

Refugee Law

Teaching Material

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Chapter I

The International Legal Framework for Refugee Protection

I) Introduction

Ever since the refugee problem became a concern, the international community has been working tirelessly to establish the legal and institutional framework at the international level to protect refugees. Under this chapter, we shall learn the sources and historical evolution of international refugee law, the establishment of and responsibilities and mandates of international institutions mandated to protect refugees, the responsibilities of states under international refugee instruments and their obligations towards international institutions mandated to protect refugees. Besides, we shall also learn the complementarities among international refugee law, international human rights law and international humanitarian law.

II) General Objectives

Having studied this chapter, you shall be able to:

- a) Identify the international refugee instruments including instruments from institutions mandated to protect refugees and establish their legal significance
- b) Understand the historical evolution of both international refugee instruments and institutions mandated to protect them
- c) Understand the nature of obligation of states under international refugee instruments and their relationship with institutions mandated to protect refugees.
- d) The role, function and responsibilities of international institutions mandated to protect refugees
- e) Understand the relationship among international refugee law, international humanitarian law and international humanitarian law and understand the legal significance of that relationship.

1. Sources of International Refuge Law

Early in the twentieth century, the refugee problem became the concern of the international community, which, for humanitarian reasons, began to assume responsibility for protecting and assisting refugees.

The pattern of international action on behalf of refugees was established by the League of Nations and led to the adoption of a number of international agreements for their benefit which were, by and large, ad hoc agreements adopted in relation to specific refugee situations.

Pursuant to a decision of the General Assembly, a United Nations Conference of Plenipotentiaries met at Geneva in 1951 to draft a Convention regulating the legal status of refugees. As a result of their deliberations, the United Nations Convention relating to the Status of Refugees was adopted on 28 July, 1951. Following the deposit of the sixth instrument of ratification, it entered into force on 22 April 1954.

The Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. It lays down basic minimum standards for the treatment of refugees, without prejudice to the granting by States of more favorable treatment. The Convention is to be applied without discrimination as to race, religion or country of origin, and contains various safeguards against the expulsion of refugees. As stated in its preambular paragraphs, the object of the 1951 Convention is to endeavor to assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations.

Certain provisions of the Convention are considered so fundamental that no reservations may be made to them. These include the definition of the term “refugee,” and the so-called principle of *non-refoulement*, i.e. that no Contracting State shall expel or return (“*refouler*”) a refugee, against his or her will, in any manner whatsoever, to a territory where he or she fears persecution.

While earlier international instruments only applied to specific groups of refugees, the definition of the term “refugee” contained in Article 1 of the 1951 Convention is couched in general terms. But the scope of the Convention is limited to persons who became refugees as a result of events occurring before 1 January 1951.

With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the Convention applicable to such new refugees. As a result, a Protocol relating to the Status of Refugees was prepared and submitted to the United Nations General Assembly in 1966. In Resolution 2198 (XXI) of 16 December 1966, the Assembly took note of the Protocol and requested the Secretary-General to submit the text thereof to States, to enable them to accede. The authentic text of the Protocol was signed by the President of the General Assembly and the Secretary- General in New York on 31 January 1967, and transmitted to Governments.

It entered into force on 4 October 1967, upon the deposit of the sixth instrument of accession. By accession to the Protocol, States undertake to apply the substantive provisions of the 1951 Convention to all refugees covered by the definition of the latter, but without limitation of date. 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. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to States parties to the Convention.

The Convention and the Protocol are the principal international instruments established for the protection of refugees and their basic character has been widely recognized internationally. The General Assembly has frequently called upon States to become parties to these instruments. Accession has also been recommended by various regional organizations, such as the Council of Europe, the African Union, and the Organization of American States.

In view of the increasing recognition of the fundamental significance of the Convention and the Protocol for the protection of refugees and for the establishment of minimum standards for their

treatment, it is important that their provisions should be known as widely as possible, both by refugees and by all those concerned with refugee problems.

Information on accessions to the Convention and to the Protocol, as well as other relevant details, may be obtained from UNHCR, or from the UNHCR website at www.unhcr.org.

In sum, the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention 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 over half a century, they have clearly demonstrated 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.

International refugee protection is as necessary today as it was when the 1951 Convention was adopted as we still have thousands of individuals crossing international borders seeking surrogate international protection.

The 1951 Convention and the 1967 Protocol contain three types of provisions:

- (i) Provisions giving the basic definition of who is (and who is not) a refugee and who, having been a refugee, has ceased to be one.
- (ii) Provisions that define the legal status of refugees and their rights and duties in their country of refuge.
- (iii) Other provisions dealing with the implementation of the instruments from the administrative and diplomatic standpoint. Article 35 of the 1951 Convention and Article 11 of the 1967 Protocol contain an undertaking by Contracting States 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 these instruments.

2. International Oversight Institutions and their Mandates and Responsibilities

A. The Establishment of UNHCR and its Mandate

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 its present activities.

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 United Nations General Assembly, 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'. By Resolution 428 (V) of 14 December 1950, the United Nations General Assembly adopted the Statute of the Office of the United Nations High Commissioner for Refugees. UNHCR was thus established as a subsidiary organ of the United Nations General Assembly pursuant to Article 22 of the UN Charter. 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.

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.

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.

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.

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.

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 several 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.

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 recognized 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 or its 1967 Protocol. From the examination of the common needs of the various 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 needed, 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.

Although UNHCR is accorded a special status as the guardian of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 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.

B. The Executive Committee of the High Commissioner's Programme

Resolution 319 (IV) of 3 December 1949, by which the United Nations General Assembly 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'.

It further indicated that '[m]eans should be provided whereby interested Governments, non-members of the United Nations, maybe associated with the work of the High Commissioner's Office'

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.

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.

In the light of continuing concerns over the situation of refugees, the United Nations General Assembly, 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 its 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'. 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.

Having regard, *inter alia*, to the emergence of 'new refugee situations requiring international assistance', the United Nations General Assembly, 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

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)'. Membership of the Executive Committee progressively expanded since its establishment.

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.

The Executive Committee was established by ECOSOC at the request of the United Nations General Assembly. 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.

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 and the protocol.

C. Supervisory Role of UNHCR and States Duty to Cooperate

The term 'supervision' 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.

In order for the UNHCR play its supervisory role under Article 35 of the 1951 Convention, both member and non member states have the following obligations.

(I) 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,

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’

Article 35 is not, however, limited to cooperation in the area of the application of treaties but, as the clear wording shows, refers to ‘any and all of the functions of the High Commissioner’s office, irrespective of their legal basis’.

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, 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. 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).

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’s would be of particular value in facilitating the uniform application of the Convention’.

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. Thus, the cooperation duties follow the changing role of UNHCR.

(II) 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 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. This is another area where a link between the Convention and UNHCR's Statute is established.

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 and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees. 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'. Arguably, this duty is not only a moral one, but has a legal basis in Article 56 of the 1945 United Nations Charter on the

obligation of member States to cooperate with the UN, a duty that extends to UNHCR in its capacity as one of the subsidiary organs of the General Assembly.

(III) UNHCR's Protection Role

International protection denotes 'the intercession of an international entity either at the request 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. International protection on behalf of refugees is UNHCR's core function. 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 general.

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', 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'. As has been recognized by the UN General Assembly, such international protection is a dynamic and action-oriented function.

UNHCR's protection activities are listed in some detail in paragraph 8 of its Statute and paragraph (a) regarding UNHCR's task of '[p]romoting the conclusion and ratification of international conventions for the protection of refugees [and] supervising their application' is of particular importance. 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.

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.

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 advice and developing jurisprudence.

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', and to provide advice on the application of the relevant instruments of refugee law;
- to monitor refugee status determination and treatment of refugees by 'survey[ing] individual cases with a view to identifying major protection problems'³⁴ and by participating 'in various forms . . . in procedures for determining refugee status in a large number of countries',³⁵ 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,³⁶ including those in reception centers, camps, and refugee settlements,³⁷ asylum applicants and refugees, including those in detention, being at the same time entitled to contact UNHCR and being duly informed of this right;³⁸ and
- to 'monitor the personal security of refugees and asylum-seekers and to take appropriate action to prevent or redress violations thereof'.

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 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. 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 or in general issues relevant to refugees, and do not regard such activities as an intervention in their internal affairs. 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’. While not exhaustively enumerated here, current practice which has broadly met with the acquiescence of States can be described as follows:

- 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 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.
- 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.

(IV) 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. 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 has a certain duty to make sure that relevant information is made available in an appropriate way.

D. 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, their attitude has been changing recently. In the case of *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’. 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.’ The House of Lords has sought guidance from the *Handbook* and Executive Committee Conclusions 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)’. 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.’ 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. The New Zealand Refugee 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’.

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.

E. Implementation through third party monitoring mechanisms

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 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. Similarly, the Human Rights Committee came to the conclusion that Article 7 of the International Covenant on Civil and Political Rights⁶⁸ 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*'.

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 and applied this reasoning in the case of a rejected asylum seeker. 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 in 1989 derived such a prohibition from Article 3 of the European Human Rights Convention. The Human Rights

Committee and the European Court of Human Rights have also addressed other aspects of refugee protection such as issues relating to the detention of asylum seekers.

3. Refugee Law, Human Rights Law and Humanitarian Law Inter- play

Refugee law, international humanitarian law, and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact.

(I) The interplay between international human rights law and Refuge law

In seeking to ensure humane treatment for a particularly vulnerable group of people, international refugee law is closely related to international human rights law, which focuses on preserving the dignity and well-being of every individual. The two bodies of law are complementary; increasingly, human rights principles have been applied to enhance refugee protection:

- In terms of the entitlements that refugees and asylum-seekers have under international human rights law in the country of asylum;
- In so far as international mechanisms to monitor the proper implementation of human rights law can be utilized by, and on behalf of, individual refugee men, women and children;
- In how international human rights law influences UNHCR policy, for instance, in setting standards of due process, conditions of detention, gender equality, and children's rights.

The entire international protection framework is based on human rights concepts. It aims to help those who have been forced to flee their countries because their rights have been violated. In particular, the notion of persecution, which is at the heart of the refugee definition in the 1951 Convention/1967 Protocol, is regularly interpreted in accordance with human rights standards. An understanding of international human rights law is therefore vital for securing international protection for refugees and others of concern.

Since human rights law applies to everyone, including refugees, regardless of their legal status, it is a helpful standard to use in assessing the quality of the treatment that asylum countries offer to refugees and asylum-seekers on their territories. This is particularly important when States are not Parties to any of the refugee treaties (the 1951 Convention, its 1967 Protocol, or the OAU refugee Convention).

The prohibition under customary and treaty-based human rights law on returning a person to a territory where he/she is at risk of torture, or cruel, inhuman or degrading treatment or punishment, reinforces the principle of non-refoulement under refugee law. In doing so, it offers another legal avenue for securing protection for individual refugees, through recourse to an international complaints mechanism that is not available under the provisions of the 1951 Convention/1967 Protocol. The Human Rights Committee and the Committee against Torture have both, for example, prevented the expulsion of individuals facing a substantial risk of torture.

Similarly, at the regional level, European Court of Human Rights can direct a country under its jurisdiction not to expel an asylum seeker to another country where he/she might be at risk of torture or any other violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The Inter-American Court of Human Rights has similar powers in relation to the prohibition on torture under the American Convention on Human Rights.

The promotion of human rights is also relevant in securing solutions to refugee crises. Efforts to improve the human rights situation in a refugee-producing country are imperative if there is to be any real prospect of sustainable voluntary return and reintegration.

Thus, the principles of human rights are applicable to all phases of the cycle of displacement which includes: the causes of displacement, determining eligibility for international protection, ensuring adequate standards of treatment in the country of asylum, ensuring that solutions are durable.

(II) Interface between international humanitarian law and refugee law

The relationship between international humanitarian law and refugee law is also a two-way cross fertilization.

Armed conflict and international humanitarian law are of relevance to refugee law and refugee protection in a number of ways.

First, to determine who is a refugee. Many asylum seekers are persons fleeing armed conflict and often violations of international humanitarian law. Does this make them refugees? Not every person fleeing an armed conflict automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution. While there may be situations, notably in conflicts with an ethnic dimension, where persons are fleeing because of a fear of persecution based on their “race, religion, nationality or membership of a particular social group”, this is not always the case.

Recognising that the majority of persons forced to leave their state of nationality today are fleeing the indiscriminate effect of hostilities and the accompanying disorder, including the destruction of homes, food stocks and means of subsistence – all violations of international humanitarian law – but with no specific element of persecution, subsequent regional refugee instruments, such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict.

Moreover, states that are not party to these regional instruments have developed a variety of legislative and administrative measures, such as the notion of “temporary protection” for example, to extend protection to persons fleeing armed conflict.

A second point of interface between international humanitarian law and refugee law is in relation to issues of exclusion. Violations of certain provisions of international humanitarian law are war

crimes and their commission may exclude a particular individual from entitlement to protection as a refugee.

As far as protection is concerned international humanitarian law offers refugees who find themselves in a state experiencing armed conflict a two-tiered protection. First, provided that they are not taking a direct part in hostilities, as civilians refugees are entitled to protection from the effects of hostilities. Secondly, in addition to this general protection, international humanitarian law grants refugees additional rights and protections in view of their situation as aliens in the territory of a party to a conflict and their consequent specific vulnerabilities.

If respected, international humanitarian law operates so as to prevent displacement of civilians and to ensure their protection during displacement, should they nevertheless have moved.

Parties to a conflict are expressly prohibited from displacing civilians. This is a manifestation of the principle that the civilian population must be spared as much as possible from the effects of hostilities.

During occupation, the Fourth Geneva Convention prohibits individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying power or as is more the case in practice, in to third states.

In addition to this general protection, international humanitarian law affords refugees further specific protection. In international armed conflicts refugees are covered by the rules applicable to aliens in the territory of a party to a conflict generally as well as by the safeguards relating specifically to refugees.

Refugees benefit from the protections afforded by the Fourth Geneva Convention to aliens in the territory of a party to a conflict, including:

- the entitlement to leave the territory in which they find themselves unless their departure would be contrary to the national interests of the state of asylum,
- the continued entitlement to basic protections and rights to which aliens had been entitled before the outbreak of hostilities

- guarantees with regards to means of existence, if the measures of control applied to the aliens by the party to the conflict means that they are unable to support themselves.

While recognising that the party to the conflict in whose control the aliens find themselves may, if its security makes this absolutely necessary, intern the aliens or place them in assigned residence, the Convention provides that these are the strictest measures of control to which aliens may be subjected.

Finally, the Fourth Convention also lays down limitations on the power of a belligerent to transfer aliens. Of particular relevance is the rule providing that a protected person may in no circumstances be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs; a very early expression of the principle of non refoulement.

In addition to the aforementioned rules for the benefit of all aliens in the territory of a party to a conflict, the Fourth Geneva Convention contains two further provisions expressly for the benefit of refugees. The first provides that refugees should not be treated as enemy aliens – and thus susceptible to the measures of control - solely on the basis of their nationality. This recognises the fact refugees no longer have a link of allegiance with that state and are thus not automatically a potential threat to their host state.

The second specific provision deals with the precarious position in which refugees may find themselves if the state which they have fled occupies their state of asylum. In such circumstances, the refugees may only be arrested, prosecuted, convicted or deported from the occupied territory by the occupying power for offences committed after the outbreak of hostilities, or for offences unrelated to the conflict committed before the outbreak of hostilities which, according to the law of the now occupied state of asylum, would have justified extradition in time of peace. The objective of this provision is to ensure that refugees are not punished for acts - such as political offences - which may have been the cause of their departure from their state of nationality, or for the mere fact of having sought asylum.

4. Review Questions

- a) Discuss exhaustively the sources of international refugee instruments and the power and responsibilities of institutions mandated to protect refugees
- b) The UNHCR and the Executive Committee have issued a number of hand books and conclusions, how far are states bound by them?
- c) Discuss the various mechanisms designed to ensure the implementation of the UN refugee convention.
- d) Discuss the how of and the extent to which international human rights and international humanitarian laws are relevant to refugee protection.

Chapter 2

Determination of Refugee Status at the International Level: Criteria and Procedure

I) Introduction

Recognizing the refugee status of an asylum seeker involves both substantive and procedural issues. Under this chapter, in two sections, we shall closely consider the whole international legal frame work regarding determination of refugee status. In the first section, we shall consider the definition of a refugee, the legal concepts making that definition such as well founded fear, persecution, crossing international border, exclusion from refuge status(undeserving cases), and cessation of refugee status. In the second section, we shall closely consider procedural issues involved in the course of determination of refuge status. Some of these procedural issues include : who bears the burden of proof, shared responsibility, standard of proof, assessing evidence, credibility and procedural safeguards.

II) General Objectives

Having studied this chapter, you shall be able to:

- a) Understand who a refugee is and differentiate it from economic migrants and internally displaced people.
- b) Understand the concepts and terms making the definition of a refugee such as well founded fear, persecution, sources of persecution, grounds of persecution, lack of national protection, refuge sur place.
- c) Understand circumstances where a person who would otherwise be protected as refugees is excluded from such a status and the legal complications thereto.
- d) Understand circumstances where a refugee status and thereby a protection as refuge ceases and, the legal complications thereto.
- e) Catch the understanding of UNHCR and Executive Committee in relation to many of the issues mentioned above

- f) Understand the procedural guarantees refugees are endowed with in the course of refugee determination process, standard of proof, shared responsibility, credibility and obligation of an asylum seeker to cooperate.

Section One: Substantive Requirements (Criteria)

1. General Principles

Refugee status, on the universal level, is governed by the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, the two international legal instruments that have been adopted within the framework of the United Nations.

These two international legal instruments are applicable to persons who are refugees as therein defined. The assessment as to who is a refugee, i.e. the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status.

Both the 1951 Convention and the 1967 Protocol provide for co-operation between the Contracting States and the Office of the United Nations High Commissioner for Refugees. This co-operation extends to the determination of refugee status, according to arrangements made in various Contracting States.

2. Definition of a refugee

According to Article 1 A (2) of the 1951 Convention the term “refugee” shall apply to any person who:

“As 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.”

3. The Meaning of Terms Making the Definition of a Refugee

(1) ‘Events occurring before 1 January 1951’

As shown before this dateline has been removed by the 1967 Protocol and thus lost much of its practical significance. An interpretation of the word “events” is therefore of interest only in the small number of States parties to the 1951 Convention that are not also party to the 1967 Protocol.

The word “events” is not defined in the 1951 Convention, but was understood to mean happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes. The dateline refers to ‘events’ as a result of which, and not to the date on which, a person becomes a refugee, nor does it apply to the date on which he left his country. A refugee may have left his country before or after the datelines, provided that his fear of persecution is due to “events” that occurred before the dateline or to after-effects occurring at a later date as a result of such events.

(2) ‘Well founded fear of being persecuted’

(a) General analysis

The phrase “well-founded fear of being persecuted” is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of “fear” for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

To the element of fear--a state of mind and a subjective condition--is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted"--for the reasons stated--by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences--in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable.

Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. Knowledge of conditions in the applicant's country of origin-- while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded".

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each

member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.

Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

The expressions ‘fear of persecution’ or even ‘persecution’ are usually foreign to a refugee's normal vocabulary. A refugee will indeed only rarely invoke “fear of persecution” in these terms, though it will often be implicit in his story. Again, while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms.

A typical test of the well-foundedness of fear will arise when an applicant is in possession of a valid national passport. It has sometimes been claimed that possession of a passport signifies that the issuing authorities do not intend to persecute the holder, for otherwise they would not have issued a passport to him. Though this may be true in some cases, many persons have used a legal exit from their country as the only means of escape without ever having revealed their political opinions, a knowledge of which might place them in a dangerous situation vis-à-vis the authorities.

Possession of a passport cannot therefore always be considered as evidence of loyalty on the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously. In conclusion, therefore, the mere possession of a valid national passport is no bar to refugee status.

If, on the other hand, an applicant, without good reason, insists on retaining a valid passport of a country of whose protection he is allegedly unwilling to avail himself, this may cast doubt on the validity of his claim to have “well-founded fear”. Once recognized, a refugee should not normally retain his national passport.

There may, however, be exceptional situations in which a person fulfilling the criteria of refugee status may retain his national passport-or be issued with a new one by the authorities of his country of origin under special arrangements. Particularly where such arrangements do not imply that the holder of the national passport is free to return to his country without prior permission, they may not be incompatible with refugee status.

(b) Persecution

Underlying the 1951 Convention is the international community’s commitment to the assurance of basic human rights without discrimination. The Convention does not, however, protect persons against any and all forms of even serious harm. 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. 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. 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 as 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 Economic, Social and Cultural Rights, 1966. These must be added to the Convention on the Elimination of All Forms of Racial Discrimination, 1965, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child, 1989.

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. Persecution is the construct of two separate but essential elements,

namely risk of serious harm and failure of protection. This can be expressed in the formula: persecution = serious harm + the failure of State protection.

In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

(c) Discrimination

Differences in the treatment of various groups do indeed 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. 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, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.

Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.

(d) Punishment

Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim--or potential victim--of injustice, not a fugitive from justice.

The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition (for example, in respect of “illegal” religious instruction given to a child) may in itself amount to persecution.

Secondly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have “well founded fear of persecution”. In such cases the person concerned is a refugee. It may, however, be necessary to consider whether the crime in question is not of such a serious character as to bring the applicant within the scope of one of the exclusion clauses.

In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against “public order”, e.g. for distribution of pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication.

In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

(e) Consequences of unlawful departure or unauthorized stay outside country of origin

The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the 1951 Convention.

(f) Economic migrants as distinguished from refugees

A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.

Whether the same would apply to victims of general economic measures (i.e. those that are applied to the whole population without discrimination) would depend on the circumstances of the case. Objections to general economic measures are not by themselves good reasons for claiming refugee status. On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.

(g) Agents of persecution

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. 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.

(3) 'For reasons of race, religion, nationality, membership of a particular social group or political opinion'

(a) General analysis

In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.

(b) Race

Race, in the present context, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage. Frequently, it will also entail membership of a specific social group of common descent forming a minority within a larger population.

Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.

Discrimination on racial grounds will frequently amount to persecution in the sense of the 1951 Convention. This will be the case if, as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences.

The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.

(c) Religion

The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

Persecution for 'reasons of religion' may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.

(d) Nationality

The term "nationality" in this context is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term

'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific "nationality".

Whereas in most cases persecution for reason of nationality is feared by persons belonging to a national minority, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.

(e) Membership of a particular social group

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.

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.

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.

(f) Political opinion

Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions--in so far as this can be established from all the circumstances of the case--will also be relevant.

While the definition speaks of persecution 'for reasons of political opinion' it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on 'opinion'. More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

As indicated above, persecution 'for reasons of political opinion' implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of

persecution. In such circumstances 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 returned. This applies particularly to the so-called refugee “sur place”.

Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political opinion or for politically-motivated acts. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.

Whether a political offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof. Again, there may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution. 86. In determining whether a political offender can be considered a refugee, regard should also be given to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; finally, also, the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment--within the law--for an act committed by him.

(4) ‘Is outside the country of his nationality’

It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.

(a) General analysis

In this context, “nationality” refers to “citizenship”. The phrase “is outside the country of his nationality” relates to persons who have a nationality, as distinct from stateless persons. In the majority of cases, refugees retain the nationality of their country of origin.

Where, therefore, an applicant alleges fear of persecution in relation to the country of his nationality, it should be established that he does in fact possess the nationality of that country. There may, however, be uncertainty as to whether a person has a nationality. He may not know himself, or he may wrongly claim to have a particular nationality or to be stateless. Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.

As mentioned above, an applicant's well-founded fear of persecution must be in relation to the country of his nationality. As long as he has no fear in relation to the country of his nationality, he can be expected to avail himself of that country's protection. He is not in need of international protection and is therefore not a refugee.

Nationality may be proved by the possession of a national passport. Possession of such a passport creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example, by showing that the passport is a so-called “passport of convenience” (an apparently regular national passport that is sometimes issued by a national authority to non-nationals). However, a mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality. In certain cases, it might be possible to obtain information from the authority that issued the passport. If such information cannot be obtained, or cannot be obtained within reasonable time, the examiner will have to decide on the credibility of the applicant's assertion in weighing all other elements of his story.

In certain countries, particularly in Latin America, there is a custom of "diplomatic asylum", i.e. granting refuge to political fugitives in foreign embassies. While a person thus sheltered may be considered to be outside his country's jurisdiction, he is not outside its territory and cannot therefore be considered under the terms of the 1951 Convention. The former notion of the "extraterritoriality" of embassies has lately been replaced by the term "inviolability" used in the 1961 Vienna Convention on Diplomatic Relations.

(b) Refugees “sur place”

The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘sur place’.

A person becomes a refugee “sur place” due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

A person may become a refugee “sur place” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

(5) “and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”

Unlike the phrase dealt with under (6) below, the present phrase relates to persons who have a nationality. Whether unable or unwilling to avail himself of the protection of his Government, a refugee is always a person who does not enjoy such protection.

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

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.

The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase “owing to such fear”. Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution”. Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.

(6) “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”

This phrase, which relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of stateless refugees, the “country of nationality” is replaced by “the country of his former habitual residence”, and the expression “unwilling to avail himself of the protection...” is replaced by the words “unwilling to return to it”. In the case of a stateless refugee, the question of “availment of protection” of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.

It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

Such reasons must be examined in relation to the country of “former habitual residence” in regard to which fear is alleged. This was defined by the drafters of the 1951 Convention as “the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned”.

A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.

Once a stateless person has been determined a refugee in relation to “the country of his former habitual residence”, any further change of country of habitual residence will not affect his refugee status.

(7) Dual or multiple nationalities

Article 1 A (2), paragraph 2, of the 1951 Convention:

“In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.”

This clause, which is largely self-explanatory, is intended to exclude from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.

In examining the case of an applicant with dual or multiple nationality, it is necessary, however, to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals. In such circumstances, the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal.

4. Exclusion Clauses

A. Introduction

Those applicants found to fall within Article 1F of the Convention Relating to the Status of Refugees 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.

Article 1F excludes the applicant from refugee status. The guarantees of the 1951 Convention are not available. Reference to the *travaux préparatoires* shows 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’. 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. 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, Article 1F must be applied sparingly and only where extreme caution has been exercised.

The past decade has seen ever more restrictive responses to asylum seekers trying to obtain refugee status in Western Europe and North America. 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. 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 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.

On the other hand, international criminal law has progressed since 1951. Extradition to the *locus delicti* is no longer the only practical way to ensure that they 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) and the International Criminal Tribunal for Rwanda (ICTR) 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.

Most interestingly, the use of universal jurisdiction in domestic courts for serious international crimes has burgeoned in recent years.

An Amsterdam seminar in June 2000 on ‘Article 1F and Afghan Asylum Seekers’ 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; 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. Most recently, the Brussels Court of 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.

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 and act as a surrogate extradition treaty if no other arrangement exists between the affected States.

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. The two most recent United Nations multilateral antiterrorist conventions, on the Suppression of Terrorist Bombings and the Financing of Terrorism, both incorporate a non-persecution clause and extend it to ‘ethnic origin’.

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. 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. 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.

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.

A. Article 1F (a)

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 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, which refers to crimes ‘mentioned in Article VI of the London Charter of the International Military Tribunal’. However, interpretation of Article 1F is therefore not fixed in the 1946 definition, although the London Charter crimes are certainly included within subparagraph (a). In addition, regard should be had to the Geneva Conventions of 1949 and the Additional Protocols of 1977, the 1948 Genocide Convention, the Draft Code of Crimes Against the Peace and Security of Mankind, the Statutes of the ICTY and the ICTR and their jurisprudence, and the Statute of the International Criminal Court (ICC). 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 as 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. There is debate as to whether only those in a position of high authority in a State can be responsible for 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, 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, although case law from the tribunals has interpreted its meaning. Beyond genocide, however, the content of crimes against humanity is less uniform. Article 5 of the ICTY Statute lays down that crimes against humanity take place in armed conflict. The modern view is that crimes against humanity can take place in peacetime, a fact recognized in the statutes of the ICTR and the ICC. The latter two instruments require that crimes against humanity be part of a widespread or systematic attack against any civilian population, 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, they could include terrorism.

There is further divergence as to the place of 'persecution' in crimes against humanity in the three instruments. 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.

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, violation of the laws and customs of war, in international and non-international conflicts, can give rise to individual criminal responsibility. Furthermore, individual criminal responsibility attaches to breaches of common Article 3 of the 1949 Geneva Conventions in 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, 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, but the Tribunal's robust approach from 1995 has been followed in part in Article 8 of the Rome Statute. 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. Article 1F 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. Furthermore, command responsibility includes military and civilian commanders and superior orders will only be an excuse in the rarest of cases. The net is drawn widely, therefore, around those who have 'committed' Article 1F (a) crimes.

B. Article 1F (b)

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 problem is that international law provides no definition, although the United Nations has outlawed several crimes deemed ‘terrorist’ in the popular perception. Labeling something as terrorism is a matter of political choice rather than legal analysis, distinguishing it in some illegible way from the more ‘acceptable’ conduct of the so-called freedom fighter. 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. 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; terror is terror:

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. Even those fighting for self-determination should at minimum obey common Article 3 of the Geneva Conventions 1949.

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 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. 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.

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’. The 1998 International Convention for the Suppression of Terrorist Bombings 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. Two more recent UN documents have attempted to define terrorism. General Assembly Resolution 53/10872 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 defines terrorism in part by reference to other UN anti-terrorist conventions and additionally in Article 2(1)(b) as:

[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, 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.

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.

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, 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, however, the refugee protection instruments have never provided a safe heaven for terrorists.

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? Are all members complicit? 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:

- (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.

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' membership *per se*, whether of a repressive government or of an organization advocating violence, should not be enough to exclude under Article 1F(b). 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, 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.

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. 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. Before the Conventions on Terrorist Bombings and the Financing of Terrorism, 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, but there were no other universal treaties excluding the political offence exemption. In Europe, the 1977 European Convention for the Suppression of Terrorism 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.

Furthermore, it gave parties the discretion to exclude a much broader range of *soi-disant* 'terrorist' crimes. Nevertheless, the Convention has not been a wholehearted success, 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. 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.

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. Furthermore, if the drafters were tying Article 1F(b) to extradition law, why did they not adopt in Article 1F(b) the language of paragraph 7 of the 1950 Statute 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.¹⁰² 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.

On the other hand, Article 1F(b) should be 'related to', 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. The United Kingdom approach used to be based solely on the remoteness of the crime from the ultimate goal of the fugitive's organization. The Swiss approach, to which the United Kingdom now also subscribes, adopts the 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. The case of *T. v. Secretary of State for the Home Department*, 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'. 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.

Not all non-political crimes fall within Article 1F(b), only serious ones. The UNHCR *Handbook* 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 fulfill the Article 1F(b) criteria. Van Krieken, on the other hand, equally without rigorous authority, implies that all extradition crimes are serious. Those crimes that are within United Nations multilateral anti-terrorist conventions can safely be assumed to be serious.

However, theft of \$1 million is a serious crime; theft of a bar of chocolate 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. Furthermore, the seriousness of certain offences varies from state to state. Each case must be viewed on its own facts, which calls into question the very existence of automatic bars to refugee status based on the severity of any penalty already meted out. The UNHCR 'Guidelines on Exclusion' 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). This view can be seen in *Pushpanathan*, a Canadian Supreme Court case from 1998 under Article 1F(c) dealing with drug smuggling, and in *Aguirre-Aguirre*, a 1999 US Supreme Court case dealing with violent political protest in Guatemala and relying on the domestic law equivalent of Article 1F(b). *Pushpanathan* 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. 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.

Paragraph 156 of the 1979 *Handbook* talks of balancing the nature of the crime and the degree of persecution feared. Practice in continental Europe does indicate some examples of courts not excluding where there was a fear of persecution on return. 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.

Furthermore, the nature of public international law is that a purposive interpretation must always be applied to treaty interpretation that supplies flexibility. In *Gonzalez*, the Canadian Federal Court of Appeal, basing itself on Goodwin-Gill but limiting his analysis to Article 1F(b) alone,

found that there was room for balancing where the court had to determine whether the applicant had committed 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. The General Assembly has reaffirmed that all measures to counter terrorism must be in conformity with international human rights standards. 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. 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, 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 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 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 Freedoms¹³⁷ might be violated, regardless of all other factors, 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 crimes¹³⁹ 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.

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, there existed the safety net of protection provided by Article 3 of the Convention Against Torture or Article 3 of the 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. 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. If so, then reading Article 64 with Article 44(2) of the Vienna Convention on the Law of Treaties, it can be argued that any provision of the 1951 Convention that would allow for *refoulement* would be void. 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. 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 benefiting from international human rights law. In the twenty-first century, the two systems need to be better harmonized.

C. Article 1F(c)

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.

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, 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. There is a danger that the phrase is so imprecise as to allow States to exclude applicants without adequate justification. What is clear after 11 September 2001 and the subsequent Security Council resolutions, particularly Resolution 1377, 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.

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. 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.

In the *Georg K.* case, 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. 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)? Nevertheless, van Krieken explicitly accepts that all individuals could be excluded under Article 1F(c), not just high office holders.

In the Canadian Supreme Court case of *Pushpanathan*, 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 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*.

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. 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.

The domestic legislation and procedure in certain countries 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. 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. 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 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*.

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 community of that country, although even in this situation refugee status does not cease, only the protection of *non-refoulement*.

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 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 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. 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*.

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 territories 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]’, 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 of Article 32, but do so with heightened care. 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. 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. Furthermore, derogation is 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. The courts possess 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).

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. Extrapolating this approach, EC Ministers agreed in 1992 that exclusion cases could be considered under accelerated 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.

On the other hand, paragraph 141 of the UNHCR *Handbook* 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. 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’. In order to avoid consideration of suspected exclusion cases in accelerated procedures, UNHCR has proposed the establishment of specialized exclusion units. 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’.

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. Indeed, to apply Article 1F before Article 1A(2) indicates a presumption that all applicants for refugee status are potentially excludable. 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. Nevertheless, if it is felt necessary, a distinction might be drawn between subparagraph (b) of Article 1F and subparagraphs (a) and (c). 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.

D. Standard of proof for Article 1F and membership of the group

Article 1F demands that there should be ‘*serious* reasons for considering’ that one or more of the subparagraphs has been satisfied. Implicitly, therefore, Article 1F prohibits the application of automatic bars to refugee status based on a list of excluded crimes; 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. 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.

G. Exclusion and minors

There is no internationally accepted minimum age of criminal responsibility. Equally, there is no equivalent to Article 1F in Article 22 of the Convention on the Rights of the Child. 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’. Nevertheless, it would be possible to exclude applicants who were under that age when they acted contrary to Article 1F. 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’.

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.

5. Cessation of refugee Status

(1) 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 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.

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:

He can no longer, because the circumstances in connection 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 previous persecution for refusing to avail himself of the protection of the country of nationality; [or] Being a person who has no nationality he is, because the circumstances in connection 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'.

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. 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'. 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'. 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.

(2) Interpreting the ceased circumstances clauses

A. Ceased Circumstances

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’. The status of a refugee ‘should not in principle be subject to frequent review to the detriment of his sense of security’. The *Handbook* also explains in greater detail the exception to the cessation clause based on ‘compelling reasons arising out of previous persecution’.

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’

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. 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’. 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. Changes in these areas must also be ‘effective’ in the

sense that they ‘remove the basis of the fear of persecution’. It is therefore necessary to assess these developments ‘in light of the particular cause of fear’.

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 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.

Although observance of these rights needs not to 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. 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.

Large-scale successful voluntary repatriation may also provide evidence of a fundamental change in circumstances. The repatriation and reintegration of refugees can promote the consolidation of such developments. 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.’ 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. The practice of some States Parties is consistent with this recommendation. For example, the Swiss Government observes a minimum two-year ‘waiting period’, while Netherlands policy considers a period of three years necessary to establish the durability of a change in circumstances in the country of origin.

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’. Conversely, when developments in the country of origin occur in the context of violence, un-reconciled warring groups, ineffective governance, and the absence of human rights guarantees, a longer waiting period will be necessary to confirm the durability of change.

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. 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.

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.

The Commission of the European Communities, for example, has drafted a proposed Directive harmonizing minimum standard for refugee status within the European Union, which includes cessation provisions. 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.

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.

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.

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.

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. Similarly, the end of the civil war in Chad and the consolidation of President Habre's government enabled UNHCR to examine the possibility of applying the ceased circumstances provisions to Chadian refugee in 1990.

(3) State practice regarding ceased circumstances cessation

Although frequently considered by UNHCR, the ceased circumstances cessation clauses are 'little used' by states. 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. 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 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.

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.

(4) 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 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 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 noticed 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 there will be room for 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'.

The burden of proof rests with the asylum State authorities where the cessation clauses are applied to an individual recognized refugee. 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 allocation of the burden of proof may vary in other circumstances where cessation concepts figure. Two other cessation-related situations may arise:

(5) 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. 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 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. 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, 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. 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'.

The Conclusion does not mandate that the proper solution is to continue refugee 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. 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'.

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. Thus, traumatized individuals, persons with family ties in the State of refuge, and especially vulnerable persons maybe spared cessation of UNHCR protection. The Statute does not limit this exception to refugees as defined in Article 1A(1) of the 1951 Convention, but also extends it to all refugees subject to UNHCR protection.

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. 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’.

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.

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.

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 . 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 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’. 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).

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. 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. This alteration in legal status may occur without formal cessation. 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.

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 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.

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. 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 reestablishment 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. Automatic termination as a penalty for any physical return to the State of persecution is, 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.

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. Reestablishment 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.

Section Two: Procedures for the Determination of Refugee Status

Part Two – Procedures for the Determination of Refugee Status

1. Introductory Remark

The 1951 United Nations Convention relating to the Status of Refugees and the 1967 Refugee protocol do not specify the requirements for refugee status determination procedures, the idea being that state parties to the Refugee Convention would establish appropriate procedures having regard to the particular legal traditions and constitutional and administrative arrangements in their respective country. It should be recalled that at the time the Refugee Convention was adopted fifty years ago, various aspects of law and practice in the administrative law field for example, which is a common framework for refugee determination, were not very well developed.

Different jurisdictions have developed varied refugee status determination procedures which serve the common objective of deciding on the claim of asylum seekers. Differences of

terminology, procedural rules governing the administrative and juridical bases for determining refugee status in European countries and, more generally, differences between common and civil law traditions, adds to the difficulty of proposing international standards for assessing refugee status. Despite these differences it is apparent that harmonised procedural guarantees and interpretation of refugee law are generally desirable.

In short, a common understanding and interpretation of the key aspects of refugee status determination would help avoid disparate interpretation of international standards, first and foremost, and by consequence would result in more consistent recognition and treatment of refugees and asylum seekers.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status noted the “unlikelihood that all states bound by the 1951 Convention and the 1967 Protocol could establish identical procedures” (para 192). The Handbook nonetheless highlights that “determination of refugee status, which is closely related to questions of asylum and admission, is of concern to [UNHCR]”. It should be recognised that in some countries UNHCR either undertakes refugee status determination under its Statute or is a party of the national determination procedure.

The Handbook, which was originally prepared by UNHCR in 1979 at the request of state parties to the Refugee Convention to assist them in applying the Convention, has been criticised by some commentators for not articulating very clear standards. Regardless of any apparent shortcomings, and the fact that since 1979 there has been a benefit of developments in refugee law, the Handbook has been recognised by some courts as playing a useful role in interpreting the refugee definition and related procedural requirements. More recent developments deriving from international and national jurisprudence in addition to UNHCR policy papers and guidelines have added to our common understanding of refugee law.

A central argument put forward in most cases is that the humanitarian nature of international refugee law and the obligation of states to make good on the protection of refugees a fortiori requires that the refugee definition and determination procedures should be interpreted and

applied in a liberal manner. Said another way, evidentiary standards in the refugee context should not be interpreted too strictly. In this connection Hathaway has noted that:

(T)he concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted ... (A)ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments”.

If we accept that the concept of ‘persecution’ should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high of a standard in order for a victim of persecution to prove his or her claim. Indeed, Hathaway, who is a proponent of the approach that decision-makers in refugee matters need only concern themselves with the objective risk of being persecuted, has floated the idea that “an individual can be untruthful and still be a Convention refugee”. In support of this seemingly odd comment he described the following scenario:

Take for example a case in which the decision-maker is satisfied of the identity of the claimant, and has adequate documentary evidence that persons of the claimant’s description face a well-founded fear of being persecuted. In such circumstances, no further evidence is required to recognise the refugee claim. If the applicant fails to testify truthfully – or indeed, to testify at all then the decision-maker is left only with the documentary evidence as the basis for assessing the well-foundedness of the claim. But if that documentary evidence is in fact sufficient to make the case for a real chance or serious possibility of being persecuted, the fact of the applicant’s false statements does not negate the reality of the risk faced, and refugee status should be recognised.

No one is suggesting that dishonesty be encouraged. Dishonesty is, however, sometimes explicable, especially in cases “when bad advice is received from traffickers or others viewed by an asylum-seeker as experts; when fear of return drives an asylum seeker to embroider his or her real story; or when decision makers appear to attach weight to matters such as travel routes which are, in truth, substantively irrelevant to qualification for refugee status”. The following discussion will look more closely at what is meant by evidentiary terms used in refugee law.

Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties to the 1951 Convention and to the 1967 Protocol vary considerably. In a number of countries, refugee status is determined under formal procedures specifically established for this purpose. In other countries, the question of refugee status is considered within the framework of general procedures for the admission of aliens. In yet other countries, refugee status is determined under informal arrangements or ad hoc for specific purposes, such as the issuance of travel documents.

In view of this situation and of the unlikelihood that all States bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of the applicant for refugee status, would ensure that the applicant is provided with certain essential guarantees, are the following:

- (i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority-wherever possible a single central authority-with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.

- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.

The Executive Committee also expressed the hope that all States parties to the 1951 Convention and the 1967 Protocol that had not yet done so would take appropriate steps to establish such procedures in the near future and give favourable consideration to UNHCR participation in such procedures in appropriate form.

2. Burden of proof: a shared responsibility

It is normally considered that the burden of proof, or the obligation to prove a claim or allegation, lies with the applicant. In addition to the general duty to tell the truth and co-operate with the decision-making authority a refugee applicant should be provided a reasonable opportunity to present evidence to support his or her claim. A refugee claimant must therefore make reasonable efforts to establish the truthfulness of his or her allegations and the accuracy of the facts on which the claim is based.

In view of the particular nature of the refugee situation and the vulnerability of some asylum seekers, the decision-maker must share the duty to ascertain and evaluate all the relevant facts. Reference to relevant country of origin and human rights information by the decision maker will assist in assessing the objective situation in an applicant's country of origin.

In recent years UNHCR as well as a number of states and non-governmental organisations have made significant advances in compiling and disseminating country of origin and related human rights information. Seeking and referring to such information in refugee status determination

proceedings should be considered an essential undertaking by the decision-maker towards satisfying the shared responsibility of the burden of proof.

The Handbook acknowledges that evidentiary requirements should not be applied too strictly “in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself” (para 197) Although the burden of proof is discharged by the applicant through providing evidence, in the end the only available evidence may be an applicant’s oral testimony. In addition to an applicant’s individual testimony, other evidence such as documents or the testimony of witnesses who have expertise on relevant country conditions may be considered as part of the determination procedure.

In some national procedures, decision-makers commonly make use of sources of information which are not available to a refugee applicant including reports from diplomatic missions or fellow governments, or even in some cases reports from security intelligence agencies.

Administrative law principles of natural justice and fairness provide that an applicant normally be permitted to know what evidence is being relied upon to reach a decision. The use of internal reports by decision-makers without providing the asylum applicant or his or her legal counsel disclosure of such information may actually prejudice an applicant, as they would be unable to refute the evidence or provide a full and informed explanation in case of perceived discrepancies.

3. The standard of proof

In considering an applicant’s responsibility to prove facts in support of his or her refugee claim, the term ‘standard of proof’ means the threshold to be met by the claimant in persuading the decision-maker of the truth of his or her factual assertions.

Facts which need to be ‘proved’ are those which concern the background and personal experiences of the applicant which purportedly give rise to fear of persecution and the unwillingness to avail him or herself of the protection of the authorities in the country of origin. In this sense there must be a well-founded fear of persecution which has caused the applicant to

flee their country of origin or residence. The applicant's fear must be genuine and this is assessed in the light of his or her personal situation and background, as well as the evidence presented and the situation in the country of origin.

The refugee definition requires that a fear of persecution must be well-founded, but this does not mean there must have been actual persecution. The travaux préparatoires to the 1951 Refugee Convention supports this approach. The drafting group's explanatory note on the refugee definition provides that an applicant:

(M)ust prove that he or she has either actually been a victim of persecution or can show 'good reason' why they, he or she fears persecution. It is generally accepted that the 1951 Refugee Convention does not require a causal relationship between persecution and flight. Thus, if the reasons to fear persecution have occurred after the applicant had already left the country (e.g. in case of a change of regime), the granting of refugee status due to those "post flight reasons" is nevertheless justified.

In the UK House of Lords decision of Sivakumaran, it was established that the appropriate test to determine whether an applicant's fear was well-founded was if there is a "reasonable chance", "substantial grounds for thinking" or a "serious possibility" of the feared event occurring. The applied test was intended to be a lesser standard than the civil standard of balance of probabilities. The test for well-foundedness was further clarified by the Canadian Federal Court of Appeal in the case of Ponniah, where Mr Justice Desjardins stated that:

'Good grounds' or 'reasonable chance' (of persecution) is defined in Adjei as occupying the field between upper and lower limits; it is less than a 50 percent chance (i.e. a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is 'good grounds'.

The UNHCR Overview of Protection Issues in Western Europe also cites the example of the German Federal Constitutional Court which has ruled in a number of cases that there "should be a 'considerable likelihood' that the applicant would be exposed to persecution on return.

However, according to the Court, ‘considerable likelihood’ of persecution exists even if the chances of persecution actually occurring are less than 50%. The important element is rather whether there are sufficient objective elements that would make a reasonable thinking person fear persecution”.

In common law countries the law of evidence relating to criminal prosecutions requires cases to be proved by the state ‘beyond a reasonable doubt’. In civil cases, the law does not require such a high standard; rather the decision-maker has to decide the case on a ‘balance of probabilities’. For refugee claims, there is no necessity for the decision-maker to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The decision-maker needs to decide if, based on the evidence provided as well as the veracity of the applicant’s statements, there is a ‘reasonable likelihood’ or ‘good reason’ that the claimant has a well-founded fear of persecution.

UNHCR favours the more generous test of ‘standard of proof’ as developed in some common law countries as the correct approach. The flexibility which the decision-maker must take into account in assessing evidence on a refugee application, as well as the concern that placing too high an evidentiary burden on refugee applicants is inconsistent with the humanitarian nature of refugee law, supports the view that the standard of proof is satisfied if an applicant has demonstrated a ‘serious possibility’, ‘good reason’, ‘valid basis’ or ‘real or reasonable chance or likelihood’ of persecution.

4. Assessing evidence and the link to credibility

The 1995 UNHCR European Series publication entitled ‘An Overview of Protection Issues in Western Europe’ notes that:

- in the refugee context, given the potential seriousness of an erroneous negative decision and because objective evidence will frequently be unavailable or inaccessible, assessing whether the applicant has proved a ‘well founded fear’ should be approached flexibly, in particular where;

- the fear which is the subject of an asylum claim relates to sur place or a future possibility and therefore is not capable of being demonstrated in the present;
- the circumstances of sudden and often clandestine flight and travel make it difficult or impossible to provide documentary evidence;
- the existence of fear and/or trauma following persecution and flight results in gaps or inconsistencies in the testimony;
- refugees cannot return to their country of origin, and enormous risks and difficulties are associated with obtaining original documentary evidence.

The Resolution on Minimum Guarantees for Asylum Procedures which was adopted by the EU Council of Ministers in 1995, has noted that “when examining an application for asylum the competent authority must ex officio take into consideration and seek to establish all relevant facts and give the applicant the opportunity to present a substantial description of the circumstances of the case and to prove them”.

As noted above, in order to discharge the burden of proof the applicant must make sincere attempts to access and present all the relevant facts and circumstances of his or her case. The Resolution on Minimum Guarantees explicitly states that recognition of refugee status is not dependent on the production of any particular formal evidence. Even in the case of undocumented claims where the evidence is solely based on an applicant’s oral testimony, notwithstanding the inability to prove all the elements of the asylum claim, if an applicant’s statements are coherent, plausible, consistent and thereby credible it would be proper to grant the applicant ‘the benefit of the doubt’.

In assessing the evidence presented, which is of key importance in assessing an applicant’s credibility, the decision-maker must consider all of the evidence, both oral and documentary. Furthermore, the evidence must be assessed as a whole and not just in parts in isolation from the rest of the evidence. The decision-maker would be correct, however, to place greater weight on evidence that is directly relevant to the issues being addressed as some evidence may be more material to the refugee claim.

If there are inconsistencies or exaggerations in the evidence presented, the decision-maker must go on to assess those aspects of the evidence which are found to be credible to determine if they support the claim to refugee status in its totality. The rejection of some, and in some cases even substantial, evidence on account of lack of credibility does not necessarily lead to rejection of the refugee claim. The claim must still be assessed on the basis of the information that was found to be truthful, including documentary and other evidence relevant to the applicant's situation including as required persons who are similarly situated. If aspects of a claim are in doubt, the applicant should be provided a reasonable opportunity to present further evidence in order to clarify any aspects which the decision-maker deems not credible.

Other considerations may come into play in assessing the evidence of children or persons suffering from mental or emotional disorders. In order to ensure that the best interests of a separated asylum-seeking child are taken into account, for example, a designated legal representative should be appointed to help the child through the determination proceeding. Factors to consider in assessing the evidence of children include: a child's age at the time of the events; the time that has elapsed since the events; level of education; ability to understand and relate his or her experiences; understanding of the need to tell the truth; capacity to recall certain events and capacity to communicate intelligibly or in a form capable of being rendered intelligible.

A minor refugee applicant may have difficulty in recounting the events that led him or her to flee, and often the child's parents will not share distressing events with the intention of protecting the child. As a result a child's testimony may appear vague and uninformed about key events which are relevant to the claim of persecution. It is therefore essential when assessing the credibility of a minor applicant, that the child's sources of knowledge and his or her maturity and intelligence be taken into account. The seriousness of the persecution alleged must also be considered to determine whether past events have traumatised the child and hindered his or her ability to recount certain details.

Persons who have suffered trauma or are suffering from mental or emotional disorders also require special care. The Handbook suggests that in such cases, whenever possible, the examiner should obtain expert medical advice.

The Handbook further recommends that a medical report should provide information on the nature and degree of mental illness and assess the applicant's ability to fulfil the requirements normally expected of an asylum seeker in presenting his or her case. The Handbook proposes that the decision-maker "lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant ... it may also be necessary to draw certain conclusions from the surrounding circumstances." (para 210)

Female asylum seekers may also experience particular problems in providing evidence and thereby supporting the credibility of their refugee claim when they are not given access to the determination process independently from their husbands or male relatives. In some cases women may experience problems in obtaining travel documents prior to their flight, which may lead to undermining their credibility. Similarly, women from certain cultures where men do not share the details of their political, military or social activities with their female partners or family members may find themselves in a difficult situation when questioned about the experiences of their relatives.

5. Absolute Credibility v. Overall Credibility

Credibility is a key factor in establishing the validity of the refugee claim. The overall credibility of an applicant's claim to refugee status is normally assessed by examining a number of factors including: the reasonableness of the facts alleged; the overall consistency and coherence of the applicant's story; corroborative evidence adduced by the applicant in support of his or her statements; consistency with common knowledge or generally known facts; and the known situation in the country of origin. The applicant's demeanour or behaviour may also be a relevant consideration.

Credibility is established where the applicant has presented a claim that is coherent and plausible and does not contradict generally known facts and is therefore, may not be absolutely credible. There are a number of factors that may tend to place credibility in doubt. As noted in the UNHCR Overview, factors reducing credibility may include that: the applicant has withheld information, personal history data or submitted new information in a second interview; the applicant is unwilling to supply information; the behaviour of the applicant is inappropriate; the applicant has deliberately destroyed his passport or other documentation; the professed inability of the applicant to name the transit countries through which he or she has travelled. However, these factors may be capable of rational explanation and should be assessed in each individual case in the broader context of refugee status determination. This requires that an asylum seeker be provided a sufficient opportunity to explain or help clarify any aspects of the claim which a decision-maker finds doubtful or simply not credible.

A number of national authorities are particularly strict when assessing an applicant's credibility. Even inconsistencies which are not central or material to the basis of the refugee claim may be considered as grounds for rejection. For example, some countries place great emphasis on an applicant's travel route when considering credibility or determining whether a third country may be considered responsible for assessing a particular refugee claim.

Given the extensive legislative and other measures states have in place in order to 'legally' access European territory, it is not surprising that many genuine asylum seekers would be obliged to resort to illegal or irregular means to enter a country. Inconsistencies concerning a person's travel route may then be offered in order to protect the identity of the individuals, who provided assistance, or to safeguard the travel route for future asylum seekers or to avoid return to a third country.

A more balanced analysis may be achieved by focusing on contradictions or discrepancies that are of a significant or serious nature. Inconsistencies, misrepresentations or concealment of certain facts should not lead to a rejection of the asylum application where they are not material to the refugee claim. Where an applicant is found to be lying and the mistruth is material to the claim, then it is necessary for the decision-maker to take this into account in light of the entire

body of evidence to be assessed and decided upon. In general, what is required is overall credibility as opposed to absolute credibility.

Contradictions or inconsistencies should relate to the fundamental or critical aspects of the claim to be deemed to undermine an applicant's credibility. Rejecting a claim based solely on the non-credibility of marginal issues (e.g. delays in applying for refugee status), without evaluating the credibility of the evidence concerning the substance of the claim, is not a desirable practice. On the other hand, just as an applicant may be able to show on cumulative grounds that he or she has a well-founded fear of persecution, a series of discrepancies and contradictions taken individually which may appear insignificant, when considered together may support a finding of lack of credibility.

6. The benefit of the doubt

The UNHCR Handbook provides the following guidance on when it is warranted to grant a refugee applicant the 'benefit of the doubt'. The relevant excerpts are:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his [or her] statements by documentary or other proof, and cases in which an applicant can provide evidence of all his [or her] statements will be the exception rather than the rule ... 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 [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt.

After the applicant has made a genuine effort to substantiate his [or her] story there may still be a lack of evidence for some of his [or her] statements. As explained above (para 196), it is hardly possible for a refugee to "prove" every part of his [or her] case, and indeed, if this were a requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt.

The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

The application of the benefit of the doubt has been widely adopted in national determination procedures and as part of UNHCR's practices in the field. It is worth emphasising that a key element in its proper use is to ensure that the applicant is deemed credible. Given the difficulty or impossibility in establishing all the facts of a refugee claim, and in consideration that the claim presented satisfies the refugee definition, and then the benefit of the doubt may be properly exercised provided a certain credibility threshold is met.

7. Review Questions

- a) Who is a refugee and how is he different from an economic migrant or internally displaced people? Who is a refugee sur place? Who is a prima facie refugee?
- b) What is persecution? Are the grounds of persecution given under the UN refugee exhaustive?, if so, discuss the practical problems it generates
- c) Discuss the subjective and objective elements of a well- founded fear of persecution
- d) In refugee determination process, who has the principal responsibility to prove that the asylum seeker has a well founded fear of persecution? Why? What is a shared responsibility? What is the standard of proof required? What is credibility and is overall credibility enough to get a refugee status?

Chapter Three

Some Concepts of Underpinning Refuge Law

I) Introduction

Under this chapter, we shall consider in detail some important concepts underlying refugee protection. Such concepts discussed in detail in this chapter are: non-refoulment, temporary and subsidiary protections, reception and detention, family unity, safe third country, safe country of origin, internal flight alternative and durable solutions to refugee problems. All these concepts are at the heart of international legal framework protecting refugees. While concepts such as non-refoulment, family unity, reception and detention and durable solutions are as old as international refugee law, concepts of subsidiary protection, safe third country and safe country of origin, and internal flight alternative are relatively recent developments having their origin essentially in Europe. Most of these concepts, both old and new, have been points of debate across the globe. Some of them are taken as unfortunate move towards diminishing the benevolent international refugee protection that has already taken root and, the different understanding states have regarding some of these concepts have also generated a legal lacuna that runs counter to refugee protection. Cognizant of these problems, UNHCR, the Executive Committee and the General Assembly of the United Nations have played some role to clarify on what the content and scope of these concepts should be.

II) General Objectives

Having studied this chapter, we shall be able to:

- a) Understand what does a protection against refoulment mean in relation to article 33 of the UN refugee convention, and international human rights instruments, who is bound by this obligation of non-refoulment, where to refoulment is prohibited, prohibition of indirect removal and the exceptions under article 33(2) of the UN refugee convention to protection against refoulment.
- b) Understand what a temporary protection is about, how it has evolved, under what circumstances it is applicable, and its significance in refugee protection

- c) Understand what a subsidiary protection is about, how it has evolved, its legal base in the UN refugee convention, and its significance in refugee protection
- d) Understand the manner states should behave towards asylum seekers both at borders and within their territory, establish if states are allowed to detain asylum seekers and refugees, if so, understand the circumstances where this is possible and identify the controversies surrounding reception and detention.
- e) Understand the right to family unity and reunification, the rationale behind it and problems surrounding it
- f) Understand the concepts of safe country of origin and safe third country, how and why these concepts have evolved and the reaction and position of UNHCR regarding these concepts
- g) Understand the concept of internal flight alternative, why and how it has evolved, how an assessment of the availability of internal flight alternative is to be made and, the reaction and position regarding this concept
- h) Identify and understand durable solutions, the obligation of states and UNHCR to seek durable solutions and, the practical problems hindering its realization

1. Non- Refoulement

(i)Introduction

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.

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.

Its best known expression is given in Article 33 of the 1951 Convention Relating to the Status of Refugees:

- (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.

The principle also appears in varying forms in a number of legal instruments such as:

- (a) the 1966 Principles Concerning Treatment of Refugees, adopted by the Asian- African Legal Consultative Committee, 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 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 as Resolution 2132 (XXII), 14 December 1967, Article 3 of which provides: 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, 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, 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’

(e) the 1984 Cartagena Declaration, 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.

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 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.

Likewise, Article 7 of the 1966 International Covenant on Civil and Political Rights 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;

The corresponding provision in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has similarly been interpreted by the European Court of Human Rights as imposing a prohibition on non-refoulement in *Soering v. United Kingdom*, *Vilvarajah v. United Kingdom* and *Chahal v. United Kingdom* cases.

In sum, it should be clear that the principle of non-refoulement has been recognized not only by refugee-specific legal instruments but also by virtually all international and regional human rights instruments either directly or indirectly. Now, we shall be looking into article 33 of the refugee convention on non-refoulement fairly at length.

(ii)Some preliminary observations

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.

Secondly, the 1951 Convention is certainly of 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 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’.

The humanitarian character of the 1951 Convention is also evident 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.

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.

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 United Nations General Assembly. 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’.

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 several years. Thus, for example, in 1980, the Executive Committee reaffirmed the fundamental character of the principle of non-refoulement'. In 1991, it emphasized 'the primary importance of non refoulement and asylum as cardinal principles of refugee protection'. In 1996, it again reaffirmed 'the fundamental importance of the principle of non-refoulement'. 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 (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.)

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.

Article 33(2) contains exceptions to this principle. These will be addressed further below.

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. The object and purpose of the 1951 Convention – its humanitarian character – as well as any subsequent developments in the law and any subsequent agreements and practices of the parties regarding its 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'

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'.

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.

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:

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 organization 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.

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;
- (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;
- (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; 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.

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 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?

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.

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. 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.

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.

For example, in *Lo'pez Burgos v. Uruguay*, involving the alleged arrest, detention, and mistreatment of Lo'pez 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 Lo'pez 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 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.

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’

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.

2. Prohibited conduct

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’?

As the words ‘in any manner whatsoever’ indicates, 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.

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.

(a) Applicability to extradition

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.

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, support the proposition.

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 with 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.

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.

Finally, it should also be noted 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

As regards rejection or non-admittance at the frontier States are not 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.

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.

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. As any ambiguity in the terms must be resolved in favor of an interpretation that is consistent with the humanitarian character of the Convention, and in the light of the qualifying phrase, the interpretation to be preferred is that which encompasses acts amounting to rejection at the frontier.

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’. 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.

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.

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).

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.

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 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.

Fourthly, 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 United Nations General Assembly Resolution 55/74 of 12 February 2001 which states inter alia as follows:

The General Assembly. . .

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 jeopardize the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards;

Condemns all acts that pose a threat to the personal security and well-being of refugees and asylum-seekers, such as refoulement . . .

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?

The next question is who is protected by the prohibition on refoulement?

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.

(a) Non-refoulement is not limited to those formally recognized as refugees

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.

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 United Nations High Commissioner for Refugees 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.’

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.

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.

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.

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.’

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.’

The same view has been endorsed in United Nations General Assembly Resolution 52/103 of 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 returning or expelling refugees or asylum-seekers contrary to international human rights and to humanitarian and refugee law. This has been reiterated by the United Nations General Assembly in subsequent resolutions.

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.

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 equally.

(b) Need for individual assessment of each case

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.

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. Noticing 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:

‘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.’

(c) Mass influx

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 anyway 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 of states.

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.

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:

‘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.’

‘ 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.’

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, and nationality, country of origin or physical incapacity.

In all cases, the fundamental principle of non-refoulement – including non-rejection at the frontier must be scrupulously observed.

The Executive Committee expressed the same view in response to the humanitarian crisis in the former Yugoslavia in Conclusion No. 74 (XLV) 1994.

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 United Nations General Assembly as a fundamental principle of protection for refugees and asylum seekers.

Even more recently, United Nations High Commissioner for Refugees, 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 practiced in relation to large-scale flows in countries, such as those in Southern Africa, that have no legal framework for dealing with refugees.’

That is not to say that refugee protection in conditions of mass influx is free from difficulties. It is not. But there has been no 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’

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’, employed in article 33 of the Convention.

Next, we 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.

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’

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.

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.

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 nonrefoulement 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. The State

concerned has a responsibility to ensure that the individual in question is not exposed to such a risk.

Secondly, a number of instruments adopted since 1951 in the refugee field are cast in terms of suggesting that a State proposing to remove a refugee or asylum seeker must consider whether there is a possibility of his or her subsequent removal 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.

Thirdly, from the information provided by United Nations High Commissioner for Refugees, it appears to be well accepted by States operating ‘safe country’ policies that the principle of nonrefoulement 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.

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’.

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

We now turn to examine the meaning of the words ‘where his life or freedom would be threatened’.

Commonsense 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’.

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 expression ‘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 expression ‘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.

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.

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.

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.

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 United Nations General Assembly 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).

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.

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.

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'.

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.

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.

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.

6. The nature of the threat

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’.

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, and nationality, membership of a particular social group or political opinion.

In the light of the above conclusions 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.

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:

‘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.’

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. 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.

7. Article 33(2): the exceptions

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.

General observations

(a) Relationship to Article 1F of the Convention

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.

In an important respect, Article 33(2) indicates a higher threshold than Article 1F in so far 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).

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’. 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.

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.

(b) The trend against exceptions to the prohibition of refoulement

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 ‘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.’

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.

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, 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.

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’.

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’. 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’. The Executive Committee has similarly affirmed the application of non-refoulement in circumstances involving the irregular movement of refugees and asylum seekers notwithstanding the destabilizing effects of such movement.

Regarding this notwithstanding, there is still no sufficiently clear consensus opposed to exceptions to non-refoulement to warrant reading the 1951 Convention without them. There remains an evident appreciation amongst States, within UNHCR, and amongst commentators 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)

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 he or she is in danger, the exceptions to non-refoulement must be interpreted restrictively and applied with particular caution.
- (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

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*

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

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'.

A number of elements of this exception require comment.

(i) The prospective nature of the danger

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

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.

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.

(iii) A State's margin of appreciation and the seriousness of the risk

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.

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.

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.

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.

(iv) The assessment of risk requires consideration of individual circumstances

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 refugee’. It is also supported by the scheme and character of the principle of nonrefoulement 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.

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.

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.

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.

(c) The interpretation and application of the ‘danger to the community’ exception

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’.

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.

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.

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.

2. Temporary and Subsidiary Protections

I. Protection of Refugees in Mass Influx Situations

Mass displacement poses particular challenges for receiving States, for other States affected in the region and, increasingly, for the international community. States as well as UNHCR have grappled with the complexities of providing adequate protection responses in these circumstances. The need for greater clarity concerning the scope of international protection in mass influx situations is apparent, not least in view of the varying responses that have been used to address mass displacement.

II. Existing Responses to Mass Influx

Mass displacement usually makes individual refugee status determination impracticable. This may be either because systems geared to individual determinations are too unwieldy, costly and protracted in the face of large numbers of arrivals, or because there are no such systems in place. In any event, the evident and immediate need for emergency assistance and protection demand an urgent response.

The traditional response has been to use *prima facie* determination or acceptance on a group basis because of the obvious refugee character of the individuals concerned, without going into any formal, individual determinations. More recently, principally but not exclusively in Europe, States faced with large numbers of arrivals have adopted and indeed legislated for the device of “temporary protection”, which allows them to extend protection and assistance to the group without initially going into individual status determinations. In such cases, it has been acknowledged that individual procedures under the 1951 Convention can be kept “on hold” for use if or when it becomes necessary to determine individual protection needs and consequent State responsibilities.

These two approaches, including an assessment of their strengths and weaknesses, are examined in the following paragraphs.

A. Group Determination of Refugee Status on a Prima Facie Basis

Group determination 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 South Asia, that have no legal framework for dealing with refugees. This approach has also been resorted to by UNHCR in line with its Statute and subsequent General Assembly resolutions. Under this practice, the objective evidence available on the situation or event prompting the exodus is used to determine that members of the group are at risk for refugee reasons. The specific emphasis on the objective situation set out in both the 1969 OAU Convention on the specific aspects of refugee problems in Africa and in the 1984 Cartagena Declaration, the two regional complements to the 1951 Convention, has helped facilitate such assessment. At the same time, however, specific procedures have rarely been put in place by which group determination is effected.

Given the very nature of mass influx, it may be difficult or impossible to provide immediately the full standards of treatment foreseen under the 1951 Convention. In its Conclusion No. 22 adopted in 1981, the Executive Committee defined minimum standards of immediate treatment in situations of large-scale influx. For UNHCR as well as for affected States, this Conclusion remains an important yardstick against which to measure such treatment in a mass influx of refugees. It is important to note, however, that the Conclusion was never intended as a substitute for standards of protection under the 1951 Convention.

The following points, among many others, require clarification in order to make this approach work effectively.

(a) Exclusion of persons not deserving of international protection: Since there is no individual screening in mass influx situations, the identification of armed or other excludable elements poses a particular challenge. Security concerns, as well as the maintenance of the civilian and

humanitarian character of asylum require that such persons be promptly separated from the refugee population and where appropriate screened for exclusion from refugee status. The procedural elements for exclusion from refugee status in such instances need to be developed further to address this problem.

(b) Adjusting resettlement criteria: Resettlement screening and refugee status determination are clearly related but nevertheless separate processes. Normally a determination pursuant to the 1951 Convention criteria precedes resettlement processing, which takes Convention refugee status as its starting point and then brings into play additional criteria. A problem arises where a person enjoys prima facie refugee status, with the broader refugee criteria being the underlying basis for this, but is rejected for resettlement as not meeting a strict application of the 1951 Convention criteria. This will happen most often in displacement driven by generalized violence or conflict, often compounded by other elements contributing to the compulsion to flee. While theoretically this is understandable, it creates a number of important dilemmas. Firstly, if the number of rejected cases multiplies, as is likely when there are quotas specifically for persons from prima facie refugee populations, doubts are created in the minds not least of the host governments as to the refugee character of the population at large. These can put into question the continuing viability of the prima facie approach. Secondly, for UNHCR, the resettlement solution has to retain its flexibility as a response mechanism to address particular protection vulnerabilities in the host country.

Regardless of whether an individual is a “Convention refugee” or an “extended definition refugee” (insofar as this distinction can even clearly be made), where a protection situation develops that is best addressed through resettlement, UNHCR needs the assurance of being able to pursue this solution effectively. There is, in UNHCR’s assessment, a need for resettlement countries to reconsider their resettlement criteria to allow them to take into account the specificities of prima facie status.

B. The Provision of “Temporary Protection”

Europe was faced with major displacement throughout the 1990’s as a result of the successive armed conflicts in South-East Europe. States receiving large numbers of arrivals feared that their

asylum systems would be overwhelmed. The fact that those fleeing were in need of international protection was widely acknowledged. Since the conflicts were expected to end promptly as a result of efforts by the international community, many European States decided in effect to suspend status determination under their existing individualized asylum systems, and offered instead “temporary protection”. Related considerations have prompted some countries outside Europe to use a similar terminology and approach.

Temporary protection is best conceptualised as a practical device for meeting urgent protection needs in situations of mass influx. Its value in ensuring protection from refoulement and basic minimum treatment in accordance with human rights without over-burdening individual status determination procedures has been demonstrated. Its unclear relationship to the 1951 Convention has led, however, to a series of conceptual and practical difficulties, not least in the status and standards of treatment to be accorded to beneficiaries.

The following points, among many others, require clarification in order to make this approach work effectively.

(a) Defining the trigger for temporary protection: Agreeing on what constitutes mass or large scale displacement is an essential first step in order to define the triggering factor for activating temporary protection. Mass displacement is prompted by a significant event or situation in a country of origin, which is easily recognizable as the trigger for an exodus. In numerical terms, what amounts to “large-scale” or “mass” influx will necessarily differ from country to country and/or region to region, and must be decided on a case-by-case basis. The analysis needs to take into account the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination systems. There is a need for clearer, less equivocal recognition that there must be an actual mass influx before a temporary protection regime can become relevant. There is also a need for broader endorsement of the fact that temporary protection is not a device for use in individual cases.

(b). Standards of treatment: If the crisis generating the mass displacement is of short duration, treatment should in the first instance respect the standards set out in Executive Committee

Conclusion No. 22. It is recognised that those of the 1951 Convention linked to permanent residency may not be appropriate in the first instance, as the temporary protection approach is predicated on temporariness. Situations giving rise to large-scale displacement have not infrequently, however, proven to be prolonged and call for concerted attention to promoting durable solutions, which clearly may include more permanent residence and its ensuing rights. There would be value in a more harmonized approach to standards of treatment and stay in countries employing the temporary protection device.

(c). Duration and ending of temporary protection: In the context of temporary protection, the issue of when, and indeed whether, a person benefiting from it may have access to an individualised refugee status determination have remained a subject of debate. As temporary protection is an interim protection response complementary to the international refugee protection regime, access to determination procedures (or conversion to a more permanent status) should be implemented when necessary and after a reasonable time to meet enduring protection needs. The criteria for ending temporary protection in a mass influx situation need to be better defined not only for the specific situation but in general terms.

C. The 1951 Convention Framework

It is accepted that the 1951 Convention and the 1967 Protocol is the basic framework within which the protection and treatment of refugees should proceed. Mass numbers may call for different practical approaches but, nevertheless, the Convention framework must always retain its proper place, as outlined in the previous paragraphs. This being said, UNHCR would also observe that in fact, there is nothing inherent in the provisions of the 1951 Convention and 1967 Protocol to preclude it being applied in mass influx situations. The stumbling block has been less the Convention itself and more the individualised processes put in place to implement it, coupled with a perception of the Convention as an instrument of integration.

In reflecting upon the advantages and difficulties inherent in devising new approaches to deal with mass arrivals in countries where Convention-based systems are particularly well developed and comprehensive, States may have to stick to the following understandings:

(a) The Convention definition is capable of being applied in large-scale situations on a group basis. Individualised assessment of the subjective element of fear would normally be rendered unnecessary, as being on its face self-evident from the event or situation which obviously precipitated the flight in Convention terms.

(b) The Convention is a refugee protection instrument, not a migration instrument and it does not necessarily require permanency of refugee status. The refugee regime is a special one, linked to the changing nature of conditions in the country of origin. The treatment provided for in the Convention is made conditional, in the language of the different provisions, on certain criteria being fulfilled, some of them linked to permanency of stay and others linked to immediate need. It is quite possible, within the Convention, to develop a response to large-scale group arrivals, which, depending on the specific situation, can be predicated on temporariness and return.

(c) Issues that would benefit from closer analysis in the context of group determination under the Convention would include concepts, such as “lawful stay”, the cessation threshold and persecution in the context of different conflict situations. The procedures and processes for group determination could also be examined.

(d) Overall however, it is important to understand that the 1951 Convention can be applied directly in large scale influxes in countries with developed status determination procedures, and this should be borne in mind in the context of developing further strategies to address these situations.

II. Subsidiary Protection

Subsidiary or 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. 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.

Under international law, the Convention is the key instrument regulating refugee protection, with Articles 1A(2) and 33 forming the cornerstones. Despite the ratification of a number of human rights treaties since the Convention's adoption in 1951, states have been reluctant to formally acknowledge their protection obligations under these instruments. Although the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the only other universal treaty to explicitly refer to non-refoulement, Article 7 of the International Covenant on Civil and Political Rights has been held to implicitly prohibit non-refoulement, while Article 3 of the regional ECHR extends CAT Article 3 beyond cases of torture to include inhuman or degrading treatment or punishment as grounds for non-refoulement.

In addition to these restraints on returning an asylum seeker to territories in which his or her life or freedom would be threatened, treaties such as the ICCPR and International Covenant on Economic, Social and Cultural Rights contain substantive rights which states parties owe to all persons within their territories. Article 3 of the Convention on the Rights of the Child, which states that in all decisions affecting children 'the best interests of the child' shall be a primary consideration, may temper the application of the refugee definition in cases concerning children, as the two principles may not always be compatible. Further, the rights which all children are owed under the CRC may extend international protection beyond the regime contemplated by the Convention.

Although most states have retained the Article 1A(2) definition as the test for refugee status, states practice has revealed a general broadening of the concept of non-refoulement, which has led to a greater use of complementary protection measures. This has paralleled the expansion of UNHCR's mandate beyond the protection of Convention refugees to include OAU and Cartagena refugees, internally displaced persons, stateless persons, refugees fleeing man-made disasters, and rejected cases.

However, despite the support of UNHCR's Executive Committee, the General Assembly and states generally in widening UNHCR's area of activities, states have expressed concerns about any corresponding broadening of the Convention definition. While acknowledging that persons fleeing armed conflict or internal disturbances need international protection, some states have

argued that this does not derive from any obligation, but is purely a matter of states discretion. In 1982, the USA and UK stressed that UNHCR's mandate was 'sufficiently flexible and adaptable to changing requirements' so that no expansion of it or the Convention definition was necessary. In the mid-1980s, Switzerland argued that protecting persons outside Article 1A(2) was based not on any Convention obligation but on considerations of humanitarian law or international solidarity - 'on a free decision by the states concerned'. The Netherlands maintained that such protection was based on national asylum policies rather than international obligations. Similarly, Germany argued that there was no right of asylum for persons outside the Convention, and that what counted was the 'prerogative of sovereign states to regulate the entry of aliens'.

Though hesitantly, a number of member states offer protection on grounds other than the convention. This can broadly be described as 'complementary protection', but is not necessarily identified by states in those terms. The meaning of 'complementary protection' is thus diverse. The following has an illustration.

In Spain, complementary protection may be extended to 'persons who, as a result of serious conflicts or disturbances of a political, ethnic or religious nature, have been obliged to leave their country and who do not fulfil the requirements laid down in the definition of refugee.' In Portugal, 'subsidiary protection' is available to those 'who are prevented or do not feel they can return to the country of their nationality or of their habitual residence for reasons of serious insecurity owing to armed conflicts or systematic violation of human rights which are occurring there.'

In Finland, a residence permit may be granted where a person 'cannot return because of an armed conflict or environmental disaster.' Sweden allows for alternative protection on the grounds of external or internal armed conflict, an environmental disaster, or a well-founded fear of persecution based on a person's sex or homosexuality. In the UK, Exceptional Leave to Remain may be granted where the circumstances are so exceptional and compassionate that they warrant leave to remain in the country.

With a view to harmonize subsidiary protection laws among states and thus limits secondary movements of asylum seekers within the EU and prevent ‘forum shopping’, Member states of the European union has recently adopted a directive that regulates the grant of subsidiary protection to those who need it.

The significance of the directive is that for the first time, complementary protection is explicitly recognised as having a basis in international obligations under human rights instruments and the fundamental rights and principles recognised in the Charter of Fundamental Rights of the European Union. The directive is the first supranational instrument to outline a comprehensive complementary protection regime, moving ‘complementary protection’ beyond the realm of ad hoc and discretionary national practices to formalise it as part of EU asylum law.

The directive divides protection into two categories - refugee protection, based on the ‘full and inclusive application’ of the Convention, and subsidiary protection, based on international human rights instruments. The term ‘subsidiary protection’ reveals the nature of the Proposal regime, which emphasizes the primacy of the Convention and places complementary protection in a secondary role.

According to the directive subsidiary protection is to be granted only if an applicant does not meet the criteria for refugee status, or if the application for protection explicitly excludes the Convention as a source of protection. It takes effect where an applicant can demonstrate a well-founded fear of being subjected to torture, inhuman or degrading treatment (reflecting Article 3 of the European Convention on Human Rights); a violation of other human rights, sufficiently severe to engage international protection obligations; or a threat to life, safety or freedom as a result of indiscriminate violence in armed conflict or generalised violence.

The directive also details the substantive rights which states owe to beneficiaries of international protection. Broadly speaking, all beneficiaries are granted the same rights. However, the differences that do exist are significant and afford lesser rights to persons granted subsidiary protection.

While complementary protection is almost accepted as an important instrument as it extends protection to those who do not meet the strict test of the convention to be a refugee and help states respect other international and regional human right instruments, there has always been a concern that it should not be used as a means of siphoning genuine refugees into a category which places less onerous protection obligations on states.

3. Reception and Detention

(I) Introduction

Article 31 of the 1951 Convention Relating to the Status of Refugees 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.

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. 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. 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 centers, 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. 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.

(II) 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, to what is referred to as ‘presumptive refugees’. This necessary interpretation, which takes account also of the declaratory nature of refugee status, 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.

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.

By contrast, the English version only uses the term ‘penalties’, which allows a wider interpretation.

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 depend on other factors.

Apart from the text of article 15(1), regard must be had, inter alia, to its object and purpose.

Nowak, in his commentary on the ICCPR, refers to the term ‘criminal offence’ in Article 14 of the ICCPR. 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’.

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 centers for those deemed to have moved in an ‘irregular’ fashion, 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, 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 the duration and circumstances of detention.²⁹ 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, 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.

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.

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 turning to 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 . . .

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. 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 to the obligations accepted under Article 31.

(III) 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/she has compelling reasons for leaving his/her present asylum country due to fear of persecution or because his/her physical safety or freedom are endangered,

the authorities of the second country should give favourable consideration to his/her asylum request.

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 . . .
- (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 . . .

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:

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 . . .

(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 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*). 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.

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’.

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).

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 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.

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.

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.⁸⁰ 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.

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,⁸¹ 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.

(V) Restrictions on freedom of movement under Article 31(2), including detention

Several thousand refugees and asylum seekers are currently detained throughout the world 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, 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.

(VI) International standards

The detention of refugees and asylum seekers was fully considered by the UNHCR Executive Committee at its 37th session in 1986. The Conclusions 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.

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 deprivations of liberty and an identifiable (and lawful) object and purpose also seek to keep the practice under the rule of law.

In 1998, the UNHCR Executive Committee stated that:

it[d]eplores 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.

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’. 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. 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.

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 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.

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 national 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.

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 motionally 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.

4. Family Unity

(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.

Although the right to seek and enjoy asylum in another country is an individual human right, 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 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’. 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’.

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 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.’

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.

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.

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. 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. Expecting 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. 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.

Reunification, even when successful often takes much longer than refugees expect because of the length of asylum procedures for the principal applicant and 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 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 behavior. 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 or 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 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.

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 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. 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.

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. 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.

(ii) International standards on the right to family unity

The need for a contextual analysis is crucial 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. 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. 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’. 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. 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:

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.

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. 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’.

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. 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. The Executive 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’. 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.

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. 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. 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. As a result, there are cases of one spouse and a dependent child being granted refugee status while the other spouse is not, or one parent being recognized while the dependent children are not, or even a child being recognized but the parents and other siblings are not. 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.

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 and child-specific forms of harm, it is now understood that the principal applicant need not necessarily be the male head of household. All members of the family are entitled to an individual hearing. 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.

5. Safe Third Country, Safe Country of Origin

1. Safe third country

A variety of terms are used as synonyms of what has become generally known as a ‘safe third country’. These include ‘country of first asylum’; ‘host third country’; ‘country responsible for examining the asylum application’. The terms are not perfectly interchangeable, and the vocabulary has been developing over the last decade of application and implementation of the principle. UNHCR sees a clear distinction between a ‘first country of asylum’ – a place where protection has been granted, and where the level of protection remains satisfactory – and a ‘safe third country’ – a place with which an asylum seeker has some connection, eg transit, and in which the State applying the principle believes the person could have requested protection. This implies that the ‘first country of asylum’ has accepted responsibility for the protection of the individual in questions, while a ‘safe third country’ has not done so.

One discussion of the terminology is particularly interesting in the light of the European developments. In 1995, the United Kingdom Delegation in Geneva wrote a note explaining the terminology as follows:

‘safe third country’ – meaning a country other than the country of origin or the one where the applicant is seeking asylum which is ‘safe’ in that the applicant would not “face treatment contrary to article 33 of the 1951 United Nations Convention relating to the Status of Refugees, or other violations of human rights.

A ‘safe third country’, the note says, is broader: the applicant does not have to have been in the ‘safe’ State in question – but can safely be sent there.

The ‘safe third country’ concept is applied to allow the removal of asylum-seekers/refugees to countries where they have or could have sought asylum and where their safety would not be jeopardized, whether in that country or through return from there to the country of origin. While the concept is often presented as being something which would lead to a reasonable sharing of

protection, its ultimate effect, if uniformly applied, would rather be for those States which are considered safe and which are closest to countries of origin to receive the maximum number of refugees – being relieved only by the generosity of more distant States which could, for example, organize resettlement or evacuation programs (to assist countries of ‘first asylum’). As Noll has written, “Ultimately, it is a matter of taste whether such [‘safe third country’] arrangements are considered measures inhibiting entry or speeding up exit. The decisive issue is that they impact the actual number of beneficiaries present in the host country.”

(i) Relation of ‘Safe third countries’ to the Convention, Protocol and the UN Handbook

There is no explicit legal prohibition against sending an asylum seeker to a State where no persecution is feared. However, there is also no obligation on an asylum seeker to seek asylum in the first country where that is possible.

European State practice may create an obligation on refugees to seek protection in the first country in which they could do so, and even on those States to accept responsibility for examination of their claims. However, the main effect of this would be to exacerbate the uneven distribution of refugees around the world. The Preamble to the 1951 Convention states:

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation, Expressing the wish 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

UNHCR’s position as noted in its comments on the European Commission staff working paper is that:

Any analysis of the issue must be based on the understanding that the responsibility for examining an asylum request lies primarily with the State to which it has been submitted. While that State may be relieved from such responsibility if it ensures that another State will consider

the request, it is essential that any arrangements that may be concluded to this end be consistent with the imperatives of refugee protection.

These positions from UNHCR, reflecting a wider perception of State responsibility for assessing a claim, indicate that the State where a claim is made takes on responsibilities with respect to the claimant; including the processing of the claim and ensuring that refoulement does not occur. The suggestion is however made that passing responsibility to another State, which agrees to its role in the given case, and which will, under strict safeguards, assess the claim fairly and efficiently, does not have to be problematic, even if it is the exception rather than the rule, and still entails responsibilities on the part of the State where the claim is lodged.

What makes a country 'safe'?

Where refugees and asylum-seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if they are protected there against refoulement and 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. Where such return is envisaged, UNHCR may be requested to assist in arrangements for the re-mission and reception of the persons concerned.

This then gives cause to consider that States may be justified in returning people who had indeed already achieved protection, ie who have come from a 'first country of asylum' as long as there is no new protection need or reason to believe protection would not be continued on return. However, it gives no justification for the return of people who merely transited a State. In other words, it supports the notion of return to a 'first country of asylum' (so long as there is no claim of persecution in that country), but rejects the notion of their being 'safe third countries'.

Article 1 E of the 1951 Convention gives rise to further questions in relation to the impact a person's status in another 'host' State may have on their application for protection.

Those people who have in fact been accepted as refugees in a third country, unless they are seeking protection from a fear of persecution in the third country, would therefore be more likely to be excludable from acceptance as refugees, although a procedure would be needed to establish that no well-founded fear existed vis-à-vis the third country.

In the process refugees do, and legitimately should, have a voice in determining the State in which they seek asylum: that a meaningful link between individual and State is relevant to long-term protection and the integration capacity of both State and individuals. One implication of this could be that determining that a State is responsible for both the assessment of an asylum claim and any resulting protection on the basis of travel route, for example, could stand in the way both of upholding individual rights with regarding to the seeking of asylum and to State goals of integrating those people protected into their society.

2. Safe Country of Origin

The concept of the ‘safe country of origin’ leads to nationals of those countries designated as safe being either automatically precluded from obtaining asylum/refugee status or at least having it raised as a presumption against their claim, which they then need to rebut. From the point of view of states it might be said to be a way of indicating which people are illegal/irregular migrants with only the asylum channel as possible means of gaining residence rights. However, as many advocates of refugee rights have pointed out, even a country which is indeed safe for 99.999% of its residents might fail a tiny minority, who then do have the right to seek protection in another state.

The “safe country of origin notion is” say Crisp and van Hear: inherently dangerous, as there is an evident potential for persecution to occur in any State, however democratic its constitution. The notion of safe countries of origin is also susceptible to political manipulation. Once they have established a list of nations which fall into this category, the world’s more affluent States may be tempted to include their closest allies and most important trading partners.

In a July 1991 Background Notes, UNHCR set out its position.

In UNHCR's view, the 'safe country of origin' principle is inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees - because it precludes a priori a whole group of asylum seekers from refugee status. It forms a reservation de facto to Article 1A(2) - and thus would be in violation of Article 42 which prohibits reservations to this article. It Would introduce a new geographic limitation - incompatible with the protocol to the convention; inconsistent with Article 3 of the 1951 Convention requiring States to apply its provisions without discrimination as to country of origin; inconsistent with the individual character of refugee status and subjective nature of the fear of persecution requiring evaluation of the applicant's statements rather than a judgement on the prevailing situation in countries of origin.

The key point in the development of this notion was the Conclusion agreed by the European Community in London in November 1992 on Countries Where There is Generally No Serious Risk of Persecution. Byrne and Shacknove write:

The EU Immigration Ministers defined a safe country of origin as a country 'which can clearly be shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Convention have ceased to exist.' ... The Conclusions of the EU Immigration Ministers provide that a safe country of origin determination by a Member State should not be an automatic bar to all asylum applications from that State, but may be used instead as justification for directing applicants into expedited procedures with sharply curtailed legal safeguards.

While there is no EU-wide agreement on which countries are designated as 'safe', a number of the various approaches can be mentioned. In Denmark a special 'white list' was drawn up of countries from which citizens are unlikely to be granted refugee status. These countries are the Baltic States, Bulgaria, Romania, Russia, the Czech Republic, Slovakia, Poland as well as all Western European countries, USA, Canada, Australia, New Zealand, Japan and some African states. In the case of France, a clear link is made between the Cessation Clause (Article 1C(5)) of the Geneva Convention and their safety as a country of origin. Mention is made of the following

countries: Romania, Bulgaria, Argentina, Benin, Cap Verde, Chile, Hungary, Poland, Czech Republic, Slovakia, and Uruguay. In Germany, a special accelerated procedure is used at airports, applied to asylum seekers coming from “safe countries of origin”, or without valid passports. The list of “safe countries of origin”, approved by Parliament, includes Bulgaria, Ghana, Poland, Romania, Senegal, Slovakia, the Czech Republic and Hungary. In these cases, applicants awaiting a decision on entry into the country must remain at the airport, provided it has sufficient capacity to accommodate them. Usually, they stay in special premises within the airport’s transit zone. UNHCR and other refugees assisting NGOs normally have access to asylum seekers in the transit zone.

The latest European Commission proposal on Minimum Standards on Procedures in Member States maintains the notion of ‘safe country of origin’ and seeks to harmonize it.

Within the EU, the Protocol on asylum for nationals of Member States of the EU, attached to the Treaty of Amsterdam, is a measure which in principle excludes EU citizens (ie citizens of EU Member States) from the protection of asylum in other Member States, although States do have the flexibility to be able, unilaterally, to accept applications. The history of the Protocol can be traced to Spain's reaction to the protection which some EU Member States, notably Belgium and France, extended to members of ETA, the Basque nationalist organization. Spain proposed a measure to remove the right of EU nationals to seek asylum within the EU, suggesting that the national of any Member State be regarded, "for all legal and judicial purposes connected with the granting of refugee status and matters relating to asylum" as a national of the Member State in which he or she might be seeking asylum. UNHCR, as Landgren explains, described the development as a "cause for concern" and advised that such a measure would be at variance with the international obligations of the Member States. If the problem for Spain was that the ETA members in question were terrorists, then what was required was more effective application of the 1951 Convention which excludes terrorists.

The key factor of concern with the ‘safe country of origin’ principle is the discrimination on the basis of nationality which it entails. If the notion of a person’s coming from a ‘safe country of origin’ would not only be taken into account in the assessment of an asylum application, but

even be a starting presumption on the part of those judging the claim, it would appear that barriers perhaps not insurmountable in all cases, but high barriers nonetheless, would be put in the way of fair assessment of the facts. An acceptance of general presumptions of safety as being satisfactory as a starting point in substantive assessment of an asylum claim certainly takes State concerns into account, but may not balance those concerns fairly with the individual's right to an objective assessment of his or her asylum claim.

(i). Relation of 'Safe Countries of Origin' to the Convention, Protocol, and the UN Handbook

In UNHCR's view the 'safe country of origin' principle, when used to deny access to asylum procedures, is inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees. This is because it precludes a priori a whole group of asylum seekers from refugee status. It forms, furthermore, a reservation de facto to Article 1A(2) which would be in violation of Article 42 prohibiting reservations to this article.

Article 42 Reservations

(1) At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

The 'safe country of origin' principle also introduces a new type of geographic limitation, which is incompatible with the protocol to the convention. In addition, it is inconsistent with Article 3 of the 1951 Convention requiring States to apply its provisions without discrimination as to country of origin;

Article 3 Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

The Handbook tells us, as cited above, that:

This provision relates to persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship. (They are frequently referred to as "national refugees".)

The country that has received them is frequently one where the population is of the same ethnic origin as themselves.

There is no precise definition of “rights and obligations” that would constitute a reason for exclusion under this clause. It may, however, be said that the exclusion operates if a person's status is largely assimilated to that of a national of the country. In particular he must, like a national, be fully protected against deportation or expulsion.

The clause refers to a person who has “taken residence” in the country concerned. This implies continued residence and not a mere visit. A person who resides outside the country and does not enjoy the diplomatic protection of that country is not affected by the exclusion clause.

6. Internal flight alternative

(i) Introduction

In many jurisdictions around the world, the possibility of an ‘internal flight alternative’ (IFA) (often referred to as ‘internal relocation alternative’) is invoked to deny refugee status to persons at risk of being persecuted for a Convention reason of their country of origin.

It is widely accepted 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 to meet its basic protective responsibilities. 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', and 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.

It follows logically that person 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 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' 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.

Secondly, 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.

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 existing 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.

(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 needs 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.

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, 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’. 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. 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, 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 to articulate its components, 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.

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, it 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', 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.

UNHCR's most recent analysis of the IFA concept was set out in a 1999 Position Paper entitled, 'Relocating Internally as a Reasonable Alternative to Seeking Asylum'. This document implicitly 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 judgment 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 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.

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. 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 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. 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 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 existing 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 legitimation of using the IFA inquiry to short-circuit a careful consideration of

the affirmative elements of the refugee claim. In contrast, 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.

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.

As shown above, 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. 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. Although the current UNHCR formulation and most State practice now assume a prospective analysis, the continued use of the phrase 'internal flight' is dangerous. 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. 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 arrival in the alternative site. 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'.

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’.

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 duty on the applicant to hide or ‘go underground’ in order to avoid detection. In other words, UNHCR’s rather fungible safety standard can be interpreted as asking, ‘is it some how possible for the asylum seeker to avoid domestic harm?’ rather than ‘Can the individual secure access to domestic protection?’ This approach is evident in cases that view as decisive the fact that an asylum seeker has some how managed to avoid persecution for a short period before fleeing his or her home State.

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. 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 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’.

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. 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.

(IV) 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 PA 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 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’ is already a well-accepted proposition in the jurisprudence of States Parties:

Notwithstanding 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.

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. 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.

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 is 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.

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. 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 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).

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'.

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 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; 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].

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. 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'.

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. However, these 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. 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. 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 the 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.

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. 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 enough to meet the 'real chance', 'serious possibility' standard throughout the country over which that government has authority.

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.

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.

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 his/her 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'. As recently explained by Brooke LJ:

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. It has been

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.

However, 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. 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 path 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 – 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 factor to the risk of being persecuted, then Convention status is appropriately recognized.

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 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 3(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.’ 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.

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. 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.

D. Step 4: minimum affirmative State protection available

The fourth and most conceptually challenging element in the protection approach to devising 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 criterion, 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 protection; accorded by such instruments by means of a new agreement'. 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. Moreover, in its *Chahal* decision, the European Court of Human Rights recognized the centrality 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. 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.

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 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.

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 free from controversy or from divergence in State practice. 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. Similarly, some courts have held that Somali applicants can be returned to Somaliland or Puntland even though no State structure is in place there. In cases involving Somali claimants in particular, such findings have frequently required applicants to turn to their own clan for protection. 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.'

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) 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, a legal and judicial system, and a mechanism for issuing identity and travel documents. 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.

7. Durable Solutions to Refugee Problems

(i) Introduction

Voluntary repatriation, resettlement and local integration have long been recognized as durable solutions to refugee problems. In its engagement to protect refugees and promote durable solutions, UNHCR employs one comprehensive approach in order to find the most appropriate solution for the individual or groups of refugees. While voluntary repatriation in conditions of safety and with dignity remains the preferred solution for refugees, UNHCR is cognizant that local integration and resettlement continue to be applied where appropriate and feasible. At the same time, it is important to note that a refugee who benefits from resettlement or local integration may eventually choose to repatriate.

Furthermore, it should be noted in determining the appropriate durable solution that neither the Statute of UNHCR, nor any other international instrument relating to refugees, sets out a hierarchy of durable solutions. Each durable solution, as part of the comprehensive range of responses available to States and to UNHCR, is of equal importance, although the use of one or another of the solutions can vary greatly depending on its appropriateness, desirability and feasibility under the circumstances.

That the three solutions are complementary in nature, and can function simultaneously has been demonstrated in a number of recent programmes, including those for Bosnian refugees during the mid-1990s and for Afghan refugees in the early 2000s. While acknowledging that the need for temporary protection had ended and asserting the primacy of voluntary return for the majority, UNHCR also advocated with States to continue to provide protection to specific groups of refugees from the former Yugoslavia in the form of local integration and resettlement in third countries. States were encouraged to increase or maintain resettlement quotas for such groups while, at the same time, UNHCR was promoting voluntary repatriation for large parts of the refugee population. This same approach has also been taken with refugees from Afghanistan.

(ii) Voluntary Repatriation

When conditions that allow return in safety and with dignity prevail going home is judged to be the most beneficial solution for refugees, as it enables them to resume their lives in a familiar setting under the protection and care of their home country. From UNHCR's perspective, the core of voluntary repatriation is return "in safety and with dignity", i.e. return in and to conditions of physical, legal and material safety, with full restoration of national protection.

When looking at this possible durable solution, it is important to identify the indicators which may determine voluntary repatriation as an option in the near or foreseeable future. For example, are peace talks underway in the country of origin, or is there a likelihood of such talks in the near future? Have there been any case of spontaneous returns of refugees or internally displaced persons? Has the security situation in the country of origin improved? Are the minimum safeguards as to treatment upon return and the conditions required to promote voluntary repatriation being met in the country of origin? Is continued asylum for those who remain refugees ensured?

These and a number of other factors as delineated in the 1996 UNHCR Handbook on Voluntary Repatriation, determine the involvement of UNHCR in any voluntary repatriation operation as well as with regard to the individual cases. In this regard, UNHCR's mandate for voluntary repatriation includes the following:

- Verify the voluntary character of refugee repatriation;
- Promote the creation of conditions that are conducive to voluntary return in safety and with dignity;
- Promote the voluntary repatriation of refugees once conditions are conducive to return
- Facilitate the voluntary return of refugees when it is taking place spontaneously, even if conditions are not conducive to return;
- Create an enabling environment to allow return in physical, legal and material safety and with dignity;
- Organize, in cooperation with NGOs and other agencies, the transportation and reception of returnees, provided that such arrangements are necessary to protect their interests and well-being
- Monitor the status of returnees in their country of origin and intervene on their behalf if necessary
- Raise funds from the donor community in order to assist governments by providing active support to repatriation and reintegration programmes
- Act as a catalyst for medium and long term rehabilitation assistance provided by NGOs, specialized agencies and bilateral donors and
- Undertake activities in support of national legal and judicial capacity-building to help states address causes of refugee movements.

Voluntary repatriation is clearly a protection function of UNHCR. For this reason, and particularly in the case of mass repatriation, it is important that a legal framework should be set up to protect the returning refugees' rights and interests. The task of returnee monitoring by UNHCR should include the fulfilment of any amnesties or guarantees the country of origin has undertaken to implement. The criteria applied are based on the principle of voluntariness, that is refugees should not be forced or coerced to return but are able to make a free and informed decision. It is also imperative that they may return in safety and with dignity with the support and cooperation of the country of asylum and home country. Whenever possible, UNHCR also advocates that returnees should be allowed to return to their place of former residence or any other place of their choice and that property rights are restored. The protection of refugees and returnees must be safeguarded during the process of return and reintegration this involves

continued monitoring of the safety of returnees to ensure that they are not subjected to further persecution or discrimination and that national protection is reestablished.

UNHCR and its partners need to address the rebuilding and development efforts of the home country for both the short and long-term needs of the returning refugee population and, if requested so and specifically mandated, they need to address the concerns of other disadvantaged groups like internally displaced persons (IDPs) and affected local populations. Without such structures in place, the chances for successful reintegration are often negligible, and the risk of further displacement increases. Most large voluntary repatriation programmes involve the support of Governments and NGOs which work with UNHCR to ensure that the rights of refugees and returnees are respected and that their reintegration needs are met. Along with protection, essential assistance for those in need will include preparations for travel home, and assistance in the reintegration process, that include special longer-term programmes of development aid carried out by the related actors.

Refugees may seek assistance to return to their place of origin from the authorities (or UNHCR), either in their country of first asylum or in their country of resettlement, if they have retained their refugee status. In such cases it is important to bear in mind the following points: · refugees are free and have the right to return to their country of origin at any time; · the decision by a refugee to return should be voluntary; · refugees must be provided with credible and up-to-date information on the situation in their country of origin to make an informed decision about repatriation; and · the level of assistance and protection provided in the country of refuge should not be the determining factor for refugees to decide whether or not to return.

Many refugees decide to return to their home country spontaneously. Refugees who express the wish to return home independently of an organized repatriation programme may still require advice and assistance. They may ask the authorities of the resettlement or asylum country, or they may appeal to an NGO or to UNHCR for advice.

It should always be remembered that special arrangements should be in place to organize the return of vulnerable refugees (elderly, disabled, medical cases, unaccompanied minors, etc.).

Such arrangements include travel and appropriate reception and care facilities on arrival in the home country.

(iii) Resettlement

Resettlement involves the selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them – as refugees - with permanent residence status. The status provided should ensure protection against refoulement and provide a resettled refugee and his/her family or dependants with access to civil, political, economic, social and cultural rights similar to those enjoyed by nationals. It should also carry with it the opportunity to eventually become a naturalized citizen of the resettlement country.

Resettlement is an essential element in a comprehensive strategy of refugee protection, the attainment of durable solutions, and burden and responsibility-sharing.

Resettlement should be considered when refugees cannot repatriate and are at risk in their country of refuge or when they are resettled as part of a burden-sharing arrangement. The decision to resettle is taken in light of the prospects for other durable solutions and when there is no alternative and lasting way to eliminate the danger to the legal or physical security of the person concerned.

As a matter of UNHCR policy stipulating in favour of a comprehensive approach to durable solutions, the possibility of resettlement for certain individuals or for specific groups of refugees is not precluded by voluntary repatriation within a population. At all stages of voluntary repatriation - that is during spontaneous returns, during facilitation or active promotion of voluntary return, and for residual caseloads - there may be individuals who are unable to repatriate due to a continued fear of persecution in their country of origin or other reasons. In the absence of the possibility of local integration in the country of asylum, resettlement for these refugees may provide the only durable solution. Such cases should, however, be processed with discretion in order not to disrupt the repatriation operation. Equally, resettlement under UNHCR's Group Methodology should in principle only be considered where returns are

spontaneous or as a means of possibly dealing with residual caseloads. All resettlement criteria would apply in situations of spontaneous returns and with regard to possible residual caseloads, while during facilitated or promoted voluntary repatriation operations the emphasis would, in principle, be on criteria pertaining to legal and physical protection as well as refugees with special needs.

(IV) Local Integration

Local integration of refugees in the country of asylum is one of the durable solutions to the problem of refugees, particularly if voluntary repatriation cannot be pursued in the foreseeable future. Successful local integration requires agreement by the host country concerned, an enabling environment that builds on the resources refugees bring with them, thereby implicitly contributing to the prevention of secondary movement.

Local integration follows the formal granting of refugee status, whether on an individual or prima facie basis, and assistance to settle in order for the refugee to live independently within the community.

Local integration in the refugee context is the end product of a multifaceted and ongoing process, of which self-reliance is one part. Integration requires preparedness on the part of the refugees to adapt to the host society, without having to forego their own cultural identity. From the host society, it requires communities that are welcoming and responsive to refugees, and public institutions that are able to meet the needs of a diverse population. As a process leading to a durable solution for refugees in the country of asylum, local integration has three inter-related and quite specific dimensions.

First, it is a legal process, whereby refugees are granted a progressively wider range of rights and entitlements by the host state that are broadly commensurate with those enjoyed by its citizens. These include freedom of movement, access to education and the labor market, access to public relief and assistance, including health facilities, the possibility of acquiring and disposing of property, and the capacity to travel with valid travel and identity documents. Realization of

family unity is another important aspect of local integration. It is a process which should lead to permanent residence rights and ultimately, the acquisition of citizenship.

Second, local integration is clearly an economic process. Refugees become progressively less reliant on state aid or humanitarian assistance, attaining a growing degree of self-reliance and becoming able to pursue sustainable livelihoods, thus contributing to the economic life of the host country.

Third, local integration is a social, cultural and political process of acclimatization by the refugees and accommodation by the local communities, that enables refugees to live amongst or alongside the host population, without discrimination or exploitation and contribute actively to the social life of their country of asylum. It is, in this sense, an interactive process involving refugees and nationals of the host state, as well as its institutions. The result should be a society that is both diverse and open, where people can form a community, regardless of differences.

Local integration builds on Article 34 of the 1951 Convention and can only be achieved if there is an enabling environment. This includes the grant of a legal status, temporary but renewable or permanent residence status, access to civil, socioeconomic and cultural rights and, to a certain degree, political rights, as well as a viable economic situation, availability of affordable housing and access to land, as well as receptive attitudes within the host community. With the grant of citizenship, a refugee ceases to be in need of international protection and will be considered to be fully, legally integrated.

Article 34 of the 1951 Convention encourages states to facilitate, as far as possible, the naturalization of refugees through expedited naturalization proceedings and reductions of the charges and costs of such proceedings.

It should be noted, however, that opportunities for local integration in countries of asylum are limited. Some asylum countries are not signatories to universal or regional instruments concerning refugees and/or do not apply practices akin to the rights enumerated under the 1951

Convention. For others, the absorption of refugees into the host community may be economically, socially or politically destabilising, especially in large-scale influxes.

8. Review Question

- a) What is the obligation not to refoul? The obligation not to refoul under international human rights instruments is absolute while it suffers exceptions under the UN refugee convention, how could states parties to, both instruments, reconcile their obligation?
- b) Discuss the prohibition of indirect removal in the context of *TI v.UK*, a judgment of European Court of Human Rights.
- c) Are temporary and subsidiary protections recognized under the UN refugee convention? Do they promote or diminish protection for refugees?
- d) There has been a suspicion that European states are thinking of establishing a reception center outside of Europe so that they can do the refugee determination outside of Europe and only those whose refugee status is recognized could get in to Europe. Would this be valid under the UN refugee convention?
- e) Is detaining asylum seekers and refugees possible under UN refugee convention? If so discuss the circumstances where that is possible.
- f) Define safe country of origin and, safe third country. How do you determine if a country is a safe origin or a safe third country? How one should determine that? Does a safe third country concept help 'refugee in orbits'? Or/and does it help alleviate the problem of 'asylum shopping'?
- g) Should a person fly in his country before he seeks refugee status in another country?

Chapter Four

Regional Refuge Protection Regimes

I) Introduction

This chapter briefly discusses the legal and institutional frameworks that are adopted at a regional level. As it is difficult, though not impossible, to discuss all refugee issues in detail in all regional refuge instruments in a single course, this chapter limits itself only to important issues, which would help you have a general picture of the legal and institutional arrangements at European, American and African continents. From the three regions, Europeans have by far a more complex network of regional refuge regime and most of the new concepts that we have considered under chapter three have also their root in this region's refuge legal framework.

II) General Objectives

Having studied this chapter, we shall be able to:

- a) Understand the legal and institutional frame work regarding asylum seekers and refugees at European regional level;
- b) Identify the distinct features of the European refuge regime as compared to the other two regional refugee regimes;
- c) Understand the legal and institutional frame work regarding asylum seekers and refugees at American regional level;
- d) Identify the distinct features of the American refuge regime as compared to the other two regional refugee regimes;
- e) Understand the legal and institutional frame work regarding asylum seekers and refugees at African regional level; and
- f) Identify the distinct features of the African refuge regime as compared to the other two regional refuge regimes

4.1 The Legal and Institutional Framework to Protect Refugees in Europe

(I) Introduction

With a view to harmonize refugee standards at a regional level, European states have adopted a network of regional refugee standards including: Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Directive on the right to family reunification, Directive on minimum standards for the reception of asylum-seekers, Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons, Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application (Dublin II Regulation).

As it would be difficult to consider all these standards at length in this material, we shall confine ourselves to considering one of the most influential directive, i.e., Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, adopted on 29 April 2004.

The Preamble states that ‘the main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.’ The Directive therefore constitutes the first legally binding supranational instrument of regional scope in Europe that establishes the criteria that individuals need to meet in order to qualify as refugees or as persons otherwise in need of international protection and the rights attached to that status.

The Directive contributes to the clarification of some of the elements of the refugee definition in the UN Convention of the Status of Refugees that had been interpreted differently by the

Member States, such as the recognition that persecution can arise from non-state actors (Art 6), as well as the recognition of gender and child specific forms of persecution (Art 9(2)).

The Directive itself, however, contains controversial provisions, such as the understanding that refugee status may not arise when an internal flight alternative exists (Art 8) and when protection can be provided by non-state actors (Art 7(1)). Furthermore, in order to ascertain the existence of protection (and therefore, the lack of refugee status), it is enough that the state or non-state actors take 'reasonable steps to prevent the persecution' (Art 7(2)), regardless of whether those steps lead to the effective protection of individuals or not. Other controversial elements of the Directive include the subtle, yet significant, modifications of the wording of the Refugee Convention on matters of cessation and exclusion, as well as provisions on revocation, and the definition and minimum rights guaranteed to persons granted subsidiary protection.

It is not the purpose of this section to provide a detailed commentary on the provisions of the Directive, but rather to undertake an overall assessment of the value of this instrument for refugee protection in Europe by addressing some of the key issues raised by it in light of international refugee and human rights law. By virtue of its incorporation in an instrument of EC legislation, the obligation of Member States to grant protection and to recognise socio-economic rights to refugees and to other persons in need of international protection confers upon these individuals a subjective right to be granted asylum, protected by the community legal order and enforceable before national courts and the European Court of Justice (ECJ). Accordingly, its scope of application and the limitations and derogations to which it may be subjected on security or other grounds, are to be interpreted by reference to the community's legal order and in particular, in light of the general principles of community law, including human rights.

I shall first address the relationship between the Directive and the Geneva Convention, and other relevant international instruments, thus establishing the legal framework within which the Directive is to be interpreted and applied. I will then analyse the legal nature of the right of refugees and other persons to be granted protection and the scope of application of that right *ratione personae*. I shall then look at the limitations that may be placed upon this right within the

Community legal order, in particular on security grounds and in relation to the effective enjoyment of the status granted.

(II) The right to be granted asylum for refugees and other persons in need of protection

The starting point in any consideration on the right to be granted asylum is the acknowledgement that, while this right is the most fundamental one for refugees, at the time when the Directive was adopted, it had not been expressly recognised by any international human rights law instrument (including the Geneva Convention) of either universal or European scope.

The right to asylum however, had already been enshrined in international treaties of regional scope in the Americas and Africa. The Directive therefore brings Europe in line with other regions, as it constitutes the first legally binding instrument in Europe of supranational scope that imposes an obligation on states to grant asylum to refugees and other persons in need of protection. It's worth noting that despite the lack of an international recognition of the right to be granted asylum of universal scope, following the entry into force of the Directive, around 100 of the 146 states parties to the Geneva Convention and/or its Protocol are now bound by an obligation under international law (of regional scope) to grant asylum.

The Directive, however, does not word it in these terms. Article 13 establishes that 'Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee'. Likewise, Article 18 establishes that 'Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection'. It is therefore necessary to examine what these terms mean for the purposes of the Directive.

Article 2(d) of the Directive establishes that "'refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee.' This wording is unfortunate, as a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition -regardless of whether his refugee status has been formally determined- something that the Directive itself recognises. As UNHCR has pointed out, 'the Qualification Directive appears to use the term "refugee status" to mean the set of rights,

benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum".

A similar analysis can be made of the protection granted to other persons in need of protection, who don't meet the criteria for the recognition of refugee status. Article 2(f) establishes that "subsidiary protection status" means the recognition by a Member state of a third country national or a stateless person as a person eligible for subsidiary protection.'

Indeed, if asylum is defined as the protection accorded by a state to an individual who comes to seek it, the name that this protection status may receive is irrelevant, as long as it includes -at a minimum- the right to enter, the right to stay, the right not to be forcibly removed and the recognition of the fundamental rights of the individual.

Furthermore, despite the trend in European Union (EU) instruments to refer to asylum in relation to Geneva Convention refugees only, asylum as an institution is not restricted to the category of individuals who qualify for refugee status. Rather on the contrary, this institution predates the birth of the international regime for the protection of refugees and has been known and practised throughout history protecting different categories of individuals.

In accordance with the transposition period established by Article 38, Member States are under an obligation to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 10 October 2006. Should they fail to do so, or should they transpose the Directive incorrectly, given the direct effect of EC law, individuals may nevertheless derive rights from the Directive upon the expiration date for transposition by invoking the direct effect of its provisions, provided that they are clear and unconditional, and do not require a discretionary implementing measure. Articles 13 and 18 arguably meet the requirements for direct effect, and therefore, even when Member States fail to transpose the right to be granted protection into their domestic legal orders, or when they do so incorrectly (for instance, by imposing limitations incompatible with the right), individuals may nevertheless invoke this right as directly deriving from these provisions, including in legal procedures before courts.

The right to be granted protection as an EC law based right has therefore important implications in relation to the restrictions that Member States may impose to its effective enjoyment, as well as for its protection by national courts and under the European Convention of Human Rights.

(III) Scope of application of the right to be granted asylum

The Directive is applicable to refugees within the meaning of the Geneva Convention, as well as to other persons who, despite not fulfilling the criteria in this instrument are nevertheless protected under international human rights law against forced removal or the refusal of entry. The Directive also makes it clear that individuals who fall under the exclusion clauses of the Directive are not refugees or persons eligible for subsidiary protection within the meaning of this instrument.

Art. 2(c) of the Directive defines a ‘refugee’ as: ‘a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.’

While the Directive broadly reflects the terms in Article 1A of the Geneva Convention, not surprisingly, it is limited to third-country nationals and stateless persons, thereby excluding EU nationals from the protective scope of this instrument.

This is in line with Protocol 29 to the Treaty of European Council (ETC) on asylum for nationals of Member states of the European Union. This Protocol was the result of pressure exercised by Spain to prevent the examination of asylum applications by Member states lodged by EU nationals indicted or convicted of terrorist crimes, on the grounds that such applications were unfounded and aimed at delaying extradition proceedings and to give publicity to their cause.

The Protocol introduced a prohibition to examine asylum applications lodged by nationals of the EU's Member states. It nevertheless allowed for several exceptions, including the unilateral decision by any given Member state to do so, which in practice deprives the prohibition of much of its impact. Although the Protocol constitutes an unnecessary statement (given that the exclusion clauses in the Geneva Convention suffice to accommodate state concerns in this regard), as a matter of law, Member states remain free to fulfil their international legal obligations towards refugees and asylum-seekers, including the one enshrined in Article 3 of the Geneva Convention not to discriminate on the grounds of nationality.

The Directive contains provisions developing the terms in the Geneva Convention definition, thus providing for the meaning of terms including persecution, actors of persecution, race, religion, nationality, particular social group, and political opinion.

The Directive is also applicable to individuals who, despite not qualifying as refugees within the meaning of the Geneva Convention, can nevertheless claim the protection of international human rights law on certain grounds. It has been argued that international human rights law has evolved in a manner that has conferred individuals falling within its protection scope protection claims vis-à-vis the state where they find themselves. Therefore, in addition to refugees within the meaning of the Geneva Convention, there are other categories of individuals that have a right to protection under international law and accordingly, they are 'refugees' in a broader sense. The refugee in this broader sense includes not only those who have a well founded fear of persecution, but also those who have a substantial risk to be subjected to torture or to a serious harm if they are returned to their country of origin, for reasons that include war, violence, conflict and massive violations of human rights.

Article 2(e) of the Directive recognises these developments and defines a 'person eligible for subsidiary protection' as:

'a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former

habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country’.

The Directive further lists in Article 15 the international human rights law grounds that give rise to subsidiary protection status:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The scope of application of subsidiary protection is therefore limited to those who are protected against violations of their right to life and freedom from torture or other inhuman or degrading treatment (in their country of origin), as well as those at risk of individualised threats in situations of armed conflict. This limited scope of application is disappointing, as it does not include all individuals who are not removable under international human rights law grounds.

Given that Member States remain under an obligation of international law not to remove these broader categories of individuals, and they often do so by granting them some formal status, the Directive goes against its stated objective ‘to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection’ by creating a category of persons protected by EC law, in addition to those that shall remain protected by the national legal orders of Member States in fulfilment of their international obligations. As Gilbert has pointed out, the Directive as drafted is seriously misleading about the scope of the Member States’ international legal obligations, as it seems to suggest that all those outside the scope of application of the Directive are allowed to remain by Member States on purely compassionate or humanitarian grounds, rather than on the basis of their international obligations.

Furthermore, while international monitoring bodies have consistently found that international human rights law does not confer a right of entry and residence on non nationals, an incipient

case law has been developed in this regard. The European Court of Human Rights has found that in light of the positive obligations of states to guarantee the rights in the Convention, the continuous refusal to recognise the right of permanent residence to certain categories of individuals with a particular connection to the State constitutes a violation of Article 8 of the Convention. The Court has also established that limitations on this right are only justified on very serious grounds.

Likewise, the United Nations Human Rights Committee has established that the right to enter one's own country enshrined in Article 12(4) of the International Covenant on Civil and Political Rights applies not only to nationals but had a wider scope of application, covering individuals who despite not been nationals in the formal sense, are not foreigners within the meaning of Article 13 of the Convention, although they may be so to other effects. The Committee further clarified that while it is not possible to elaborate an exhaustive list of cases protected by Article 12(4), it would at a minimum cover individuals that due to their special connection or entitlements vis-à-vis a particular State cannot be considered a mere foreigner. Therefore, it is arguable that a right to be granted some status, beyond the mere prohibition of removal or denial of entry, may be derived from international human rights law under certain circumstances.

Accordingly, the Commission proposal reflected better the existing and evolving obligations of states under international human rights law, as it included a general clause as qualifying grounds for subsidiary protection, namely, a well founded fear to be subjected to a 'violation of a human right, sufficiently severe to engage the Member State's international obligations.'

Despite its limited scope of application in relation to individuals who don't meet the Geneva Convention criteria as well as the limited content of the status to them granted, the Directive constitutes the first supranational legally binding instrument in Europe that recognises the status of individuals protected under international human rights law. Given that the Directive makes it explicit that beneficiaries of subsidiary protection are those who do not qualify as a refugee and that the ECJ may be ultimately called to interpret the refugee definition in the Geneva Convention, the Directive leaves room for skilful lawyers to argue an inclusive interpretation of the Geneva Convention definition in accordance with the terms of the Convention.

(IV) Security grounds as limitations on the right to asylum: Exclusion and nonrefoulement

How best to incorporate security concerns in the Directive was a matter of much debate during negotiations. It's worth noting that the Commission's proposal was adopted on 12 September 2001 and therefore was negotiated under the climate that followed the attacks in the US the previous day. The provisions finally agreed reflect the emphasis to ensure that protection legislation would not become an avenue for the impunity of those suspected of involvement in serious criminal activities and the difficulties faced by Member States in so doing while respecting their international refugee and human rights obligations.

The Directive therefore contains provisions on exclusion, revocation and nonrefoulement that arguably fall short of existing and evolving international law and standards. Article 14 paragraphs 4 and 5 include what constitute de facto provisions on exclusion, going beyond what is permissible by the Geneva Convention:

‘4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

- (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
- (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.’

Likewise, while Article 21 reaffirms the obligation of Member States to ‘respect the principle of non-refoulement in accordance with their international obligations’, its paragraph 2 nevertheless contains an exception to the rule, similar to the one enshrined in paragraph 2 of Article 33 of the Geneva Convention:

‘Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

- (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
- (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.’

A careful look at the drafting history of the Directive may explain the unfortunate wording of these provisions. Right at the very first meeting of the Council’s Asylum Working Party on the Directive, Article 19 of the Commission’s proposal on nonrefoulement was amended to include a proposal for an exception to the principle, mirroring Article 33(2) of the Geneva Convention.

The general obligation enshrined in paragraph 1 was qualified by a new paragraph 2:

‘Without prejudice to paragraph 1 a Member State may refoule a refugee or a person eligible for subsidiary protection when there are reasonable grounds for considering:

- (a) him or her as a danger to the security of the country in which he or she is; or
- (b) having been convicted by a final judgement of a particular serious crime, he or she constitutes a danger to the community of that country.’

However, this move was far from peaceful and only a few weeks later, the added paragraph 2 to Article 19 had been deleted and security concerns had instead become a ground for exclusion, rather than an exception to non-refoulement. The exclusion clauses in the draft Directive were thus expanded by adding a new clause excluding individuals from refugee status.

Member states became then divided among these two options to incorporate security concerns in the Directive. Belgium, Finland, the Netherlands, and Sweden –supported by the Commission– opposed security concerns as a ground for exclusion, which they understood as being contrary to the Geneva Convention by effectively expanding Article 1F of the said treaty. In their view, security considerations should constitute an exception to the principle of non-refoulement, given that a provision in this regard would mirror Article 33(2) of the Geneva Convention.

The same debate took place in relation to the provisions excluding individuals from subsidiary protection, and to the Commission's proposal replicating Article 1F, a paragraph was added to ensure that persons who constitute 'a danger to the community or to the security of the country in which' they are, would also be excluded from protection. Only Sweden expressed concern at excluding individuals from subsidiary protection altogether, considering that exceptions to exclusion should be provided in cases where the person risks death penalty or torture in the country of origin. Sweden felt that these exceptions were necessary in order to ensure compliance by Member States with the absolute prohibition to remove individuals under those circumstances, regardless of security or other concerns.

Given the controversial nature of the existing options, the (Danish) Presidency of the EU addressed the Council's Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) in advance of its meeting in early November 2002 with a note explaining the respective rationale and purpose of Articles 1F and 33(2) of the Geneva Convention.

The Presidency noted that in its view 'the difference in treatment of a third country national or a stateless person who is excluded and that of a refugee who is not given the benefit of non-refoulement is insignificant'. The Presidency therefore invited delegations to comment on whether an expansion of the exclusion clauses (which at the time was the preferred option by the majority of Member States to deal with security concerns) was acceptable. Given the opposition to this move by a number of Member States, as explained above, the Presidency also asked SCIFA to comment on whether 'it should be optional for Member States to grant refugee status or subsidiary protection status to a third country national or a stateless person, in spite of the fact that this person has been excluded from international protection'.

With regards to subsidiary protection, the Presidency stated in its note to SCIFA that although Member States agreed that the Directive's provision on exclusion from subsidiary protection 'should take its outset in Article 1 F of the Geneva-Convention,' they were nevertheless aware 'that they are not bound by any legal obligations with regard to the exclusion from subsidiary protection'. Sweden, however, did not agree with this view and a day later presented a proposal to SCIFA for an additional paragraph to Article 17:

‘In the case where a third country national or a stateless person in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of formal habitual residence, would face a real risk of suffering serious harm as defined in Article 15 (a) and (b) and is unable or, owing to such risk, is unwilling to avail himself or herself of the protection of that country, a Member State may grant the person subsidiary protection status, residence permit and other rights, should it be in compliance with the Member States' international obligations’..

Despite Sweden’s reservation, Member States agreed that it should be mandatory to exclude individuals from subsidiary protection on security grounds, a decision reflected in the final wording of Article 17 of the Directive as adopted.

The question arises as to the compatibility of this provision with the concept of ‘minimum standards’ in Article 63 TEC, and in particular as to whether those minimum standards may be below those established by international refugee and human rights law, leaving it to Member States to develop them further in order to meet their obligations under international law.

Article 3 of the Directive explicitly states that ‘Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection,’ but it adds a qualification, as this is only allowed ‘in so far as those standards are compatible with this Directive.’ Accordingly, should Member States decide to grant protection to excludable individuals that they are not allowed to remove under international human rights law, this may be interpreted as a breach of Article 3 of the Directive by being incompatible with the obligation to exclude imposed by Article 17 of the Directive.

During the negotiations of the Directive, the Council Legal Service was called to give an opinion on the legal meaning of Article 3. The Legal Service recalled that, as in any other area of Community Law, Member States remain free to legislate in areas which are outside the scope of the directive, which prohibits Member States from taking any measure which could jeopardise the attainment of the objectives of the Treaty. Accordingly, the Legal Service further noted that Member States were not precluded to legislate in areas which are outside the scope of the

Directive, such as those referring to individuals allowed to remain for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, as they do not fall within the scope of the Directive.

However, it took a rather wide interpretation of the term ‘minimum standards’. The Legal Service stated that in order not to annihilate the objective of harmonization, the possibility to introduce more favourable standards allowed for in Article 3 could not be unlimited. It explicitly noted that any deviation in national law from the definitions laid down in Article 2 of the Directive and the related provisions that develop their content, including those on exclusion, would be incompatible with the objective of harmonizing the content of those notions.

As it has been shown above, the Directive’s scope of application does not cover all individuals vis-à-vis whom Member States are under an international obligation to protect; the question therefore arises as to whether a decision by Member States to grant protection to those individuals in accordance with those international obligations (rather than for mere compassionate or humanitarian reasons) would be considered a breach of EC law.

(V) Revocation of refugee status and the non-refoulement of refugees

As regards to refugees, Member States all agreed that security concerns needed to be reflected in the Directive, but remained divided between doing so by means of an expanded exclusion clause (therefore breaching the Geneva Convention) or by means of an exception to the non-refoulement prohibition (raising issues under Article 3 of the Convention Against Torture and other human rights instruments). Given the requirement in Article 63 TEC that measures on asylum be in compliance with the Geneva Convention and other relevant treaties, as examined above, none of these options was satisfactory.

Another alternative then emerged, namely, to add a new paragraph to a provision on revocation of refugee status that had already been introduced earlier on allowing Member States in security cases to ‘decide not to officially recognise a third country national or a stateless person as a refugee, where such a decision on recognition has not yet been taken.’ However, this provision

constituted a de facto exclusion clause (regardless of whether it was called so or not) and therefore, the majority of Member States (Austria, Belgium, Finland, Luxembourg, The Netherlands, Portugal, Sweden, and The UK) pronounced themselves in favour of an exception to the principle of nonrefoulement, which they saw as best fitting the Geneva Convention.

Negotiations then proceeded and after further consultations with UNHCR in late November, the EU's Justice and Home Affairs Ministers were presented with a proposal for their approval, where the idea to expand the wording of the exclusion clause in the Directive was abandoned, and security concerns were introduced as a de facto exclusion ground in the revocation clause in Article 14B(5), as well as an exception to the non-refoulement obligation in Article 19(2). And the Council so agreed at its meeting on 28 November 2002.

As stated above, the post September 11 climate explains the desire of Member States to retain discretion in security cases. The controversies surrounding the debate on how best to achieve that objective, as described above, show some willingness on the part of Member States to find an adequate solution. Yet, the outcome is far from adequate, and it seems to reflect the priority given to other considerations, such as the wish to find agreement at the expense of ensuring legal certainty in the respect of the international obligations of Member States. The Council could have, for instance, considered alternative options to deal with non removable individuals who pose a threat to security, such as those offered by international criminal law, in terms of prosecution or extradition. Therefore, the provisions as adopted have been criticized by commentators as raising issues under international refugee and human rights law.

In relation to non-refoulement, the Council (admittedly, after having consulted with UNHCR), seems to have ignored the evolution of international law regarding this norm over the past 50 years by introducing a clause similar to Article 33(2) of the Geneva Convention in a legally binding instrument of EC law. While this provision may not be at odds with the literal wording of the Geneva Convention, it does not reflect the broader international law obligations of Member States.

On the one hand, all Member States are Parties to the Convention Against Torture, which explicitly prohibits to ‘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’, a provision that has been consistently interpreted as including an absolute prohibition even when security concerns apply, and therefore offering wider protection than the Geneva Convention. Likewise, the European Court of Human Rights has consistently interpreted that Article 3 of the European Convention of Human Rights enshrines an absolute prohibition to remove anyone to prohibited treatment, regardless of the nature of the activities of the individual. On the other hand, Member States had already agreed on the wording of this principle in Article 19 of the Charter, which establishes that ‘[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

Yet, the Directive as adopted allows Member States to refoule a refugee as long as such refoulement is not prohibited by international law. Given that the Directive does not refer to extradition or expulsion, but rather to refoulement, a literal reading of the Directive would lead to an interpretation ad absurdum, as one must conclude that as the law stands today, refoulement is in all cases contrary to international human rights law, given that this legal term refers precisely to the removal of individuals to prohibited treatment. As one commentator has observed in relation to the limitation clauses in the Charter of Fundamental Rights, ‘one can only hope that the[y] will not be placed on the curriculum for training of future civil servants as examples of model drafting technique.’

A closer examination of this seemingly contradictory wording might make more sense if one looks at the possible motivations behind it. A look at the interpretation that some Member States have been advancing in relation to the prohibition of refoulement might shed some light on the matter.

In *Chahal*, the United Kingdom argued that ‘there was an implied limitation to Article 3 (art. 3) entitling a contracting state to expel an individual to a receiving state even where a real risk of ill-treatment existed, if such removal was required on national security grounds.’ In support for

this view, the United Kingdom referred to Article 33(2) of the Geneva Convention. In the alternative, the United Kingdom suggested that ‘the threat posed by an individual to the national security of the contracting state was a factor to be weighed in the balance when considering the issues under Article 3 (art. 3). This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security.’ The Court rejected this view and affirmed the absolute nature of the prohibition to remove anyone to treatment contrary to Article 3 of the Convention.

Yet, the United Kingdom continues to object to the absolute nature of the obligation enshrined in Article 3. The suggestion that the Court might need to reconsider its case-law was taken up by the European Commission in its response to the Council’s invitation to examine the relationship between security and protection:

‘Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a “balancing act” between the protection needs of the individual, set off against the security interests of a state.’

A closer look at Article 21(2) of the Directive in the light of the above considerations may lead one to conclude that the Community legislator may have wished to ensure that the Directive left the door open for Member States to accommodate any future developments in the interpretation made by international monitoring bodies regarding permissible exceptions to the prohibition of refoulement.

However, as international law stands today, Article 21(2) of the Directive in its current wording allows Member States to remove individuals in breach of international law. Even if the Directive does not impose an obligation on Member States to do so, but merely leaves it to their discretion, arguably the provision is in itself contrary to Community law. As the Advocate General has explained in her Opinion on the Directive on Family Reunification, rules of Community law that

allow Member States to adopt or maintain norms contrary to fundamental rights are in themselves contrary to those fundamental rights and therefore, contrary to Community law.

Beyond the specific interpretation of security grounds as limitations on non derogable rights, the question also arises as to the precise scope of security grounds under EC law, as limitations on the more general right to be granted protection derived from the Directive.

(VI) Effective exercise of the rights attached to protection status

The content of the status recognised to refugees in the Directive mostly reflects –and sometimes expands- that of the Geneva Convention, for instance, in relation to the right to access employment, education and health care, notwithstanding concerns in relation to other provisions, as indicated above. Regrettably, Article 34 of the Geneva Convention, which requires States Parties to facilitate the naturalisation of refugees, has not been reflected in the Directive.

On the contrary, the status accorded in the Directive to persons under subsidiary protection is either limited or largely left to the discretion of Member States. The measures adopted by Member States to give content to these provisions will therefore be scrutinised in relation to their compliance with international law and for their ability to ensure the effective enjoyment of the right to be granted protection.

Apart from the level of rights that protected persons may be able to claim, the question arises as to the extent in which access to the rights recognised may be restricted by the imposition of administrative requirements. The Preamble of the directive establishes that:

‘[w]ithin the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.’

This requirement found its way into the Directive at the very end of the negotiations process. Although the Directive had found provisional agreement by Member States (pending

reservations by Germany and Austria) at the Justice and Home Affairs Council meeting of June 2003, the preparations for the formal adoption of this instrument within the time-limit set by the Treaty of Amsterdam, required the lifting of reservations by Germany and Austria.

This allowed the United Kingdom to reopen the debate on provisions already agreed and to which it had not entered reservations at the time, regarding the level of socioeconomic rights that would be recognised under the Directive. Although the proposed reduction of the level of rights was not agreed by all other Member States, a decision was reached to include a recital in the Preamble allowing Member States to require a residence permit as a prerequisite for the enjoyment of certain socio-economic rights.

Given that the Preamble has been at times greatly influential in the interpretation of secondary legislation by the European Court of Justice, the question therefore arises as to what value this recital may have as a means to prevent the enjoyment of the rights attached to refugee and subsidiary protection status.

On the one hand, Article 24 of the Directive imposes an obligation on Member States to issue residence permits, although this obligation is qualified. Firstly, it only requires Member States to do so 'as soon as possible' after the status has been granted. Secondly, it allows for exceptions when 'compelling reasons of national security or public order otherwise require'. Therefore, in practice, protected persons may have to wait long delays before they see their residence permit issued, or may never see it issued at all, which could prevent their effective access to the rights attached to the status that they have been recognised.

On the other hand, given that residence permits are issued with a limited validity (3 years for refugees and 1 year for persons with subsidiary protection), the non renewal of permits may become an easy way for Member States effectively to deny protection without having to engage in a formal procedure to withdraw status. Explicit indication of this possibility can be found in Art. 21(3), whereby 'Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee' who falls under the non-refoulement exception in Article 21(2) for

constituting a danger to the security of the Member State where he finds himself in or to the community of that Member State.

Therefore, there are a number of instances where individuals who have seen their refugee status recognised or subsidiary protection granted, may nevertheless find themselves undocumented in the country of asylum, and therefore prevented from enjoying the rights attached to their status. The question therefore arises as to the extent to which holding a resident permit may constitute a valid requirement for the enjoyment of the subjective rights of individuals under the Directive.

While the ECJ has already ruled that Member States may require individuals to comply with certain administrative formalities in order to have their rights recognised, the lack of compliance by Member States with such administrative formalities cannot result in preventing the effective exercise of the rights recognised.

As examined above, given that Articles 13 and 18 of the Directive recognise a subjective right of refugees and persons eligible for subsidiary protection respectively to be granted protection under European Community Law, the better view is that preventing the enjoyment of the rights attached to protection status through the imposition of a requirement to hold a residence permit undermines the very substance of the right to be granted protection, and is therefore contrary to EC Law.

A different interpretation would render meaningless the right to protection enshrined in the Directive. The considerations expressed above in relation to the limitations of EC Law based rights on security grounds and on the applicability of general principles of Community law, are also valid in relation to restrictions to the rights attached to the protection status granted.

Likewise, the legality of other provisions of Community law and the measures adopted by Member States to implement them, such as the application of the 'safe third country' concept, restrictions on the right to appeal, and other procedural safeguards, will also have to be checked against the effective enjoyment of the right to be granted protection.

Furthermore, in so far the socio-economic rights in question may be mandatory on Member States in a clear, precise and unconditional manner, they would give rise to direct effect, as explained above, and therefore individuals may rely directly on them against the Member State that prevents their access on the grounds that the individual does not hold a residence permit.

(VII) Conclusion

The Directive constitutes a major step forward in the recognition of the rights of refugees and other persons protected by international Law. The obligation of Member States under EC Law to grant protection and to recognise socio-economic rights to refugees and to the broader category of individuals who are not removable under international human rights Law confers upon these individuals a subjective right to be granted asylum, protected by the community legal order and enforceable before national courts and the ECJ.

The Directive however, falls short of international standards in a number of ways, notably, in relation to the qualifying grounds and the status of individuals under subsidiary protection and to the provisions on exclusion, revocation, and nonrefoulement, which should have never found its way in the Directive.

Restrictions and limitations to the right to be granted protection on security or other grounds are however subject to the applicable principles of Community law, including the protection of fundamental rights, and therefore the legality of the Directive's provisions and those enacted in national legislations to implement the Directive remain subjected to the scrutiny of national courts and the ECJ on these grounds. This leaves room to argue for an interpretation of this instrument in light of all existing and evolving obligations of Member States under international Law.

These shortcomings, as well as the possible conflicting obligations arising for Member States under EC Law and under international human rights law, call for the review of the Directive in the near future in a way that fully integrates Member States obligations under international law.

Beyond the review of provisions that fall short of international standards, a further reflection on the process and outcomes of the first stage in the establishment of a Common European Asylum System is called for in order to ensure that lessons are learned and that the EU lives up to its commitments to refugees and other categories of protected non nationals.

While it might not be easy to reconcile the human rights protection obligations of states with other legitimate interests, including the duty to prevent the serious threats posed by transnational criminality, states nevertheless remain bound by their international human rights obligations, even in the most serious circumstances, whether they act individually or collectively within international organizations and multilateral arrangements.

As Goodwin-Gill has observed, the protection of refugees under EC Law must be clearly premised both on the specific requirements of the Geneva Convention and its Protocol, and on the foundations of international human rights law, the essentials of which are obligations erga omnes and much of which its authority from peremptory rules of international law (jus cogens).

4.2 The Legal and Institutional Framework to Protect Refugees in Africa

1. Introduction

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted in 1969 and came into force in 1974. The convention has proven to be one of the world's most flexible and innovative refugee instruments. In the years following its adoption, Africa has continued to be wracked by conflicts and civil strife leading to the displacement of millions of people. In face of these mass exoduses, the OAU Convention has provided a wide ambit of protection.

2. Genesis of the OAU Refugee Convention

When draft work began on the OAU Convention in 1964, Africa was in the throes of decolonization. As early as 1957, a surge of independence movements would see much of the

continent enter into anti-colonial struggles leading to the displacement of hundreds of thousands of people. Between 1963 and 1966, the number of refugees in Africa nearly doubled, from 300,000 to 700,000 people. These massive displacements were not unprecedented, but placed a particular burden on the fragile order developing on the continent. This burden was only compounded by Africa's continued exclusion from an international refugee regime limited to "events occurring in Europe prior to 1951."

The historical climate of decolonization has led some to speculate about the motives prompting the OAU Convention's creation. Most prominent is a thesis that sees the OAU Convention as an effort to "africanise" the refugee definition because of alleged deficiencies in the 1951 refugee definition. Some even maintain that "in Africa, the need for a more inclusive definition was noted from the inception of the 1951 Convention."

The record actually suggests that this thesis is the first in a series of unsupported assumptions about the OAU Convention. Rather than playing a central role in the drafting process, the refugee definition was a minor part of three broader objectives. Chief among these was the desire to balance Africa's traditional hospitality toward strangers with the need to ensure security and peaceful relations among OAU member states. Much of this concern was based on the fact that mass population movements could prompt interstate conflict, particularly if exiles used host countries as bases of operation for subversive activities. Early on, these fears were translated into drafts which were far more limited in terms of legal guarantees than the 1951 Convention. The UNHCR was highly critical of the first two drafts – the Kampala and Leopold drafts - "for being more rigid than the 1951 Convention."

When the Convention was adopted in 1969, the important role of security and subversion became obvious: throughout the Convention, frequent reference is made to refugees as a potential "source of friction", of "discord" and "the "grant of asylum to refugees is a peaceful and humanitarian act." The OAU Convention explicitly prohibits subversive activities and obliges host states to settle refugees away from borders. Security was the core preoccupation and as Okoth-Obbo remarks, the success of the Convention may be largely measured by its attempt

to “depoliticize and cohere the grant of asylum in particular, and the refugee question more generally, in the context of international relations and state security politics.”

The framers’ second objective was to create an effective regional complement to the 1951 Convention. While the tendency has been to focus on the OAU Convention’s controversial aspects, it was never intended to supplant the 1951 Convention. Instead, the drafters were more intent on filling the conspicuous gap left by the 1951 Convention’s temporal and geographic limitations. Most of the early drafts simply replicated the 1951 Convention. The Addis Ababa draft of 1965 confirms that: “In all matters relating to the status, condition and treatment of refugees Member states shall, save as hereinafter provided, apply the provisions of the convention relation to the status of Refugees signed in Geneva on 28 July 1951, irrespective of the dateline and of any geographical limitation.” The complementary character is firmly established in the OAU Convention’s statement that it “shall be the effective regional complement in Africa of the 1951 United Nations Convention on the status of Refugees.”

The drafters’ final objective was to create a convention that would meet the specific needs of African refugees. It is the extended definition which gives clearest voice to this goal.

3. The Convention’s Expanded Definition of a Refugee

Without a doubt, the OAU Convention’s so-called “expanded definition” of a refugee is its most celebrated feature and has long been praised for moving beyond the narrower scope of the 1951 refugee definition. The provision, part of Article 1 whose first sub-article corresponds to the definition of a refugee contained in the 1951 Convention states that:

“The term refugee shall also apply 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.”

What is it about this definition that is “expanded”? What is the positive, practical effect of the definition today?

For sure, in elaborating the expanded definition, the one contained in the 1951 Convention provided the contrast. The Convention was developed under the influence essentially of two rather particular questions. The first of these was the problem of subversive activities and the other the date line contained in Article 1 A of the 1951 Convention. The latter meant that whatever was the legal scope of application of the 1951 Convention, it did not apply to the new refugee situations which had arisen in Africa.

With the adoption of the 1967 Protocol Relating to the Status of Refugees, the problem of the date line would be solved. Concerned up to this time with the fact that the 1951 Convention was legally barred from applying in Africa, the Commission had thus far been elaborating a standalone instrument that was complete and comprehensive in every respect.

At the end of 1966, when it was clear that the Protocol was on its way to adoption, a shift would take place. First of all, as the 1951 Convention was now due to apply fully in Africa, the priority to prepare a Convention which was substantively complete so as to be able to stand alone changed. Instead, the OAU was now expressing its appreciation to UNHCR for its “efforts to ensure the United Nations Convention’s universality and adaptation to the present realities of the refugee problems in Africa.” The original instructions to elaborate a Convention “covering all aspects of the problem of refugees” (which thus far was being prepared under a title more or less identical to that of the 1951 Convention – Draft Convention on the Status of Refugees in Africa), would also now change. The drafting committee thus received instructions to prepare an instrument to “govern specifically African aspects of the refugees [and which] should come to be the effective regional complement of the 1951 United Nations Convention on the Status of Refugees.”

And after the Protocol was formally adopted, both the Summit and the Council thereafter issued calls to “Member States which have not yet done so to accede to the 1951 United Nations Convention relating to the Status of Refugees and the 1967 Protocol and to apply their provisions

to Africa”. Of course, when finally adopted itself, the 1969 OAU Convention essentially maintained this position vis-à-vis those instruments.

The question of subversion itself was rather narrowly defined and the two separate aspects under consideration came to influence the Convention in different ways. One aspect concerned subversion by refugees from independent African countries and the other the position to be taken with regard to refugees from territories still under colonial rule or domination by the white minority regimes in the Southern African region. In the latter case, the issue was whether the freedom fighters among them could also be considered as refugees

As to the question concerning subversion by refugees from independent African countries, the “specific” solutions erected in the Convention were comprised not in the provision covering the definition, but in those considered later below prohibiting subversive activities. The debate concerning refugees from territories still under colonial or minority rule is what produced the expanded definition. It centered on the distinction which should be made in attributing refugee status between “ordinary refugees fleeing their country of origin for fear of persecution” and “freedom fighters”. A number of countries, especially from among the so called Front Line States, were of the view that freedom fighters should not be treated under refugee obligations, and that the states should not be obliged to grant them refugee status. The weight of opinion however ultimately favored the position that:

“It was the duty of every African country in a spirit of solidarity to assist freedom fighters who were fighting for the liberation of the African continent from colonial rules...Freedom fighters had no duty to abstain from subversive activities against countries under colonial rule and white minority domination. African solidarity and the principles of the OAU as expressed in its Charter, clearly states that in seeking freedom for the African Continent, it was legitimate to assist liberation movements.”

The expanded definition was drafted accordingly. Contrary to the current discourse on this point, it did not grow as such out of dissatisfaction with what is seen as the personalized and individualized nature of the 1951 definition.

It is also not possible to establish the general dissatisfaction so widely claimed today concerning that the 1951 convention definition's inability to accommodate persons forced to seek safety elsewhere in large groups, or for reasons such as general violence, war and conflict, what is typically expressed in statements such as:

“The traditional definition of refugee [was expanded] to include persons who, as a result of civil wars or other armed conflicts in their home country are forced to leave without being politically persecuted in the traditional sense.”

Put simply, these statements are not supported by the historical record. As we have seen, the definition was expanded to deal specifically with the situation of refugees from territories still under colonial or minority racist rule.

4. The value and positive effects of the expanded definition

Notwithstanding the foregoing paragraphs, it is precisely in light of the perspectives being contended there that not only the roots, but, even more so, the value of the expanded definition has come to be widely viewed.

Those are also the features which are cited as the Convention's most novel and forward-looking contributions to refugee jurisprudence. Because it focuses on the objective circumstances which have compelled flight; because the fear of danger is not linked to the individual's personal subjective reaction to the adversity he perceives; because the definition includes within its scope even accidental situations not necessarily based on deliberate State action; and because the source of danger need not be the actions of a State or its agents; the wideness of the definition is thereby clearly established.

In that context, it is clear that, legally speaking, these qualities of the expanded definition constitute a pillar of immeasurable magnitude not only for refugees in Africa, but, it will also be argued, even elsewhere. Thus far, the preponderant part of Africa's refugees has resulted mainly from massive abuses of human rights, civil strife and conflicts and war. If, indeed, the 1951

Convention does not provide and could not have provided the legal device for considering as refugees these masses seeking safety in other countries, then it is of course only the 1969 Convention that has made it possible for them to be protected and treated in line with international refugee standards. Already many years ago, Rainer Hoffman said:

“Considering the actual refugee situation in Africa which is characterized by the fact that migration of refugees mostly occurs as a result of internal conflicts and, therefore, the persons concerned do not fall within the traditional definition of refugees, the expanded definition is certainly the only reasonable and appropriate one.”

Given the views concerning the inapplicability of the 1951 Convention, these arguments remain just as compelling today. And, as far as can be foreseen, the need for the Convention in this context will continue to demonstrate itself in the future. A few years ago, Robert Kaplan was warning that deep-seated anarchy whereby “Borders crumble, wars are fought over scarce resources especially water and war itself becomes continuous with crime as armed bands of stateless marauders clash with the private security forces of the elite [and] nations crumble under the tidal wave of refugees from environmental and social disasters is what awaited Africa. If he is correct, masses of refugees will surely result from this dysfunctional state of affairs. The Convention and its definition are therefore set to remain even more pivotal and crucial than before, if Africa’s refugees of the future are to have access to protection under refugee obligations.

Looked at this way, the continuing need for the expanded definition is demonstrable even for those regions where only the 1951 Convention applies. The point simply is that the continuing narrowing of the scope of application of that Convention’s refugee definition has the result of denying protection to people who so evidently require safety for their lives away from home. The narrow interpretation of the 1951 Convention definition is thus not an idle or abstract intellectual exercise. It represents a diminution, not expansion, of the practice of human rights protection in a refugee context, the consequences of which can be grim for those denied. It is a backward step, first, from the shared human rights values around which all mankind should rally and, second, from the direction in which refugee law should instead be moving. The fact that the expanded

definition represents an opposite trend is what comprises its true value for refugee jurisprudence at a global level.

5. Illusions around OAU refugee definition

There seemed to have been a “consensus” about the definition that may loosely be categorized around three general propositions: first, the OAU refugee definition is objective rather than subjective; second, it creates a framework within which the cause of harm and motive of flight may be indeterminate; and finally, the extended definition is said to have been drafted with an intention to create a group refugee definition. Below it will be shown that these propositions do not stand up to close scrutiny, indicating that the definition must be approached with more care and deliberation.

A) Objectivity Test

Unlike the mixed subjective-objective test in the 1951 refugee definition, the extended definition is said to be “based solely on objective criteria, meaning that persons leaving their country of origin [...] are to be given refugee status [...] irrespective of whether or not they can satisfy the subjective criteria.” In one of the earliest comments, Mr. Ousmane Goundiam, former Director of the Legal Division of the UNHCR, remarks that the OAU definition declares an asylum-seeker to be a refugee “without first having to justify fear of persecution in terms of [1951 Convention definition].” Because an OAU refugee is every person who is compelled to take flight, they are not required to satisfy the subjective, psychological factor of fear. Instead, the OAU definition is said to focus on the “unbearable and dangerous conditions which set entire populations on the move” and looks to “the objective circumstances which have compelled flight [rather than] the individual’s personal subjective reaction to the adversity she perceives.” As a consequence, the definition draws our attention to the “objective conditions prevailing in the country of nationality or habitual residence,” which involves an examination of whether the facts of a specific situation fit within the definition’s specified causes of flight.

In effect, this thesis posits two explanations for the OAU definition’s objective quality: first, it is objective because the word fear has been replaced with the word compelled; and second, it is

objective because it focuses on a series of objective events in an asylum-seeker's country of origin. But this explanation seems unsatisfactory and may miss a more important distinction. To begin, it overestimates the importance of the subjective element in the 1951 definition. Some argue that fear was never intended to introduce a subjective element, but was meant to incorporate a prospective risk assessment into the definition. Although case law has confirmed the need for a subjective element, in practice, it tends to be of secondary importance to the objective element of "well-foundedness." What is more troubling is that the explanation proceeds from an assumption that the term "compelled" is objective. Although compelled may be objective, no one has offered satisfactory explanation for why it does not contain a subjective element. Compelled could relate to a subjective feeling or preference. Is the mere existence of an OAU event enough to demonstrate that someone has been compelled? Or is it necessary to show linkages between an asylum seeker and a particular event? Until these questions are answered compelled remains ambiguous.

The objective element is also said to depend on the inclusion of the four OAU events: external aggression, occupation, foreign domination, and events seriously disturbing public order. However, to contrast this with the 1951 definition appears incoherent unless we adopt the untenable position that persecution – the comparable harm in the 1951 definition – contains a subjective element. While persecution is a relatively ill-defined concept, the case law suggests an objective assessment and defines persecution as serious harm. It is not the subjective perceptions of the individual that determine its content; it is an objective assessment of whether a factual situation discloses the existence of persecution. In other words, the OAU events do not particularly distinguish it from 1951 definition in so far as its objectiveness is concerned.

B) An indeterminate cause of flight

The OAU refugee definition is also said to stand in contradistinction to the 1951 definition because it lacks the quality of deliberateness found in the 1951 definition. Under the 1951 definition, an asylum-seeker must show that they face persecution by virtue of being deliberately targeted because of her race, nationality, religion, membership in a social group, or political opinion. In this way, the definition requires an element of deliberate targeting of an individual on the part of the agent of persecution.

The OAU definition is said to be “qualitatively different [from the 1951 Convention] for it considers situations where the qualities of deliberateness and discrimination need not be present.” Rather than implying a particular agent of persecution, the extended definition acknowledges “that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee’s state of origin, but also as a result of that government’s loss of authority.” As a consequence, the definition includes “even accidental situations not necessarily based on deliberate state action [where] the source of danger need not be the actions of a State or its agents.” The generality of the threat is furthered by the fact an event may occur “in either part or the whole” of an asylum-seeker’s country of origin.

Yet there is some sense of specificity captured by the definition’s four events: external aggression, occupation, foreign domination, and events seriously disturbing public order. Although many of these terms “lacked firm definition under international law” at the time the Convention was drafted, the act of selecting particular events suggests a conscious effort to place limits on the scope of the definition. Few have been interested in discussing either the scope or the limits entailed by these events, which remains perplexing when faced with notions as vague as “events disturbing public order”. Instead, most agree with Rwaleimera that the clause “is designed to cover a variety of man-made conditions which do not allow people to reside safely in their countries of origin.” While this is a testimony to the definition’s flexibility, it does little to assist in interpretation: is a riot sufficient to disrupt public order or would only a civil war suffice? There is something arbitrary about this simultaneous celebration of broadness next to an exclusion of non-man made events such as natural disasters. After all, a plain reading does not immediately indicate why an earthquake or flood does not seriously disrupt public order.

The fact that thirty years have passed without articulating the meaning of these OAU terms raises some troubling concerns. First of all, the failure to provide an interpretive framework may ultimately undermine the broadness and the flexibility of the definition by limiting the situations in which it could be applied. Although many of the revolutionary conditions that led to the inclusion of the OAU events no longer exist, Okoth Obbo is astute in remarking that they could “be viewed as vessels still possessed of the capacity for the legal transcription of Africa’s refugee realities.” It would not, for example, be a stretch to apply occupation to Congo which

remains “divided into territory controlled by the Government and territories controlled by several rebel factions, Ugandan troops, ethnically based militias and other armed groups.” Nor would it have seemed wrong to apply it to South Africa’s long occupation of Namibia, an occupation which was confirmed illegal in an advisory opinion of the International Court of Justice.

state practice also indicates why a legal interpretation is necessary. The limited evidence suggests that states take relatively restrictive approach to the definition. The official position of the South African government is that the OAU Convention only applies to African asylum seekers despite the fact the definition uses the words “every person”. The result is “the overwhelming rejection of non-African applicants.” South Africa has also favoured “a particular reading of the OAU definition whereby the properly recognizable refugee...emerges as an African victim of generalized violence.” Similarly illustrative was Cote d’Ivoire’s restrictive treatment of asylum-seekers fleeing the Liberian civil war which demonstrated “a narrower application of the “refugee” definition called for by the 1969 OAU Convention.” What appears most lacking in scholarship is a threshold for applying the extended definition. Is the Convention only applicable to African refugees who come from countries where civil war and generalized violence are endemic? Or is it possible that other wide scale violations of human rights may also fall within its ambit?

C) The enumerated events: Specifying the scope and the limits

The uniqueness of the extended definition very much depends on the four enumerated OAU events. These can be loosely described in terms of two categories: the first category is war-like phenomena – external aggression, occupation, and foreign domination - which can be understood with reference to existing humanitarian law; the second category of “events seriously disturbing public order” is broader and must be developed with more care and detail.

The inclusion of external aggression, occupation and foreign domination was likely prompted by the violent territorial conquests of Africa and more general humanitarian concerns. In some respect, the inclusion of these events is somewhat anomalous in a document which ostensibly seeks to depoliticize the grant of asylum. Few labels could have a more overt political implication than aggressor, occupier or foreign dominator. This political element may explain

why these terms have rarely been applied in spite of their continued relevance to today's refugee problems.

Political difficulties aside, the interpretive issues raised by this category pose less controversy. Aggression was likely to be included because of its relationship to the prospect of imperial expansion. Although there is some debate on its meaning, two principal sources provide useful interpretive assistance: first, aggression could be applied by virtue of a declaration of the United Nations Security Council. This occurred when UN Security Council, "acting under Articles 39 and 40 of the Charter of the United Nations" condemned the "Iraqi invasion of Kuwait." The second source is the widely accepted definition of aggression 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."

Occupation is defined by an even clearer humanitarian law standard. The earliest definition of occupation is found in Article 42 of the Annex to the 1899 Hague Convention No. IV Respecting the Laws and Customs of War on Land. It states that "a territory is occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." A second definition is found in Paragraph 2 of Article 2 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War: "The Convention [...] shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Of these two definitions, the Hague definition is possessed of much stricter requirements and would be more relevant to conditions of formal war. The Geneva Convention definition is more relevant to refugee problems in Africa because it focuses on de facto control of territory, whether occupation is "partial or total occupation", and "even if a state of war is not recognized."

Foreign domination is the most ambiguous of the first category of events. The term recurs in a number of international documents and declarations, few of which indicate a precise meaning. Its place in other documents suggests that it was included as a reference to colonialism. Most telling

is the 1967 OAU Council of Minister Resolution on the Problem of Refugees in Africa which “appeals to countries adjacent to African territories under foreign domination to afford these refugees transit facilities, temporary residence and travel papers.” This is a fairly clear reference to peoples struggling against colonialism. Foreign domination is also used in the Banjul Charter and in a number of UN Resolutions, all of which suggest an implicit reference to colonial or colonial-like situations.

One may also speculate that foreign domination was included because of a concern that aggression and occupation would not capture the legal status of a colonial territory. Colonial expansion was “not initially analyzed as an infringement on the conquered state's Sovereignty.” In a colonial state, the metropolitan government is vested with sovereignty, whereas a fundamental aspect of occupation is that the occupied territory retains its sovereignty. Aggression faces similar problems since once a territory is conquered and under the sovereign control of another country, it is no longer an aggressor per se. Strictly speaking, occupation and aggression require the interaction of two sovereign powers, which may have prompted the OAU Convention’s drafters to include the broader concept of foreign domination.

The second category of events seriously disturbing public order arguably has a function comparable to a “particular social group” in the 1951 definition; that is, it acts as a basket clause capturing a generic set of refugee producing situations. The extent to which this expands the refugee definition remains controversial. While some take the view that it includes all man-made disasters, others maintain that it provides “the necessary flexibility to include even victims of ecological changes such as famine and drought, which remain among the most challenging situations on the continent.” The legal basis for either interpretation is unclear. What does seem clear is that the clause is not infinitely variable and indicates both a quantitative and qualitative element.

The OAU Convention’s text suggests that there is an objective, quantitative element, captured by the terms “seriously disturbing”. Although “public order” has a very particular meaning in the OAU Convention, the legal issues raised by disturbances have a long history in common law jurisdictions, particularly in relation to breaching or disturbing the King’s peace. In *R v. Lohnes*,

for example, the Supreme Court of Canada considered what it meant to disturb or to create a disturbance, noting that a disturbance “may be something as innocuous as a false note or a jarring colour [or] at the other end of the spectrum are incidents of violence, inducing disquiet, fear and apprehension for physical safety.” The Supreme Court reasoned that the test was objective because the essential concern was “public forum disorder” and not an individual’s subjective, emotional state. To determine when a disturbance had taken place involved weighing “the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time.”

The Supreme Court’s reasoning in *Lohnes* should apply to the OAU definition. By placing “disturbance” alongside “public order”, the Convention’s text suggests that it is concerned by disturbance in the public context. And by including the term “seriously”, there is an indication that the gravity of the harm must be greater than emotional distress. Consequently, the test should be an objective assessment which considers the gravity of the harm in relation to what can normally be expected of public order. What remains is the more important issue of determining the quality of the harm. This is to be found in the concept of “public order”. Public order is a technical legal concept which recurs in several treaties, most notably in Article 2 and 32 of the 1951 Convention. There are two reasons suggesting that it was intended to be read in the technical sense in the 1951 Convention: first, the final draft of the OAU Convention substituted “internal subversion” with “public order” because the former was considered too ambiguous. This suggests an intention to use the term in its technical sense. And second, because the OAU Convention is the complement to the 1951 Convention, and because public order appears in both instruments, it seems reasonable to give the terms the same meaning.

That said, public order is not a rigid formula but must be contextualized. Its place in the OAU Convention is probably more akin to its role in article 32 of the 1951 Convention which permits expulsion of refugees “on the grounds of national security or public order.” In the 1951 Convention’s travaux préparatoires, public order was intended to be a reference to acts prejudicial to the “peace and tranquility of society at large” and was imbued with a broad sense of a threat to state authority. As Grahl-Madsen remarks, “it takes a rather extraordinary act to disturb the existing state of affairs.” Thus, in approaching public order in the case of expulsion,

the “common criteria seems to be that public order is at stake only in cases where a refugee constitutes a threat to an uncertain number of persons carrying out their lawful occupations (habitual criminals, wanton killers), or to society at large, as in the case of riots and unrests, or traffic of drugs.”

But public order is not only used in the context of expulsion, it “may also demand respect for human rights as an element of the exercise of the public authority.” It demonstrates a rare area of reciprocal interest between an individual and the state.

D) Compelled to take flight

The term “compelled” creates a number of difficult interpretive problems, but foremost is the question of its objectiveness. Although compelled is said to be “objective”, a plain reading leaves a range of possible meanings. Compelled could refer to the application of force leading to “involuntary” action, as in, ‘she was compelled by the wind to take refuge’. Or it could be closer to a subjective preference, as in, “he made a compelling argument”. Intuitively, the objective meaning is more plausible but this requires some explanation.

The objective reading takes the term to refer to an irresistible force or constraint and implies a certain level of involuntariness on the part of the actor. There are a variety of reasons that point towards an objective construction: first, it corresponds more closely to the equally authentic French text which uses the term, “obligée”. Second, a reading in reference to the text associated with it, suggests the objective construction. Compelled is in a distinct causal relationship with the events listed in the definition. The events represent the “irresistible force”, which causes an asylum-seeker to take flight. As Deng writes, “the word ‘compelled’ read in conjunction with the reasons that cause the compulsion, indicates that such a fear or other similar notion is assumed to exist.” This is made more evident when read against terms such as “seriously disturb” which clearly imply something more than a subjective choice.

What an objective construction does not solve is the problem of operationalizing compelled. It does not, for example, explain whether compelled involves an actual application of force or a threat thereof. Nor does it suggest how a decision-maker might conceive of compelled in legal

terms. To do so, it is best to draw legal analogies, the clearest of which appears to lie with the criminal defences of necessity and duress. The relationship to these defences is that they use objective tests and “involve situations where a person claims to have been forced by threats” to take certain actions which they otherwise would not. In the case of duress, the threats emanate from a human source, whereas in necessity, the threats tend to originate from “natural sources such as the forces of nature.” Aside from these differences, there are a number of shared ingredients relating to causality: first, there is the requirement of serious threat or imminent danger to a person or their family; second, the threat must be imminent, continuous or impending; and third, “the circumstances must be such that a person of ordinary fortitude in the position of the accused would have responded in the manner of the accused.” Although this simplifies an area of considerable debate, the criminal law provides a useful framework by suggesting that a person is only compelled to do something when faced with a threat of a particular character.

Strictly speaking, the application of these defences to the refugee law context has some limits. The criminal law test is intended to be restrictive, whereas the OAU definition is intended to be inclusive and should be read flexibly. Thus, the most practical way of dispelling ambiguity and incorporating the criminal law element may be to simply read the words “threats to lives, liberty or freedom”. These are the terms used in the Cartagena declaration which was inspired by the OAU definition. Similar words are used in the UNHCR’s mandate question, which asks whether an asylum seeker faces “serious and indiscriminate threats to life, physical integrity or freed. In either case, the conceptual problems are effectively dealt with by reading terms into the definition.

While some might argue that reading in these terms distorts the definition or places unjust limits on its application, threats to life, liberty and security represent relatively flexible categories which cover most situations in Africa. Moreover, they are distinctly related to the OAU events. There must be something about aggression, occupation, domination, or disruption of public order that reasonably compel a person to take flight. Although this may appear to create problems in the face of situations such as occupation or foreign domination which may be “stable”, there is near universal acceptance that they constitute inherent threats to liberty. A reasonable

presumption can be made that the imposition of martial law or the constraints of a racist regime would reasonably compel someone to take flight.

Before turning to the other clauses, it is worth remarking on a final interpretive problem. Unlike the 1951 definition which is phrased in the present tense and incorporates prospective risk assessment, the OAU definition is phrased in the past tense, pointing to a retrospective assessment. The unfortunate result is that a plain reading appears to lead to a technical exclusion of sur place claims; a person who is already abroad when an OAU event takes place would not be compelled to leave, but would be compelled to remain. This manifestly absurd result clearly runs contrary to the spirit of the Convention. The only resolution that can be offered is that the extended definition should be read in good faith and in a manner that is consistent with the 1951 definition. Since the 1951 definition is included in the OAU Convention and allows for sur place claims, the OAU Convention should as well. To do otherwise would lead to the OAU Convention having two categories of refugees within the same document and would run contrary to the OAU Convention's purpose.

E) Group Refugee

The ability to consider entire groups as refugees is highlighted as one of the features that set definition apart from the one contained in the 1951 Convention. Because practical considerations often compel the grant of refugee status to groups on the so-called prima facie basis, the latter is also now characterized as one of the unique devices contained within the OAU definition. And, still within the frame of that definition, both concepts, that is, refugee status granted to groups and the prima facie device, are also seen as one and the same thing.

It is in the historical origins of the prima concept and the circumstances of its use in that context that its equation to group refugee status resides. However, it has been widely argued that the concepts are not one and the same and the OAU Convention in fact deals with neither of the two. Furthermore, the real insufficiency in refugee law in general, but also in both the 1951 and the OAU Conventions is legal standards for both the substance and procedures of the two concepts are quite trivial. For Africa in particular, this is a crucial question. Legal developments are urgently required.

The prima facie concept refers to the provisional consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual. Its essential purpose is not directed to the question of refugee status as such. It is, rather, a means to enable urgent measures to be taken under circumstances where the protracted attention which conclusive refugee status determination would otherwise require something that cannot be afforded. As explained by UNHCR, it is a facility which is particularly useful in cases where it is necessary to provide life-saving measures on an emergency basis:

“While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called group determination of refugee status, whereby each member of the group is regarded prima facie (i.e in the absence of evidence to the contrary) as a refugee.”

Several factors are lumped together here in such a way that the misconception as one and the same thing of a legal question (refugee status); a methodology for decision-making (prima facie); numeric factors (groups) and the imperative to save lives, is practically impossible to avoid. It is necessary to explain therefore that the prima facie concept essentially consists in a device for preliminary decision-making on what is the separate question of refugee status. In particular, it enables an urgent decision to be made in favour of dealing with claimants for protection and assistance under refuge obligations without this being decisive of the question of their refugee status as such. The paragraph cited above implies that numbers are part of the triggering mechanism for prima facie refugee status determination. The situation referred to in the paragraph is of course one of the most typical examples in which the prima facie methodology will be used. Here, a rapid, mass influx whereby human rights protection and lifesaving assistance under a refugee framework are urgently called for is in progress. Be that as it may, the approach can also be used for individual claimants for protection as refugees.

Refugee status granted on a prima facie basis remains presumptive although this presumption continues to be enjoyed until there is a specific decision to the contrary. On the other hand, whereas groups can, and are, granted prima facie status, group status as such refers to a legal classification and not to a procedure. The two are not equal to each other. Not only can groups accrue refugee status by other means, status accrued on a group basis can be legally conclusive.

The confusion being cleared here has helped obscure a critical shortcoming in the legal breadth and depth of the OAU Convention, the 1951 Convention and refugee law in general in the context of mass or group flows as far as refugee status determination is concerned. Because of the historical and practical use of the prima facie concept in these types of situations, it has come to be considered as the quintessential mechanism for dealing with refugee status in situations of mass influx. Similarly, there is a likewise enduring impression that the OAU Convention definition provides the legal means for such a mechanism. This is, however, incorrect. The prima facie concept, as we have underlined, is only a device used for a particular set of problems which asylum-seekers can present. Beyond this, it says nothing else about the question of how to conclusively determine the status of those claimants. The OAU Convention does not provide for this and nor does the 1951 Convention. None of these provide in a systematic and coherent way the standards, operational definitions or mechanisms enabling conclusive determination of refugee status, both inclusion and exclusion, in mass influx cases.

It is true of course that refugee status determinations based on the OAU definition could arguably be easier to arrive at in a mass influx or group situation than the comparable case under 1951 Convention.

However, the OAU Convention is itself neither the source nor the authority for either “prima facie” or “group determination” of refugee status. Actually, nowhere in its definition of a refugee or the provisions on asylum are either concept mentioned in the Convention.

The deficiency was thus not only a practical one. Refugee law itself, as it stood then and remains today, does not provide a fulsome set of legal notions, standards, and definitions setting up the legal infrastructure for conclusive refugee status determination, one way or the other, in

group/influx situations. The prima facie approach is a device which enables the performance of certain emergency tasks. It attributes a provisional status but is itself not a conclusive process of refugee status determination.

It does not really speak as such to the question of definitive refugee status. Persons assisted under a prima facie framework still await the conclusive determination of their refugee status no less than an asylum-seeker awaiting adjudication before a tribunal. However, the predictability which exists in the latter case in terms of procedures, methodologies and legal standards does not exist at all in international refugee law for purposes of the conclusive determination of refugee status for groups. This includes both the OAU and the 1951 Conventions.

At a minimum, Africa can expect to continue to be faced with mass influxes. At worst, more of the mixed and intractable flows such as that which unfolded out of the genocide in Rwanda could occur. The OAU Convention remains as unequipped now as it was at the time of its adoption in providing the legal framework for refugee status determination in these kinds of situations. Where an influx points to criminality and therefore exclusion, the problem can be viewed even more clearly and acutely.

6. The Convention's provisions on asylum

The Convention's provisions on asylum, contained in Article II, are considered by many scholars as among its most important contributions to refugee jurisprudence in general. They combine classical refugee preoccupations with priorities evidently drawn from the politics of international relations and state security. On the legal side, the Member States "shall use their best endeavours, consistent with their respective legislation, to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality." In what is perhaps its most crucial provision in terms of classical refugee law, the Convention states that:

"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.”

This is the Convention’s provision on non-refoulement. Its prohibition of forcible return goes much farther than the comparable provision in the 1951 Convention. The latter makes an exception in the prohibition of refoulement for “the security of the country” arising out of the refugee having been “convicted by a final judgement of a particularly serious crime.” The OAU Convention expressly prohibits, and thereby includes within the scope of its non-refoulement principle, rejection at the border. Pointing to this aspect, some scholars have contended that asylum has been established as a right in Africa. Others disagree.

These scholars point to various conditions and qualifications reflected in the asylum Article and the Convention’s other provisions and argue that the privilege of a State to admit persons onto its territory according to its discretion remains intact. There is even concern that the pivotal role assigned to domestic law in the Convention’s asylum provision means that a State, by establishing stringent conditions through such devices, can in effect defeat the intention of the Convention.

Perhaps mindful of this uncertainty, the drafters of the African Charter on Human and Peoples Rights seem to have sought to put the matter beyond dispute. The Charter contains by far more forthright and complete provisions on what is specifically referred to as the right to ‘seek and obtain asylum in other countries’. Interestingly, the charter itself also uses the qualification “in accordance with the laws of those countries and international conventions,” thus potentially reproducing here too the debate as to what exactly is the quantum and quality of the rights and obligations established. Even so, it clearly adds to, and thereby strengthens, the legal infrastructure of the asylum regime in Africa.

It is important to explain this point further. It is known that the refugee question in Africa has tended to be heavily influenced by sensitive political and security questions. Reading the history and provisions of the Convention from this point of view, it is clear that its motivators and drafters were determined to bring to refugee politics, practice and jurisprudence a veritably

humanitarianised construct, predictability, transparency and coherence. Provisions geared to these objectives are to be found everywhere in the Convention, yet they form a notionally consistent cluster. They include, most famously, the stipulation prohibiting subversive activities, to which we turn later. Among those addressing asylum is the statement that “the grant of asylum to refugees which is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.” The exhortation that “for reasons of security, countries shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin” is based on the same rationale. The provisions in the preamble which speak about a “humanitarian approach”, “eliminating friction among Member states” the primacy of “the spirit” of the OAU Charter in solving refugee problems are all part of the architecture of predictability, depoliticization, humanitarianization and coherence that the Convention was striving to construct.

7. Some Problems Underling the Convention

(i) Introduction

As much as the convention has been hailed for its various positive features, there was, however, also a myriad of other problems for which legal solutions were called for already at the time the OAU Convention was being elaborated.

The Convention needed to devise those solutions. Of course, by making a direct link with the 1951 Convention and describing itself as the “regional complement” to the latter, its full scope of application must be considered as also including that of the 1951 Convention.

Even so, the fact that a number of questions for which legal regulation was required in the African context were not covered within the 1951 Convention itself points to the deficiency in even this relationship.

Therefore, the task which faced the Convention was not only to devise the legal means technically to bridge Africa to the international refugee system, but also to remedy the gaps in the latter system as far as Africa was concerned.

In fact, the preparation of the Convention at one point did contain the ambition to elaborate a quite comprehensive instrument. This objective was, however, dropped inter alia because of the concern “to ensure full harmony with the principles of the 1951 Convention and to avoid any possible conflict between regional obligations and those resulting from the world-wide legal instrument.” There may have been good reasons for this strategy at the time. Nevertheless, when, therefore, the Convention finally saw the day of light without any provisions addressing a number of urgent, Africa-specific questions. In fact, the need to hold, less than ten years after the Convention was adopted, a major continental meeting, the Pan-African Arusha Conference, in effect to bridge and develop the scope of application of refugee law in Africa, itself testifies to the fact that the Convention had been unable to capture all the “specific aspects of refugee problems in Africa.” We look at some of these questions below.

(ii) Standards for attributing refugee Status

One of the most important, foundational questions in the African context then was, and remains today, the problem of managing and attributing refugee status. It inheres particularly in the massive fashion in which persons spill into exile from their countries of origin.

Most of the literature on the OAU Convention is dominated by the impression that it provides the facility for dealing more manageably with refugee status in these kinds of situations.

In relation to an elaborate or even only essential set of standards pursuant to which the process of refugee status determination could be devised and status determination operations better structured, organized and delivered in mass influx or so-called group situations, the OAU Convention is entirely silent. As, indeed, is international refugee law in general.

(iii) A framework for the coherent and predictable management of refugee affairs

The management of refugee affairs in a way that is coherent and predictable is linked to the issue just considered. It should have been evident already when the Convention was being formulated, that the enormity and complexities of managing thousands of people displaced onto the territory of another country precipitously would require more than just the ad hoc imagination of UNHCR

and local officials. This question has continued to be the source of widespread and protracted problems.

If it may be said that Governments have the overall responsibility to ensure proper management of refugees, camps and settlements on their territories, this is not always reflected in the structures that are actually established. In some countries, camps and settlements are designated as UNHCR facilities and for all practical purposes run as such without a notable involvement of the Government. On the other extreme, the role of the Government can be over-stated. Given the strict regime under which these “facilities” are then run, they can become, for all practical purposes, concentration camps to go into which even UNHCR has to obtain permission!

In other cases, the camps or settlements are fully integrated as part of the local social milieu and are able to thrive as viable communities open to locals and refugees alike. The administration of these facilities also varies considerably, in some places law enforcement personnel, and in others ordinary civil servants, are doing the job. In one situation, governments may provide security, law and order. In others, UNHCR will be called upon to provide, or any way pay for, these services as “part of its responsibility”.

These were questions that required systematic legal regulation and elaboration of broad, yet detailed, standards. However, the Convention did not address itself with the matter. It is true that domestic regulations have been elaborated on the subject in many countries, in some cases in quite exacting detail. Indeed, the process of creating international standards might itself gain a lot from examining the experience at the national level, along, of course, with those Conclusions of the Executive Committee which have touched on related aspects. The point being made here, however, is that for a matter of such signal importance to the protection of refugees throughout the continent as this, the international sphere should be the most appropriate forum for the development of the broad standards. In the case of Africa, that refers to the context of the OAU Convention.

(IV) The quality of life of the refugees

At the time of elaborating the Convention, a central pre-occupation in the refugee reality in Africa was the quality of life for refugees, or, rather, their dismal state. This was to remain an increasingly preoccupying problem and today the Continent is locked in a bitter row with the international community on the issue. In fact, one of the drafts in the evolution of the Convention had quite elaborate provisions on, among others, wage-earning employment, self-employment and the liberal professions.

However, these were among the provisions which were dropped as a result of the “the concern to ensure full harmony with the principles of the 1951 Convention.”

The elaboration of standards of treatment for refugees, including, particularly, social and community rights, was important then but is even more compelling today. The question of food for refugees, in other words, its appropriateness, quality and quantity requires one of the most particular and urgent attentions in this respect. The sometimes callous, often just ignorant, but thoroughly ghastly manner in which African refugees can be treated by the international humanitarian system is best (worst) illustrated in the food sector. Late, culturally inappropriate, sometimes degraded, refugees have to accept what is offered, in the quantities and ways in which it is provided. Fundamental and far-reaching changes are required on this matter, which only the facility and force of law can bring about.

There are a number of other questions, some touching more directly on legal protection as such. For instance, today, refugees increasingly find themselves in sensitive situations such as the involvement in regular or irregular military organizations in the asylum context. Where such involvement is forced, the applicable standards are clear. Yet, we find that many refugees are voluntarily submitting themselves to military activities part of an intricate web of national and even regional politics. Even though an individual refugee may voluntarily choose by him/herself to join the service of one or another military body, the consequences at a political and protection level may fall more broadly on and affect the larger refugee population as a whole. Moreover, the consequences on state and regional security in particular, and the effect in turn of these on refugee policy and protection can be biting. This is therefore a question that could not be

addressed on the basis alone of the voluntary choice of the individual refugee and requires much broader consideration.

Secondly, in the context of solutions, the concept of local integration needs to be revisited. Above all, the phenomenon of refugees who several years and generations later still remain refugees (some still receiving relief assistance), requires a new and more imaginative construct, at the centre of which an easier route to naturalization should be established.

Still on the question of solutions, access by refugees to education, health care delivery, and land for occupation and use should also receive special attention. All these and several other related matters had been considered in detail by the Conference on Legal, Economic and Social Aspects of African Refugee Problems of 1967 which in effect provided the last major working forum for the Convention before it moved towards completion.

The conference outlined in detail the general lines of the standards that might be elaborated within the African context with the idea that these should be considered in the elaboration of the Convention.

Regrettably, they were unsuccessful in gaining a foothold. Later efforts, most notably the Arusha Conference, have also produced useful road maps. Yet, for all the priority and preoccupations that the issue generates at a political and rhetorical level, similar concern at a legal level remains invisible.

In connection especially with this last point, the increasing recourse by Governments to encampment of refugees as the policy of choice above all else simply serves to imbed the refugees deeper into dependency upon relief assistance. Standards which should enable the greatest degree of freedom possible and the choice of settlements over camps while at the same time meeting the pre-occupations of Governments would be most helpful. Needless to say, in any reform/review of the standards of treatment for refugees in general, the phenomenal developments which have taken place in the field of gender/ refugee women and

children/adolescents protection would also have to be given special reflection within the OAU refugee frame.

(V) Regional solidarity, co-operation and burden-sharing

Considering the central role that the principle and practice of burden-sharing has to play in the protection of refugees, it is somewhat surprising to see that the basis for it in 1951 Convention consists in only a fleeting reference in a preambular paragraph. In the set-up of the 1969 Convention, this is a central theme, sub-article (4) of Article II stipulating that: “Where a Member state finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU and such Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.”

The principles expounded in this provision have been widely lauded. Yet, in looking at the distribution of refugees among African countries, one would wonder the effectiveness of the provisions. For instance, at the height of Africa’s refugee crisis, 90% of the total refugee burden was carried by only 18 countries and 70% by just 12. Somalia and the Sudan at one time hosted 25% of all Africa’s refugees. Yet, even numbers by themselves alone do not provide a full picture of the burdens and constraints.

The social and community pressures of hosting refugees are just as forbidding. It has to be considered, for example, that some asylum countries have found that up to 70% of those partaking of their public and community services can be made up of refugees. Added to the poverty which afflicts many African countries, the difficulties of structural adjustments, the crippling effects of international debt and poor balance of payment and trade, a refugee situation could, for sure, come to threaten the very social and economic viability of a hosting state.

Under these circumstances, it is easy to understand the concern that “despite the progressive ‘appeals’ rule, there has been no corresponding success in implementing it and turning burden-sharing into reality.”

Yet, the broad strokes of even a valid criticism should neither wash away nor diminish the instrumental role which the kind of co-operation and support envisaged in the OAU's burden-sharing rule has actually played in sustaining a system of protection in Africa. It will be recalled that, in the face of destabilization, intimidation, armed attacks and sabotage perpetrated by the apartheid regime, a number of the Frontline States in effect became unable to provide safe and secure asylum for the South African refugees arriving on their territories. However, it was possible to provide protection for these refugees principally because several countries throughout Africa agreed to receive them, even if they had not arrived directly in the latter's territory.

8. Voluntary Repatriation

The OAU Convention is credited with having been the first international instrument to codify in treaty terms the principles on the voluntary repatriation of refugees. The relevant provisions are contained in Article V which states that:

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in the country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland as a result of such assurance or their own initiative shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and inter-governmental organizations to facilitate their return.

The provision clusters together an amazing array of issues. As with the provisions on asylum and the prohibition of subversion, the complexion of those on repatriation hints at the pre-occupation with friendly relations and especially political and security predictability among the States concerned by the refugee caseload in question. The article also evinces the accent which both the Summit of Heads of State and the Council of Ministers had been placing on voluntary repatriation as the best solution for Africa's refugee problems.

For sure, the provisions of the OAU Convention and indeed of repatriation law in general have and continue to face major challenges in Africa. Whether or not refugees have repatriated voluntarily is a question which has dogged many of the major movements that have taken place in Africa during the lifetime of the Convention so far. The point concerns direct compulsion as well as situations where more diffuse social, political and economic pressures are at play. Problems of security for returning refugees have also been central in some of the repatriations. Many of these situations, however, involve difficulties in the implementation of standards that are themselves well established. The rest of this section of the paper thus wishes to concentrate on the cases where even the standards themselves are uncertain.

One of these arises out of the fact that the Convention clearly envisages mainly organized repatriations, that is, when refugees "return under the terms of a plan worked out well in advance and has the support of both the home and asylum governments as well as that of UNHCR and the refugees themselves." Such plans will normally include formal written agreements of the type discussed earlier. Yet, as UNHCR and others have pointed out:

"The great majority of refugees who return to their home do so on their own initiative, rather than by agreeing to join a formal repatriation plan devised under international auspices after a 'fundamental change of the circumstances' had made possible a return 'in safety and dignity'."

This view at one and the same time over-states and understates the dynamics of what can be quite a complex process. It is not in all cases that refugees “vote with their feet” as a result of considered and deliberative decision-making. Spontaneous repatriation is often the consequence of diffuse push and pull factors and under-currents which themselves might not be so obvious. In any case, as far as international protection aspects are concerned, the question is really rather how refugees who repatriate spontaneously are to be guaranteed the rights and protections which repatriation law otherwise secures. For instance, how is the responsibility of the Government in the home country to ensure the conditions for safe return to be actualized and ensured in these cases? How is return to be monitored where, for instance, UNHCR, any other organization or even the Government itself does not have presence in the areas of return?

The other point is that, within the set-up of the provisions of the Convention, refugees are configured principally as subjects of a repatriation framework being established for them by state and international actors but in the construction of which they themselves play no major part. We, however, see today many politically-charged and protracted situations where it is apparent that the return of refugees will require more than just the actions of states alone in making “adequate arrangements for the safe return of those who request repatriation.” A role must be provided for ‘ordinary refugees’ to be the architects of their own destiny not just in terms of the technical aspects of the repatriation, but above all in reference to the political issues.

The provisions of the OAU Convention also rest on the assumption that the conditions for return in safety would exist already, therefore they focus primarily on the legal organization and conditions for the return itself. Yet, what are the optimal conditions for the promotion of repatriation, and even how to determine their existence is one of the most central and intractable questions confronted in cases where repatriation is to be encouraged. In a biting criticism of the approach set out in UNHCR’s handbook on voluntary repatriation, Saul Takayahashi has argued in favour of a standard in which repatriation itself is only a secondary consequence of an “objective and impartial assessment based on human rights assessment and an authoritative decision that conditions are safe.”

Especially in view of the attraction which is being shown today for so called induced returns, it is indeed essential that any further elaboration of the Convention's standards should take account of this human rights perspective and ensure that there is no dropping below the protection thresholds established by the elements of volition and safety.

9. The Prohibition of Subversive Activities

Even before the OAU was established in 1963, the newly independent African States were already being exercised by the question of subversion. The pre-occupation was, on the one hand, with the more classical, international relations version of the problem, that is, "The overthrow of the legal, political and social order of the state which another state attempts or achieves by propagating its ideology amongst the political forces of the state which is the target of this undertaking. It converts those forces to its ideology by supporting them in their efforts to capture power.

On the other hand, activities evidently already being carried out by refugees and exiles were also attracting the concern of states within the frame of the problem. Little surprise then that when established, the cornerstone principles of the OAU would include "non-interference in the internal affairs of states", "respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence" and "unreserved condemnation of...subversive activities on the part of neighbouring states or any other states." Both aspects of the problem would also be among the very first with which the OAU's highest political and executive organ, the Summit of Heads of state and Government, would seize itself. In only its second ordinary session, the Summit produced, first, a declaration dealing with the problem of subversion in the context of regional and international relations and then another focusing more particularly on the problem in the context of asylum and activities by refugees. The parts of the declaration which have a general or direct bearing to refugees deserve to be set out in full:

3. To oppose collectively and firmly by every means at our disposal every form of subversion conceived, organized or financed by foreign powers against Africa, OAU or its Member States individually.

4 (b) To refrain from conducting any press or radio campaigns against any member States of the Organization of African Unity and to resort instead to the procedure laid down in the Charter and Protocol on Mediation, Conciliation and Arbitration of the Organization of Africa Unity.

6. To observe strictly the principles of international law with regard to all political refugees who are nationals of any Member States of the Organization of African Unity.

7. To endeavour to promote through bilateral and multilateral consultations, the return of refugees to their countries of origin with the consent of both the refugees concerned and their governments.

8. To continue to guarantee the safety of political refugees from non-independent African territories and to support them in their struggle to liberate their countries.

The resolution on refugees recalled the pledge by Member States “to prevent refugees living on their territories from carrying out by any means whatsoever any acts harmful to the interest of other states. Members of the Organization of African Unity” and requested “all Member states have been never to allow the refugee question to become the source of dispute among them.” By the time of this meeting of the Summit, the Council of Ministers had the previous year established a commission on refugees which was later to be instructed to “draw up a draft Convention covering all aspects of the problem of refugees in Africa.” Those instructions, however, did not as such spell out any specific matters which should be covered in the drafting of the Convention. A particular one was now to be indicated by the Summit, which instructed the Commission “to re-examine the draft OAU Convention on the status of refugees having regard to the views expressed by the Assembly at its present session,” that is, the question of subversion. The obligation to deter subversive activities in a refugee context in independent African countries would thereafter continue to be reiterated in several resolutions of the OAU along the lines of the above language.

There could, therefore, again be no surprise to find that when the OAU Convention was adopted in 1969, it figured in its provisions on what had after all been one of the organization’s most

serious pre-occupations in the refugee context. As it stands now, in Article III of the Convention, the prohibition of subversive activities is couched as follows:

- “1. Every refugee has duties to the country in which he finds himself which require in particular that he conforms with its law and regulations as well as with measures for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press or by radio.”

The prohibition of subversive activities does not stand alone in the Convention. Several other provisions including a number in the preamble buttress it directly and indirectly. One of these speaks of the “need for the essentially humanitarian approach towards solving refugee problems”. In another, the Heads of State and Government express their anxiety “to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside”. There is also the determination that “such subversive activities should be discouraged”. The exclusion clause contained in Article I (5) (c) for committing “acts contrary to the purposes and principles of the Organization of African Unity” also has a bearing to the matter.

So also is the stipulation in Article I (6) according to which “for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin”.

Speaking generally, the prohibition of subversive activities and the obligations reflected here are in fact not unique to Africa and conform to the general principles of international law, for instance as set out in the Declaration on General Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. Indeed, two years before the adoption of the Convention, the Declaration on Territorial Asylum adopted by the United Nations General Assembly had stipulated that “States granting

asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.”

From among those who otherwise accept the rationale of the prohibitions, some have questioned the expression “any other activity likely to cause tension between Member States” as being too wide.

Others have contended that the prohibition of activities through the press and the radio might infringe freedoms protected under the Universal Declaration of Human Rights. In fact, the Convention’s prohibition of subversive activities has attracted far more vicious and rounded criticism than this. One of the most brutal has come from Etienne-R Mbaya who, following an ideologically-loaded analysis of the relevant provisions concludes:

“When we realize that for the OAU Convention a subversive activity consists of any action which ‘is such as to cause tension between the member states and particularly through the use of armed force, the press and broadcasts’, we can more fully appreciate the extent of the danger such cases threaten a subversive refugee who is guilty or remaining interested in his country’s political problems. To accept such a situation without reacting to it is tantamount to ensuring that the African refugee is considered as a subhuman species.”

The one-time Head of the OAU’s Bureau for Refugees has articulated essentially the same sentiment:

“By implication, while refugees are allowed to stay in exile until the circumstances that drove them out their country change, they are not allowed by work or deed to help bring about the desired political change. Put more simply, the refugees’ stay in a member state that offered them asylum is contingent upon their passivity and silence, even though the motive behind their flight might have been the search for freedom of expression as well as the right to development.”

Many of the discussions around these provisions concentrate on what, exactly, is comprised in the prohibitions, the imprecision in language and so forth. The study by the Lawyer’s Committee

for Human Rights referred to earlier goes much further and in more detail than most in this regard, and is more forthright in its condemnation of the prohibition for, according to the Committee, violating freedoms protected in human rights law and particularly the International Covenant on Civil and Political Rights. At the same time, the study concentrates on the consequences of the prohibition, as well as the inconsistent behaviour of states in discharging their obligations under these provisions, the Committee's point being that:

“...what is most striking is the double standard operated by Governments everywhere. Whether or not a host government restricts the political activities of refugees depends almost entirely on its own alignments and preferences.”

Some of these criticisms simultaneously overstate their case while at the same time diminishing the seriousness of the devastation that can be visited upon an entire refugee situation once politicization and militarisation are allowed to take root. Evidently, the situation which unfolded in the eastern Zaire camps is an extreme example.

However, for precisely that reason, it provides an unparalleled lesson as to what this is all about. Moreover, it should also be obvious that the pre-occupations are not over the natural, relatively benign oracular interest in the affairs of their country of origin that refugees would find impossible to disabuse themselves of. “Political activities” of this type go on in exile all the time, the intention not necessarily being the disruption of the international relations or security priorities of the countries concerned. Although, of course, states will indeed often object, situations where rhetorical reasons are at the root of the dissatisfaction will normally be easy to detect.

We earlier suggested, and the point may now be reinforced, paradigm reforms to construct a threshold of, “permissible political behaviour” by refugees. The idea is that such activities would be acknowledged by all concerned as comprising a legitimate, proper and even beneficial exercise of their democratic freedoms by refugees.

Accordingly, they would not be considered as inviting objections in the context of subversion. Moreover, their value in the drive towards the solution of the refugee problem itself could also then be explored. Obviously, this would still remain a potentially sensitive and controversial matter. Therefore, in the interest of the greatest degree of predictability possible, and here the concerns by the Lawyer's Committee are well placed, the so-called permissible activities would have to be defined in the clearest manner possible.

Activities which truly pose genuine threats to the security of states are, it is argued, relatively easy to spot, indeed the key players in their perpetration usually themselves vouchsafe the intent precisely to disrupt the status quo. They are of both a political and military nature but can also take other forms, including the diplomatic. In relation to such activities taking place in a refugee context, the position of this paper is forthright and unambiguous. They cannot and should not be allowed to take place under any circumstances. To do otherwise is the surest route to shutting down, ultimately, the humanitarian asylum and refugee protection regime.

Irrespective of how just the extra-constitutional political and military resistance activities might be, they cannot and should not be permissible in a refugee context, that is, either in the physical refugee milieu as such, or through the use of refugee status and the protections it provides.

Focusing therefore on the protection interests of the refugees, and not only the priorities of States (which is the principal rationale of the prohibition as it stands now), we have little hesitation in supporting the maintenance of the prohibition of what are referred to presently as subversive activities. We, however, argue that some refinements are necessary if the refugee-centred purposes just mentioned are also to be realized. Four main points are highlighted in this connection.

4.3 The Legal and Institutional Frame work to Protect Refugees in America

1. General Observation

Cartagena Declaration on Refugees (1984) was adopted in the wake of the civil war-related refugee crises that affected Central America in the 1980s by government representatives, distinguished academics and lawyers from the region.

Although the Declaration is not legally binding, it has been repeatedly endorsed by Central and Latin American States. Its broad refugee definition has been incorporated in the legislation by almost all countries in the Central American and Caribbean region and in a number of Latin American countries.

Indeed, its importance as a regional protection tool has been recognized in numerous resolutions of the United Nations General Assembly and of the Organization of American States.

The Cartagena Declaration contains a set of principles and criteria guiding the States signatories to it on the treatment of refugees in the Central American Region. The Latin American positions and perspectives in relation to the determination of refugee status are to be found in the Declaration. Its provisions also include durable solutions to the refugee problem which have been put into practice in Central America.

Account was taken in the Cartagena Declaration of the legislative antecedents and existing practice within the region concerning the right to asylum as well as protection of human rights and of civilian populations in wartime. Particularly noteworthy in this regard is the 1889 Montevideo Treaty on International Penal Law enshrining respect for the right to asylum, The Inter- American Charter on Human Rights and the 1949 Geneva Conventions.

The Cartagena Declaration found an inspiring influence in the provisions of the 1969 OAU Convention from which it borrows in particular the concept of refugee.

Above all it takes into consideration the notion of refugee contemplated in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

The immediate objective of the Cartagena Declaration was to provide a much needed common framework, unifying criteria and programmes in order to meet the demands of the refugee situation in Central America. In addition, the Declaration performed two important functions. One being to establish regional legislation dealing specifically with refugees; another to make governments of countries in the region more sensitive to the need to eliminate causes leading to the massive displacement of persons from their countries of origin.

The drafting of the Cartagena Declaration adopted criteria which, having been previously developed in different regional meetings, took shape in the Contadora Act for Peace and Cooperation in Central America. The action of the Contadora Group was one of the first attempts at seeking regional and joint solutions to consolidating peace in Central America. It led countries directly concerned and friendly nations to get together and take on responsibility for examining the problem in all its dimensions.

The Contadora Act defines the criteria which have to be taken into account in the refugee policy in Central America. These criteria are included in the Cartagena Declaration. The most important of which are as follows:

- (a) First and foremost it is imperative to adhere to the 1951 Convention and to its 1967 Protocol, to implement it and to set up national mechanisms for this purpose. It is likewise suggested that States in the region hold regular consultations with the UNHCR and support the work of the High Commissioner in the region (II (a), (b), (c), (d), (e));
- (b) The Declaration establishes the necessity to meet refugees' requirements in the fields of health, education, labour and security (II (h)) and to respect their human rights (II (o)). It prohibits the transfer of refugees to other countries against their will. At the same time, it recommends that resettlement in third countries be considered in certain cases in order to alleviate the situation in those countries burdened with a large number of refugees;
- (c) It accepts voluntary repatriation as a durable solution (II (f)). Voluntary repatriation must be based upon the principle of individually and freely-expressed wish of the refugee as well as

be carried out in collaboration with the UNHCR. For repatriation process is to be conducted through tripartite commissions made up of representatives of the country of origin, the country of asylum and UNHCR For repatriation purposes, asylum countries have to facilitate any legal or other procedures returnees are subjected to on their departure;

- (d) Another important criterion is that of providing for self-sufficiency of refugees by means of developing programmes and projects permitting them to engage in productive and gainful activities and thereby making it possible for them to earn a living (II (i)). This does not exclude, however, the possibility of voluntary repatriation, for, even in those cases where the sojourn of refugees is temporary, they ought to play a part in satisfying their own needs, for economic and mental health reasons;
- (e) Asylum countries are, furthermore, given assurances by the Declaration that refugees must take no political action against their countries of origin. This criterion proved to be necessary in order to assert the exclusively humanitarian nature of the granting of asylum and of the ensuing protection enjoyed by refugees (II (o));
- (f) Concluding the explanation on criteria, it is to be stressed that the Cartagena Declaration enshrines the need for Governments of countries in the area to make efforts directed at removing the causes of the flow of refugees (II (m)). It also appeals to the international community to make financial contributions with a view both to finding solutions to the problem of refugees and to eradicating its causes.

Some of the features of the Cartagena Declaration make it a unique document within the international legal framework relating to refugees. Such features have contributed to the definition of the concept of refugees and to the determination of universal principles of policy and law related to the subject. They have advanced durable solutions which are proving in today's world to be increasingly valid for the treatment of refugee problems in all their dimensions.

In its third conclusion, the Declaration contemplates a broad concept of refugee which incorporates the elements of the 1951 Convention relating to the Status of Refugees, the OAU definition, and the doctrine found in the relevant reports of the Inter-American Commission on Human Rights. This conclusion states that "the definition of the concept of refugees

recommended for use in the region is that which, besides containing the provisions of the 1951 Convention and the 1967 Protocol, considers to be refugees persons who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights and other circumstances which have seriously disturbed public order (III 3.).

Such a definition comprises an array of situations affecting the security of persons from a political viewpoint. It makes explicit reference to reasons deemed to be valid justifications for persons to flee their countries of origin, such as:

- (a) - the categories contemplated in the 1951 Convention and in its 1967 Protocol;
- (b) - generalized violence;
- (c) - foreign aggression;
- (d) - internal conflicts;
- (e) - massive violation of human rights;
- (f) - other circumstances leading to a serious disturbance of public order.

This definition broadens the concept of refugee to encompass circumstances having a bearing upon the life, security and liberty of individuals in the region. Category (f) offers a still wider possibility as it envisages examining what may or may not be considered as a situation of serious disruption of public order in the light of factors other than those listed in the previous categories. For our region, that definition is sufficient, viewed from the angle of covering all circumstances which may impact on the maintenance of public order to such an extent that the life, security and liberty of persons are put into serious danger.

It is important to point out that no reference is made to economic or ecological factors, which today are being regarded as new categories. Though such factors also play a role in Central America, they are not so serious as to pose a threat to the physical integrity of persons in countries of the region.

Some other features of the Cartagena Declaration are:

- (a) The reiteration of the right to asylum as a principle of humanitarian nature which, in no case, can be interpreted as an instrument for criticism or sanction against the country of origin. Accordingly, receiving refugees must not be taken as an excuse for changes in bilateral relations between a country of asylum and a country of origin;
- (b) The principle of non-refoulement is another key element of international protection confirmed by the Declaration and respected by countries in the region;
- (c) Another important aspect is the need for reunification of families, deriving from one of the most distinctive marks of Latin American idiosyncrasy;
- (d) The Declaration embodies in the notion of integration of refugees into the productive life of countries of asylum a very important humanitarian principle aimed at protecting the physical and mental health of persons. Towards this end, the Declaration suggests that resources made available by the international community be channelled to development programmes which may generate employment, thereby enabling refugees to make proper use of their manual and mental skills and to take care of their own subsistence needs as well as allowing countries of asylum to benefit from skilled labour which refugees may happen to be a source of;
- (e) The Declaration requests States of the region to incorporate into their legislations a regime for treatment of refugees including at least the minimum standards of international protection applicable to persons who find themselves in a situation amenable to the establishment of the status of refugee;
- (f) Finally, another salient feature of the Declaration is its explicit mention of internally displaced persons (III 9.). There is no clear indication of the region's position on the issue. The ninth conclusion contains, however, an appeal to national authorities and to competent international organizations to provide protection and assistance to persons in this situation. In other words, internally displaced persons deserve the attention of national authorities in the States signatories to the Declaration, but not because of the status of refugee as it is defined therein (conclusion III 3.);
- (g) The last main feature of the Declaration is the recommendation for cooperation between the OAS and the UNHCR regarding unification of efforts related to refugees.

The Declaration puts forward durable solutions taking into account the three fundamental aspects in which they may originate:

- (a) Voluntary repatriation is a definitive solution when carried out under adequate conditions, that is to say, if it is the result of the wish of the refugee expressed individually and freely if necessary resources are made available for his/her re-incorporation in the social and productive life of his/her country of origin, and if conditions prevailing in that country no longer pose any risk to the security of the returnee. Voluntary repatriation must be conducted by means of a joint action of interested parties, namely the country of asylum, the country of origin and the UNHCR.
- (b) Integration of refugees in the productive life of the country of asylum. This is a sort of transitional arrangement of caring for refugees wishing to return to their country, but it is equally a durable solution for those who desire either to settle definitively or to stay for a longer period in the country of asylum. Local integration's importance lies in the fact that with it refugees reacquire autonomy in their lives, countries of asylum gain from their involvement in productive activities, and the UNHCR's costs of providing protection can be reduced. In addition, refugees do not lose their sentiment of attachment and responsibility for their family and for society at large.
- Integration in productive life ought to be understood furthermore as a pedagogical way of caring for refugees. Not only does it enable refugees to develop their abilities and to make full use of such abilities for their own benefit as well as for the welfare of the countries they live in, but it is also an instrument of prevention against social isolation and any form of discrimination they might be victims of.
- (c) The third solution the Cartagena Declaration contemplates is the eradication of causes leading to the status of refugee. In this sense, the Declaration calls on countries to take the necessary steps in order to restore peace in the region. For this reason refugee policy is one of the aspects of the agreements concluded within Contadora and Esquipulas II. These constitute the most important efforts in the region with the aim of eradicating causes of the social and political conflicts tormenting countries in Central America.

The Cartagena Declaration has been important not only for having offered bases for a solution to a complex refugee problem at a time when it was highly serious and delicate for the Central American region. It has also projected its importance as a landmark for positive developments which ensued its adoption. A clear instance of this is the transcendence of its principles in the

approach taken subsequently by Latin American countries in recognizing the status of refugee and the measures on which it rests, essentially protection and the search for durable solutions.

The dynamism of the Cartagena Declaration has already resulted in the adoption in certain countries such as Mexico and Ecuador of legal measures embodying its principles, in particular the broader concept of refugee. Other countries in the region are considering adopting positive rules on the matter. This is the case of Nicaragua and Costa Rica. The same applies to Belize, a country which has recently adhered to the 1951 Convention.

In other Latin American countries, the principles enunciated in the Declaration have been observed de facto, the status of refugees having been granted to persons who would not have fulfilled all the conditions set forth in the 1951 Convention.

Within the framework of regional organizations, the repercussion of the Cartagena Declaration has manifested itself since its adoption. The Organization of American States has been passing yearly since 1985 a consensus resolution on the problem of refugees which stresses the importance of the Declaration and its relevance for the development of international law. It recommends to all States members of the Organization to comply with its provisions. Coming as it does from the chief organization on the American continent, this manifestation has a particular transcendancy. For its part, the Andean Parliament has also underlined the importance of the Declaration and recommended its observance in the resolution it adopted in 1991.

4.4) Review Questions

- a) In what regard do you think the European refugee regime is different from the other two regional refugee regimes?
- b) What is the significance of the decision of European Court of Human Rights, in *Chahal v. UK* case, to refugee protection?
- c) In what regard do you think the African refugee regime is different from the other two regional refugee regimes?
- d) In what regard do you think the American refugee regime is different from the other two regional refugee regimes?
- e) Discuss the expanded definition of refugees adopted by the OAU refugee convention and what is its significance in protecting refugees.
- f) Is the concept of 'group refugee' recognized under the OAU refugee convention?

Chapter Five

The Legal and Institutional Framework to Protect Refugees in Ethiopia

I) Introduction

Under this chapter, we shall discuss the legal and institutional framework of Ethiopia regarding protection of refugees. Ethiopia has expressed its desire to be part of the effort of the international community to protect refugees by signing both the UN and OAU/AU refugee convention. Ethiopia has also further shown its concern to protect refugees through its constitution which recognizes certain rights of non-nationals and by adopting a proclamation that specifically deals with refugees. This chapter shall discuss the place of international and regional refugee instruments in Ethiopia, the relevant provisions of the FDRE constitution, the substantive and procedural guarantees the proclamation provides for refugees and consider those guarantees against the guarantees provided for by the UN and OAU/AU refugee conventions.

II) General Objectives

Having studied this chapter, we shall be able to:

- a) Understand the status of international and regional refugee instruments in Ethiopian legal system and their significance in Ethiopia.
- b) Identify and understand the relevant provisions of the FDRE constitution that protect refugees.
- c) Understand the substantive rights, procedural guarantees and duties that the refugee proclamation provides for.
- d) Understand the strong and weak areas of the proclamation in terms of protecting refugees in Ethiopia.
- e) Analyze and understand if Ethiopia has been able to live up to its commitment under the UN and OAU/AU refugee conventions.

5.1 The Status and Importance of International and Regional Refugee Instruments in Ethiopia

Ethiopia signed the 1951 Convention relating to the Status of Refugees on 10 Nov 1969 and its 1967 Protocol in Nov 1969. It is a party to the convention with reservations to its article 8 (that obliges states to exempt refugees from measures which may be taken against the person, property or interests of nationals of a foreign State), article 9 (that allows states, in time of war or other grave and exceptional circumstances, to take provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security), article 17(2) (that prohibits states to impose restrictive measures that may be imposed on aliens or the employment of aliens for the protection of the national labour market, to refugees) and article 22 (that obliges states to accord to refugees the same treatment as is accorded to nationals with respect to elementary education). Regionally, Ethiopia is also a party to the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention).

Besides these refuge-specific instruments, Ethiopia is also a party to most of international and regional human rights and humanitarian law instruments such as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on Torture, Inhuman and Degrading treatment, The Convention on the Rights of the Child, The Convention on the Elimination of Discrimination against Women, the 1949 Geneva Conventions and, the African Charter on Human and Peoples Rights, thereby reinforcing protection for refugees.

More importantly, the fact that Ethiopia has committed itself to these refuge instruments both at international and regional level demonstrates the desire of the country to assume the shared responsibility of protecting those who are in a danger of persecution. Apparently, being a party to these regional and international treaties imposes obligation on Ethiopia to respect and protect them. This again means that Ethiopia should undertake various measures at a national level which may include: domesticating these instruments so that they can be enforced in Ethiopia,

adopting refugee legislations at a national level, establishing or designating the necessary institutions to handle refugee matters etc.

The current Ethiopian constitution under its article 9(4) expressly provides that ‘all international agreements ratified by Ethiopia are an integral part of the law of the land’. Once the executive branch of the government negotiates and signs international treaties, they are expected to be presented before the House of Peoples Representatives for ratification. In the normal course of things, after some level of deliberations, these instruments should be adopted which make them part of the law of the land.

The same proviso of the constitution also provides that ‘the constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this constitution shall be of no effect.’ From this one could suggest that international and regional refugee conventions are subordinate to the constitution and the latter prevails in case the two conflict each other.

On the other hand, Chapter three of the constitution gives a catalogue of human rights. Article 13 of this chapter of the constitution provides that ‘the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenant on Human Rights and International instruments adopted by Ethiopia’

It is clear, therefore, that the constitution demands the long list of human rights under chapter three to be interpreted in conformity with international human rights instruments adopted by Ethiopia. This means that international human rights instruments including refugee-specific human rights are to be taken as a guideline to establish the meaning and content of the rights given in chapter three of the constitution. From this, again, one could suggest that as far as chapter three rights of the constitution are concerned, the constitution is subordinate to the adopted international human rights instruments, particularly where the issue of interpretation comes up.

Substantiating this line of argument, Article 27 of the Vienna Convention on the Law of Treaties provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. It is; therefore, clear that a domestic law including a constitution can not be a justification for failing to live up to the expectations of international agreements. As a corollary, for a state party to perform its international obligations under a treaty, its national laws should be made and interpreted in such a way that they do not go against these international commitments. The expression of article 13 of the constitution that the human rights provisions of the constitution should be interpreted in compliance with international human rights instruments is a keen indication of the enormous interest of Ethiopia to respect these instruments and its internal laws should not serve as an impediment to that end. Teleological interpretation of the constitution based on its overall object and purpose also adds credence to this far-reaching understanding of article 13 of the constitution.

In sum, it is more tenable to take a position that the human rights provided in the constitution that applies to refugees and the refuge proclamation should be interpreted in light of the refuge convention, the OAU refuge convention and the international and regional human rights instruments Ethiopia is a party to. Doing in the otherwise would expose Ethiopia to a possible violation of its commitments at a regional and international level.

5.2 Ethiopian Legal and Institutional frame work on the Protection of Refugees

(I) Introduction

The Ethiopian people have long been known for its hospitality and its governments have shown no less of this over the years. According to the World Refuge Survey(2008)Ethiopia hosted about 201,700 refugees and asylum seekers, including about 111,600 Somalis who fled the collapse of the Somali state in 1991 or more recent turmoil and about 55,400 Sudanese who fled the civil war in the south of Sudan.

Ethiopia also hosted some 23,900 Eritrean refugees. About 16,800 of them lived in Shimelba camp near the northern border: this group included some 4,000 ethnic Kunama, whom the

Eritrean Government had accused of supporting Ethiopia in the 1998 to 2000 dispute; evangelical Christians fleeing religious persecution; and newer arrivals fleeing forced conscription. Most of the Kunama turned down the option of U.S. resettlement after guerrilla leaders who wanted to keep them in the camp showed them the movie *Roots* and violent American television police dramas and told them that Americans would steal their organs. Another 7,100 ethnic Afar Eritrean refugees lived in the remote Afar region of northern Ethiopia. Some 17,000 Somalis lived in the Kebribeyah camp in the northeast. Around 50,000 more, mostly women and children, entered Ethiopia between August 2006 and early February 2007 and stayed with family and clan members. Between 30,000 and 45,000 unregistered Somali asylum seekers lived in and around Addis Ababa and other urban areas.

At the end of the year, more than 41,000 Sudanese refugees, who had fled the 21-year-war between Khartoum and the Sudan People's Liberation Movement, lived in four camps near the western border. Yarenja, a fifth refugee camp, closed in March. The Office of the UN High Commissioner for Refugees (UNHCR) helped about 19,000 Sudanese return. Pursuant to the 2006 tripartite agreement, Ethiopia allowed refugees who did not wish to return to Sudan to remain in Ethiopia as refugees.

Between 300 and 600 ethnic Tigrinya Eritrean refugees entered per month as fear grew over the possibility of war between Ethiopia and Eritrea over their disputed border.

(II) Legal Standards

It is shown above that Ethiopia is a party to the 1951 international refugee convention and its additional 1967 protocol. At a regional level, it is a party to the OAU refugee convention of 1969. Furthermore, Ethiopia is also a party to a number of international and regional human rights instruments which are meant to protect every individual including refugee. It is shown in previous chapters that all refugee instruments are nothing but a restatement of refugee-specific human rights and, refugee law is a segment of the complex network of human rights law and the two are meant to complement each other.

It is also shown above that the 1995 Constitution made adopted international agreements an integral part of the law of the land and gave the executive and legislative branches specific authority to provide asylum. What is more, most of the rights provided under chapter three of the constitution are couched in a language which goes as 'every person', which may well include aliens including refugees. If this understanding is tenable, refugees could benefit from most of those human rights in the constitution. On the other hand, one could also note that some of the rights in the constitution seem to be limited to only Ethiopian nationals as these provisions employ the phrase 'every Ethiopian'. Such provisions of the constitution include: article 40 (the right to ownership of property), article 41 (regarding economic, social and cultural rights) and article 42 (right to work)

The constitution in its article 32 also expressly provides non-national including refugees the freedom of movement within Ethiopia and the freedom to choose residence in the following words: "any ... foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes," but the same proviso seems to have reserved the right of reentry to nationals.

As a significant step towards enhancement of refugee protection, as granted by the refugee Convention, Ethiopia has recently adopted a proclamation (2004) that specifically deals with refugees.

Being a national refugee-specific instrument, the proclamation regulates a fairly wide area related to refugees in almost the same language the refugee convention provides. Apart from this, unlike many contemporary national refugee instruments, the proclamation does not provide for concepts such as internal flight alternative, safe country of origin, safe third country, subsidiary and temporary protection.

The adoption of this proclamation highlights Ethiopia's commitment to implement its international and regional obligations. Its adoption facilitates the grant of asylum and the protection of refugees. To this effect, the preamble part of the proclamation reads: 'it is desirous

to enact national legislation for the effective implementation of the aforesaid international legal instruments, establish a legislative and management framework for the reception of refugees, ensure their protection, and promote durable solutions whenever condition permit'

The proclamation also provides for institutions such as the Security, and Immigration, and Refugee Affairs Authority's (SIRAA) and the Appeal Hearing Council to deal with refuge applications and other refuge related matters.

(III) General Observation of the Proclamation

(a) Definition of Refugees

The 2004 proclamation incorporated refugee definition from both the 1951 Convention and the 1969 African refuge convention verbatim. Article 4 of the proclamation adopted a combined definitions of refugees given by the above two instruments.

It has been shown in the previous chapters that while the 1951 convention refuge definition has been at times considered to be too restrictive, the 1969 OAU definition on the contrary has been hailed to be inclusive. The fact that the Ethiopian Refuge proclamation combines the two definitions suggest an enormous interest on the part of Ethiopia to be more accommodative and more open to the plights of refugees.

The Ethiopian Proclamation does not provide for subsidiary or supplementary protections, a kind of scheme that has been developed to extend international protection to individuals who do not satisfy the refuge definition but who otherwise need protection. Given the broader definition of refugee adopted in the proclamation one may, however, argue that such persons could even be subsumed into the definition itself.

Under its Article 19, the proclamation talks about group refugees. The provision reads as follows:

If the Head of the Authority considers that any class of persons met the criteria under Article 4(3) of this Proclamation, he may declare such class of persons to be refugees.

The reading of this provision suggests that a group of persons, whom the authority believes that they meet the refuge definition, may be recognized as refuge with out even having gone through individual refuge determination procedure. In effect, this provision seem to refer to what is commonly referred to as prima facie refuge, that is that a group could be recognized as refugee, in the absence of evidence to the contrary, especially during mass influx situations, without having undertaken an individual determination procedure.

In chapter two and four we have considered the content of the definition of the 1951 convention and the 1969 OAU Convention respectively. As the Ethiopian refuge convention adopts these two definitions verbatim, and because Ethiopia is a party to these conventions, the meaning and content of this definition in the proclamation should be approached as per the understanding we have reached in those chapters. In order to understand the definition under this proclamation one may, thus, have to refer to the analysis under those chapters.

(b) Non- Refoulement

We have repeatedly seen in the previous chapters that the protection against refoulment is an international preemptory norm. States are obliged both under refuge specific and more broadly under international human rights instruments not to expel an individual to the place where she or he risks persecution. We also have seen that though this obligation suffers certain exceptions under the 1951 convention, it has largely been conceived, under human rights instruments, as absolutely absolute.

Article 9 of the proclamation provides for the protection against refoulment in the following words:

No person shall be refused entry in to Ethiopia or expelled or returned from Ethiopia to any other country or be subject to any similar measure if as a result of such refusal, expulsion or turn or any other measure, such person is compelled to return to or remain in a country where:

- a) the may be subject to persecution or torture on account of his race, religion, nationality', membership of a particular social group or political opinion: or
- b) his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination of events seriously disturbing public order in part or whole of the country.

As with the 1951 convention, the proclamation, in addition, provides for grounds of exception in the following words:

- 2) The benefit of this provision may not, however, be claimed by a refugee whom there are serious reasons for regarding as a danger to the national security, or who having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community.

Clearly, this provision of the proclamation is nothing more than a direct copy of the relevant provisions of the 1951 convention and the 1969 OAU Convention. Accordingly, one should refer to the rather lengthy discussion on non-refoulement under chapter three of this material so as to be able to better understand what it means under the proclamation.

It is also worth noting that unlike the 1951 convention, the Ethiopian proclamation provides for expulsion clause under its article 10 stating that a 'refugee who is lawfully resident in Ethiopia shall not be expelled except on the ground of national security and public order'. This clause authorizes the concerned authority to expel a refuge on the grounds of national security and public order. While it is understandable that a refuge is not protected under the convention against refoulement in certain exceptional situations, and same is adopted by the proclamation under the non-refoulement clause, providing for another clause on expulsion might be criticized as a move to make the exception go wider.

Further more, any restriction to the protection against refoulment should be limited to those exceptional convention reasons. The trend to expand the exceptions would suggest nothing less than going counter to the contemporary understanding of the international community.

It is interesting to note that under its sub article 4, the provision of the proclamation envisaged a kind of moratorium whereby the decision to expel could be delayed, upon request of the refugee, so that a refugee seek admission to a country other than the country to which he is to be expelled. As shown before, what is prohibited is not only expelling a person to the country where he or she risks persecution but also to the country from where that person could subsequently be expelled to a place where he or she risks persecution. The sub- article is significant in giving a chance to the refugee to look for safe-heavens elsewhere, and extending that chance, in effect, will help Ethiopia lives to the obligations of non-refoulement as provided by a number of international and regional human rights instruments to which it is a party.

(c) Exclusion from Refugee Status

We have seen in the previous chapters that, though an asylum seeker has satisfied the requirement to be recognized a refugee, he or she may be excluded from such status. Exclusion comes after a refugee determination is undertaken. Exclusion from refugee status is meant to limit protection only to those deserving cases and to avoid the possibility of individuals escaping prosecution for serious crimes they have committed.

Accordingly, as with the 1951 convention, the Ethiopian Proclamation, under article 5, provides for grounds for excluding asylum seekers from refugee status. The grounds of exclusion given in the proclamation are similar to the grounds given under the convention except that the proclamation provides for one more grounds of exclusion under its sub article 4. This sub article provides that a person shall not be considered a refugee if;

4) having more than one nationality, he has not availed himself of the protection of one of the countries of which he is a national and has no valid reason, for not having availed himself of its protection.

One could argue that this sub article is either unnecessary addition to the provision or perhaps misplaced.

What is provided under this sub article is a component of the definition of refuge under the 1951 convention as well as the proclamation. Having a dual nationality and a refusal to avail oneself of that protection ,without good reason, is and should be an element of a refuge determination process and hence should not be raised at exclusion stage. This is because a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.”

Such part of the definition of a refuge is intended to deny from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.

(d) Family Unity

The Ethiopian proclamation, as with the other international and regional refugee instruments, recognizes family unity under its article 12. As was discussed in the previous chapters, it is part of states humanitarian obligation to allow and facilitate the family members of the asylum seeker and refugee join the latter in a country where the asylum is sought. The proclamation does not limit the right of family unity only to refugees. It rather equally recognizes the right of family unity of asylum seekers. The family members of both asylum seekers and refugees have the right to enter Ethiopia with a view to reunite with the asylum seeker and refugee. The family members of the asylum seeker enjoy same measure of rights the asylum seeker enjoys and if the asylum seeker is found not to deserve refuge status, they also loose protection unless otherwise, of course, they are given refuge status on their right.

Family members of the refuge are entitled to the same measure of rights a refuge is entitled to under the proclamation. Interestingly enough, in order for them to enjoy those rights, they need not have to apply for refuge status and need not necessarily have a refuge status themselves. The family of asylum seekers and refugees, however, has the right not an obligation to apply for refuge status.

Though the proclamation does not provide the details of how Ethiopia would facilitate family reunification, the fact that the proclamation recognizes family unity both for asylum seekers and refugees alike and that they are entitled to same rights the refugee has without they having been required to have a refugee status is an extremely positive gesture of humanitarianism and is in line with its commitment under the convention.

(e) Procedure for the determination of refugee status

We have seen in the previous chapters that the procedure for the application and determination of refugee status should be fair. The asylum seeker should be given the opportunity and time to lodge his application before a designated authority and the right to a fair hearing. These obligations have been duly recognized by international and regional refugee instruments. Similarly, the Ethiopian refugee proclamation extends procedural protections to asylum seekers in its provisions 13-18.

The Proclamation, under its article 13, requires asylum seekers to apply for asylum both at the frontier and within Ethiopia in 15 days time. They can report either at the nearest police stations or the office of the authority. The police station receiving the application shall, as soon as possible forward the application to the Authority. The applicant shall fill relevant forms and vouch for the truth of the statement therein. Having received the application, the Authority shall provide the applicant with identity card attesting to his status as asylum seeker pending refugee status determination.

Interestingly enough, unlike the refugee convention which allows for a possibility of detaining asylum seekers who are inside the country illegally, the proclamation prohibits both detention and criminal prosecution against a person who has applied or is about to apply for refugee status on the account of his illegal entry and presence in the country. Seen even from the standard provided by the refugee convention point of view, the proclamation is a step ahead as it categorically prohibits detention and prosecution of any sort for unlawful entry or presence.

According to the 2008 world refugee survey, ‘there were no reports that Ethiopia detained refugees or asylum seekers for illegal entry, presence, work, or movement, but the Government

kept several Eritreans in detention on national security grounds, allowing the International Committee of the Red Cross (ICRC) to visit them.’

Having received the application of the asylum seekers and issued an asylum seeker with an identity card, the Security, and Immigration, and Refugee Affairs Authority (SIRAA) determines the refuge status of the applicant. In deciding asylum application, the SIRAA shall ensure that every applicant is given reasonable time to present his case; ensure the presence of qualified interpreter during all the stages of the hearing; cause the person concerned to be notified of its decision and the reason thereof in writing; decide on every application or case referred to it within reasonable period of time; and invite the United Nations High Commissioner for Refugees to participate as an observer.

Apart from these procedural guarantees the proclamation does not provide for a right to legal aid, an essential component of fair hearing. But one would only hope that an asylum seeker shall be given a free legal aid at least in circumstances where this looks imperative to establish the truth. Any asylum-seeker, who is aggrieved by the decision of the SIRAA, may within thirty days of being notified of such a decision, appeal in writing to the Appeal Hearing Council. This organ, hearing the appeal of the asylum seeker, follows same procedure the SIRAA follows to reach its decision. If the Appeal Hearing Council affirms the decision of the SIRAA, as the proclamation stands now, that would be the end of the matter and the asylum seeker may have to leave as our proclamation does not seem to have recognized, at least explicitly, the so called subsidiary or complimentary protection. While it has been an important factor of a fair refuge determination procedure, the fact that the proclamation does not provide for a judicial review by ordinary courts is regrettable.

(f) Rights and Obligations of Asylum-seekers and Refugees

Several states subject asylum seekers and refugees to different standards of treatment such as alien, preferred nation’s nationals and as nationals. The contemporary understanding of the refugee convention, however, means that refugees should be entitled more or less to the same measure of rights nationals are entitled to. In other words, discriminatory treatment between nationals and refugees is increasingly becoming unacceptable.

The Ethiopian refugee proclamation, under its article 21, provides that a refugee shall be permitted to remain within Ethiopia, issued with identity card and travel document to travel outside of Ethiopia. In practice, the Government and UNHCR jointly adjudicated refugees' written applications for international travel documents for educational, work-related, or urgent personal reasons.

The proclamation has also reaffirmed that refugees are entitled to the rights recognized under both the refugee convention and the OAU refugee convention.

Notwithstanding the above, the proclamation under its sub article 2 provides that the Head of the Authority may designate places and areas in Ethiopia within which recognized refugees, persons who have applied for recognition as refugees, and family members thereof shall live, provided that the areas designated shall be located at a reasonable distance from the border of their country of origin or of former habitual residence.

As shown before, the 1995 Constitution also provides that 'any ... foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes,' but reserved the right of reentry to nationals.

Clearly, the 2004 Refugee Proclamation gave refugees the right to international travel documents, but likewise authorized the head of SIRAA to designate areas where refugees and asylum seekers must live, thereby imposing residential restrictions.

According to the 2008 world refugee survey, Ethiopia required nearly all Eritrean, Sudanese, and Somali refugees to live in seven camps near their respective orders and required them to obtain permits to leave. The Government issued permits specifying the period of travel to camp residents for personal, medical, educational, or safety reasons. In general, Ethiopia restricted aid to refugees in camps or those with specific permission to live in urban areas. Some refugees from the Great Lakes area lived in Sherkole camp in the west because aid was available to them only there. In the north, refugees lived with local communities in 24 remote locations, but in February

UNHCR, regional authorities, and the World Food Programme limited aid to two distribution sites near Dubti and Berhale.

Understandably, one could see that there is a general trend of confining refugees to campus. Such measures will deprive refugees of a chance to locally integrate with the people of Ethiopia and live a normal life free of confinement. Furthermore, such a measure apparently runs counter to the country's obligation to seek and work towards durable solution one of which being local integration.

Sub article 3 of Article 21 of the proclamation imposes further restriction on the scope of rights refugees could enjoy in Ethiopia in the following words: '...Every recognized, refugee, and family members thereof shall, in respect to wage earning employment and education, be entitled to the same rights and be subjected to the same restrictions as are conferred or imposed generally by the~ relevant laws on persons who are not citizens of Ethiopia.'

According to the 2008 world refugee survey, Ethiopia did not allow refugees to work. The Government granted work permits to foreigners only when there were no qualified nationals available and rarely issued permits to refugees. The Government also tolerated some refugees with special skills working illegally. Authorities tolerated refugee participation in the informal sector, including trading in markets or doing other piecemeal jobs.

The 1995 Constitution offered only citizens the right to work; and also granted them the right to join unions, to bargain collectively, and to strike, as well as to other labor rights generally. The 2004 Proclamation exercised Ethiopia's reservation to the 1951 Convention's right to work, placing the same restrictions on refugees as on other foreigners.

The Constitution offered only citizens the right to run enterprises and reserved other limited property rights to citizens. The state owned all land and all radio and television stations. Only permanent residents could operate newspapers. Refugees, however, could hold title to and transfer other types of property.

As far as the right to education is concerned, the 1995 Constitution limited its offer of equal access to publicly funded services to citizens. The 2004 Proclamation exercised Ethiopia's reservation to the 1951 Convention's right to primary education, placing the same restrictions on refugees and their children as on other foreigners. In June, the UN's Committee for the Elimination of Racial Discrimination expressed concern about refugee children's enjoyment of their right to education and recommended that Ethiopia "adopt adequate measures" to ensure their equal access to education.

According to the 2008 world refugee survey, girls' enrolment in primary school was less than 50 percent in all the camps. Government schools did not accept refugees, but UNHCR contributed to private primary school tuition, uniforms, transportation, and books for 350 students in Addis Ababa. In Kebribeyah, only 22 percent of school-aged children went to primary school. There was only one textbook for every four students and an average of 61 students per classroom and only 10 trained teachers. There were, however, over 800 children enrolled in 15 Koranic schools in the camp.

In relation to provision of food and medical care, the 2008 world refugee survey indicates that only in Dimma camp did refugees receive the standard provision of 20 liters of water per person per day, and in Bonga and Kebribeyah refugees received only 11 liters. In Kebribeyah, global acute malnutrition was over 10 percent and trained staff attended fewer than 10 percent of births. Newly arrived refugees in Shimebba camp reportedly had to trade sex for shelter. Only about one in five of the Sudanese refugees in Bonga, Dimma, and Fugnido camps had blankets, jerry cans, and cooking sets. Most in these camps and Sherkole camp had not received such nonfood items in over six years.

Government clinics in camps provided health services, including drugs. In general, refugees and asylum seekers outside camps received services from Government hospitals on par with nationals, including free anti-retroviral treatment. UNHCR's implementing partner reimbursed Ethiopian hospitals for the treatment of refugees. Only Dimma and Sherkole camps had HIV/AIDS programs. New Eritrean arrivals received four eucalyptus poles and a plastic sheet for

shelter. Most Eritreans could use hospitals and other public services, but some local government officials reportedly denied medical services to indigent Eritreans.

5.3 Ethiopian Refugee law in the Light of its International and Regional Commitments

As mentioned above, Ethiopia is signatory to UN refugee convention, the OAU Refugee convention and a number of international and regional human rights instruments. We have also noted that commitments under these instruments demands Ethiopia to bring its national laws in conformity with them and take various measures towards their implementation at a national level.

We have seen, in the other section of this chapter, that the constitution contains certain provisions that deal with non nationals and hence refugees. It is also indicated that chapter three of the constitution is relevant to refugees and should not be denied. Otherwise, it is expressly shown that a right is available only to citizens. One could, thus, see that refugees are protected and can avail themselves of the guarantees given by the constitution.

Ethiopia has adopted a refugee proclamation that specifically deals with issues of asylum seekers and refugees. Though not a sophisticated and comprehensive instrument, the proclamation touches upon and regulates a number of refugee issues. Taking this legislative measure to regulate issues of asylum seekers and refugees with a view to protect them is what is expected to be undertaken under international refugee instruments by all state parties.

In general, Ethiopia has sufficiently demonstrated its desire to cooperate with the international community in a shared responsibility of protecting individuals who are in a state of plight by adopting international and regional refugee instruments. The same has also been reflected through its constitution which extends rights to non nationals including refugees and most importantly, by adopting a proclamation that gives individuals, who are at risk of persecution, the right to seek protection in Ethiopia and endowed them with a number of rights. Overall, these phenomenon suggest that Ethiopia is on the right track towards honoring its international obligations.

By adopting a wide definition of refugees, the proclamation, extends protection to a large number of persons who may not even satisfy the stringent and restrictive definition of refugees given by the refugee convention. This broad definition mirrors a definition given by the OAU Refugee convention. Though the proclamation does not provide for subsidiary protection, it is conspicuous that broad definition employed in the proclamation means that those who would otherwise be eligible for such protection could even be granted a refugee status. Besides, the proclamation seems to recognize a prima facie refugee status as a means to address mass influx situations.

In general, today, where the international community is demanding a more generous approach to refugees, Ethiopia's desire to make the protection available to most people in need of it is commendable.

Another fundamental positive aspect of the proclamation is the prohibition of refoulement. As shown above the protection against refoulement is an obligation of states not only under refugee instruments but also virtually under all human rights instruments. The fact that Ethiopia recognizes this norm in a similar fashion as the refugee convention would enable her honor its obligations under all those instruments. The fact that the proclamation seems to extend the exceptions to deny this protection under article 10 beyond the exceptions under the refugee convention may expose Ethiopia to a possible violation of its obligation at the international level. The proclamation is remarkable as far as family unification is concerned. The proclamation recognizes right to family unity not only to refugees but also to asylum seekers. In addition, it allows family members of a refugee to stay in the country and endowed them with same measure of rights a refugee is entitled to without even them being expected to apply for refugee status.

The proclamation prohibits detaining and prosecuting asylum seekers and refugees even if they have entered the country unlawfully. This protection preponderates to the protection given by the refugee convention.

Though the constitution recognizes the rights of non nationals including refugees to freedom of movement and their right to choose places of residence, the proclamation authorized the

limitation of the same. Practically, it has been reported that Ethiopia has kept a huge number of refugees in campus and thereby denying them a chance to local integration. Such a trend is nothing but a violation of its commitment under the refuge convention.

Ethiopia has made reservation to those provisions of the refuge convention on the rights to work, to education and ownership of property. Practically, it has been reported that most of refugees are kept at refuge campus and are not allowed, save under some exceptional situations, to work and get public education provision. The fact that refugee children are denied access to public education may well be a discriminatory treatment and a violation of Ethiopia's commitment under international and regional human rights instruments.

Over all, though refuge status is a temporary protection, it is the duty of states to allow refugees integrate with nationals and entitle them to a more or less same standard of treatment. States should focus on seeking durable solutions such as voluntary repatriation, local integration and third country resettlement. While allowing those who are at risk of persecution to enter Ethiopia and protecting them in campus is something, confining them to camps for a protracted time which denies them opportunities to mix up with the local people, to get employment and education would clearly run counter to the obligation of states under refuge convention.

5.4 Review Questions

- a) We have seen that Ethiopia is signatory to both the UN refuge convention and the OAU/AU refuge convention and the fact of being a party to these instruments means that Ethiopia should implement them at a national level. Discuss if an asylum seeker or a refuge in Ethiopia can invoke them before Ethiopian courts and if Ethiopian courts can take judicial notice of these instruments. If not, in what way do you think these instruments are relevant to protect refugees in Ethiopia?
- b) Discuss if Ethiopia's reservation of most of the so called social rights to its citizens and denying them to refugees is a violation of its obligation under international instruments to which it is a party to.

- c) Discuss areas where the proclamation seems to have diminished the protection of refugees under the UN refugee convention and the OAU/AU refugee convention.
- d) Discuss the positive aspects of the proclamation from the point of providing a better protection to refugees

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- Convention on the Rights of the Child

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- WWW.UNHCR.org