/930, 7 July 2000, para. 2. See also, UNHCR, ‘Note on International Protection’, UN doc. A/AC.96/830, 7 Sept. 1994, para. 12. On the protection of refugees by UNHCR in general, see, Türk, above n. 12, pp. 139–69; G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), pp. 207–20; F. Schnyder, ‘Les aspects juridiques actuels du problème des réfugiés’, *Academy of International Law, Recueil des Cours*, 1965-I, pp. 346–7 and 406–23. See also J. Sztucki, ‘The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme’, 1 *International Journal of Refugee Law*, 1989, pp. 291–4.

25 Note on Protection 1994, above n. 24, para. 12. See also, Note on Protection 2000, above n. 24, para. 9.

26 UNGA Res. A/RES/55/74, 12 Feb. 2001, para. 8. See also, Executive Committee, Conclusion No. 89 (LI), 2000, Conclusion on International Protection, para. 2.

27 This provision reads:

8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
- (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
- (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
- (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
- (g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
- (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
- (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

This list of activities is non-exhaustive, as is evidenced by the many UN General Assembly resolutions that have enlarged UNHCR’s protection mandate (Türk, above n. 12, p. 148).



of '[p]romoting the conclusion and ratification of international conventions for the protection of refugees [and] supervising their application' is of particular relevance.<sup>28</sup> UNHCR has noted that:

2. . . . In carrying out this mandate at a national level, UNHCR seeks to ensure a better understanding and a more uniform interpretation of recognized international principles governing the treatment of refugees. The development of appropriate registration, reception, determination and integration structures and procedures is therefore not only in the national interest of the countries concerned, but also in the interest of the international community, as it helps stabilize population movements and provide a meaningful life for those who are deprived of effective protection. In creating this mandate for UNHCR, the international community recognized that a multilateral response to the refugee problem would ensure a coordinated approach in a spirit of international cooperation.

3. The mandate for international protection gives UNHCR its distinctive character within the United Nations system. International protection involves also promoting, safeguarding and developing principles of refugee protection and strengthening international commitments, namely to treat refugees in accordance with international rules and standards . . .<sup>29</sup>

International protection is ultimately oriented towards finding durable solutions for the protected individuals

be it in the form of voluntary repatriation, local integration or resettlement. In addition, preventive action is necessary to address the economic, social and political aspects of the refugee problem. The protection mandate is therefore intrinsically linked with the active search for durable solutions. This is necessarily embedded in an international legal framework which ensures predictability and foreseeability as well as a concerted approach within a framework of increased state responsibility, international cooperation, international solidarity and burden-sharing.<sup>30</sup>

In its 2000 Note on Protection, UNHCR mentioned the following activities as particularly important components of its protection work: (i) receiving asylum seekers and refugees; (ii) intervening with authorities; (iii) ensuring physical safety; (iv) protecting women, children, and the elderly; (v) promoting national legislation and asylum procedures; (vi) participating in national refugee status determination procedures; (vii) undertaking determination of refugee status; and (viii) providing

28 On the application *ratione personae* and *ratione materiae* of Art. 8 of the UNHCR Statute, see Türk, above n. 23, pp. 141–5.

29 Executive Committee of the High Commissioner's Programme, Standing Committee, 'Overview of Regional Developments (Oct.–Dec. 1995)', UN doc. EC/46/SC/CRP.11, 4 Jan. 1996, paras. 2 and 3.

30 *Ibid.*, para. 3.

advice and developing jurisprudence.<sup>31</sup> The Executive Committee, in many of its Conclusions, has reaffirmed UNHCR's mandate in these areas of activities, in particular its role:

- to contribute to the development and observance of basic standards for the treatment of refugees, 'by maintaining a constant dialogue with Governments, non-governmental organizations (NGOs) and academic institutions and of filling lacunae in international refugee law',<sup>32</sup> and to provide advice on the application of the relevant instruments of refugee law;<sup>33</sup>
- to monitor refugee status determination and treatment of refugees by 'survey[ing] individual cases with a view to identifying major protection problems'<sup>34</sup> and by participating 'in various forms . . . in procedures for determining refugee status in a large number of countries',<sup>35</sup> either through informal intervention in individual cases or by playing a formal role, as defined by relevant domestic obligations, in decision-making procedures;
- to have prompt and unhindered access to asylum seekers, refugees, and returnees,<sup>36</sup> including those in reception centres, camps, and refugee settlements,<sup>37</sup> asylum applicants and refugees, including those in detention, being at the same time entitled to contact UNHCR and being duly informed of this right;<sup>38</sup> and
- to 'monitor the personal security of refugees and asylum-seekers and to take appropriate action to prevent or redress violations thereof'.<sup>39</sup>

In practice, the obligation to respect and accept UNHCR's international protection activities as provided by Article 35(1) is well established and well rooted in State

31 Note on Protection 2000, above n. 24, paras. 10–29.

32 Executive Committee, Conclusion No. 29 (XXXIV), 1983, paras. b and j, mentioning the areas of asylum seekers whose status has not been determined or the physical protection of refugees and asylum seekers.

33 E.g. in situations of mass influx (Executive Committee, Conclusion No. 19 (XXXI), 1980, para. d) or on the exclusion clauses (Executive Committee, Conclusion No. 69 (XLIII), 1992, second preambular para.).

34 Executive Committee, Conclusion No. 1 (XXVI), 1975, para. g.

35 Executive Committee, Conclusion No. 28 (XXXIII), 1982, para. e.

36 Executive Committee, Conclusions Nos. 22 (XXXII), 1981, para. III; 33 (XXXV), 1984, para. h; 72 (XLIV), 1993, para. b; 73 (XLV), 1994, para. b(iii); 77 (XLVI), 1995, para. q; 79 (XLVII), 1996, para. p.

37 Executive Committee, Conclusions Nos. 22 (XXXII), 1981, para. III; 48 (XXXVIII), 1987, para. 4(d).

38 Executive Committee, Conclusions Nos. 8 (XXVIII), 1977, para. e(iv); 22 (XXXII), 1981, para. III; 44 (XXXVII), 1986, para. g.

39 Executive Committee, Conclusion No. 72 (XLIV), 1993, para. e. See also, Executive Committee, Conclusion No. 29 (XXXIV), 1983, para. b.

practice. Although paragraph 8 of the Statute does not refer to the international protection of refugees as individuals when listing the elements of international protection, it was immediately established by State practice that UNHCR could also take up individual cases.<sup>40</sup> Unlike, for example, in the field of human rights where interventions by an international body on behalf of individual victims or visits to the territory of States often raise problems, States do not object if UNHCR intervenes in individual cases<sup>41</sup> or in general issues relevant to refugees, and do not regard such activities as an intervention in their internal affairs.<sup>42</sup> This general acceptance of UNHCR's protection role is rooted in, among others, the fact that, due to its Statute and Article 35 of the 1951 Convention, 'UNHCR does not have to be invited to become involved in protection matters', something that makes 'UNHCR's mandate distinct, even unique, within the international system'.<sup>43</sup>

While not exhaustively enumerated here, current practice which has broadly met with the acquiescence of States<sup>44</sup> can be described as follows:<sup>45</sup>

- UNHCR is entitled to monitor, report on, and follow up its interventions with governments regarding the situation of refugees (for example, admission, reception, and treatment of asylum seekers and refugees). Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR's supervisory function.
- UNHCR is entitled to cooperate with States in designing operational responses to specific problems and situations that are sensitive to and meet protection needs, including those of the most vulnerable asylum seekers and refugees.
- In general, UNHCR is granted, at a minimum, an advisory and/or consultative role in national asylum or refugee status determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedures, and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate. UNHCR

40 S. Aga Khan, 'Legal Problems Relating to Refugees and Displaced Persons', *Academy of International Law, Recueil des Cours*, 1976-I, p. 332; Grahl-Madsen, above n. 7, p. 254.

41 Goodwin-Gill, above n. 24, p. 213.

42 See Executive Committee of the High Commissioner's Programme, Standing Committee, 'Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It', 8th meeting, UN doc. EC/47/SC/CRP.27, 30 May 1997, para. 7. See also, Türk, above n. 12, p. 158.

43 Note on International Protection 2000, above n. 24, para. 71.

44 See also, UNHCR Global Consultations on International Protection, Cambridge Expert Roundtable, 'Summary Conclusions – Supervisory Responsibility', 9–10 July 2001, paras. 4 and 5.

45 See Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 7; and Note on Protection 2000, above n. 24, paras. 10–29. See also Türk, above n. 23, pp. 149–54 with detailed references to State practice.

is entitled to intervene and submit its observations on any case at any stage of the procedure.

- UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements, or letters.
- UNHCR is granted access to asylum applicants and refugees and vice versa, either by law or administrative practice.
- To ensure conformity with international refugee law and standards, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees during all stages of the process. UNHCR is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
- UNHCR also plays an important role in strengthening the capacity of relevant authorities, judges, lawyers, and NGOs, for instance, through promotional and training activities.
- UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular of its supervisory responsibility.
- UNHCR is entitled to receive data and information concerning asylum seekers and refugees.

## 2. *Information requests by UNHCR*

Based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol, particularly their subparagraphs 2, UNHCR requests information from States Parties on a regular basis, particularly within the context of its daily protection activities, and States are obliged to provide such information. Such information represents an important source for UNHCR's annual protection reports on the state of refugee protection in individual States (which remain confidential) as well as for certain of its public statements. The gathering of such information on legislation, court decisions, statistical details, and country situations facilitates the work of UNHCR staff. Until recently, it was made available to States and their authorities, to refugees and their legal representatives, and to NGOs, researchers, and the media through the Centre for Documentation and Research (CDR) and its databases. This gathering and dissemination of information is of paramount importance for the protection of asylum seekers and refugees.<sup>46</sup> It helps, for example, to identify State practice in the application of the 1951 Convention and 1967 Protocol and to distribute knowledge about best practices in dealing with refugee situations. Therefore, UNHCR

<sup>46</sup> See also Grahl-Madsen, above n. 7, pp. 254 and 255, stressing the importance of Art. 35(2) of the 1951 Convention for the supervision of the application of the Convention.

has a certain duty to make sure that relevant information is made available in an appropriate way.

Information gathering on the basis of Article 35(2) of the 1951 Convention and Article II(2) of the 1967 Protocol has never been regularized, for example in the form of an obligation to submit State reports at regular intervals. From time to time, however, UNHCR has sent questionnaires to States Parties.<sup>47</sup> In recent years, this has been rare and not very successful. After a discussion on issues relating to the implementation of the 1951 Convention and the 1967 Protocol during the 1989 session of the Executive Committee,<sup>48</sup> UNHCR sent out a comprehensive and detailed questionnaire on 9 May 1990. The response was disappointing: by July 1992, only twenty-three States had responded;<sup>49</sup> a call by the Executive Committee to submit outstanding answers yielded only five additional answers.<sup>50</sup>

### 3. *The authoritative character of the UNHCR Handbook and UNHCR guidelines and statements*

In recent years, some courts have invoked Article 35 of the 1951 Convention when deciding the relevance of the UNHCR *Handbook* or UNHCR statements regarding questions of law or of Conclusions by the Executive Committee of the High Commissioner's Programme. While UK courts, for a long time, insisted on the non-binding nature of such documents and their corresponding irrelevance for judicial proceedings,<sup>51</sup> their attitude has been changing recently. In the case of

47 Weis, above n. 8, pp. 362–3.

48 See Executive Committee, Conclusion No. 57 (XL), 1989, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. d, requesting 'the High Commissioner to prepare a more detailed report on implementation of the 1951 Convention and the 1967 Protocol for consideration by this Sub-Committee in connection with activities to celebrate the fortieth anniversary of the Convention and called on States Parties to facilitate this task, including through the timely provision to the High Commissioner, when requested, of detailed information on implementation of the Convention and/or Protocol in their respective countries'. See also, the background document, Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SPC/54, 7 July 1989.

49 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SCP/66, 22 July 1991, para. 3.

50 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions', UN doc. EC/1992/SPC/CRP.10, 15 June 1992, para. 6.

51 See, e.g., Lord Bridge of Harwich in *R. v. Secretary of State for the Home Department, ex parte Bugdaycay*, House of Lords, [1987] AC 514, [1987] 1 All ER 940, 19 Feb. 1987, on the *Handbook* and Executive Committee Conclusions: '[I]t is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law.' See also, Staughton LJ in *Alsawaf v. Secretary of State for the Home Department*, Court of Appeal (Civil Division), [1988] Imm AR 410, 26 April 1988 (quoting Art. 35

*Khalif Mohamed Abdi*, the English Court of Appeal held that by reason of Article 35 of the 1951 Convention UNHCR should be regarded as ‘a source of assistance and information’.<sup>52</sup> In *Adimi*, Simon Brown LJ of the English High Court, when quoting the UNHCR Guidelines on the Detention of Asylum Seekers, went even further, stating: ‘Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight.’<sup>53</sup> The House of Lords has sought guidance from the *Handbook*<sup>54</sup> and Executive Committee Conclusions<sup>55</sup> on several occasions, without however referring to Article 35 of the 1951 Convention. In *T. v. Secretary of State for the Home Department*, Lord Mustill recognized that ‘the UNHCR *Handbook* . . . although without binding force in domestic or international law . . . is a useful recourse on doubtful questions’, and Lord Lloyd of Berwick, in the same judgment, called the *Handbook* an ‘important source of law (though it does not have the force of law itself)’.<sup>56</sup> Similarly, the US Supreme Court, in *Cardoza Fonseca*, stressed that the *Handbook* had no force of law, but ‘provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.’<sup>57</sup> In the Netherlands, the District Court of The Hague acknowledged the relevance of a UNHCR position paper on the basis of UNHCR’s supervisory role according to Article 35(1) of the 1951 Convention.<sup>58</sup> The New Zealand Refugee

of the 1951 Convention and referring to Lord Bridge in *Musisi*), and *Thavathevathasan v. Secretary of State for the Home Department*, Court of Appeal (Civil Division), [1994] Imm AR 249, 22 Dec. 1993. In *R. v. Secretary of State for the Home Department, ex parte Mehari et al.*, High Court (Queen’s Bench Division), [1994] QB 474, [1994] 2 All ER 494, 8 Oct. 1993, Laws J stressed the fact that the *Handbook*, Executive Committee Conclusions and UNHCR statements had no particular relevance for the decision of individual cases because Art. 35 had not been incorporated into domestic law.

- 52 *Secretary of State for the Home Department v. Khalif Mohamed Abdi*, English Court of Appeal (Civil Division), [1994] Imm AR 402, 20 April 1994, Gibson LJ.
- 53 *R. v. Uxbridge Magistrates’ Court and Another, ex parte Adimi*, English High Court (Divisional Court), Brown LJ, 29 July 1999, [1999] Imm AR 560, [1999] 4 All ER 520.
- 54 See, e.g., Lord Lloyd of Berwick in *Horvath v. Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577, [2000] 3 WLR 379, 6 July 2000, invoking the *Handbook* to buttress his argument, but also counselling that ‘there is a danger in regarding the UNHCR *Handbook* as if it had the same force as the Convention itself’.
- 55 See, e.g., Lord Hoffmann in *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah*, and *Islam v. Secretary of State for the Home Department*, conjoined appeals, UK House of Lords, [1999] 2 WLR 1015; [1999] 2 AC 629, quoting with approval Executive Committee, Conclusion No. 39, 1985, on ‘Refugees, Women and International Protection’.
- 56 *T. v. Secretary of State for the Home Department*, UK House of Lords, 22 May 1996, [1996] 2 All ER 865, [1996] 2 WLR 766.
- 57 *Immigration and Naturalization Service v. Cardoza-Fonseca*, US Supreme Court, 480 US 421; 107 S.Ct. 1207; 1987 US Lexis 1059; 94 L. Ed. 2d 434; 55 USLW 4313, 9 March 1987 (although Powell J, Rehnquist CJ, and White J dissented from this holding). Reaffirmed in *Immigration and Naturalization Service v. Juan Anibal Aguirre-Aguirre*, US Supreme Court, 526 US 415; 119 S.Ct. 1439; 3 May, 1999, where the Court, at the same time, recalled the *Handbook*’s non-binding character.
- 58 *Osman Egal v. State Secretary for Justice*, The Hague District Court (Administrative Law Sector/Unity of Law Division for Aliens’ Affairs), 27 Aug. 1998, AWB 98/3068 VRWET (available in partial translation on *Refworld*).

Status Appeals Authority after invoking Article 35(1) of the 1951 Convention held that the ‘Conclusions of the Executive Committee of the UNHCR Programme . . . while not binding upon the Authority, are nonetheless of considerable persuasive authority’.<sup>59</sup>

This case law is significant as it acknowledges that, as part of States Parties’ duty to cooperate with UNHCR and to accept its supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, they have to take into account Executive Committee Conclusions, the UNHCR *Handbook*, UNHCR guidelines, and other UNHCR positions on matters of law (for example, *amicus curiae* and similar submissions to courts or assessments of legislative projects requested or routinely accepted by governments), when applying the 1951 Convention and its Protocol. ‘Taking into account’ does not mean that these documents are legally binding.<sup>60</sup> Rather, it means they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard requires justification.

### C. The hybrid character of supervision by UNHCR

The notion of supervision of international instruments covers all activities and mechanisms that are aimed at ensuring compliance with the obligations binding upon State Parties.<sup>61</sup> It comprises the three elements of (i) information gathering, (ii) analysis and assessment of this information, and (iii) enforcement.<sup>62</sup> Activities of UNHCR based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol cover all three elements.<sup>63</sup> In particular, UNHCR’s interventions on behalf of individual asylum seekers and refugees and its dialogue with governments on particular laws or policies serve to enforce the Convention and the Protocol. In this sense, UNHCR is an agency vested with some power to supervise States in their application of relevant provisions of international refugee law. This arrangement reflects the development of international law before and after the Second World War when supervision of rule compliance was no longer left to the highly decentralized, ‘horizontal’ system of enforcement measures by individual States alone, but was complemented by the creation of international organizations having some limited supervisory power.<sup>64</sup> At the same time, it would be inadequate to regard UNHCR’s

59 *Re S.A.*, Refugee Appeal No. 1/92, New Zealand, Refugee Status Appeals Authority, 30 April 1992, available on <http://www.refugee.org.nz/rsaa/text/docs/1-92.htm>.

60 See Sztucki, above n. 24, pp. 309–11, listing several reasons for what he calls ‘the relative low status of the Conclusions’.

61 N. M. Blokker and S. Muller, ‘Some Concluding Observations’, in *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* (eds. N. M. Blokker and S. Muller, Martinus Nijhoff, Dordrecht/Boston/London, 1994), vol. I, p. 275.

62 See Türk, above n. 23, p. 146.      63 *Ibid.*, pp. 147–9.

64 On this development, see Blokker and Muller, above n. 61, pp. 275–80.

activities as supervision only. UNHCR is an operational organization that is not only providing assistance but also carrying out protection work on the ground on a daily basis. In this role, UNHCR is an advisor to and an (often critical) partner of governments, as well as a supporter or advocate of refugees. This creates horizontal relationships which are clearly distinct from the vertical relationship between supervisor and subordinate. As has been stressed by Türk, it is necessary to distinguish clearly between two distinctive features of UNHCR's international protection function: '(i) its "operationality"; and (ii) its supervisory function'.<sup>65</sup> The two functions often complement each other, but they may also come into conflict, for instance, if a strong critique of non-compliance would endanger operations on the ground.

### III. More effective implementation through third party monitoring mechanisms

#### A. The need to move forward

##### 1. *The struggle for improved implementation*

UNHCR's supervisory role and its positive impact on the protection of asylum seekers and refugees is unique, especially when compared to the monitoring mechanisms provided for by other human rights treaties. Unlike the 1951 Convention and 1967 Protocol, these treaties do not have an operational agency with a presence of 'protection officers' in a large number of countries working to ensure that these instruments are implemented.

However, human rights mechanisms have started to play a significant role in protecting the rights of refugees and asylum seekers. Thus, for example, Article 3 of the 1984 Convention Against Torture<sup>66</sup> states: 'No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' It thus protects among others rejected asylum seekers from forcible return to their country of origin in cases of imminent torture.<sup>67</sup> Similarly, the Human Rights Committee came to the conclusion that Article 7 of the International Covenant on

65 Türk, above n. 23, p. 138.

66 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN doc. A/RES/39/46, 10 Dec. 1984.

67 See, e.g., *Balabou Mutombo v. Switzerland*, views of the Committee Against Torture under Art. 22, concerning Communication No. 13/1993, adopted on 27 April 1994 (Annual Report 1994, UN doc. A/49/44), para. 9.3, p. 45; also in 15 *Human Rights Law Journal*, 1994, p. 164, and 7 *International Journal of Refugee Law*, 1995, p. 322.



Civil and Political Rights<sup>68</sup> forbids States Parties from exposing ‘individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*’.<sup>69</sup> The Human Rights Committee also decided that forcible return is prohibited if the individual concerned risks a violation of the right to life in the country to which he or she is to be returned<sup>70</sup> and applied this reasoning in the case of a rejected asylum seeker.<sup>71</sup> On the regional level, the prohibition of return to situations of torture and inhuman treatment has led to a particularly rich case law in Europe since the European Court of Human Rights<sup>72</sup> in 1989 derived such a prohibition from Article 3 of the European Human Rights Convention.<sup>73</sup> The Human Rights Committee and the European Court of Human Rights have also addressed other aspects of refugee protection, namely, issues relating to the detention of asylum seekers.<sup>74</sup>

Despite the uniqueness of UNHCR’s supervisory role and the positive impact of recent developments in the area of human rights law on the protection of refugees, weaknesses of the present system persist. They have been a matter of debate on several occasions.

In 1986, the Executive Committee called upon States to adopt ‘appropriate legislative and/or administrative measures for the effective implementation of the international refugee instruments’<sup>75</sup> and to accept the utmost importance of the ‘effective application of the principles and provisions of the 1951 Convention and the 1967 Protocol’.<sup>76</sup> In 1989, the Executive Committee recalled ‘the utmost

68 International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, 999 UNTS 171.

69 Human Rights Committee, General Comment No. 20/44 of 3 April 1992 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.5, 26 April 2001, para. 9, p. 140. See also, *Charles Chitat Ng v. Canada*, views of the Human Rights Committee, in respect of Communication No. 469/1991, adopted on 5 Nov. 1993, Annual Report 1994, vol. II, UN doc. A/49/40, para. 14.2, p. 189, also in 15 *Human Rights Law Journal*, 1994, p. 149.

70 *Joseph Kindler v. Canada*, views of the Human Rights Committee under Art. 5, para. 4, of the Optional Protocol, in respect of Communication No. 470/1991, adopted on 30 July 1993, Annual Report 1993, vol. II, UN doc. A/48/40, para. 13.1, p. 138, also in 14 *Human Rights Law Journal*, 1993, p. 307.

71 *Mrs G.T. on Behalf of Her Husband T. v. Australia*, views of the Human Rights Committee in respect of Communication No. 706/1996, adopted on 4 Nov. 1997, Annual Report, vol. II, UN doc. A/53/40, para. 8.2, p. 191; and *A.R.J. v. Australia*, views of the Human Rights Committee in respect of Communication No. 692/1996, adopted on 28 July 1997, Annual Report 1997, vol. II, UN doc. A/52/40, para. 6.9, p. 205.

72 *Soering v. United Kingdom*, 1989, European Court of Human Rights, Series A, No. 161.

73 Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 Nov. 1950, ETS 5, prohibits torture and inhuman and degrading treatment or punishment.

74 See, e.g., *A. v. Australia*, views of the Human Rights Committee, in respect of Communication No. 560/1993, adopted on 3 April 1997, Annual Report 1997, vol. II, UN doc. A/52/40, p. 225; *Amuur v. France*, 1996, European Court of Human Rights, *Reports* 1996-III, p. 826.

75 Executive Committee, Conclusion No. 42 (XXXVII), 1986, para. j.

76 Executive Committee, Conclusion No. 43 (XXXVII), 1986, para. 3.

importance of effective application of the Convention and Protocol’, underlined ‘again the need for the full and effective implementation of these instruments by Contracting States’, and linked these calls to Article 35 of the 1951 Convention; in particular, it

- (a) *Stressed* the need for a positive and humanitarian approach to continue to be taken by States to implementation of the provisions of the Convention and Protocol in a manner fully compatible with the object and purposes of these instruments;
- (b) *Reiterated* its request to States to consider adopting appropriate legislative and/or administrative measures for the effective implementation of these international refugee instruments;
- (c) *Invited* States also to consider taking whatever steps are necessary to identify and remove possible legal or administrative obstacles to full implementation.<sup>77</sup>

The background for these calls was the acknowledgment that the implementation of the 1951 Convention and 1967 Protocol was facing considerable difficulties. UNHCR identified three categories of obstacles: socio-economic; legal and policy; and practical.<sup>78</sup> First, regarding socio-economic obstacles, UNHCR stressed that:

there are inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering their own severe economic difficulties, high unemployment, declining living standards, shortages in housing and land and/or continuing man-made and natural disasters.<sup>79</sup>

Secondly, as legal obstacles to proper implementation of the Convention and the Protocol UNHCR mentioned:

the clash of, or inconsistencies between, existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementation legislation; or implementing legislation which defines not the rights of the individuals but rather the powers vested in refugee officials. As to the latter, this means that protection of refugee rights becomes an exercise of powers and discretion by officials, rather than enforcement of specific rights identified and guaranteed by law.

<sup>77</sup> Executive Committee, Conclusion No. 57 (XL), 1989.

<sup>78</sup> Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on International Protection, ‘Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, UN doc. EC/SPC/54, 7 July 1989, paras. 8–22.

<sup>79</sup> Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on International Protection, ‘Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions’, UN doc. EC/1992/SCP/CRP.10, 15 June 1992, para. 9.

Where the judiciary has an important role in protecting refugee rights, restrictive interpretations can also be an impediment to full implementation. Finally, the maintenance of the geographic limitation by some countries is a serious obstacle to effective implementation.<sup>80</sup>

Thirdly, on a practical level, UNHCR saw:

bureaucratic obstacles, including unwieldy, inefficient or inappropriate structures for dealing with refugees, a dearth of manpower generally or of adequately trained officials, and the non-availability of expert assistance for asylum-seekers. Finally, there are certain problems of perception at the governmental level, including that the grant of asylum is a political statement and can be an irritant in inter-state relations.<sup>81</sup>

Many of these obstacles to full implementation persist and continue to create problems at all levels, domestic, regional, and universal. In 2000, the Executive Committee showed itself:

*deeply disturbed* by violations of internationally recognized rights of refugees which include *refoulement* of refugees, militarization of refugee camps, participation of refugee children in military activities, gender-related violence and discrimination directed against refugees, particularly female refugees, and arbitrary detention of asylum-seekers and refugees; also *concerned* about the less than full application of international refugee instruments by some States Parties.<sup>82</sup>

During informal consultations on Article 35 of the 1951 Convention, conducted under the auspices of UNHCR in 1997, it was recognized that better implementation remains a challenge. Four issues were put forward for further consideration: (i) the problem of '[d]iffering interpretation regarding the content and application of provisions of the international refugee instruments, standards and principles'; (ii) the question whether and how 'State reporting as a whole' should be improved; (iii) the challenge 'of institutionalizing a constructive dialogue at regular intervals with States Parties on the application of the international refugee instruments'; and (iv) the problem of '[m]easures of enforcement'.<sup>83</sup>

## 2. *Reasons for strengthening the monitoring of the 1951 Convention and 1967 Protocol*

Taking into account that the degree of implementation of the 1951 Convention and 1967 Protocol remains unsatisfactory, strengthening the supervision of the

80 *Ibid.*, para. 9.      81 *Ibid.* para. 10.

82 Executive Committee, Conclusion No. 89 on International Protection, above n. 26.

83 Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 8.

application of these instruments is in the interest of all actors in the field of refugee protection:<sup>84</sup>

1. Non-implementation violates the legitimate interests of *refugees* as well as their rights and guarantees provided for by international law.
2. Prolonged toleration of non-implementation by one State violates the rights of the other *States Parties* to the Convention and other relevant instruments for the protection of refugees. Obligations to implement the provisions of these instruments are obligations *erga omnes partes*, that is, obligations towards the other States Parties as a whole.<sup>85</sup> This is clearly evidenced by Article 38 of the 1951 Convention and Article IV of the 1967 Protocol, entitling every State Party to the Convention or the Protocol to refer a dispute with another State ‘relating to its interpretation or application’ to the International Court of Justice even if it has not suffered material damage.<sup>86</sup> The 1969 OAU Refugee Convention contains a parallel provision.<sup>87</sup> Non-implementation is detrimental to the material interests of those States Parties that scrupulously observe their obligations. Disregard for international refugee law might create secondary movements of refugees and asylum seekers who have to look for a country where their rights are respected. It forces States that would be ready to treat refugees fully in accordance with international obligations to adopt a more restrictive policy in order to avoid a greater influx of refugees attracted by the higher degree of protection available on their territory.<sup>88</sup> At a regional level, divergent interpretations of the refugee definition or non-compliance may complicate cooperation in the determination of the country responsible for examining an asylum request.
3. Non-implementation is a serious obstacle for *UNHCR* in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations.

84 On the reasons for improved monitoring of the 1951 Convention and 1967 Protocol, see also L. MacMillan and L. Olson, ‘Rights and Accountability’, 10 *Forced Migration Review*, April 2001, pp. 38 and 41.

85 On this concept, see, e.g., C. L. Rozakis, ‘The European Convention on Human Rights as an International Treaty’, in *Mélanges en l’honneur de Nicolas Valticos – Droit et Justice* (ed. Dupuy, Pedone, Paris, 1999), pp. 502–3; M. T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (University of Pennsylvania Press, Philadelphia, PA, 1992), pp. 154–76.

86 See below, text at nn. 100–1.

87 Art. IX of the OAU Refugee Convention, above n. 14, provides that any one of the parties to a dispute ‘relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity’.

88 See, e.g., Standing Committee, ‘Progress Report on Informal Consultations’, above n. 42, para. 9.

4. Prolonged toleration of non-implementation seriously undermines the system of international protection as it was established fifty years ago and threatens a regime that has often been able adequately and flexibly to address and solve instances of flight for Convention reasons. Non-implementation is thus detrimental to the proper management of current and future refugee crises at the global level and thus hurts the interests of States Parties to the 1951 Convention and 1967 Protocol and even of the *international community* as a whole.
5. On a more practical level, States might consider a strengthening of supervisory mechanisms at the universal level in order to counterbalance emerging regional mechanisms which might respond to regional problems and expectations rather than upholding the universality of these instruments. In this context, recent developments in Europe are of particular importance as the European Court of Justice, in the near future, will be able to decide on the proper application of European Union law on refugee and asylum matters.<sup>89</sup> To create the possibility for regional organizations to become parties to the 1951 Convention and 1967 Protocol<sup>90</sup> would be another measure to safeguard the uniform application and full implementation of these instruments.

### 3. *The need for third party monitoring*

For all the reasons outlined above, the urgency and timeliness of taking a fresh look at the issue of supervision is evident. While UNHCR's supervisory function is of paramount importance for the protection of refugees, the persistence of

89 With the Treaty on European Union (Treaty of Amsterdam) of 10 Nov. 1997, visa, asylum, immigration, and other policies related to the free movement of persons were shifted from the 'third pillar' to the 'first pillar' of the European Union, that is, they moved from being an intergovernmental matter to become part of the law of the European Community. Art. 63 of the consolidated version of the Treaty Establishing the European Community stipulates among others that:

[t]he Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: . . . (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status . . .

When implemented into the secondary legislation of the European Community, the European Court of Justice as the supervisor of Community law will, at least indirectly, have the competence on the European level to decide on the application of the 1951 Convention without, however, being bound by this instrument.

90 Ratification of and accession to these instruments is open only to States (Art. 39 of the 1951 Convention and Art. V of the 1967 Protocol).

implementation problems described above makes it necessary to go beyond the traditional discourse on Article 35 of the 1951 Convention and to learn from the different supervisory and monitoring mechanisms in present international law. These mechanisms have in common that they rely, although to a varying degree, on supervision by a third party not directly involved in a dispute regarding implementation of treaty obligations in a particular case.

As a result of the hybrid character of its supervisory function described above,<sup>91</sup> UNHCR's independence must necessarily be limited. UNHCR's 'operationality', namely, its daily protection work on the ground as a partner both of governments and of refugees, often facilitates the carrying out of its supervisory role. At the same time, a tension between the two functions will arise whenever a State or a group of States resents supervision by UNHCR in a particular case. The possibility of providing assistance and protection depends to a certain extent on the degree of confidence that exists between the government concerned and UNHCR, and such trust will often be negatively affected if UNHCR makes its criticism public in order to put more pressure on that State. It is no accident that UNHCR's annual protection reports remain confidential,<sup>92</sup> as their publication might endanger the success of protection and assistance in the country concerned or, in some cases, even the agency's continued presence there. Similarly, there is a tension between UNHCR's interest in putting pressure on States that do not comply with their treaty obligations and its dependence on voluntary financial contributions from the very same States. Operations on the ground and supervision may follow different logics, and conflicts of interest are unavoidable where this is the case. It is therefore necessary to examine forms of supervision that rely on independent bodies or experts, or at least States that are not directly involved in the problem giving rise to supervisory activities, that is, third parties with at least a minimal degree of independence.

The next subsection of this study examines in some detail existing mechanisms that might provide guidance for developing new approaches to supervision in the area of refugee law. In order to distinguish them from supervision by UNHCR under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, the study refers to them interchangeably as 'third party supervision' or 'monitoring by third parties'.

## B. Third party supervision in present international law

### 1. *General framework*

One of the main tasks of international organizations is the supervision of compliance with the rules binding upon the organization and its members.<sup>93</sup> Such

<sup>91</sup> See above, section II.C, 'The hybrid character of supervision by UNHCR'.

<sup>92</sup> See above, section II.B.2, 'Information requests by UNHCR'.

<sup>93</sup> H. G. Schermers and N. M. Blokker, *International Institutional Law* (3rd revised edn, Martinus Nijhoff, The Hague/London/Boston, 1995). I. Seidl-Hohenveldern, 'Failure of Controls in the

supervision can be internal or external. The first oversees ‘compliance by an international organization with its own acts’, that is the behaviour of its organs and its staff.<sup>94</sup> The latter evaluates ‘performance by the members’ of the organization ‘to which [its] acts are addressed’.<sup>95</sup> External supervision is also at stake where a treaty entrusts an independent body with the task of examining compliance by the States Parties with their treaty obligations. These types of external supervision include ‘all methods which help to realize the application of legal rules made by international organizations’<sup>96</sup> or contained in treaties. The present study is limited to forms of external supervision.

External supervision is critical for the effective application and implementation of international law, as ‘[v]iolations which receive wide attention are more difficult to commit than violations which remain practically unknown’.<sup>97</sup> In present-day international law, such supervision takes many different forms. Based on a categorization developed by Schermers and Blokker,<sup>98</sup> it is possible to distinguish the following forms of supervision:

1. supervision initiated by other States (members of the organization or other parties to the treaty) acting on their own account:
  - dispute settlement by the International Court of Justice;
  - inter-State complaints to treaty bodies or to the organs of the organization;
2. supervision by or on behalf of the organization or the treaty body:
  - supervision based on State reports;
  - supervision based on information collected by the organization;
  - supervision based on requests for an advisory opinion;
3. supervision initiated by individuals:
  - individual petitions;
  - court proceedings.

## 2. *Supervision initiated by other States*

### (a) Dispute settlement by the International Court of Justice

Treaties granting guarantees or even rights to individuals, such as human rights treaties, remain treaties between States. As such, treaty obligations are not only owed to those individuals entitled to its guarantees but are at the same time owed to the other States Parties. This gives all States Parties the right to monitor compliance by other parties with their treaty obligations even if their own interests are not at

Sixth International Tin Agreement’, in *Towards More Effective Supervision by International Organizations*, above n. 61, p. 255, regards the supervisory role of international organizations even as their very *raison d’être*.

94 Schermers and Blokker, above n. 93, p. 864.      95 *Ibid.*, p. 865.

96 *Ibid.*      97 *Ibid.*, p. 867.      98 *Ibid.*, pp. 867–97.

stake.<sup>99</sup> This is an expression of the fact that international law is a highly decentralized legal order where enforcement cannot wait for actions of a centralized agency but depends on the vigilance of all members of the international community.

Many treaties in the area of human rights formalize this right of States Parties to monitor the behaviour of other parties by providing that disputes between States Parties about the interpretation and application of its provisions are to be referred to the International Court of Justice. There is no requirement that the State invoking such a provision should have suffered any material damage as a consequence of a violation; it is sufficient that there persists 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations'.<sup>100</sup> The possibility of referral to the International Court of Justice is not only foreseen in many universal conventions and treaties relating to different aspects of human rights protection,<sup>101</sup> but is also embodied in Article 38 of the 1951 Convention and Article IV of the 1967 Protocol.

### (b) Inter-State complaints to treaty bodies

In the area of human rights law, treaties that have established a treaty body specifically entrusted with monitoring its implementation, generally do not include provisions on dispute settlement by the International Court of Justice.<sup>102</sup> Instead, four universal and three regional human rights instruments establish procedures allowing for the submission of inter-State complaints to the pertinent treaty body.<sup>103</sup> The

<sup>99</sup> See *ibid.*, p. 867, and also Rozakis, above n. 85, pp. 502–3.

<sup>100</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, para. 29, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 74, and referring to *East Timor (Portugal v. Australia)*, ICJ Reports 1995, p. 100, para. 22.

<sup>101</sup> See Art. 8 of the 1926 Slavery Convention, 212 UNTS 17; Art. 9 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Art. 9 of the 1952 Convention on the Political Rights of Women, 193 UNTS 135; Art. 34 of the 1954 Convention Relating to the Status of Stateless Persons, 360 UNTS 117; Art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195; Art. 29 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13; and Art. 30 of the Convention Against Torture.

<sup>102</sup> A notable exception is Art. 30 of the Convention Against Torture.

<sup>103</sup> See, on the *universal* level, Art. 41 of the ICCPR; Art. 11 of the Convention on the Elimination of Racial Discrimination; Art. 13 of the 1985 Convention Against Apartheid in Sports, 1500 UNTS 161; Art. 21 of the Convention Against Torture; and, on a *regional* level, Art. 33 of the ECHR; Art. 45 of the 1969 American Convention on Human Rights (ACHR), Organization of American States (OAS) Treaty Series No. 35; Art. 47 of the 1981 African (Banjul) Charter on Human and Peoples' Rights (ACHPR), 21 ILM, 1982, p. 58. See, e.g., Kamminga, above n. 85, p. 147; P. H. Kooijmans, 'Inter-State Dispute Settlement in the Field of Human Rights', 3 *Leiden Journal of International Law*, 1990, p. 87; S. Leckie, 'The Inter-State Complaint Procedure in International Law: Hopeful Prospects or Wishful Thinking?', 10 *Human Rights Quarterly*, 1988, p. 249; W. Karl, 'Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte', in *Aktuelle Probleme des Menschenrechtsschutzes* (eds. W. Kälin, E. Riedel, W. Karl, B.-O. Bryde, C. von Bar, and R. Geimer, Berichte der Deutschen Gesellschaft für Völkerrecht 33, C. F. Müller, Heidelberg, 1994), pp. 108–10.



universal instruments normally entitle the pertinent treaty body to refer the matter to an ad hoc conciliation commission if a friendly settlement cannot be reached.<sup>104</sup>

The International Labour Organization (ILO) has a more complicated system.<sup>105</sup> Any member State has the right to file a complaint with the ILO if it is of the opinion that another member is not effectively observing an ILO Convention which both have ratified. The Governing Body (the executive body of the ILO) may refer such a complaint to a Commission of Inquiry which, on the basis of information provided to it by the pertinent member States, will prepare a report with its findings on the relevant facts and its recommendations regarding the steps to be taken. If the State concerned is not willing to implement the recommendations and does not submit the dispute to the ICJ, the matter will be referred to the Governing Body and the ILO Conference.

A mechanism that is less an inter-State complaint mechanism and more an institutionalized conciliation procedure is part of the monitoring system of the 1960 UNESCO Convention Against Discrimination in Education.<sup>106</sup> Articles 12–19 of its 1962 (Additional) Protocol<sup>107</sup> institute a Conciliation and Good Offices Commission, which is responsible for seeking a settlement of any disputes which may arise between States Parties to that Convention.<sup>108</sup>

Inter-State complaints to treaty bodies do not depend on the claimant being a victim of a violation directly affecting its material interests. In this sense, the European Court of Human Rights acknowledged that:

[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective

104 Art. 42 of the ICCPR; Art. 21 of the Convention Against Torture; Art. 12 of the Convention on the Elimination of All Forms of Racial Discrimination.

105 Arts. 26–34 of the ILO Constitution. See K. Weschke, *Internationale Instrumente zur Durchsetzung der Menschenrechte* (Arno Spitz, Berlin, 2001), pp. 326–7.

106 UN Educational, Scientific and Cultural Organization (UNESCO) Convention Against Discrimination in Education, 14 Dec. 1960, available on <http://www.unesco.org/education/information/nfsunesco/pdf/DISCRLE.PDF>.

107 Protocol of 10 Dec. 1962 Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking a Settlement of Any Disputes which May Arise Between States Parties to the Convention Against Discrimination in Education, available on <http://www.unesco.org/human.rights/ded.htm>.

108 According to these provisions, every State party to this treaty, considering that another State party is not giving effect to one of its provisions is entitled to bring the matter to the attention of that State. Within three months, the receiving State shall afford the complaining State an explanation concerning the matter. If it turns out to be impossible for the States involved to come to a solution bilaterally, either State may submit a complaint to a Commission, which will subsequently draw up a report on the facts and indicate its recommendations with a view to reconciliation. The Commission's reports will finally be communicated to the Director General for publication and to the General Conference, which, upon request of the Commission, may decide that the International Court of Justice be requested to give an advisory opinion on the matter.

obligations which, in the words of the preamble, benefit from a ‘collective enforcement’ . . . [T]he Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals.<sup>109</sup>

Inter-State complaints have, however, never been used by States Parties to the pertinent human rights instruments at the United Nations level. There have been a few cases within the framework of the ILO<sup>110</sup> and a few more under the European Convention,<sup>111</sup> but even there they have remained rare.

### (c) Assessment

Referral of disputes about the interpretation and application of a treaty provision to the International Court of Justice or submission of an inter-State complaint to a treaty body may serve different purposes. First, proceedings started by a State Party whose own interests have been affected by a violation of international law address isolated cases of non-compliance. Here, the State taking up a case is not so much playing the role of a supervisor but acting as a victim that looks for protection against the violator and hopes for redress.<sup>112</sup>

Secondly, proceedings that are instigated by non-victims are more relevant for monitoring purposes. They are suitable for addressing situations of mass violations<sup>113</sup> or clarifying fundamental issues haunting many States Parties. Here, the *erga omnes* character of human rights<sup>114</sup> and similar guarantees for the individual becomes very clear.<sup>115</sup> States not directly affected by non-compliance have, however, little incentive to become active. First, inter-State complaints are, as Leckie put it, ‘one of the most drastic and confrontational legal measures available to states’,<sup>116</sup> and thus come with high political costs. Secondly, they obligate the State to do all the fact-finding for itself in order to present a strong case, something a State is not ready to do when international bodies (for example, the UN Commission on Human Rights) have the possibility of investigating the situation on their own.<sup>117</sup>

109 *Ireland v. UK*, 1978, European Court of Human Rights, Series A, No. 25, pp. 89–91. See also, European Commission of Human Rights, *Austria v. Italy*, 4 *Yearbook of the European Convention on Human Rights*, 11 Jan. 1961, p. 140. See also Inter-American Court of Human Rights, Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention, 24 Sept. 1982, para. 29, reproduced in 22 ILM, 1983, p. 47.

110 Leckie, above n. 103, p. 277.

111 J. Frowein and W. Peukert, *Europäische Menschenrechtskonvention – EMRK-Kommentar* (Engel, Kehl/Strasbourg/Arlington, 1996), p. 516.

112 Within the context of human rights treaties, this constellation is typical for cases of diplomatic protection where the human rights of a citizen of that State have been violated by another State.

113 Karl, above n. 103, p. 108.

114 See above, text at n. 85.

115 Karl, above n. 103, p. 108.

116 Leckie, above n. 103, p. 259.

117 Kälin, above n. 103, p. 17.

### 3. *Supervision by or on behalf of the organization or the treaty body*

#### (a) Supervision based on State reports

##### aa) *State reporting under the UN human rights instruments*

In the area of international human rights law, State reports are the most prevalent monitoring instrument. Seven universal<sup>118</sup> and two regional<sup>119</sup> human rights instruments oblige States Parties to submit reports on the measures they have taken to implement their treaty obligations and the difficulties they are facing in this process. Treaty monitoring by examining such State reports started in 1970, when the Committee on the Elimination of Racial Discrimination began its operations, and expanded gradually to the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture, the Committee on Economic, Social and Cultural Rights and, in 1991, the Committee on the Rights of the Child.<sup>120</sup> All these treaty bodies require States to report every four or five years.<sup>121</sup>

All these Committees follow a similar procedure:<sup>122</sup> once the report has been submitted, the secretariat, a rapporteur, or a working group of the Committee identifies key issues and questions to be addressed. This is followed by the most important phase of the whole procedure – the dialogue with the delegation of the State Party concerned. After an introduction by the head of delegation, a discussion is held with the members of the Committee asking questions, and the members of the delegation either responding or promising to give a written answer at a later stage. At the end of the meeting, the members of the Committee make individual comments. The examination of the report ends with the adoption of Concluding Observations expressing the opinion of the Committee as such and addressing both

118 Art. 40 of the ICCPR; Art. 16 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3; Art. 19 of the Convention Against Torture; Art. 9 of the Convention on the Elimination of Racial Discrimination; Art. 44 of the 1989 Convention on the Rights of the Child (CRC), UNGA Res. 44/25; Art. 18 of the Convention on the Elimination of Discrimination Against Women; Art. 73 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Doc. A/RES/45/158.

119 Art. 21 of the 1961 European Social Charter, ETS 35; Art. 62 of the African Charter on Human and Peoples' Rights.

120 H. Klein, 'Towards a More Cohesive Human Rights Treaty System' in *The Monitoring System of Human Rights Treaty Obligations* (ed. E. Klein, Arno Spitz, Berlin, 1998), p. 89. As the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families has not yet entered into force, its Committee has not become operational.

121 Klein, above n. 120, p. 90.

122 See Klein, 'The Reporting System under the International Covenant on Civil and Political Rights' in Klein, above n. 120, pp. 18–23; B. Simma, 'The Examination of State Reports: International Covenant on Economic, Social and Cultural Rights', in Klein, above n. 120, pp. 35–40; R. Wolfrum, 'International Convention on the Elimination of All Forms of Racial Discrimination', in Klein, above n. 120, pp. 55–62; H. B. Schöpp-Schilling, 'The Convention on the Elimination of All Forms of Discrimination Against Women', in Klein, above n. 120, pp. 71–88.

the main areas of progress and of concern. Formalized follow-up procedures do not exist, although some of the Committees under discussion have developed some elements of such procedures.<sup>123</sup>

The objectives of reporting systems were summarized by the Committee on Economic, Social and Cultural Rights in 1994<sup>124</sup> in a manner that can be generalized. First, the reporting duty ensures that the State Party undertakes a comprehensive review of its domestic law and practices ‘in an effort to ensure the fullest possible conformity’ with its treaty obligations. The second objective is ‘to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction’. Thirdly, the reporting process should enable the State Party to elaborate ‘clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions’ of the pertinent instrument. The fourth objective is to facilitate public scrutiny of government policies. Fifthly, the reporting process should ‘provide a basis on which the state party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained’ in the pertinent instrument. ‘The sixth objective is to enable the state party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range’ of the pertinent human rights and to identify the main difficulties in order to be able to devise more appropriate policies. Finally, the reporting process should ‘enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the’ pertinent guarantees.

*bb) State reporting under ILO and UNESCO law*

Reporting is an important part of the ILO monitoring system. Member States of this organization are – according to Articles 19 and 22 of the ILO Constitution – requested to report regularly, on the basis of so-called Report Forms,<sup>125</sup> on the measures which they have taken to give effect to the provisions of Conventions binding them, on the implementation of non-binding Recommendations, and even

123 This is particularly true for the Committee on Economic, Social and Cultural Rights: see Simma, above n. 122, pp. 39–41.

124 Committee on Economic, Social and Cultural Rights, General Comment No. 1, Reporting by States Parties, third session, 1989, paras. 2–9, in Compilation of General Comments, above n. 69, pp. 13–14.

125 The ILO has published Report Forms for all material Conventions as well as one for the reporting obligation concerning the non-ratified treaties.

on the reasons for not becoming party to all instruments adopted by the ILO.<sup>126</sup> Since 1926, the reports have been examined by two different organs. First, the Committee of Independent Experts<sup>127</sup> – appointed by the ILO Governing Body – inspects the reports in an objective, technical manner. Questions on matters of secondary importance or technical questions concerning the application of a ratified ILO Convention are sent in writing – called a direct request – directly to the government concerned. More serious or long-standing cases of failure to fulfil conventional obligations are reported as so-called observations to the Governing Body and to the annual International Labour Conference. They form the basis for discussions of individual cases in the second supervisory body, the Tripartite Conference Committee.<sup>128</sup> This organ holds public discussions annually on the main cases of discrepancies in the light of the experts' findings.<sup>129</sup> The reporting process ends with the presentation of the reports in the Plenary Sitting of the International Labour Conference.

A reporting system is also part of UNESCO's monitoring system. Article VII of its Constitution stipulates that 'each Member State shall submit to the Organization, at such times and in such manner as shall be determined by the General Conference, reports on the laws, regulations and statistics relating to its educational, scientific and cultural institutions and activities, and on the action taken upon the recommendations and conventions'. The necessary content of these reports is determined by questionnaires elaborated by the organization. The reports are considered by the UNESCO General Conference. The Conference publishes its findings in a report, which is transmitted, among others, to the member States and the United Nations.<sup>130</sup>

### cc) *Assessment*

Reporting mechanisms under the UN human rights treaties serve important functions<sup>131</sup> and deserve a positive assessment on a conceptual level. However, there

126 The Constitution requires member States to report annually on the application of ratified conventions, but due to the large number of conventions and ratifications detailed reports are at present only requested on any given convention at less frequent intervals. See K. Samson, 'The Protection of Economic and Social Rights Within the Framework of the International Labour Organisation', in *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte* (ed. F. Matscher, Engel, Kehl/Strasbourg/Arlington, 1991), p. 128.

127 The Committee consists of twenty independent persons of the highest standing, with eminent qualifications in the legal or social fields and with an intimate knowledge of labour conditions or administration.

128 This is a political organ, consisting of 200 members who are representatives of governments, employers, or workers' organizations.

129 N. Valticos, 'Once More About the ILO System of Supervision: In What Respect is it Still a Model?' in Blokker and Muller, above n. 61, pp. 104–5; Samson, above n. 126, p. 128; Weschke, above n. 105, p. 325.

130 Adopted by the General Conference at its 5th session, and amended at its 7th, 17th, and 25th sessions.

131 See above, text at n. 124.

seems to be agreement today that in practice reporting mechanisms face serious problems for at least three reasons.

First, many States do not fulfil their reporting duties on time and a very large number of reports are overdue.<sup>132</sup> As of 1 December 1998, there were 124 (out of 151) States Parties with a total of 390 overdue reports within the framework of Convention on the Elimination of Racial Discrimination. The Committee on the Elimination of Discrimination Against Women had 245 overdue reports from 134 (out of 162) States Parties. The relevant 1998 figures for the other Committees were similarly bad.<sup>133</sup> Reasons for this include lack of resources, the burden of a multitude of reporting obligations, fears of criticism, or simply the fact that some countries ratified treaties ‘without bothering much about the domestic as well as international procedural obligations entailed’.<sup>134</sup>

Secondly, if all reports arrived on time, the Committees would not be able to process them in due course.<sup>135</sup> Alston estimated in 1996 that, depending on the particular Committee, it would take between seven and twenty-four years to process all overdue reports.<sup>136</sup>

Thirdly, some States have a tendency not to report about the real situation but instead either focus on the law without looking at its implementation or just deny any violations.<sup>137</sup> Especially in these cases, the discussions between the Committees and the States Parties do not always amount to a real dialogue but rather an exchange of routine questions and routine statements that avoid focusing on the real issues.<sup>138</sup>

132 For the following figures see J. Crawford, ‘The UN Human Rights Treaty System: A System in Crisis’, in *The Future of UN Human Rights Treaty Monitoring* (eds. P. Alston and J. Crawford, Cambridge University Press, 2000), p. 5.

133 Committee Against Torture: 105 overdue reports from 72 out of 110 States Parties; Committee on the Rights of the Child: 141 overdue reports from 124 out of 191 States Parties; Committee on Economic, Social and Cultural Rights: 134 overdue reports from 97 out of 138 States Parties; and Human Rights Committee: 145 overdue reports from 97 out of 140 States Parties (source, *ibid.*, p. 5).

134 Simma, above n. 122, p. 32. See also, Wolfrum, above n. 122, p. 63.

135 International Human Rights Instruments, Twelfth Meeting of Chairpersons of the Human Rights Bodies, ‘Plan of Action to Strengthen the Implementation of the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2000–2004’, UN doc. HRI/MC/2000/4, 5 May 2000, para. 12.

136 ‘Effective Functioning of Bodies Established Pursuant to United Nation Human Rights Instruments, Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System’, prepared by P. Alston, UN doc. E/CN.4/1997/74, 27 March 1996, para. 48.

137 Committee on International Human Rights Law and Practice, ‘Report on the UN Human Rights Treaties: Facing the Implementation Crisis’ (by A. Bayefsky), in International Law Association, *Helsinki Conference 1996* (International Law Association, London, 1996), p. 341.

138 Klein, above n. 120, pp. 26–7. See also Bayefsky, above n. 137, p. 341.

- (b) Supervision based on information collected by the organization
- aa) *Fact-finding by special rapporteurs or independent fact-finding commissions*

Monitoring by or on behalf of an organization can avoid some of the weaknesses and pitfalls of State reporting mechanisms. Monitoring based on fact-finding by independent experts is the most important form of supervision by or on behalf of an organization in the area of human rights outside the treaty mechanisms.

The main example for the use of fact-finding by independent experts is provided by the UN Commission on Human Rights.<sup>139</sup> The Commission for a long time focused on standard-setting and was reluctant to deal with allegations of human rights violations in a specific country.<sup>140</sup> It has relied on fact-finding by Special Rapporteurs and Working Groups since the Economic and Social Council (ECOSOC) adopted Resolution 1235 (XLII) in 1967 authorizing the Commission 'to examine information relevant to gross violations of human rights' in a *public procedure* and Resolution 1503 (XLVIII) in 1970 on the *confidential discussion* of situations appearing to reveal 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'.

In this regard, the Commission has developed different techniques. Within the framework of public procedures,<sup>141</sup> the Commission distinguishes between a 'country-oriented' and a 'thematic' approach. *Thematic procedures*, which are not restricted to the situation in a particular country, deal with specific human rights guarantees; they aim to enhance the protection of individuals and, at the same time, tend to deal with the root causes of such violations.<sup>142</sup> *Country-oriented*<sup>143</sup>

139 The following is adapted from W. Kälin and L. Gabriel, 'Human Rights in Times of Occupation: An Introduction', in *Human Rights in Times of Occupation: The Case of Kuwait* (ed. W. Kälin, Staempfli, Bern, 1994), pp. 9–10.

140 See M. Nowak, 'Country-Oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission', 22 *Netherlands Yearbook of International Law*, 1991, p. 39.

141 The confidential procedure in accordance with Resolution 1503 (XLVIII) is not further discussed here. For details, see P. Alston, 'The Commission on Human Rights', in *The United Nations and Human Rights – A Critical Appraisal* (ed. P. Alston, Clarendon Press, Oxford, 1992), p. 145; A. Dormenval, *Procédures onusiennes de mise en œuvre des droits de l'homme: Limites ou défauts* (Presses universitaires de France, Paris, 1991), p. 58.

142 Nowak, above n. 140, p. 44. Thematic procedures currently include the activities of the Working Groups on Enforced or Involuntary Disappearances (set up in 1980) and Arbitrary Detention (1991). They also comprise the work of the Special Rapporteurs or Independent Experts on Summary and Arbitrary Executions (1982), Torture (1985), Religious Intolerance (1986), the Use of Mercenaries as a Means of Violating Human Rights (1987), the Sale of Children (1990), Racism and Xenophobia (1993), Freedom of Opinion and Expression (1993), the Rights of Women (1994), Independence of Judges and Lawyers (1994), Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (1995), Right to Development (1998), Right to Education (1998), Human Rights and Extreme Poverty (1998), Human Rights and Migrants (1999), Structural Adjustment Policies and Foreign Debt (2000), Adequate Housing (2000), Right to Food (2000), and Human Rights and Fundamental Freedoms of Indigenous People (2001).

143 For more information, see Alston, above n. 141, pp. 159–73; and Nowak, above n. 140, pp. 56–76.

procedures address human rights issues in a particular State. The Commission has developed several techniques for such fact-finding.<sup>144</sup> Reports should provide the Commission with the pertinent facts and thus enable it to adopt a resolution. Such resolutions may not only condemn the country concerned for failing to respect human rights but may also urge its government to take specific measures in order to improve the situation.

In all these procedures, the Commission is competent to consider information from all sources<sup>145</sup> concerning violations of any human right. As a political body it may not render a judicial decision,<sup>146</sup> but it can serve as a catalyst to reach a political solution resulting in the improvement of the human rights situation in the country concerned.

What is the task of the Special Rapporteurs and Working Groups? Most often, the relevant resolutions ask them to 'study', 'investigate', 'inquire into', or 'examine' either the situation of a particular human right in all States or the situation of all human rights in a particular country. The role of a Special Rapporteur is neither that of a judge nor that of a politician or diplomat. First and foremost, the task is one of *fact-finding*: he or she has to collect information, analyze it, and, on this basis, describe the pertinent events in order to enable the Commission on Human Rights to draw its conclusions.<sup>147</sup> Although he or she has no judicial functions, the Special Rapporteur can only properly fulfil this task of factual analysis if a study of the relevant legal obligations is included. Thus, a conclusion by the Commission regarding the question of whether and to what extent there have been gross violations of human rights in a particular country must rest not only on a careful establishment of the facts but also on a sound legal analysis; the latter must include a determination of the law applicable in the specific situation.

Besides these basic requirements, the mandates of the Special Rapporteurs and Working Groups regularly leave enough room to adopt different approaches and

144 Alston, above n. 141, pp. 160–1, mentions the appointment of (a) a special rapporteur, (b) a special representative, (c) an (independent) expert, (d) a working group, (e) a Commission delegation, (f) a member of the Sub-Commission to review the available information; in addition, the Commission sometimes asks the Secretary-General to maintain direct contacts with a particular government or to report on a particular country.

145 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (Martinus Nijhoff, Dordrecht/Boston/London, 1989), p. 65.

146 See the Statement by the Observer Delegation of Ireland, Ambassador Michel Lillis on Behalf of the European Community and its Twelve Member States at the 46th Session of the Commission on Human Rights, 21 Feb. 1990:

The Commission is not a Court of Law. We do not here place Governments of the world in the dock. Insofar as we can, we must strain to our utmost to achieve progress in human rights in our work here through multilateral cooperation and in a spirit of dialogue and mutual respect between Governments.

Quoted in J. A. Pastor Ridruejo, 'Les procédures publiques spéciales de la Commission des droits de l'homme des Nations Unies', *Academy of International Law, Recueil des Cours*, 1991-III, p. 244.

147 See also, Pastor Ridruejo, above n. 146, p. 238.



thus to respond to the peculiarities of each case. Alston distinguishes three principal approaches: (i) a ‘fact-finding and documentation function’, that is, the task of providing ‘the necessary raw material against the background of which political organs can determine the best strategy under the circumstances’; (ii) a ‘prosecutorial/publicity function’, namely, an attempt ‘to mobilize world public opinion’; and (iii) a ‘conciliation function’, where the ‘rapporteur’s role is not to confront the violators but to seek solutions which will improve . . . the situation’.<sup>148</sup> Which of these functions will be in the foreground in a given case depends on the content of the mandate, the individuals involved, and the specific situation.

The use of Special Rapporteurs or Working Groups has several advantages: it allows for independent fact-finding and has become an important instrument for putting pressure on States that violate human rights seriously and systematically. The rather limited number of country-specific mandates, for example, shows that, as van Dongen has put it, the ‘appointment of a country rapporteur is viewed very much as the heavy artillery, brought out only when the situation so warrants’.<sup>149</sup> Pressure can also be exercised because the report may lead to a resolution by the Commission condemning the State and trigger corresponding resolutions by ECOSOC and the UN General Assembly. Weaknesses of the use of Special Rapporteurs and Working Groups include the fact that much depends on the individuals selected for this task. Experience in the Commission on Human Rights shows that the quality of reports varies to a very considerable extent. Another problem is the danger that the creation of a mandate for a Special Rapporteur may become a highly politicized decision. This danger is reduced where a thematic mandate instead of a country-specific mandate is chosen. Finally, Special Rapporteurs and Working Groups often lack adequate resources and staff support, indicating that the number of such mandates should be fixed within the limits of available means. Cost-effectiveness speaks in favour of using individual Special Rapporteurs instead of the more costly Working Groups.

Fact-finding by independent experts also exists in the area of humanitarian law. The International Fact-Finding Commission, which consists of fifteen members of high moral standing and acknowledged impartiality, is competent to ‘enquire into any facts alleged to be a grave breach . . . or other serious violation’ of the 1949 Geneva Conventions and Protocol I and to ‘facilitate, through its good offices, the restoration of an attitude of respect’ for the relevant provisions of humanitarian law, provided the countries involved have recognized this competence. The reports are not made public ‘unless all Parties to the conflict have requested the Commission to do so’.<sup>150</sup>

148 Alston, above n. 141, pp. 167–8.

149 T. van Dongen, ‘Vanishing Point – The Problem of Disappearances’, 90/1 *Bulletin of Human Rights*, 1991, p. 24.

150 Art. 90(5)(c) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3. For the four Geneva Conventions, see 75 UNTS 31, 85, 135, and 287.

*bb) Policy review*

Some international organizations carry out fact-finding which focuses more on an overall assessment of the policy of a particular country than on violations. Such reports try to highlight, at the same time, the main strengths and weaknesses of how a State deals with particular problems in the area of investigation.

One of many examples is provided by the International Narcotics Control Board<sup>151</sup> established by the Single Convention on Narcotic Drugs.<sup>152</sup> This Board is the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions. It examines and analyzes, among others, information received from the States Parties to the drug conventions and thereby monitors whether the treaties are being applied throughout the world as effectively as possible. This continuous evaluation of national efforts enables the Board to recommend appropriate actions and to conduct, where necessary, a dialogue with the government concerned. The Board publishes an annual report that is submitted to ECOSOC and provides a comprehensive survey of the drug control situation in various parts of the world as well as an identification of dangerous trends and necessary measures.

The Organization for Economic Cooperation and Development (OECD) has a particularly rich experience with policy review reports. Such reports include Environmental Performance Reviews, which scrutinize the efforts of OECD member States to meet their domestic objectives and international commitments in the area of environmental protection, and Development Cooperation Reviews by the Development Assistance Committee (DAC).<sup>153</sup> Both review systems are based on the principle of peer review. First, a small team composed of representatives of the Secretariat and officials of two member countries is designated. The government of the country to be reviewed prepares a memorandum explaining the main policy developments and changes in its activities. The team then travels to the country concerned in order to talk to the government, members of parliament, and representatives of civil society and NGOs in order to obtain first-hand information about the content and context of the country's environmental or development policy. The report is then submitted to the OECD Group on Environmental Performance or DAC respectively, where, during a session of the Group or Committee, high-level representatives of the country concerned respond to questions asked by members of that body. Depending on the outcome of these discussions, the conclusions of the draft report

151 Information about the Board is available at [www.incb.org](http://www.incb.org).

152 Arts. 9–15 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961.

153 For a description, see OECD Environmental Performance Reviews, A Practical Introduction, doc. OCDE/GD(97)35 and the forewords to the DAC Development Co-operation Reviews (e.g. Comité d'aide au développement (CAD), 'Examen en matière de coopération pour le développement, Suisse, pré-impression des dossiers du CAD', vol. 1, No. 4, OECD, 2000, p. II-3.

are amended before it is published. The OECD has defined the following as goals of this process:

to help individual governments judge and make progress by establishing baseline conditions, trends, policy commitments, institutional arrangements and routine capabilities for carrying out national evaluations; to promote a continuous policy dialogue among Member countries, through a peer review process and by the transfer of information on policies, approaches and experiences of reviewed countries; to stimulate greater accountability from Member countries' governments towards public opinion . . .<sup>154</sup>

Both the International Narcotics Control Board and OECD are able to produce good quality review reports on a regular basis. The model of policy assessment and review reports is interesting for three reasons: (i) it rests on independent fact-finding by experts; (ii) it focuses not only on violations but also looks at achievements; and (iii) it combines objective fact-finding with a political process aimed at a process of collective learning. Its weakness lies in the limited capacity to 'sanction' a State in cases of serious violations or continued refusal to undertake improvements.

*cc) Review conferences*

Review conferences are an implementation mechanism that has gained momentum in recent decades.<sup>155</sup> Their traditional goal was to provide a chance for States to meet on a regular basis and to determine whether there are any gaps that need to be addressed by amendments to the particular treaty.<sup>156</sup> Review conferences may, however, also have the task of monitoring compliance with and implementation of a treaty.

For instance, the review conferences organized under Article VIII(3) of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),<sup>157</sup> the first treaty to use this approach,<sup>158</sup> are undertaken in order, among other things, 'to evaluate the results of the period they are reviewing, including the implementation of undertakings of the States Parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future'.<sup>159</sup>

154 Doc. OCDE/GD(97)35, above n. 153, p. 5.

155 The first review conferences aimed at monitoring implementation were convened in the 1980s. See B. M. Carnahan, 'Treaty Review Conferences', 81 *American Journal of International Law*, 1987, p. 226.

156 A recent example is Art. 123(1) of the Rome Statute for an International Criminal Court, providing for a review conference seven years after the entry into force of the Statute that will examine the need to include new treaty crimes.

157 This convention together with the various other disarmament-related conventions cited in this paragraph can be found at <http://www.unog.ch/frames/disarm/distreat/warfare.htm>.

158 Carnahan, above n. 155, p. 226.

159 Decision 1, para. 7, taken at the 1995 Review Conference, cited by R. Johnson, 'Launching an Effective Review Process of the Non-Proliferation Treaty in April 1997', 13 *Disarmament Diplomacy*, 1997, at <http://www.acronym.org.uk/dd/dd13/13launch.htm>.

A similar approach is followed by Article XII of the Biological Weapons Convention,<sup>160</sup> Article 13 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended on 3 May 1996),<sup>161</sup> and Article 12 of the 1997 Ottawa Convention.<sup>162</sup> The 1980 Conventional Weapons Convention<sup>163</sup> provides in Article 8(2) for review conferences both as an amendment and as an implementation procedure.

Review conferences are usually organized on an ad hoc basis. The rules of procedure tend to follow those adopted in 1975 to review the NPT. The first step is usually to obtain a resolution of the UN General Assembly authorizing the UN Secretariat to provide administrative support.<sup>164</sup> This is followed by arrangements for the meeting of a preparatory committee<sup>165</sup> to establish the dates for the conference, the agenda, and the draft rules of procedure, to recommend a committee structure, and to nominate a president and other members of the conference board.<sup>166</sup> No guidance is provided in regard to decision making, although decisions on substantive matters are usually taken by consensus<sup>167</sup> and incorporated in a final declaration.

#### *dd) Inspection systems*

A particularly effective method of monitoring treaty implementation is to carry out on-site visits or inspections by a monitoring body. Such systems can be found in four areas of international law:<sup>168</sup> (i) arms control and disarmament;<sup>169</sup>

160 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972.

161 Protocol II to the 1980 Convention on Certain Conventional Weapons, as amended on 3 May 1996.

162 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines of 18 Sept. 1997 (Ottawa Convention).

163 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 Oct. 1980.

164 E.g. on 22 Dec. 1993, States Parties to the Convention on Certain Conventional Weapons submitted a letter to the Secretary-General, asking him to establish a group of experts to facilitate preparation for a review conference, and to convene a review conference. See W. Hays Parks, 'Memorandum of Law: *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol', *Army Lawyer*, June 1997, p. 33.

165 On the Preparatory Committee for the Non-Proliferation Treaty, see Johnson, above n. 159.

166 Carnahan, above n. 155, p. 228.

167 *Ibid.*; Johnson, above n. 159. See also J. H. Harrington, 'Arms Control and Disarmament', 35 *International Lawyer*, 2001, p. 581.

168 See the contributions in Association for the Prevention of Torture, *Visits Under Public International Law, Theory and Practice* (Association for the Prevention of Torture, Geneva, 2000).

169 See in particular the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), the 1996 Comprehensive Nuclear Test-Ban Treaty, and the 1997 Ottawa Convention, above n. 162.

(ii) environmental law;<sup>170</sup> (iii) human rights law;<sup>171</sup> and (iv) humanitarian law.<sup>172</sup> Such visits and inspections allow for direct fact-finding to verify the compliance of a State Party with its treaty obligations, and are particularly useful in situations where actions are carried out in places that are not open to the public (for example, prisons and other places of detention, military installations, nuclear power plants, chemical factories, and so forth). As a result of the degree of intrusiveness of inspections systems, they are often based on the confidentiality of the process.<sup>173</sup> As UNHCR is already entitled to have access to refugee camps, detention centres, and similar facilities,<sup>174</sup> such a system would be less significant in the area of refugee protection.

(c) Supervision based on a request for an advisory opinion

A third potential form of monitoring on behalf of an international organization can be found in the Statute of the International Court of Justice and the UN Charter. According to Article 65 of the Statute,<sup>175</sup> the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with Article 96 of the UN Charter to make such a request. On a regional level, the Inter-American Court of Human Rights is competent to give advisory opinions regarding the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American States upon request by any member State of the Organization of American States or by organs of that Organization.<sup>176</sup> Additionally, '[t]he Court, at the request of a member State of the Organization, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments'.<sup>177</sup> As outlined above, at the European Union level, the Council, Commission, or an EU member State will be able to ask the European Court of Justice to issue an interpretative opinion on matters relating to asylum which have been implemented into secondary legislation.<sup>178</sup>

170 E.g. Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept. 1987, 1522 UNTS 3.

171 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, ETS 126.

172 Visits of prisoners of war and civilian detainees by International Committee of the Red Cross (ICRC) during an international armed conflict on the basis of the Third and Fourth Geneva Conventions of 1949 or of prisoners based on ICRC's right to offer its services during non-international armed conflicts and situations of internal violence.

173 Confidentiality is the basis of ICRC's visiting activities. See also, Art. 11 of the European Convention for the Prevention of Torture, above n. 171.

174 See above text at nn. 31–9.

175 Statute of the International Court of Justice, annexed to the UN Charter.

176 Art. 64(1) of the ACHR. 177 Art. 64(2) of the ACHR.

178 Treaty Establishing the European Community (consolidated version), Art. 68(3); see also, text above at n. 89.

#### 4. *Supervision initiated by individuals*

The possibility for individuals to petition a judicial or quasi-judicial body at the international level regarding alleged violations of their rights as guaranteed by an international convention or treaty is often regarded as the most effective form of supervision.

However, petitions to a judicial organ with the power to take binding decisions exist at the regional level only,<sup>179</sup> whereas quasi-judicial bodies are the rule on the universal level. Five UN human rights treaties<sup>180</sup> and some regional instruments<sup>181</sup> provide for the possibility of submitting individual complaints to a treaty body if the country concerned has recognized its competence to examine such petitions.<sup>182</sup> The written procedure ends with the adoption of ‘views’ which are not legally binding,<sup>183</sup> but their judgment-like style as well as the establishment of follow-up procedures by some of the treaty bodies<sup>184</sup> to address situations of non-compliance have contributed to the relatively high degree of compliance<sup>185</sup> with these ‘views’.

The number of individual complaints to the UN treaty bodies is significant but still limited.<sup>186</sup> Nevertheless, the capacity of these bodies to deal with such

179 See Art. 25 of the ECHR and Art. 44 of the ACHR.

180 First Optional Protocol to ICCPR, Art. 22 of the CAT, Art. 14 of the CERD, Art. 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN doc. A/RES/45/158, and the Optional Protocol to CEDAW of 6 Oct. 1999, UN doc. A/RES/54/4.

181 The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 Nov. 1995 allows certain NGOs to lodge complaints against a State Party to the Protocol alleging unsatisfactory application of the Charter with the Committee of Independent Experts. This Committee prepares and adopts a report that is submitted to the Committee of Ministers of the Council of Europe. In Africa, Art. 55 of the ACHPR permits individuals, groups of individuals, and NGOs, as well as States Parties, to make communications to the African Commission on Human and Peoples’ Rights, either on their own behalf or that of someone else.

182 A draft optional protocol to the International Covenant on Economic, Social and Cultural Rights has been elaborated. See in particular UN doc. E/CN.4/1997/105, 18 Dec. 1996 and E/CN.4/2001/62, 21 Dec. 2000.

183 Art. 5(4) of the Optional Protocol to the ICCPR, Art. 22(7) of the CAT, Art. 14(7)(b) of CERD, and Art. 7(3) of the Optional Protocol to the CEDAW of 6 Oct. 1999, UN doc. A/RES/54/4.

184 See in particular, ICCPR, ‘Measures Adopted at the Thirty-Ninth Session of the Human Rights Committee to Monitor Compliance with its Views under Article 5’, UN. doc. A/45/40, vol. 2, Annex XI, pp. 205–6.

185 See, e.g., M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Engel, Kehl/Strasbourg/Arlington, 1993), pp. 710–11. In more recent times, however, certain States have criticized some treaty bodies for their views, including in cases regarding asylum seekers.

186 E.g., in 1999, the Human Rights Committee received fifty-nine new cases and adopted fifty-six decisions. During the same year, the Committee Against Torture registered twenty-six new cases and adopted thirty-nine decisions. See Plan of Action, above n. 135, Annexes II and III.

complaints has already reached its limits<sup>187</sup> and procedures take too long.<sup>188</sup> At the regional level, the overload is especially dramatic in Europe.<sup>189</sup>

## C. A new mechanism for third party monitoring of the 1951 Convention and the 1967 Protocol

### 1. *Goals*

The search for ways to strengthen monitoring of the 1951 Convention and the 1967 Protocol makes it necessary to clarify the goals to be achieved. Of course, the overall goal of new monitoring mechanisms should be to strengthen the protection of refugees, that is, to ensure that their basic rights as well as their physical safety and security are better guaranteed.<sup>190</sup> This overarching goal requires that UNHCR's present supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, including its responsibility to supervise State practice on a day-to-day basis, to comment on legislation, or to advise courts, not be undermined by new mechanisms. In this regard, it is of paramount importance institutionally to separate the role of providing international protection and the process of supervising States Parties on the basis of Article 35 of the 1951 Convention and Article II of the 1967 Protocol from the highly visible task of third party monitoring of State behaviour from a universal perspective. UNHCR's work of day-to-day protection and supervision or even its presence in a particular country might be endangered if it had to play too active a role in new monitoring mechanisms. Instead, these mechanisms should be the responsibility of the States Parties to the Convention. At the same time, it is of paramount importance that such monitoring does not endanger UNHCR's supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

The goal of strengthening the protection of refugees through better monitoring can be achieved if such mechanisms are framed in a way that allows:

1. monitoring of violations of applicable international instruments on the rights of refugees with a view to taking the necessary steps to convince or pressure the States concerned to honour their obligations;

187 See Plan of Action, above n. 135, paras. 13–15.

188 See, e.g., Crawford, above n. 132, p. 6, remarking that '[a]rguably, the reason the Human Rights Committee is not itself in breach of the spirit of article 14 of its own Covenant through the delay in dealing with communications is, precisely, its non-judicial character'.

189 The European Court of Human Rights in, e.g., 2000 received 10,486 new applications and delivered 695 judgments (statistical information available at [http://www.echr.coe.int/BilingualDocuments/infodoc.stats\[2001\].bil.htm](http://www.echr.coe.int/BilingualDocuments/infodoc.stats[2001].bil.htm)).

190 On the notion of protection, see above, section II.B.1 'UNHCR's protection role'.

2. harmonization of the interpretation of the 1951 Convention and its 1967 Protocol with a view to achieving a more uniform eligibility practice; and
3. the experience of States Parties within the framework of a policy assessment to enable identification of obstacles to proper implementation, appropriate solutions for current problems, and best practices.

In order to achieve these goals, new monitoring mechanisms should meet several requirements:

1. *Independence and expertise.* It is important that monitoring is based on fact-finding by independent experts or organs. Both independence and expertise are necessary to make monitoring credible and reduce the danger of politicization.
2. *Objectivity and transparency.* The criteria applied to assess the behaviour of a State, in particular whether it has violated its legal obligations, must be objective and transparent, that is, based on recognized norms and standards.
3. *Inclusiveness.* It is important that monitoring mechanisms include all the actors concerned. This has two implications. First, such mechanisms should not single out some States or regions; rather, they should look at all those affected by a particular problem. Secondly, such mechanisms should establish a process that allows not only States but also NGOs, civil society, and refugees to voice their concerns.
4. *Operationality.* Monitoring mechanisms must be set up and resourced in a way that allows them to become operational and work properly. Mechanisms that cannot fulfil their tasks must be avoided.
5. *Complementarity.* Appropriate mechanisms must complement supervision by UNHCR based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol and avoid any weakening of the 'preeminence and authority of the voice of the High-Commissioner'.<sup>191</sup>

## 2. *Assessment of models*

Looking at different possible models for an improved monitoring in the area of refugee law, it is possible, on the basis of the goals and criteria defined above,<sup>192</sup> to make the following assessment.

### (a) *Dispute settlement by the International Court of Justice*

Dispute settlement by the International Court of Justice<sup>193</sup> would fit the requirements of independence, objectivity and transparency and would be operational. It

191 Cambridge Expert Roundtable, Summary Conclusions, above n. 44, para. 1.

192 See immediately above, section III.C.1 'Goals'.

193 See above, section III.B.2.a 'Dispute settlement by the International Court of Justice'.



does not, however, offer real potential for strengthening monitoring in the area of international refugee law. The existing possibility of referring disputes relating to the interpretation and application of the 1951 Convention and/or 1967 Protocol to the International Court of Justice<sup>194</sup> has never been used, and it is unlikely that this will change in the near future.

This possibility would only become more relevant if in the future States Parties to the 1951 Convention and/or 1967 Protocol with divergent views decided to refer questions of interpretation to the International Court of Justice in a non-confrontational manner, that is, in a way where both sides to a dispute submitted their case to the Court for the sake of clarifying an important question and not of prevailing over an adversary. In this context, Article 35 of the 1951 Convention seems to imply a possibility for UNHCR to

ask a Contracting State to intervene with another Contracting State, whose application of the Convention is not agreeable to the High Commissioner, and in case of the intervention being unsuccessful, ask the State concerned to bring the matter before the International Court of Justice according to Article 38.<sup>195</sup>

Whether this will become possible in the near future remains to be seen. In any case, such proceedings would remain exceptional and could not serve as a substitute for regular monitoring.

#### (b) Inter-State complaints

To create, within the framework of the 1951 Convention and the 1967 Protocol, a new mechanism for inter-State complaints to a treaty body cannot be recommended, although it would meet the requirements mentioned above. Such a mechanism would obviously remain as unused as the existing inter-State complaints provided by several existing human rights treaties.<sup>196</sup>

#### (c) State reports

There are certain arguments in favour of developing the reporting duties under Article 35 of the 1951 Convention and Article II of the 1967 Protocol into something closer to those under the UN human rights instruments.<sup>197</sup> It is, for example,

194 Art. 38 of the 1951 Convention and Art. IV of the 1967 Protocol. See also, Art. VIII of the 1969 OAU Refugee Convention.

195 Grahl-Madsen, above n. 7, p. 253.

196 See above, section III.B.2.b 'Inter-State complaints to treaty bodies'.

197 On the reporting duties under the human rights instruments, see above, section III.B.3.a.aa, 'State reporting under the UN human rights instruments'. The creation of a reporting system that tries to avoid some of the problems of the existing mechanisms is advocated in 'Overseeing the Refugee Convention, Working Paper No. 1: "Reporting"', by A. Pyati, which formed part of a collaboration entitled 'Overseeing the Refugee Convention' between the International

obvious that the implementation of international refugee law would be considerably strengthened if the objectives of reporting identified above<sup>198</sup> could be achieved in this area too. Furthermore, such a step would ensure that State reports are examined by an independent body, whereas reports today go to UNHCR which is not even nominally independent but governed by the fifty-six governments forming the Executive Committee and forced to be sensitive to the main donor countries.<sup>199</sup> Finally, unlike today where reports to UNHCR remain confidential, setting up a formalized mechanism of reporting to an independent body would make the reports public,<sup>200</sup> thus opening up possibilities for putting more pressure on governments not fulfilling their duties properly. As outlined above,<sup>201</sup> however, reporting systems in the area of human rights law are faced with serious problems (the burden on States resulting in overdue reports,<sup>202</sup> the impossibility of dealing with all reports in time, the tendency of some reports to describe the situation inappropriately, and so forth). It must be expected that these problems would also affect State reporting in the area of refugee law. To export current reporting mechanisms to new areas of law is not advisable as long as these problems persist.

(d) Information collected by the organization

UNHCR already collects information on the application of the 1951 Convention and 1967 Protocol and other relevant treaty law in its annual protection reports. These reports serve exclusively internal purposes, however, and are not made public. To publish these reports and to discuss them within an appropriate institutional framework would, of course, be a possible way to strengthen UNHCR's supervisory role under Article 35 of the 1951 Convention, but there are strong reasons speaking against that proposal. Especially in situations of tension between UNHCR and the State concerned, the latter's authorities are unlikely to accept the report as independent, objective, and unbiased, and may well argue that UNHCR as a party to the dispute is biased. For its part, UNHCR might be tempted to tone down its criticism in order not to endanger the effectiveness of its protection activities or even presence in a particular country. As outlined above,<sup>203</sup> it is preferable to separate protection and monitoring clearly on the operational level.

Council of Voluntary Agencies and the Program in Refugee and Asylum Law at the University of Michigan, USA, Dec. 2001, paras. 23–52.

198 See above, section III.B.3.a.aa, 'State reporting under the UN human rights instruments'.

199 See S. Takahashi, 'Effective Monitoring of the Refugee Convention', paper presented at 'The Refugee Convention 50 Years On: Critical Perspectives, Future Prospect', Second International Studies Association Conference, Feb. 2001 (manuscript on file with author), pp. 3–4.

200 *Ibid.*, p. 5. The importance of publicity of reports is also stressed by MacMillan and Olson, above n. 84, pp. 39–40.

201 See above, section III.B.3.a.cc, 'Assessment'.

202 In this context, it is also appropriate to recall UNHCR's not very encouraging experiences with the questionnaire sent out in the early 1990s (above, section II.B.2, 'Information requests by UNHCR').

203 See above, section III.A.3, 'The need for third party monitoring'.

In contrast, both the models of special rapporteurs<sup>204</sup> and policy reviews by the organization<sup>205</sup> offer many advantages. They will serve as sources of inspiration for the proposals made below.<sup>206</sup>

#### (e) Advisory opinions

Under certain circumstances, UNHCR could request an advisory opinion from the International Court of Justice regarding a question of interpretation of the 1951 Convention and the 1967 Protocol.<sup>207</sup> This would be an efficient way of settling disputes that, as a result of divergent interpretations of key notions of these instruments, affect large numbers of refugees and asylum seekers.<sup>208</sup> This possibility has, however, never been used.

States are apparently reluctant to resort to advisory opinions. In 1992, the Sub-Committee of the Whole on International Protection discussed this issue. According to the report on these discussions, ‘one delegation felt that resort to the ICJ might be unacceptable to Governments as compromising their sovereignty, and was joined by two other delegations in urging caution before further developing this point. Another noted that the United Nations could ask for an advisory opinion, but that this was not a way to resolve States’ differences.’<sup>209</sup> There was no apparent support for the idea of approaching the ICJ with requests for advisory opinions, and no consensus was reached on this point.<sup>210</sup> Even if this attitude were to change in the future, requests for advisory opinions would be exceptional, and they could not replace but only complement other mechanisms.

#### (f) Individual complaints

In the context of the 1951 Convention and 1967 Protocol, the introduction of an individual complaints procedure to a newly created treaty body would be in conformity with the criteria of independence, expertise, objectivity, and transparency. It would, however, be affected by two fundamental weaknesses.<sup>211</sup> First, individual

204 See above, section III.B.3.b.aa, ‘Fact-finding by special rapporteurs or independent fact-finding commissions’.

205 See above, section III.B.3.b.bb, ‘Policy review’.

206 See below, section III.C.3, ‘Proposal’, and section III.D, ‘Monitoring beyond the 1951 Convention and the 1967 Protocol’.

207 According to Art. 96 of the UN Charter, the General Assembly or the Security Council may request an advisory opinion on any legal matter, and other organs of the United Nations, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

208 E.g. the question as to whether Art. 1A(2) of the 1951 Convention regards as refugees victims of non-State agents of persecution in situations where the State is unable to provide protection.

209 Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on International Protection, ‘Report of the 25 June Meeting of the Sub-Committee of the Whole on International Protection’, UN doc. EC/SCP/76, 13 Oct. 1992, para. 12.

210 *Ibid.*, para. 19.

211 On the weaknesses of an individual complaints system and a proposal that aims to avoid such weaknesses, see ‘Working Paper No. 2: “Complaints”’, by V. Bedford, which formed

complaints procedures would not be inclusive but selective. Since the treaty body would not have compulsory jurisdiction, its competence would only extend to those States Parties that have ratified the optional protocol necessary for introducing such a system. Ratification would not be universal. States following more restrictive lines of interpretation than the majority of States Parties and thus more likely to 'lose' cases would probably be especially hesitant about accepting such supervision. Secondly, if many States, including those with many asylum seekers, ratified such a protocol, the system would probably not function properly as the treaty body would immediately be confronted with a workload of up to tens of thousands of cases with which it could not cope. Rejected asylum seekers, especially in Europe and North America, would not only know about this possibility but also be encouraged to petition the treaty body in order to avoid immediate deportation. In addition, there is a certain danger that the mere existence of individual applications will weaken UNHCR's existing possibility to take up protection issues affecting any asylum seeker or refugee with a government at any time.

This does not mean that judicial or quasi-judicial monitoring of the application of the 1951 Convention and 1967 Protocol is not needed. Judicial supervision has been an issue in Europe for some time.<sup>212</sup> The European Court of Justice will exercise, to a certain extent, such supervision in the near future at the European Union level.<sup>213</sup> This court may provide a potential model for addressing the problem of high numbers of individual complaints. Individuals do not have access to the Court, but, in addition to the EU Commission and the EU member States,<sup>214</sup> every national court has the possibility, even the duty, to request a preliminary ruling from the Court on the interpretation of provisions of EU law.<sup>215</sup> This allows the workload to be kept within limits, while at the same time ensuring that the applicable law is applied in a harmonized way. It might, however, be premature to propose setting up a judicial body on the universal level that has the power to make preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR. Such an option would nevertheless meet all the goals and criteria outlined above and would therefore deserve thorough discussion at least in a long-term perspective.

part of the collaboration 'Overseeing the Refugee Convention', above n. 197, paras. 17–22 and 34–55.

212 See, e.g., the Proposal for an Additional Protocol to the European Convention on Human Rights, presented to a seminar of the European Council on Refugees and Exiles (ECRE) on asylum in Europe in April 1992 and reprinted in Goodwin-Gill, above n. 24, pp. 527–33, which, had it ever been adopted by the Council of Europe member States, would have been applied by the European Court of Human Rights.

213 Above n. 89.

214 Arts. 226 and 227 of the Treaty Establishing the European Community (consolidated version).

215 *Ibid.*, Art. 234.

### 3. *Proposal*

It is proposed to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model which is inspired by mechanisms using fact-finding by independent experts and policy reviews by member States of an organization.<sup>216</sup>

1. A Sub-Committee on Review and Monitoring comprising those members of the Executive Committee that are States Parties to the 1951 Convention or the 1967 Protocol should be set up as a permanent Sub-Committee within the framework of the Executive Committee.<sup>217</sup>
2. The Sub-Committee on Review and Monitoring would be responsible for carrying out Refugee Protection Reviews looking at specific situations of refugee flows or particular countries with a view to:
  - monitoring the implementation of the 1951 Convention and the 1967 Protocol;
  - identifying obstacles to full implementation of these instruments; and
  - drawing lessons from actual experience in order to overcome obstacles and achieve more effective implementation of these instruments.
 Situations or countries to be reviewed would be identified on the basis of transparent and objective criteria, taking into account, among other things, an equitable geographical distribution, the existence of particular problems or obstacles to full implementation, the number of refugees and asylum seekers involved (absolute numbers or numbers on a per capita basis), or the degree of involvement of the international community. The review system would have the following elements:
  - UNHCR would identify the situation to be reviewed and appoint a team of reviewers selected from a pool of independent experts nominated by each of the States Parties to the 1951 Convention and 1967 Protocol.<sup>218</sup> The Sub-Committee could initiate a review on its own.
  - The governments of the countries affected by a particular refugee situation to be reviewed would prepare a memorandum explaining the main features of their policy and setting out the main problems encountered,

216 For a critical discussion of this proposal, see ‘Overseeing the Refugee Convention, Working Paper No. 4: “Investigative Capacity”’, by B. Miltner, which formed part of the collaboration ‘Overseeing the Refugee Convention’, above, n. 197, paras. 26–8 and 37–51; and ‘Overseeing the Refugee Convention, Working Paper No. 7: “Coordination with UNHCR and States”’, by T. Glover and S. Russell, same series, paras. 41–6.

217 An alternative would be to reconstitute the former Sub-Committee on Protection. Such a proposal was made during the Ministerial Meeting of States Parties on 12–13 Dec. 2001 (see below, section III.E, ‘A “light” version of the new mechanism . . .’).

218 Each State Party would have the possibility of nominating one independent expert. Alternatively, these experts could be elected by a meeting of States Parties for a period of five years, but this might need an amendment to the 1951 Convention and 1967 Protocol.

the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.

- The governments concerned would invite the review team to study the situation on the ground and to hold talks with governmental bodies and agencies, members of parliament, representatives of civil society, and NGOs, and refugees in order to get first-hand information.
  - The team would prepare its report and submit it to UNHCR which would transmit it, if appropriate, to the Sub-Committee on Review and Monitoring.
  - The report would be discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs would be able to participate in these discussions. The Sub-Committee would be able to adopt observations.
  - The report of the review team together with the Sub-Committee's observations, as the case may be, would be transmitted to the States Parties as a document with unrestricted distribution.
3. In addition, the Sub-Committee on Review and Monitoring would have to start a discussion, in close consultation with all States Parties to the 1951 Convention and 1967 Protocol, about the desirability and feasibility of setting up, in the long-term perspective and within the framework of a new protocol to the 1951 Convention, a judicial body entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR.

This proposal meets all the goals and criteria mentioned above<sup>219</sup> that are necessary for an appropriate and functioning system of supervision. Refugee Protection Review Reports would allow the monitoring of violations, would contribute significantly to a harmonized interpretation of relevant norms, and would help to identify obstacles to full implementation as well as measures to overcome them and best practices. The Refugee Protection Review Mechanism would allow for a process of collective learning as it combines independent fact-finding and expertise with elements of peer review (discussion of reports by other States Parties). The 1951 Convention and 1967 Protocol provide objective and transparent standards to be used when assessing the behaviour and activities of States Parties. Inclusiveness would be guaranteed, as all concerned (governments, UNHCR, NGOs, refugees) would play a certain role in the process. Experience in other areas shows that policy review mechanisms work well in practice.<sup>220</sup> Finally, the proposed system complements supervision by UNHCR under Article 35 of the 1951 Convention and Article II of

219 See above, section III.C.1, 'Goals'.

220 See above, section III.B.3.b.bb, 'Policy review'.

the 1967 Protocol and does not endanger UNHCR's authority because the review process in a particular case is triggered by UNHCR itself. In addition, the organization could decide whether or not to submit the findings of the review team to the Sub-Committee or to keep them confidential because the State concerned is ready to change its policy and bring it into line with the requirements of the 1951 Convention and 1967 Protocol.

The legal basis for these proposals can be found in Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol. These provisions oblige States Parties 'to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and ... in particular [to] facilitate its duty of supervising the application of the provisions' of the Convention and Protocol.<sup>221</sup> Since the Executive Committee is based on paragraph 4 of the UNHCR Statute and thus is part of the institutional framework created by the Statute, no amendments to the 1951 Convention and 1967 Protocol are needed. A resolution by ECOSOC granting the Executive Committee the power to institute the new model is sufficient. One might argue that even this is not needed, but such a step would be in line with other precedents setting up monitoring mechanisms.<sup>222</sup> In any case, such an approach would provide the new supervisory mechanism with enhanced legitimacy.

#### D. Monitoring beyond the 1951 Convention and the 1967 Protocol

Many of the current problems regarding international refugee protection as defined by UNHCR's Statute go beyond the provisions of the 1951 Convention and 1967 Protocol and also affect non-States Parties to these instruments. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would also permit examination of whether or not States, including those that are not party to the 1951 Convention and/or 1967 Protocol, are respecting their obligations under international customary law and instruments other than the 1951 Convention that are pertinent to the protection of refugees and asylum seekers. Experience in the area of human rights law shows that thematic rapporteurs are well suited to looking into specific problem areas outside treaty mechanisms. They could play an important role in the area of international protection of refugees too.

The mechanism of thematic rapporteurs could be handled by the Standing Committee, the Executive Committee's subsidiary organ that meets several times during the year and comprises among its members States that are not party to the 1951 Convention and 1967 Protocol. This committee was established in 1995 to replace two sub-committees on international protection and on administrative and

221 For an explanation of these provisions, see above, section II.A.1, 'Cooperation duties'.

222 See the examples of ECOSOC Resolutions 1235 and 1503, in the text above following n. 140.

financial matters. The session of the Standing Committee that takes place each June is usually dedicated to international protection issues and would lend itself to the discussion of reports by special rapporteurs.

The following model is proposed here:

1. UNHCR should appoint, where appropriate and necessary, special rapporteurs with thematic mandates to look at issues of special concern (for example, on women and child refugees and asylum seekers; physical security of refugees; and access to asylum procedures). The mandates should be determined in a way that avoids overlap with the topics of Protection Review Reports as well as with the thematic mandates of Special Rapporteurs and Working Groups of the UN Human Rights Commission to a maximum extent.
2. The reports by special rapporteurs would be transmitted by UNHCR to the Standing Committee,<sup>223</sup> if appropriate, and would be discussed there in the presence of representatives of countries concerned; NGOs would be able to participate in these discussions. The reports, together with observations by the Standing Committee, would be disseminated as documents with unrestricted circulation.
3. The Executive Committee would be able to reflect the outcome of discussions in its own conclusions on protection.

Nothing hinders UNHCR from commissioning studies on issues relating to its competence and having them discussed at an appropriate level.

#### E. A 'light' version of the new mechanism as a first step?

The proposals just made are rather ambitious. They not only require strong political will on the part of States to carry out the proposed reviews properly but also put new burdens on the Executive Committee which presently has only limited capacities. In addition, there is a certain danger of an unhealthy politicization of the monitoring process that could negatively affect the position of UNHCR which cannot be entirely excluded. The Declaration of the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Additional Protocol of 12–13 December 2001 urged 'all States to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol'.<sup>224</sup> At the same time, participants made it clear that it was premature to consider proposals like those made in this study. Instead, many States Parties present wished

223 Or to a revived Sub-Committee on Protection, see below, section III.E, 'A "light" version of the new mechanism . . . '.

224 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/MMSP/2001/09, 13 Dec. 2001, operative para. 9. For text see Part 1.3 of this book.



to 'reconstitute a reformed Sub-Committee on International Protection [which] would provide a forum to bring together the parties most interested in protection issues to address them in a systematic, detailed and yet dynamic way'<sup>225</sup> and to incorporate this proposal formally into the Agenda for Protection.<sup>226</sup>

Under these circumstances, it might be advisable to start with a less complex version of monitoring and review in order to gain the necessary experience. Such a 'light' version would contain the following elements: the High Commissioner could at any time ask an independent expert or a group of experts to prepare a report on matters relating to the implementation of the 1951 Convention and 1967 Protocol or other instruments relevant to the protection of refugees. Where appropriate, the High Commissioner could then submit the report for discussion to the reformed Sub-Committee on International Protection which would have the possibility of examining the report. Its discussion could be reflected in the Executive Committee's conclusions. The advantage of this model lies in the fact that it can be easily introduced and used in a very flexible way.

#### **IV. Conclusions and recommendations**

The first main section of this study examined UNHCR's supervisory responsibility and the corresponding State obligations under its Statute in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. The main conclusions of this first part can be summarized as follows.

First, Article 35 of the 1951 Convention and Article II of the 1967 Protocol impose a treaty obligation on States Parties to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and also to cooperate actively with UNHCR in this regard in order to achieve optimal implementation and the harmonized application of the Convention and Protocol. Similar duties have also been recognized in Article VIII of the 1969 OAU Refugee Convention and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees. Taking into account UNHCR's Statute and the organization's character as a subsidiary organ of the UN General Assembly, a certain duty to cooperate, binding also upon non-States Parties, can be derived from Article 56 of the UN Charter. These duties have a highly dynamic and evolutionary character.

Secondly, Article 35 of the 1951 Convention and Article II of the 1967 Protocol today have three main functions. They are the legal basis for the obligation of States to accept UNHCR's protection work regarding refugees and to respond to information requests by UNHCR, and they support the authoritative character of certain UNHCR statements.

225 Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Chairperson's report on Roundtable 1, '1951 Convention and 1967 Protocol Framework: Strengthening Implementation', 13 Dec. 2001, p. 2.

226 *Ibid.*, p. 3.

Thirdly, current practice regarding Article 35 of the 1951 Convention and Article II of the 1967 Protocol which has broadly met with the acquiescence of States can be described as follows:

1. UNHCR is entitled to monitor, report on, and follow up its interventions with governments regarding the situation of refugees (for example, admission, reception, and treatment of asylum seekers and refugees). Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR's supervisory function.
2. UNHCR is entitled to cooperate with States in designing operational responses to specific problems and situations that are sensitive to and meet protection needs, including those of the most vulnerable among asylum seekers and refugees.
3. In general, UNHCR is granted, at a minimum, an advisory and/or consultative role in national asylum or refugee status determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedures, and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate. UNHCR is entitled to intervene and submit its observations on any case at any stage of the procedure.
4. UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements, or letters.
5. UNHCR is granted access to asylum applicants and refugees and vice versa, either by law or administrative practice.
6. To ensure conformity with international refugee law and standards, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees during all stages of the process. UNHCR is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
7. UNHCR also plays an important role in strengthening the capacity of relevant authorities, judges, lawyers, and NGOs, for instance, through promotional and training activities.
8. UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular of its supervisory responsibility.
9. UNHCR is entitled to receive data and information concerning asylum seekers and refugees.

The second main section of the study was devoted to a discussion of the need to improve monitoring of the implementation of the 1951 Convention and 1967 Protocol and an analysis of existing monitoring mechanisms outside the field of refugee law. This can be summarized in three key points.

First, since the degree of implementation of the 1951 Convention and other relevant instruments for the protection of refugees remains unsatisfactory, strengthening the monitoring of the implementation of these instruments is in the interest of all actors in the field of refugee protection. Non-implementation violates the legitimate interests of *refugees* as well as their rights and guarantees provided for under international law. It also violates the rights of the other *States Parties* to the Convention and other relevant instruments and is detrimental to their interests because disregard for international refugee law might create secondary movements of refugees. Non-implementation is a serious obstacle for UNHCR in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations. Finally, non-implementation affects the whole international community because it seriously undermines the present system of international refugee protection, a regime which has been able adequately and flexibly to address and solve not all but many refugee protection problems in the past.

Secondly, existing supervisory mechanisms include supervision initiated by other States (dispute settlement by the ICJ and inter-State complaints to treaty bodies), supervision by or on behalf of the organization (State reports, policy reviews, review conferences, advisory opinions by the ICJ), and supervision initiated by individuals (individual complaints to a judicial or quasi-judicial organ). Many of the existing models have not found enough support from States in the area of refugee law. In particular, serious reasons speak against transferring mechanisms of State reporting and procedures regarding individual applications from the field of international human rights law to international refugee law and protection. The most promising mechanisms are policy review reports and the use of special rapporteurs, but they need to be adapted to the specific needs and circumstances prevailing in this field.

Thirdly, a strengthened supervisory mechanism for the 1951 Convention and 1967 Protocol should monitor violations of applicable international instruments on the rights of refugees, harmonize the interpretation of the 1951 Convention and its 1967 Protocol, and induce a learning process that allows States and UNHCR to identify obstacles to full implementation, best practices, and appropriate solutions for current problems. Such a system should be independent and based on expertise, it must guarantee objectivity and transparency, and it must be inclusive and operational. It is also important to ensure that UNHCR's present supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, including its responsibility to supervise State practice on a day-to-day basis, to comment on legislation, or to advise courts, is not undermined by new mechanisms. This makes it necessary to separate new mechanisms from UNHCR institutionally but, at the same time, to grant UNHCR the possibility of deciding for itself the time and extent of such reviews.

On the basis of these conclusions, it is *recommended* to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model:

1. A Sub-Committee on Review and Monitoring comprising those Executive Committee members that are States Parties to the 1951 Convention and 1967 Protocol should be set up as a permanent Sub-Committee within the framework of the Executive Committee.<sup>227</sup>
2. The Sub-Committee on Review and Monitoring would be responsible for carrying out Refugee Protection Reviews looking at specific situations of refugee flows or particular countries with a view to:
  - monitoring the implementation of the 1951 Convention and the 1967 Protocol;
  - identifying obstacles to full implementation of these instruments; and
  - drawing lessons from actual experience in order to overcome obstacles and achieve more effective implementation of these instruments.

Situations or countries to be reviewed would be identified on the basis of transparent and objective criteria, taking into account, among other matters, an equitable geographical distribution, the existence of particular problems or obstacles to full implementation, the number of refugees and asylum seekers involved (absolute numbers or numbers on a per capita basis), or the degree of involvement of the international community. The review system would have the following elements:

  - UNHCR would identify the situation to be reviewed and appoint a team of reviewers selected from a pool of independent experts nominated by each of the States Parties to the 1951 Convention and 1967 Protocol. The Sub-Committee could initiate a review on its own.
  - The governments of the countries affected by a particular refugee situation to be reviewed would prepare a memorandum explaining the main features of their policy and setting out the main problems encountered, the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.
  - The governments concerned would invite the review team to study the situation on the ground and to hold talks with governmental bodies and agencies, members of parliament, representatives of civil society and NGOs, and refugees in order to get first-hand information.
  - The team would prepare its report and submit it to UNHCR which would transmit it, where appropriate, to the Sub-Committee on Review and Monitoring.
  - The report would be discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs would be able to participate in

227 An alternative would be to reconstitute the former Sub-Committee on Protection. Such a proposal was made during the Ministerial Meeting of States Parties on 12–13 Dec. 2001 (see above n. 224).

these discussions. The Sub-Committee would be able to adopt observations.

- The report of the review team together with the Sub-Committee's observations, as the case may be, would be transmitted to the States Parties as a public document.
3. In addition, the Sub-Committee on Review and Monitoring would have to start a discussion, in close consultation with all States Parties to the 1951 Convention and 1967 Protocol about the desirability and feasibility of setting up, in the long-term perspective and within the framework of a new protocol to the 1951 Convention, a judicial body entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR.

Many of the current problems regarding international refugee protection as defined by UNHCR's Statute go beyond the provisions of the 1951 Convention and 1967 Protocol, and also affect non-States Parties to these instruments. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would also permit examination of whether or not States, including those that are not party to the 1951 Convention and 1967 Protocol, are respecting their obligations under international customary law and instruments other than the 1951 Convention that are pertinent to the protection of refugees and asylum seekers. The following model is proposed:

1. UNHCR should appoint, where appropriate and necessary, special rapporteurs with thematic mandates to look at issues of special concern (for example, on women and child refugees and asylum seekers; physical security of refugees, access to asylum procedures). The mandates should be determined in a way that avoids or at least limits overlap with the topics of Protection Review Reports as well as with thematic mandates of Special Rapporteurs and Working Groups of the UN Human Rights Commission.
2. The reports by the special rapporteurs should be transmitted by UNHCR to the Executive Committee's Standing Committee,<sup>228</sup> if appropriate, and discussed there in the presence of representatives of the countries concerned; NGOs would be able to participate in these discussions. The reports, together with the observations of the Standing Committee, would be disseminated as documents with unrestricted circulation.
3. The Executive Committee would have the possibility of reflecting the outcome of discussions in its own conclusions on protection.

228 Or to a revived Sub-Committee on Protection, see above, section III.E, 'A "light" version of the new mechanism as a first step?'

As the proposed model is rather ambitious, it might be advisable to start with a less complex version of monitoring and review in order to gain the necessary experience. Such a 'light' version would contain the following elements: the High Commissioner could at any time ask an independent expert or a group of experts to prepare a report on matters relating to the implementation of the 1951 Convention and 1967 Protocol or other instruments relevant to the protection of refugees. Where appropriate, the High Commissioner would then submit the report for discussion to the Executive Committee which would have the possibility of reflecting the report and the discussion in its conclusions.

## 10.2 Summary Conclusions: supervisory responsibility

Expert roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 July 2001



The second day of the Cambridge Expert Roundtable addressed the question of supervising implementation of the 1951 Convention Relating to the Status of Refugees. This was based on a background paper by Professor Walter Kälin of the University of Berne entitled ‘Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond’. Participants comprised thirty-five experts from some fifteen countries, drawn from governments, non-governmental organizations (NGOs), academia, the judiciary, and the legal profession. They were provided with a number of written comments on the paper,<sup>1</sup> as well as the report and the conclusions and recommendations of the Global Consultations Regional Meeting held in San José, Costa Rica, on 7–8 June 2001. The latter compared UNHCR’s supervisory role with that of the Inter-American human rights bodies. The morning session was chaired by Professor Chaloka Beyani of the London School of Economics and the afternoon by Professor Guy S. Goodwin-Gill of the University of Oxford.

Taking into account the breadth of the discussion and the recognized preliminary character of the inquiry, this document presents only a brief summary of the discussion, as well as a list of the varied suggestions on strengthening implementation which came up in the course of it. The document does not represent the individual views of each participant or necessarily of UNHCR, but reflects broadly the themes emerging from the discussion.

1 Comments were received by a group of African NGOs (West African NGOs for Refugees and Internally Displaced Persons (WARIPNET) (Senegal), Africa Legal Aid (Ghana), and Lawyers for Human Rights (South Africa)); Rachel Brett of the Quaker UN Office; Chan-Un Park, a lawyer from the Republic of Korea; Judge Jacek Chlebny, Poland; the International Council of Voluntary Agencies (ICVA); and the Medical Foundation for the Care of Victims of Torture, London.

## Introduction

1. The focus of the wide-ranging discussion, which was more of a brainstorming session than a legal analysis, was on ways to enhance the effective implementation of the 1951 Convention. Generally, there was agreement that the identification of appropriate mechanisms should seek to preserve, even strengthen, the pre-eminence and authority of the voice of the High Commissioner. Anything that could undermine UNHCR's current Article 35 supervisory authority should be avoided.
2. The difficulties confronting international refugee protection today form the backdrop to any examination of strengthened supervision. They include major operational dilemmas obstructing proper implementation, diverging views on the interpretation of Convention provisions, and an insufficient focus in intergovernmental forums on international protection issues.

## UNHCR's supervisory role

3. Under paragraph 8 of its Statute, UNHCR's function is to protect refugees including by promoting the conclusion of international refugee instruments, supervising their application, and proposing amendments thereto. This function is mirrored in Article 35 of the 1951 Convention in which States undertake to cooperate with UNHCR in the exercise of its functions, including in particular by facilitating its duty of supervising the application of the provisions of the Convention.
4. The elements of UNHCR's supervisory role can be listed as including:
  - (a) working with States to design operational responses which are sensitive to and meet protection needs, including of the most vulnerable;
  - (b) making representations to governments and other relevant actors on protection concerns and monitoring, reporting on and following up these interventions with governments regarding the situation of refugees (e.g. on admission, reception, treatment of asylum seekers and refugees);
  - (c) advising and being consulted on national asylum or refugee status determination procedures;
  - (d) intervening and making submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements or letters;
  - (e) having access to asylum applicants and refugees, either as recognized in law or in administrative practice;
  - (f) advising governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees at all stages of the



- process, and providing comments on and technical input into draft refugee legislation and related administrative decrees;
- (g) fulfilling an advocacy role, including through public statements, as an essential tool of international protection and the Office's supervisory responsibility;
  - (h) strengthening capacity, for example, through promotional and training activities; and
  - (i) receiving and gathering data and information concerning asylum seekers and refugees as set out in Article 35(2) of the 1951 Convention.
5. This broad range of UNHCR's supervisory activities is generally accepted and indeed expected by States, although implementation of the Convention remains fraught with difficulties. This has led to calls for strengthened supervisory mechanisms, including by enhancing capacity in the protection area.

### **Considerations and possible approaches**

- 6. Supervision is not simply about ascertaining violations, but, perhaps more importantly, it is also about constructive engagement and dialogue as well as coordination to ensure the resolution of issues.
- 7. It is important to ensure that NGOs have a proper role in the process of supervision. The establishment of specialized NGOs in the field of refugee rights should be fostered, along with information dissemination, advocacy, and legal aid.
- 8. Generally, information collection, research, and analysis need to be improved. It was suggested that UNHCR's Centre for Documentation and Research should be preserved, appropriately supported, funded, and staffed. With regard to requests for reports and information from States, such requests would need to be incremental and targeted, given the limited response to earlier requests. Another possibility would be to establish a mechanism with differentiated reporting burdens. Article 36 of the 1951 Convention, which requires States to provide information on the laws and regulations adopted to ensure application of the Convention, is a reporting responsibility of States.
- 9. There is no one single model used by treaty monitoring bodies which can simply be replicated and applied to supervising implementation of the 1951 Convention. The experience gained in the human rights monitoring field and in other areas such as the International Narcotics Control Board, the World Trade Organization, or the Council of Europe is potentially useful. There is also a need to ensure complementarity with human rights

treaty-based monitoring systems and to avoid competing interpretations which might arise with several bodies with overlapping competencies. A need for confidentiality in certain circumstances need not rule out speaking out in others.

10. A number of possible approaches and suggestions were put forwards as follows:
  - (a) *Strengthen UNHCR's role.* UNHCR's role, as described above, could be enhanced by increasing significantly the number of protection staff, by further improving cooperation with regional bodies, and by UNHCR strengthening the provision of technical, legal, and other advice. One possibility which could be examined further would be for UNHCR to prepare reports for governments on implementation, which could inform and support dialogue between UNHCR and States, and could eventually be published. Such measures naturally have resource implications.
  - (b) *The Executive Committee.* The Executive Committee could complement UNHCR's supervisory role through a special mechanism which might review special problems of implementation. There is, however, a need to avoid the politicization of debate. The experience of the Human Rights Commission is salutary in this regard. A sub-committee of the Executive Committee, similar to the former Sub-committee of the Whole on International Protection, could, for instance, be constituted, to which the High Commissioner might submit problems of implementation. This would ensure a more focused debate on international protection matters generally and better quality Conclusions on protection. Such a sub-committee could also itself usefully identify obstacles to implementation of the Convention, including in specific situations, and promote solutions, not least through burden/responsibility sharing and comprehensive approaches.
  - (c) *Meetings of States Parties.* Meetings of States Parties, as undertaken in the context of international humanitarian law organized by the International Committee of the Red Cross (ICRC), could perhaps be replicated in the refugee law context, although in the human rights context such meetings have not always been so effective. The December 2001 States Parties meeting could reflect upon the utility of a review conference some years later, with UNHCR suggesting the agenda and reporting on the state of implementation of the 1951 Convention.
  - (d) *Peer review and ad hoc mechanisms.* One advantage of peer review mechanisms among States is that they allow for a more positive identification of a 'best practices' approach, as well as collective discussion of problems. Trade policy review mechanisms serve as one model. They examine implementation and problems but not in an adversarial

manner. The approach allows peer pressure to be exerted to improve implementation. Ad hoc mechanisms which do not have to be treaty-based could also be useful. For instance, the Committee of Ministers of the Council of Europe made a Declaration on compliance with commitments accepted by member States in 1994. As a result, peer review mechanisms have now been established. Thematic issues are selected, so that 'best practice' can be identified, rather than the focus being on particular countries. Confidentiality is built into the system to ensure criticism is possible.

- (e) *Judicial forums*. An informal system of review by judges could be established. For instance, the International Association of Refugee Law Judges (IARLJ) could offer a forum in which adjudicators can discuss the interpretation and implementation of the Convention on an advisory and informal basis. Establishing a judicial body as such, which could be used to provide preliminary opinions on issues, as is the case with the European Court of Justice, was proposed as a possibility in the longer term.
  - (f) *Expert advisers and/or fact-finding missions*. One possibility would be to establish a system whereby the High Commissioner appoints one or a number of expert advisers to assess implementation in relation to particular issues or particular refugee situations. A report would be made to the High Commissioner, who could then consider bringing it to the attention of the Executive Committee. Another possibility would be to set up a mechanism whereby the High Commissioner could request the organization of fact-finding missions, including government representatives and other experts, which could collect information and/or make recommendations on particular situations. It should be remembered, however, that fact-finding missions as initiated by the ICRC have tended to encounter major obstacles and their competence is only accepted by a limited number of States.
11. Participants agreed that their discussion was only the beginning of an important process to strengthen the implementation of the Convention, including through enhanced supervision. This process should continue, expanding to include other actors and taking in other perspectives. It was felt that the Ministerial Meeting in December 2001 provided an opportunity to crystallize support for moving the discussion forward.

### 10.3 List of participants

*Expert roundtable, Cambridge, United Kingdom, 9–10 July 2001  
(Article 33, Article 35)*

Philip Alston, European University Institute, Florence, Italy  
Evelyn Ankumah, Africa Legal Aid, Ghana and the Netherlands  
Daniel Bethlehem, Barrister, Cambridge and London, United Kingdom  
Chaloka Beyani, London School of Economics, London, United Kingdom  
Ricardo Camara, Government of Mexico  
Yoram Dinstein, Tel Aviv University, Israel; Max Planck Institute, Heidelberg, Germany  
Andrew Drzemczewski, Council of Europe, Strasbourg, France  
Mohamed Nour Farahat, Arab Organization for Human Rights, Cairo, Egypt  
Guy S. Goodwin-Gill, University of Oxford, United Kingdom  
Arthur Helton, Council on Foreign Relations, New York, United States  
Dame Rosalyn Higgins, International Court of Justice, The Hague, the Netherlands  
G. M. H. Hoogvliet, Attorney, the Netherlands  
Ivor C. Jackson, United Kingdom (and Geneva, Switzerland)  
Walter Kälin, University of Berne, Switzerland  
Harold Koh, Yale University Law School, United States  
Sir Elihu Lauterpacht, University of Cambridge, United Kingdom  
Jean-Philippe Lavoyer, International Committee of the Red Cross, Geneva, Switzerland  
Leanne Macmillan, Amnesty International, International Secretariat, London, United Kingdom  
Caroline Mchome, Government of Tanzania  
Sadikh Niass, West African NGOs for Refugees and Internally Displaced Persons (WARIPNET), Senegal  
Anne-Grethe Nielsen, Government of Switzerland  
Eugen Osmochescu, State University of Moldova, Chisinau, Republic of Moldova  
Bonaventure Rutinwa, University of Dar-es-Salaam, Tanzania  
Jorge Santistevan, former Ombudsman; Andean Commission of Jurists, Peru  
Sir Stephen Sedley, Royal Courts of Justice, London, United Kingdom  
Andre Surena, Government of the United States  
Vigdis Vevstad, Government of Norway

Iain Walsh, Government of the United Kingdom

For UNHCR, Erika Feller, Kate Jastram, Philippe Leclerc, Frances Nicholson, and  
Volker Türk

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