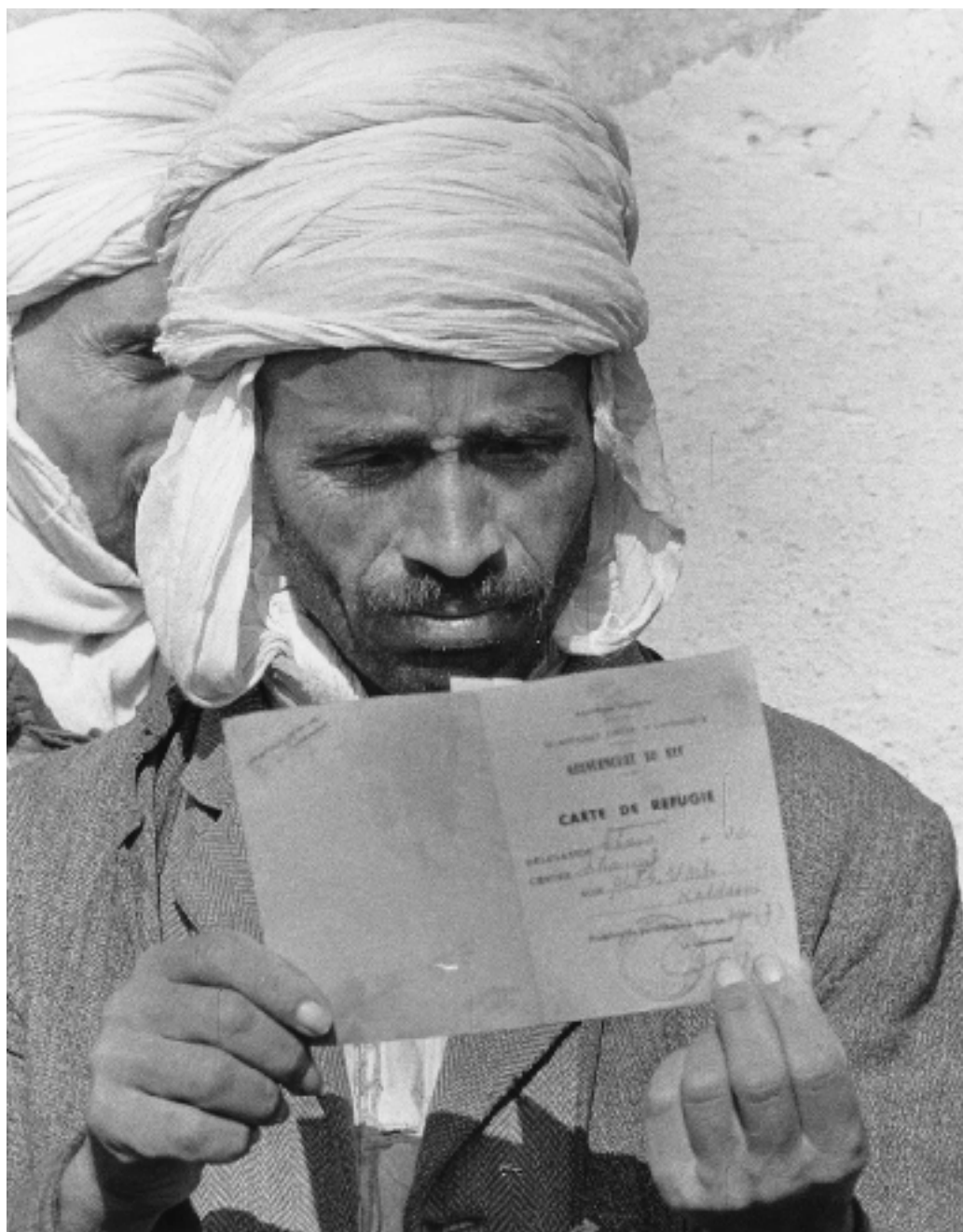

Refugee Status Determination

Identifying who is a refugee

Self-study module 2



Note

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Refugee Status Determination

Identifying who is a refugee

Overview

Both States and the Office of the United Nations High Commissioner for Refugees (UNHCR) have an obligation to provide international protection to refugees. The process whereby the authorities of the host country or UNHCR establish that an individual who seeks international protection is actually a refugee – that is, he or she meets the eligibility criteria under international or regional refugee instruments, national legislation or UNHCR’s mandate – is referred to as “refugee status determination”.

Purpose

This module aims to:

- Foster a common understanding of refugee status determination among all UNHCR staff;
- Familiarize UNHCR partners, whether governmental, inter-governmental or non-governmental, with the basic principles of refugee status determination, in terms of both substantive eligibility criteria and procedural aspects;
- Contribute to the realization of the goals of the *Agenda for Protection*, which is a programme of action to improve the protection of refugees and asylum-seekers around the world agreed by States, intergovernmental organizations (IGOs), non-governmental organizations (NGOs) and UNHCR as part of the Global Consultations on International Protection process, endorsed by the Executive Committee of UNHCR and welcomed by the General Assembly.

Contents

The five chapters of this module contain information on determining eligibility for refugee status:

- Basic questions related to refugee status determination;
- The “inclusion” criteria of the refugee definition contained in the 1951 Convention relating to the Status of Refugees;
- The “exclusion” clauses of the 1951 Convention;
- The “cessation” clauses of the 1951 Convention and the relationship between cessation and refugee status determination;
- Basic principles and safeguards to be observed in individual refugee status determination procedures.

Each chapter begins with a set of key learning objectives and ends with a summary, which can also be used in overhead presentations for training. A list of reading material is provided at the close of each chapter.

In addition, there are exercises for independent study. Answers to the exercises, most of which can be found in the text, are provided on separate pages at the end of each chapter.

The language used in this module is intended to be non-legalistic and non-technical.

Information on additional training materials and programmes can be obtained from UNHCR's Department of International Protection in Geneva.

Chapter 1

Determining who is a Refugee



Key objectives

Understand the basic elements of refugee status determination

Be aware of relevant refugee definitions

Know who is responsible for deciding whether someone is a refugee and what procedures may be applied for this purpose

This chapter sets out the basic principles of refugee status determination. It explains the meaning of “refugee status determination” and the purpose of determining who is a refugee. The chapter presents the refugee definitions contained in international and regional refugee law and explains when the need for refugee status determination arises. It also addresses the respective responsibilities of States and UNHCR in the area of refugee status determination and briefly describes the various ways in which refugee status may be determined. Finally, the chapter gives a brief overview of the rights and benefits which flow from recognition as a refugee.

1.1 What is Refugee Status Determination?

The words “refugee status determination” are forbidding and legalistic. But the process they refer to concerns human beings, usually in circumstances of great distress. Expressed more simply, they correspond to the question: “Is Mr. X or Ms. Y a refugee?” The answer to this question is obviously of vital concern to the individuals concerned. If recognized as a refugee, a special legal regime applies to them, and they will be entitled to a number of important rights and benefits as well as assistance and protection measures which, taken together, constitute what is known as “international refugee protection”. Refugees also have certain obligations towards the host State, notably that of abiding by the laws of the host country.

Thus, refugee status determination means an examination by a government authority or UNHCR of whether an individual who has submitted an asylum application or otherwise expressed his or her need for international protection is indeed a refugee – that is, whether his or her situation meets the criteria specified in the applicable refugee definition (see below at 1.2). A person does not become a refugee by virtue of a recognition decision by the host country or UNHCR, but is recognized because he or she is a refugee. In other words, the recognition decision is declaratory: it acknowledges and formally confirms that the individual concerned is a refugee.

1.2 Who is a Refugee?

Prior to the Second World War, refugees were defined on an *ad hoc* basis with reference to their national origin. Following the war, the United Nations General Assembly decided to adopt a “general” refugee definition, which was included in UNHCR’s *1950 Statute* (annexed to *Resolution 428 (V) of the United Nations General Assembly* of 14 December 1949) and shortly after in the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*. Nearly identical formulations were used in both instruments. The refugee definition in the 1950 Statute was

subsequently extended by resolutions of the UN General Assembly and Economic and Social Council (ECOSOC). Refugee definitions are also contained in regional refugee instruments and/or national legislation.

1.2.1 The 1951 Convention Refugee Definition

The 1951 Convention remains the foundation of international refugee law, and its refugee definition is the principal basis for establishing a person's refugee status. As of 1 September 2005, 146 States have become Party to the 1951 Convention and/or its 1967 Protocol (140 States are bound by both instruments). When determining whether an individual is a refugee, these States are bound by the eligibility criteria set out in the 1951 Convention.

From the refugee's point of view, recognition as a refugee within the meaning of the 1951 Convention provides the most favourable status: not only is it a guarantee against *refoulement* (see below at 1.6.1), but it also confers a number of rights which are specifically provided for in the 1951 Convention and 1967 Protocol, including, for example, the right to obtain travel documents.

Article 1A(2) of the 1951 Convention defines as a refugee 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 [or her] nationality and is unable, or owing to such fear, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

In addition to the 1 January 1951 date line, the 1951 Convention also provided in Article 1B for an optional geographical limitation to refugees "as a result of events occurring in Europe". These restrictions to the scope of its refugee definition are no longer of major importance. The temporal limitation was formally removed by the 1967 Protocol, while the geographical restriction was withdrawn by the vast majority of States which are Party to the two instruments, thus giving a universal dimension to the Convention's provisions.

Article 1A(2) of the 1951 Convention contains the so-called **inclusion** criteria of the refugee definition, that is, those elements which form the positive basis for making a determination of refugee status, and which must be met for an individual to be recognized as a refugee. These criteria are examined in chapter 2. In addition, the 1951 Convention refugee definition also contains **exclusion** provisions (Articles 1D, 1E and 1F) and **cessation** clauses (Article 1C). These are discussed in chapters 3 and 4, respectively.

1.2.2 Refugee Definitions in Regional Refugee Instruments

The refugee definition of the 1951 Convention is complemented by regional refugee instruments, notably the *1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa* and the *1984 Cartagena Declaration on Refugees*. Both provide that persons fleeing indiscriminate threats resulting from the situation in their country of origin may also be recognized as refugees under certain circumstances. Although this training module is confined to the universal definition contained in the 1951 Convention, it is essential for decision-makers working in countries which apply the wider refugee definitions set out in regional refugee instruments to understand the importance of these definitions. However, since these definitions complement that of the 1951 Convention, countries applying them should first examine whether an applicant meets the eligibility criteria of the 1951 Convention.

1.2.2.1 The 1969 OAU Convention

In addition to incorporating the refugee definition contained in the 1951 Convention, the 1969 OAU Convention provides in Article I(2) 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 [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality.”

This definition developed out of the experience of the wars of liberation and decolonization which erupted in the African continent during the late 1950s and early 1960s. In Article I(4) and (5), the 1969 OAU Convention also contains cessation and exclusion provisions, which differ in some respects from those of the 1951 Convention.

1.2.2.2 The 1984 Cartagena Declaration

In the late 1970s/early 1980s, problems related to mass human displacement caused by wars, civil conflicts, violence and political upheaval in a number of States, particularly in Central America, resulted in the recommendation in Article III(3) of the 1984 Cartagena Declaration on Refugees that

“[...] the refugee definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression,

internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

Although the Cartagena Declaration is not formally binding, many Latin American countries have incorporated its principles, including its refugee definition, into their national legislation and practice.

1.2.3 Refugee definitions in national legislation

Many States simply adopt the refugee definition found in the relevant international instrument(s) to which they are Party. There is, however, nothing to prevent a country from adopting a refugee definition that is wider than that required under its international obligations.

In a number of countries, legislation provides protection for persons who have been found not to meet the criteria of the 1951 Convention, but who are nevertheless in need of international protection. This is referred to as “complementary forms of protection” or, in Europe, “subsidiary protection”. Some States, particularly in Europe, have also provided “temporary protection” in situations where large numbers of people had fled situations of generalized violence and/or armed conflict as a pragmatic short-term measure to provide those affected with protection against *refoulement* and assistance, without however making a determination on their status. Persons enjoying these forms of protection may be of concern to UNHCR as refugees if they come within one of the categories described below at 1.2.4.

1.2.4 Refugee Definition under UNHCR’s International Protection Mandate

UNHCR’s mandate to provide international protection to refugees originally stems from its 1950 Statute, which provides that the competence of the High Commissioner shall extend, in addition to those considered refugees under treaties and arrangements in place at the time when the Statute was adopted, to the following categories:

Paragraph 6A (ii): “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 or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.”

Paragraph 6B: “Any other person who is outside the country of his [or her] nationality or, if he [or she] has no nationality,

the country of his [or her] former habitual residence, because he [or she] has or had well-founded fear of persecution by reason of his [or her] race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail him [or her]self of the protection of the government of the country of his [or her] nationality, or, if he [or she] has no nationality, to return to the country of his [or her] former habitual residence."

The refugee definition contained in the 1950 Statute is nearly identical to that adopted by the drafters of the 1951 Convention. Although the 1950 Statute does not provide for "membership of a particular social group" as a ground for persecution, and its refugee definition has from the outset been applicable without any restrictions in terms of time or place, these differences are no longer significant. The lifting of the temporal and geographical limitations to the application of the 1951 Convention has been referred to above at 1.2.1, and it is by now well established that all those who meet the eligibility criteria under the 1951 Convention are also refugees within the competence of UNHCR.

Yet the 1950 Statute no longer encompasses the entire mandate of UNHCR with regard to refugees. Later developments – in particular, resolutions adopted by the General Assembly and the Economic and Social Council (ECOSOC), organizational and State practice – have resulted in a widening of the refugee definition for the purposes of UNHCR's international protection mandate. In the late 1950s and early 1960s, the General Assembly authorized UNHCR to provide assistance on a "good offices" basis to specific groups of persons who did not fully meet the refugee definition contained in the Statute (including for example mainland Chinese in Hong Kong, or Angolans in the Congo), or generally to refugees who did not "come within the competence of the United Nations". From the mid-1960s onward, resolutions of the General Assembly regularly refer to "refugees of concern" to UNHCR, while ECOSOC and General Assembly resolutions adopted during the period from 1975–1995 have extended UNHCR's competence with regard to refugees generally to persons who are affected by the indiscriminate effects of armed conflict or other "man-made disasters", including, for example, foreign domination, intervention, occupation or colonialism.

Thus, at present, UNHCR's competence to provide international protection to refugees covers the following two categories of persons:

- 1 Those who meet the eligibility criteria for refugee status set out in the **1951 Convention/1967 Protocol**, which are virtually the same as those provided for under the **1950 Statute**; and
- 2 Those who come within the **extended refugee definition** under UNHCR's mandate because they are outside their country of origin or habitual residence and unable or unwilling to return there owing to serious and indiscriminate threats to life, physical

integrity or freedom resulting from generalized violence or events seriously disturbing public order.

Women, men, girls and boys who meet the eligibility criteria under either of these categories are refugees within the competence of UNHCR (that is, refugees of concern to the Office), unless they come within the scope of one of the exclusion clauses contained in Article 1F of the 1951 Convention (see below in chapter 3). The term “mandate refugees” refers to persons in either category, who have been recognized as refugees by the High Commissioner on the basis of the 1950 Statute and subsequent General Assembly and ECOSOC resolutions. “Mandate refugee” status may be determined individually or on a group basis (see also below at 1.5).

This self-study module, which is limited to the determination of refugee status will examine in detail the refugee definition contained in the 1951 Convention, as the criteria under the 1951 Convention and under the 1950 Statute are, for all intents and purposes, the same.

1.3 Why is it necessary to conduct Refugee Status Determination?

In order to be in a position to effectively implement their obligations under the 1951 Convention and/or 1967 Protocol, States must determine who is a refugee. This requires procedures which make it possible to establish whether a particular individual falls within the refugee definition of the 1951 Convention. These procedures are discussed in more detail below in chapter 5.

For UNHCR, providing international protection to refugees is its core function, and in order to exercise its mandate responsibilities, the Office may need to determine whether an individual is a refugee within its competence. UNHCR normally conducts refugee status determination to ascertain whether the person concerned should be protected, assisted or, sometimes, resettled to another country, or to give governments advice on refugee status. Examples of situations in which the Office carries out refugee status determination are described below at 1.4.

1.4 Who is responsible for conducting Refugee Status Determination?

1.4.1 States

The primary responsibility for identifying those who come within the refugee definition, and thus for ensuring that refugees can actually benefit from international protection and enjoy the rights and entitlements which are attached to refugee status lies with the country in which such persons have sought asylum.

For the country concerned, protecting refugees is not simply a matter of convenience. States which are Party to the 1951 Convention/1967 Protocol and the 1969 OAU Convention are

bound by these instruments to provide the protection guaranteed therein to women, men, girls and boys who meet the criteria of the relevant refugee definition. The most important obligation is that of ensuring respect for the principle that the State cannot return a person to a country where his or her life or freedom would be at risk for reasons of race, religion, nationality, membership of a particular social group or political opinion – this is known as the principle of *non-refoulement*. It has also become a norm of customary international law and, as such, is binding on all States, including those which are not Party to the 1951 Convention and/or 1967 Protocol (see also below at 1.6.1).

Thus, the State should normally establish procedures and conduct refugee status determination, in particular if it is a signatory to the 1951 Convention/1967 Protocol. Under paragraph 8 of the 1950 Statute and Article 35 of the 1951 Convention, UNHCR has a responsibility to supervise the application of the provisions of the 1951 Convention and 1967 Protocol in States which are Party to these instruments. UNHCR exercises its supervisory role by monitoring both the procedures and the criteria applied, and through interventions on behalf of applicants, as and where appropriate.

In most States, provision has been made for the involvement of UNHCR, at least in an advisory/consultative capacity. In some countries, UNHCR actually participates in the national refugee status determination procedure. Depending on the circumstances, this may take different forms, for example:

- Preparing a case for consideration by the national eligibility authority (e.g. registration, preliminary interview, file preparation, presentation to the national authority);
- Voting on the asylum application or participating as an observer/advisor at the first-instance stage;
- Voting on the asylum application or participating as an observer/advisor at the appeal or review stage;
- Reviewing inadmissibility or rejection decisions of applicants who are due to be expelled.

Moreover, in certain countries which are Party to the 1951 Convention and/or 1967 Protocol, but where national asylum determination procedures have not yet been established, UNHCR conducts refugee status determination on behalf of the State.

1.4.2 UNHCR

UNHCR also has a responsibility to provide international protection to refugees and seek permanent solutions to the problem of refugees. Indeed, it remains the only international organization with a specific mandate to protect refugees at the global level. Under its 1950 Statute and subsequent resolutions adopted by the UN General Assembly and ECOSOC, UNHCR has a mandate to

ensure international protection and seek appropriate solutions for refugees within its competence. Asylum-seekers are also among the categories of “persons of concern to UNHCR” (as are returnees, stateless persons and, under certain circumstances, internally displaced persons).

While States, particularly those which are Party to the 1951 Convention and/or 1967 Protocol, should normally conduct refugee status determination themselves, in certain situations UNHCR may need to conduct its own refugee status determination and establish for itself whether or not particular individuals, or members of a certain group, are refugees within the Office’s international protection mandate. In the majority of cases the Office does so on the basis of the 1950 Statute. In practice, this may occur in a variety of contexts, including:

- In countries which are not Party to the 1951 Convention/1967 Protocol; or
- In countries which are Party to the 1951 Convention/1967 Protocol, but where
 - asylum determination procedures have not yet been established; or
 - the national asylum determination process is manifestly inadequate or where determinations are based on an erroneous interpretation of the 1951 Convention; or
- As a precondition for the implementation of durable solutions such as resettlement.

In most cases where UNHCR conducts refugee status determination, this is done for the purpose of establishing whether a particular person is a refugee within the competence of UNHCR. The decisions reached are of direct relevance also in determining the form of protection and assistance provided by UNHCR to the person concerned. These might include documentation certifying the person’s refugee status, measures to reunite families or facilitate voluntary repatriation, or material assistance of various kinds.

1.5 How is Refugee Status Determination conducted?

Both States and UNHCR conduct refugee status determination either individually or on a group basis.

1.5.1 Individual refugee status determination

Neither the 1951 Convention nor the 1967 Protocol prescribe a particular procedure for the determination of refugee status by States Parties. National legislation defines the institutions and/or authorities involved, the stages of the asylum process as well as procedural safeguards and guarantees. Whenever possible, refugee status should be determined in an individual procedure and

following an in-depth examination of the individual circumstances of the applicant's case (for a discussion of the procedures to be followed by States when determining refugee status on an individual basis, see below at chapter 5).

1.5.2 Group-based refugee status determination

Recognition of refugee status for groups is particularly relevant in the context of mass influx, where persons seeking international protection arrive in such numbers and at such a rate as to render individual determination of their claims for refugee status impracticable. In situations of this kind, States as well as UNHCR often accord refugee status to members of a particular group on a *prima facie* basis. This is appropriate if most of those arriving in the group can be deemed to be refugees on the basis of objective information related to the circumstances in the country of origin.

Where an armed conflict in one country triggers a mass exodus of refugees into neighbouring or other countries, combatants may be mixed in with the refugees. The presumption of *prima facie* eligibility for refugee status does not include combatants. Active combatants – that is, persons who continue to take an active part in armed conflict – are not eligible for international refugee protection. Military activities are incompatible with refugee status.

The situation is different for former combatants. The mere fact of having taken part in hostilities does not disqualify a person from international refugee protection, but former combatants who apply for asylum must first undergo a clarification of their status. If they arrive as part of a mass influx, the host State would need to separate them from the refugees. Former combatants may be admitted into asylum procedures only after it has been established that they have genuinely and permanently renounced military activities and are now civilians. The claims submitted by such persons should be examined in individual refugee status determination procedures (see also below at 2.3.4).

Women, men, girls and boys recognized as refugees on a group basis enjoy the same status as persons who have been granted refugee status individually. Depending on the context, it may be necessary to establish mechanisms for identifying individuals within the group who do not meet the inclusion criteria of the applicable refugee definition (see chapter 2), or who may fall within the exclusion clauses (see chapter 3).

1.6 What does Recognition as a Refugee entail?

As already noted, refugees are entitled to a number of rights as well as protection and assistance measures which take account of their special situation. The following sections provide an overview of key elements of international refugee protection.

1.6.1 Protection against *refoulement*

Most significantly, refugees enjoy protection against return to a country where they face a risk of persecution. This is known as the principle of *non-refoulement*. Often referred to as the cornerstone of international refugee protection, it is explicitly provided for in Article 33(1) of the 1951 Convention, according to which no State shall

“expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

Formal recognition of refugee status is not a precondition for protection against *refoulement* to apply. As asylum-seekers may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending determination of their status.

Exceptions to the principle of *non-refoulement* are very narrowly defined. They are permitted only in the limited circumstances provided for in Article 33(2) of the 1951 Convention, which stipulates that

“the benefit of [Article 33(1)] 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 [or she] is or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

The conditions in which Article 33(2) may be applicable can only be met if a refugee poses a very serious future danger to the security of the host country – such as a threat to the country’s constitution, territorial integrity, independence or external peace – or if he or she has been convicted by a judgement that is no longer open to appeal of a crime of a particularly serious nature (e.g. murder, rape, armed robbery) and continues to pose a danger to the community of the host State. The application of an exception under Article 33(2) requires procedures in which guarantees of due process must be strictly observed.

Article 33(2) of the 1951 Convention will not apply, however, if the removal of a refugee results in a substantial risk of torture or cruel, inhuman or degrading treatment or punishment. The prohibition of *refoulement* to such treatment is an inherent part of the prohibition of torture and other forms of ill-treatment, as provided for under Article 3 of the 1984 UN Convention Against Torture, Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and regional human rights law. It has risen to the status of a peremptory norm of international law, or *jus cogens* and, as such, is binding on all States, regardless of whether

or not they have become party to the relevant instruments. In this context, it is also worth noting that the *non-refoulement* provision contained in the 1969 OAU Convention, which applies to all those who meet its refugee definition (see above at 1.2.2.1), does not foresee any exceptions.

The principle of *non-refoulement* as enshrined in Article 33 of the 1951 Convention has developed into a norm of customary international law. This means that it is binding even on States who are not Party to the 1951 Convention and/or 1967 Protocol.

Under international and regional human rights law, States are also precluded from returning a person to a serious risk of violations of other fundamental human rights.

1.6.2 Other rights and benefits

In addition to protection against *refoulement*, recognized refugees are entitled to a number of other rights and benefits. The standards of treatment which a refugee can expect from the country of asylum draw upon a combination of international refugee and human rights law. Many of the rights concerned flow from international human rights instruments and indeed from customary international law. As a consequence, similar standards should be upheld by countries that are Party to the 1951 Convention and its 1967 Protocol and those which are not bound by these instruments. These rights and benefits include the following:

- Protection against threats to the **physical security** of refugees within the host country, which requires the latter to put into place adequate arrangements to protect refugees from criminal violence, particularly where this is motivated by racism or xenophobia, including torture, inhuman, or degrading treatment by officials;
- Unhindered **access to the courts** in the country of asylum;
- Assistance to cover basic **physical and material needs**, which includes food, clothing, shelter and medical care. If dependence on support from others is inevitable for most refugees, especially during the initial stages of their stay in the country of asylum, it is in the interest of the host State to facilitate self-reliance by allowing access to job markets and self-employment initiatives;
- **Freedom of movement**, which refugees should enjoy to the same extent as nationals of the host country, unless an individual poses a specific threat to public order or health;
- Access to adequate **education**, at least at primary level, and recreational opportunities for child refugee;
- **Reunification** with close family members in the country of asylum as soon as possible;

- **Special measures** for the protection of **particularly vulnerable refugees**, for example where there is a threat of increased violence within the refugee community as a result of the breakdown in the normal social structure, or where a refugee community that has fled armed conflict is subjected to a risk of being infiltrated by armed groups or military recruitment, especially of children. Women and girl refugees are frequently exposed to a heightened risk of sexual and gender-based violence, which also requires special measures for their protection.

The ability of refugees to enjoy the rights described above, and especially the right to freedom of movement and protection from *refoulement*, is much greater if they possess **identity documents**. The country of asylum has an obligation to issue such papers to each refugee, unless he or she has a travel document. The 1951 Convention establishes an obligation for the country of asylum to issue **travel documents** to refugees and describes the form of travel documents so that they are recognized by other States which are Party to the Convention.

The 1951 Convention also provides that the government concerned must apply its provisions to refugees on its territory **without discrimination** as to race, religion or country of origin.

1.6.3 Durable solutions

Recognized refugees are also entitled to assistance with finding a permanent solution to their situation, so that they can lead normal lives. Depending on the situations in which refugees find themselves, one of the three following traditional durable solutions is usually pursued:

- **Voluntary repatriation:** refugees voluntarily return in safety and with dignity to their country of origin;
- **Local integration:** a process which ultimately leads to the permanent settlement of refugees in the country where they sought asylum; and
- **Resettlement:** refugees are transferred from the country of asylum to a third State willing to admit them on a permanent basis.

While there is no formal hierarchy among the durable solutions, voluntary repatriation is the solution sought and attained by most refugees. It has also been recognized as the preferred solution in the majority of refugee situations in numerous documents, including notably the *Agenda for Protection* and various conclusions adopted by the Executive Committee of UNHCR, which is made up of 64 States with a demonstrated interest in refugee issues, and whose tasks include advising the High Commissioner on the exercise of his or her functions. Nonetheless, the three alternative solutions are

complementary in nature, and, when applied together, can form a viable and comprehensive strategy for resolving a refugee situation. The successful implementation of durable solutions will depend on the interested parties, including the countries concerned and UNHCR, working in partnership.

Summary

Refugee Status Determination

- Refers to the process whereby a State or UNHCR examines whether an individual who has applied for asylum or otherwise expressed his or her need for international protection is a refugee within the meaning of the applicable refugee definition.
- Refugee status determination may be conducted individually, or on a group basis.

Refugee Definitions

- The criteria for determining who is a refugee are set out in Article 1 of the *1951 Convention relating to the Status of Refugees*.
- UNHCR's *1950 Statute* also contains a refugee definition, which is nearly identical to that provided for in the 1951 Convention. In addition, persons who come within the extended definition derived from subsequent resolutions adopted by the UN General Assembly and Economic and Social Council (ECOSOC) may also be refugees under UNHCR's international protection mandate.
- Refugee definitions can also be found in regional refugee instruments, most notably the *1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa* and the *1984 Cartagena Declaration on Refugees*, and in national legislation.

Responsibility for conducting Refugee Status Determination

States

- Primary responsibility for identifying those who, as refugees, can benefit from international protection and enjoy the rights and entitlements which are attached to refugee status lies with the country in which such persons have sought asylum.
- When determining eligibility for refugee status, States Party to the 1951 Convention and its 1967 Protocol are bound to apply the refugee definition contained in Article 1 of the 1951 Convention.
- Where the State conducts refugee status determination, UNHCR's role is normally that of an observer or advisor, although in some situations, the Office may conduct refugee status determination on behalf of the host State.

UNHCR

- UNHCR also has a responsibility to provide international protection to refugees and seek permanent solutions to the problem of refugees on the basis of its *1950 Statute*, as expanded by subsequent resolutions of the UN General Assembly and ECOSOC, and for supervising and monitoring the way in which States implement the 1951 Convention/1967 Protocol.
- Persons recognized by a country's asylum authorities as refugees under the 1951 Convention/1967 Protocol are normally considered by UNHCR as coming within its international protection mandate. UNHCR also conducts refugee status determination in certain circumstances, and in the majority of cases, does so on the basis of the 1950 Statute. Contexts in which this may occur include
 - in countries which are not Party to the 1951 Convention/1967 Protocol,

- in States Party to these instruments which do not yet have asylum determination or where the national asylum determination process is manifestly inadequate or where determinations are based on an erroneous interpretation of the 1951 Convention, or
- As a precondition for the implementation of durable solutions such as resettlement.
- When determining who is a refugee within its competence, UNHCR applies the criteria of the 1951 Convention refugee definition, which are virtually the same as those of the Office's 1950 Statute, as well as the extended refugee definition under its mandate.

Effect of Refugee Recognition

Recognition that an individual is a refugee is declaratory. It acknowledges and formally confirms that the person concerned is entitled to:

- Protection against expulsion or return (*refoulement*) to a country where there the refugee's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, as set out in Article 33 of the 1951 Convention.
- Other rights and entitlements as provided for in the 1951 Convention, international human rights instruments and customary international law.
- The entitlement to assistance with finding a permanent solution – depending on the situation, this may take the form of voluntary repatriation, local integration or resettlement.

Essential reading

Statute of the Office of the United Nations High Commissioner for Refugees

Convention relating to the Status of Refugees of 28 July 1951

Protocol relating to the Status of Refugees of 31 January 1951

UNHCR, *Note on International Protection*, UN doc. A/AC.96/830, 7 September 1994

UNHCR, *Providing International Protection including through Complementary Forms of Protection*, EC/55/SC/CRP.16, 2 June 2005

Sir Elihu Lauterpacht and Daniel Bethlehem, “The scope and content of the principle of non-refoulement: Opinion”, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection*, Cambridge University Press 2003, at pp. 87–177

Chapter 1 – Exercises

Review:

1. Which of the following answers is **correct**? The 1951 Convention and 1967 Protocol relating to the Status of Refugees establish responsibilities towards refugees for:
 - a UNHCR
 - b States
 - c International Court of Justice
 - d Non-governmental organizations
2. Which of the following statements is **correct**? UNHCR's responsibility to provide international protection to refugees is based on:
 - a An agreement between UNHCR and the country of asylum
 - b UNHCR's 1950 Statute and subsequent General Assembly and ECOSOC resolutions
 - c The 1951 Convention
 - d Regional refugee instruments
3. Where a regional refugee instrument applies, the 1951 Convention/1967 Protocol is no longer relevant. **True** or **false**? *Please explain.*
4. Which of the following statements is **not correct**:
 - a When conducting refugee status determination, the host authorities as well as UNHCR should first examine whether the applicant meets the criteria of the refugee definition contained in the 1951 Convention/1967 Protocol.
 - b A person fleeing the general consequences of armed conflict may qualify for refugee status under UNHCR's mandate.
 - c A person can be a refugee only if he or she has submitted a formal asylum application.
 - d UNHCR is mandated to provide international protection to refugees and other persons of concern and to supervise the implementation of the 1951 Convention/1967 Protocol by States which are Party to these instruments.
5. A person is entitled to full refugee status only if this has been determined in an individual procedure. **True** or **false**? *Please explain.*
6. Which of the following statements is **correct**:
 - a The principle of *non-refoulement* applies regardless of whether or not the host country is Party to the 1951 Convention/1967 Protocol.
 - b If one of the exceptions to the principle of *non-refoulement* provided for in Article 33(2) of the 1951 Convention is applicable to a particular refugee, he or she may be returned to the country of origin even if this means he or she may be at risk of torture.
 - c Primary responsibility for ensuring that a refugee may enjoy the rights and benefits to which he or she is entitled lies with UNHCR.
 - d In any given refugee situation, there will be only one durable solution which should be applied to all refugees.

Case A

Adam is a citizen of Leshi, where he used to be a member of an opposition party banned by the government. Increasingly, opposition groups in Leshi were finding it difficult to speak out without suffering reprisals. On three occasions in the last month, Adam was arrested and interrogated by the local police in connection with his opposition activities.

During the interrogations, Adam was severely beaten and, when he was arrested for the third time, threatened with being killed. He therefore decided to leave Leshi and did so immediately after his last release from detention. He made his way by plane to Afia, which is not Party to the 1951 Convention/1967 Protocol and has not established a mechanism to examine applications for refugee status.

Upon his arrival in the capital, Adam went to the UNHCR office and told the Protection Officer that he needed protection because his life was at risk in Leshi.

Please answer the following questions:

| | |
|---|---|
| a | Is it necessary to conduct refugee status determination in Adam’s case? |
| b | If yes, who is responsible for determining whether Adam is a refugee? |
| c | What are the criteria that need to be satisfied for Adam to qualify for refugee status? |
| d | What are Adam’s rights and obligations in Afia should he be granted refugee status? |

Case B

Rirutania is a country torn apart by a civil war that broke out between its two main ethnic groups just a month ago. Over the past two weeks, citizens of Rirutania started fleeing the hostilities and crossing the border to seek protection in the neighbouring country, Buka, in hundreds every day. Those arriving were women, children and elderly persons.

Buka is not involved in the civil war in Rirutania. It is Party to the 1951 Convention/1967 Protocol and has established a National Eligibility Commission (NEC) to examine individual applications for refugee status. Two case-workers have been appointed by the NEC to accomplish this task.

A few days after the influx started, the Minister of Public Order of Buka expressed concern about the possibility that combatants from Rirutania arrive in the country and use Buka as a basis for military attacks in Rirutania. The Minister suggested that unless something was done to prevent this from happening, his government should send all Rirutanians back to their country.

Please answer the following questions:

| | |
|---|---|
| a | Should the National Eligibility Commission of Buka conduct refugee status determination on an individual basis in order to identify those from Rirutania who are eligible for international refugee protection? |
| b | Are the Minister's concerns about the combatants legitimate, and if so, what would need to be done in this respect? |
| c | Can Buka lawfully return Rirutanians to their country of origin? |

Answer key to Chapter 1 exercises

Review:

- 1 b The 1951 Convention and 1967 Protocol are international treaties – they establish binding obligations for States Parties. However, some of the provisions of the 1951 Convention/1967 Protocol have become customary international law: as such they are binding on all States, including those which have not yet become Party to these instruments. This is the case, in particular, for the principle of *non-refoulement*.
- 2 b UNHCR’s Statute, which established the Office’s competence to provide international protection to refugees and seek solutions to their plight, was adopted by the General Assembly in 1950. UNHCR’s responsibilities with regard to refugees (and other categories of “persons of concern”) were subsequently expanded through resolutions adopted by the General Assembly and ECOSOC.
- 3 False Regional refugee instruments complement the 1951 Convention, which remains the principal basis of international refugee law.
- 4 c Any person who meets the criteria of the refugee definition of the 1951 Convention is, by virtue of this very fact, a refugee, even if this has not (yet) been formally recognized, and irrespective of whether or not he or she has presented a claim to asylum. Refugee status determination is declaratory – it confirms that the individual concerned comes within the refugee definition. Whether or not this is the case should in principle be examined whenever a person expressed his or her need for international protection (see also below at 5.2.3).
- 5 False Recognition of refugee status on a group basis – for example, in the context of a mass influx from a country beset by generalized violence or other events seriously disturbing public order – has the same effect as individual refugee status determination: those recognized as members of the group have full refugee status.
- 6 a The principle of *non-refoulement*, as enshrined in Article 33 of the 1951 Convention, has become a norm of customary international law. It is binding on all countries, including those which have not (yet) become Party to the 1951 Convention and/or 1967 Protocol, and precludes the return of a refugee to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The only exceptions to this principle are those provided for in Article 33(2) of the 1951 Convention. However, even if these criteria are met, the return of a refugee (or any other person) to a risk of torture is never permitted.

Case A

- a** Yes. Adam has submitted an application for international protection. It is necessary, therefore, to determine whether he qualifies for such protection.
- b** Given that the host country (Afia) is not Party to the 1951 Convention/1967 Protocol and has not established procedures for determining who is a refugee, UNHCR will need to examine whether Adam meets the refugee definition under its mandate.
- c** UNHCR must determine, first, whether Adam is a refugee within the meaning of Article 1 of the 1951 Convention (which, as seen above at 1.2.1 and 1.2.4, is virtually the same as that contained in UNHCR's 1950 Statute or, if this is not the case, whether he comes within the extended refugee definition under the Office's mandate.
- d** Afia is not Party to the 1951 Convention. However, the principle of *non-refoulement*, which is enshrined in Article 33 of the 1951 Convention, also applies to Afia, since it has become a norm of customary international law. Thus, Adam enjoys protection against being returned to a country where his life or freedom would be at risk for reasons of race, religion, nationality, membership of a particular social group or political opinion. Adam is also entitled to protection under international and regional human rights instruments which Afia is Party to, as well as those human rights standards which are guaranteed under customary international law.

As a foreigner in Afia, Adam will need to comply with the country's laws. Having been recognized by UNHCR under its mandate, Adam is entitled to expect that the Office will exercise its international protection mandate to the best of its abilities.

Case B

- a** No. In the circumstances, it would be unrealistic to expect that the two case-workers appointed by the NEC to conduct individual refugee status determination could deal with a situation in which hundreds of persons arrive every day. Instead, if the information available about the circumstances in the country of origin indicates that those seeking safety in Buka are fleeing threats to their lives and safety, their recognition by the competent authorities of Buka as refugees on a *prima facie* basis would appear appropriate. Depending on the situation, this may be based on the refugee definition in the 1951 Convention, the wider refugee definition contained in an applicable regional refugee instrument, and/or the national refugee legislation of Buka. UNHCR may also determine that those fleeing the armed conflict in Rirutania are eligible for refugee status under its mandate.
- b** In situations where large numbers of people flee an armed conflict, combatants may indeed arrive together with civilians. In such cases, the host country would rightly be concerned: under international law, countries which are neutral with respect to an armed conflict in another country have an obligation to prevent their territory from being used as a basis for military operations there. The host country also has a duty to disarm combatants who arrive on its territory, separate them from the refugees and intern them until such time when they would no longer constitute a threat to its obligations as a neutral power with respect to the armed conflict. In the present case, however, it would appear that the arrivals from Rirutania are women, children and elderly persons. The problem of combatants mixing in with civilians does not arise.
- If this were the case, however, the Government of Buka would be responsible for dealing with the combatants as described above, and for establishing procedures to determine eligibility for international refugee protection of those former combatants who submit a claim for asylum. This would require, as a first step, examining whether they have genuinely and permanently renounced military activities, and for those determined to be civilians, conducting individual refugee status determination (see also below at 2.3.4).
- c** In returning the Rirutanians to their country of origin, Buka would risk acting in breach of the principle of *non-refoulement* under international refugee law as well as international human rights law. This principle applies to refugees and also to asylum-seekers. Exceptions permitting the return of refugees to a risk of persecution (but not torture) are applicable only under certain, narrowly defined circumstances, and their existence would need to be established in proper procedures in each individual case. Buka would also act in breach of its international obligations if it were to close the border to those fleeing the civil war in Rirutania: not permitting them access to the territory would also amount to *refoulement*.

Chapter 2

Eligibility Criteria – Inclusion under the 1951 Convention



Key objectives

Understand the criteria for determining whether a person is a refugee within the meaning of the 1951 Convention

Be familiar with the concept of persecution

Know how the refugee definition may apply in certain special situations

This chapter examines the inclusion criteria of the refugee definition as set out in the 1951 Convention, that is, those elements which form the positive basis for making a determination of refugee status, and which must be met for an individual to be recognized as a refugee. The chapter describes the elements of the 1951 Convention refugee definition and examines a number of special questions related to the notion of persecution. It also addresses particular issues faced by decision-makers where a well-founded fear of persecution has arisen after the applicant's departure from his or her country of origin (*sur place* claims) or where persons are fleeing armed conflict.

2.1 Introduction

As noted in the preceding chapter, the 1951 Convention continues to form the principal basis for determining who is a refugee. The criteria of the refugee definition as contained in the 1951 Convention are applied by States and by UNHCR (as explained above, they are virtually the same as those of the 1950 Statute definition).

According to Article 1A(2) of the 1951 Convention, 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 [or her] nationality and is unable, or owing to such fear, is unwilling to avail him [or her]self 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.”

A person qualifies for refugee status within the meaning of the 1951 Convention if he or she meets these criteria, provided that none of the exclusion provisions of the Convention apply (see the discussion in chapter 3), and for as long as he or she does not come within the scope of a cessation clause (see the discussion in chapter 4).

2.2 Elements of the 1951 Convention Refugee Definition

When examining whether an asylum-seeker meets the inclusion criteria of the 1951 Convention refugee definition, decision-makers must take into account all relevant facts and circumstances of the case and determine whether each of its elements is present. The following sections consider these elements one by one.

2.2.1 Outside the country of nationality or habitual residence

A person can only be a refugee if he or she is outside his or her country of nationality, or for those who are stateless (that is, without citizenship of any country), their country of habitual residence. This is a factual issue, which is to be established on the basis of documents, statements or any other information submitted by the applicant or obtained from other sources.

Applicants who have more than one nationality must establish a well-founded fear of persecution with respect to each of the countries concerned in order to qualify for refugee status, but this applies only if the second nationality actually carries with it the full range of rights normally enjoyed by citizens of the country concerned. This is not always the case, and decision-makers must distinguish between the possession of nationality merely in a legal sense and the actual availability of protection in the country, or countries, concerned.

The 1951 Convention does not require that the applicant was a refugee already at the time when he or she left the country of origin or habitual residence, nor is it necessary that his or her departure from that country was caused by a well-founded fear of persecution. Grounds for recognition as a refugee may arise when the individual concerned is already out of the country – in such situations, the person may become a refugee while being in the host country (“*sur place*”). The specific elements to be taken into consideration by decision-makers when faced with *sur place* claims are addressed below at 2.3.3.

For more information on this element of the refugee definition as set out in the 1951 Convention, see UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited January 1992), at paragraphs 87-96 and 106-107.

2.2.2 Well-founded fear

The term “well-founded fear” contains a subjective and an objective element, and when determining refugee status, decision-makers must consider both.

2.2.2.1 *The subjective element: fear*

Fear is, by definition, a state of mind and hence a subjective condition, which will depend on the individual’s personal and family background, his or her personal experiences, and the way in which he or she interprets his or her situation. In practice, any expression of unwillingness to return is normally sufficient to establish the “fear” element of the refugee definition. If an applicant does not expressly state that he or she is afraid, this may

often be inferred from the objective circumstances, for example where there is a clear risk of persecution upon return. In most cases, the mere fact of having applied for refugee status is sufficient to indicate a fear of return. For further guidance on this subject, see UNHCR's *Handbook*, at paragraphs 37-41.

2.2.2.2 The objective element: "well-foundedness"

Whether or not the fear is "well-founded" must be assessed in the context of the situation in the applicant's country of origin and in light of his or her personal circumstances. The decision-maker also needs to develop a detailed understanding of the applicant's background, profile and experiences. Experiences of family members and/or other persons with a comparable profile will also be relevant. The applicant's credibility and his or her fear must then be evaluated against objective information on the conditions in the country of origin. Reliable country-of-origin information is an essential resource in this regard.

Asylum-seekers are not required to prove their fear "beyond reasonable doubt", or that it would be "more probable than not" that the feared harm will materialize. The adjudicator should consider the applicant's fear well-founded if there is a **reasonable possibility** that the applicant would face some form of harm if returned to the country of origin or habitual residence. Questions related to the standard and burden of proof in refugee status determination procedures are discussed further below at 5.1.2.

In general, eligibility for refugee protection under the 1951 Convention requires a current or future fear of persecution. If the applicant suffered persecution in the past, it may normally be assumed that he or she continues to be at risk of persecution. However, a person who has not been persecuted before may qualify for refugee status if he or she is avoiding persecution in the future, provided all other eligibility criteria are also met. Decision-makers will need to consider, particularly in cases where the applicant fears harm at the hands of actors other than the State (so-called "non-State actors"), whether or not the State is able and willing to provide protection within the country of origin or habitual residence: if this is the case, the applicant's fear will not normally be considered well-founded (see also below at 2.2.4 and 2.2.5).

However, there may be situations in which the circumstances in the country of origin have fundamentally changed and an applicant who was previously persecuted there would no longer face a risk of persecution if he or she were to return. While this would normally mean that the person would not have a claim to refugee status, there may be exceptional cases in which it would nevertheless be appropriate to recognize him or her as a refugee due to compelling reasons arising out of previous persecution. This could apply, for example, where the persecution experienced was particularly

atrocious and the applicant is experiencing ongoing traumatic psychological effects which would render return intolerable.

Where an applicant holds a **passport** of the country of nationality, this may raise questions as to the well-foundedness of his or her fear of persecution. It is important to note that the mere possession of such a passport should not always be considered as an indication of the absence of fear, as there may be instances in which a passport has been obtained for the sole purpose of leaving the country of origin or habitual residence. However, where an applicant insists on retaining a valid passport of a country of whose protection he or she alleges to be unwilling to avail him or herself, this may cast doubt on the validity of the claim to have a “well-founded fear”. Contacts between an applicant and the consular authorities of his or her country of origin may also be indicative of an absence of such a fear, although this would not be the case where the latter only provide administrative assistance (see also below at 2.2.5).

For more information on the objective element of an Applicant’s fear of persecution, see UNHCR’s *Handbook* at paragraphs 42-50 and UNHCR’s *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

2.2.3 Persecution

2.2.3.1 *The meaning of “persecution”*

The applicant’s well-founded fear must relate to persecution. The concept of “persecution” is not defined in the 1951 Convention. From Article 33 of the 1951 Convention it can be inferred that a **threat to life or physical freedom** constitutes persecution, as would other serious violations of human rights. The preamble to the 1951 Convention refers to international human rights standards, and these provide a useful framework for analysis. Knowledge and understanding of international human rights law is therefore an important tool for decision-makers in evaluating whether particular acts amount to persecution.

However, it is important to recall that the institution of asylum from persecution predates the development of human rights law. Many of the existing human rights standards have developed after the 1951 Convention was drafted and are continuing to evolve. Thus, while the analysis of persecution must be informed by human rights principles, it would narrow its scope unduly to define persecution solely in terms of existing codified human rights standards. For example, a prohibition of the deployment of child soldiers in armed conflict was adopted in an optional protocol to the 1989 *Convention on the Rights of the Child* (CRC) only in 2000, yet this would properly have been characterized as persecution long before a specific human rights standard was codified in international law.

Therefore, “persecution” is not limited to human rights abuses. It also encompasses other kinds of serious harm or intolerable predicament – often, but not always with a systematic or repetitive element. For more details, see paragraphs 51-53 of UNHCR’s *Handbook*.

2.2.3.2 Examples of protected rights

International human rights law enshrines a significant number of rights which all persons enjoy. The 1948 *Universal Declaration of Human Rights* set out a list of fundamental rights which should be universally respected, and the 1966 *International Covenants on Civil and Political Rights* (ICCPR) and on *Economic, Social and Cultural Rights* (ICESCR) have codified these in legally binding form. A series of other human rights instruments have built on and developed these standards to address specific categories of rights.

When determining whether particular acts amount to persecution, decision-makers should keep in mind that under international human rights instruments, States may never legitimately restrict certain fundamental rights. These are referred to as “non-derogable”. Examples of such core rights include:

- The right to life;
- The right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- The right to freedom from slavery or servitude;
- The right to recognition as a person before the law;
- The right to freedom of thought, conscience and religion.

The enjoyment of other rights (known as “derogable”) may be limited during times of an officially-proclaimed national emergency, but only to an extent which is strictly necessary and proportionate, and without any element of discrimination.

Moreover, with regard to certain rights and freedoms, human rights law recognizes that restrictions may be warranted under certain circumstances. The ICCPR, in particular, permits the limitation of a number of rights on grounds specifically spelled out in the relevant provisions. This applies, for example, to the right to freedom of movement; freedom to manifest one’s religion and beliefs; freedom of opinion and expression; freedom of association and assembly; the right not to be arbitrarily arrested or detained; or the right to freedom from arbitrary interference in private, home and family life.

Other rights do not create immediately binding obligations in terms of their realization but require States to work progressively towards their objectives. This is the case for economic, social and cultural rights (e.g., the right to work, food, clothing, housing, medical care, social security, elementary school education). However, even where States are not able immediately to extend these to all

citizens, they may not discriminate between groups in society with regard to access to these rights.

2.2.3.3 The threshold of “persecution”

Not every violation of an applicant’s human rights or instance of discrimination or harassment is serious enough to be considered persecution. In general, serious violations of non-derogable rights would normally constitute persecution. Serious breaches of other rights would generally also be considered persecution, particularly if these have a systematic or repetitive element.

Discrimination can constitute persecution if it is linked to a protected right (such as, for example, freedom of religion) or if there has been a persistent pattern of discrimination. The threshold of persecution is clearly met if the applicant’s enjoyment of fundamental human rights – for example, access to the basic means of survival – is seriously restricted. Moreover, discriminatory measures which, taken separately, would not amount to persecution, may have the combined effect of rendering the situation for the applicant intolerable. This would be considered persecution on “cumulative grounds”.

When assessing whether actual or anticipated measures amount to persecution, decision-makers should consider them in light of the opinions, feelings and psychological make-up of the applicant. In this analysis, the subjective element is crucial and the impact on the specific individual concerned is a key factor in the inquiry, as the same act may affect people differently depending on their previous history, profile and vulnerability. In each case, decision-makers must determine whether or not, in the specific individual circumstances, the threshold of persecution is reached. See UNHCR’s *Handbook*, at paragraphs 53–55.

2.2.3.4 Persecution or legitimate prosecution?

Where the treatment feared by an applicant in the country of origin constitutes legitimate prosecution rather than persecution, he or she is not entitled to international protection as a refugee, and his or her claim should be rejected. There are ways in which a State may lawfully deprive someone of his or her liberty (for example, detention on criminal charges or imprisonment as a penalty after conviction), and which would not normally give rise to a claim for refugee status.

However, if an applicant whom the country of origin wants to prosecute or punish for a criminal offence claims that he or she is in fact fleeing persecution, it is necessary to examine the circumstances and determine whether the authorities use criminal law and/or procedures as a tool for persecution. This may be the case, for example, where the law in the country of origin defines as crimes acts which are protected by international human rights

standards, such as the freedom to express an opinion, and would therefore be inherently persecutory; where criminal procedures in the country of origin lack basic standards of fairness and justice; or where the punishment arising from otherwise legitimate prosecution would be excessive, that is, too severe with respect to the crime committed.

It may happen that someone who would face legitimate prosecution would otherwise be at risk of persecution if returned to the country of origin. In such cases, it is necessary to look at the claim in its entirety, assessing first the persecution claim. If it is established that the applicant has a well-founded fear of persecution for reason of a Convention ground (see below at 2.2.4), the decision-maker will then also need to examine whether the crime committed brings the person concerned within the scope of an exclusion clause of the 1951 Convention (see below in chapter 3). For further guidance on this question, please refer to UNHCR's *Handbook* at paragraphs 56-60.

2.2.3.5 Circumstances not amounting to persecution

Persons fleeing natural disasters are not refugees, unless they also have a well-founded fear of persecution for one of the reasons listed in the refugee definition of the 1951 Convention (see below at 2.2.4). Likewise, persons who leave their countries solely to improve their economic situation are not refugees, although as noted above, severe economic restrictions which deprive a person of all means of earning a livelihood can amount to persecution. Further guidance on circumstances in which economic measures against particular persons or groups may constitute persecution can be found in UNHCR's *Handbook* at paragraphs 62–64.

The refugee definition of the 1951 Convention does not apply to persons who are compelled to flee the **indiscriminate effects** of armed conflict or other “man-made disasters”, including, for example, foreign domination, intervention, occupation or colonialism. Such persons may, however, be refugees within the meaning of the wider refugee definitions applicable under certain regional refugee instruments and UNHCR's international protection mandate (see above at 1.2.4). But the 1951 Convention can apply in civil war situations, if a person is at risk for example because of his or her membership of an ethnic group, as explained below at 2.3.4.

2.2.4 1951 Convention grounds

The refugee definition in the 1951 Convention specifies that a person will qualify for refugee status under the Convention only if he or she fears persecution “**for reason**” of one or more of the **five grounds** listed in Article 1A(2). This is often referred to as the “nexus” requirement. It is satisfied if the Convention ground is a relevant factor contributing to the persecution – it does not need to

be its sole or even dominant cause. Neither is it necessary to establish the motives of the persecutor: whether or not there is intent to persecute is irrelevant, if the effect of the measures taken amounts to persecution for the particular individual concerned and if there is a link to a Convention ground.

In practice, more than one Convention ground may apply, for example if a member of a particular religious, ethnic or social group is also a political opponent. The link between the fear of persecution and the relevant Convention ground is also present where the authorities mistakenly impute a particular belief (e.g. religion or political opinion) or attribute a characteristic (e.g. homosexual) to the individual concerned. Neutrality may also form the basis of a refugee claim, for example in the context of a civil war, as a person who remains neutral in such circumstances may be perceived by either side as a political opponent, which in turn may result in his or her persecution.

In some cases the persecution may originate from an individual or entity other than the State, known as persecution by a “non-State agent”. In order to determine whether the fear is well-founded, it is necessary to assess whether the State would be willing and able to provide effective protection to the applicant (see below at 2.2.5). In these cases, the nexus requirement is satisfied if:

- The reason for the persecution is linked to a Convention ground, regardless of the reason for the State’s failure to protect;

or if

- The reason for the persecution is unrelated to a Convention ground, but the State’s unwillingness or inability to protect is for a Convention reason.

The “Convention grounds”, as they are known, are extensively discussed in paragraphs 66-86 of UNHCR’s *Handbook*, paragraphs 23-32 of UNHCR’s Note on *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, issued in April 2001, and, in particular, UNHCR’s Guidelines on International Protection referred to in the following sub-sections.

2.2.4.1 Race

“Race” should be broadly interpreted as any kind of distinctive ethnic characteristic, whether real or perceived. Minority groups are more likely to be persecuted than majorities, but this is not always the case: for example, in apartheid South Africa, the racial majority was oppressed by the minority. Men and women in “mixed” marriages, in which each spouse comes from a different ethnic or racial background, may face problems which in some cases may amount to persecution. In such cases, it is particularly important to understand the underlying social context. Another form of persecution which is frequently based on race is denial of citizenship and the loss of rights which this entails.

2.2.4.2 Religion

Freedom of religion is a fundamental human right. It includes the right to have or not to have a religion, to practice one's religion, and to change religions. "Religion" as a 1951 Convention ground refers not only to the established institutionalized religions; it covers any system of belief – that is, convictions or values about a divine or ultimate reality, or the spiritual destiny of mankind. Claims for refugee status on this basis may involve elements related to religious belief (or the fact of not having a belief), religious identity or religion as a way of life. Religion is often the relevant ground where a conscientious objector claims a fear of persecution as a consequence of his or her refusal to comply with a military service obligation (see below at 2.3.2). Examples of persecution for reason of religion include the following:

- Serious restrictions on the exercise of religious freedom, for example prohibition of membership in a religious community or of religious instruction;
- Serious discrimination because of religious practice or membership in a given religious community;
- Forced conversion, or forced compliance or conformity with religious practices, provided that such measures have a sufficiently serious impact on the individual concerned.

Note that the right to have (or not to have) a religion is absolute and non-derogable, while international human rights law permits certain restrictions to the right to manifest one's religion. Detailed guidance on the examination of claims for refugee status based on religion can be found in UNHCR's *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, issued on 28 April 2004 (HCR/GIP/04/06).

2.2.4.3 Nationality

"Nationality" as a ground for refugee status does not only refer to "citizenship", but also extends to groups of people defined through their real or perceived ethnic, religious, cultural or linguistic identity, regardless of whether this difference has been formalized legally.

2.2.4.4 Membership of a particular social group

This Convention ground applies where an applicant belongs to a group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is:

- **Innate** – such as sex, race, caste, kinship ties, linguistic background, or sexual orientation;

- **Unchangeable** – for example, because it relates to the individual’s past history, such as former military officer, former trade union member, or former landowner; or
- **Otherwise fundamental** to identity, conscience or the exercise of one’s human rights, such that the person should not be expected to change or reject it.

The group must be set apart in some way from others, either because it sees itself as being different, or because it is perceived as such by the persecutor. It does not matter whether the members of the group know each other and associate together, nor is it necessary that it be a small group – thus, for example, there may be situations in which it is appropriate to recognize “women” generally as a particular social group. One of the most visible examples of a particular social group is the family. Claims for refugee status may arise, for example, where family members of political activists or opposition fighters are targeted for persecution as a means of punishing the latter or forcing them to surrender or cease their activities.

A detailed analysis of the applicability of this Convention ground is contained in UNHCR’s *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, issued on 7 May 2002 (HCR/GIP/02/02). On gender-related persecution within the meaning of the 1951 Convention definition, which is often relevant for determining what constitutes a particular social group, see also below at 2.3.1.

2.2.4.5 Political opinion

The concept of “political opinion” as a ground for recognition as a refugee should be interpreted in a broad sense, as encompassing any opinion concerning matters on which the machinery of the state, government or society is engaged. It goes beyond identification with a specific political party or recognized ideology, and may include for example an opinion on gender roles. The mere fact of holding a political opinion which is different from that of the government is not in itself a ground for claiming refugee status. The key question is whether the applicant holds – or is perceived to hold – opinions which are not tolerated by the authorities or by the community, and whether he or she has a well-founded fear of persecution for this reason.

Persecution for political reasons may take the form of criminal prosecution (see also above at 2.2.3.4). Political opinion may also be the basis for a refugee claim based on refusal to comply with a military service obligation (see below at 2.3.2).

2.2.5 Availability of State Protection

The 1951 Convention refugee definition also states that a refugee is a person who is unable or (owing to a well-founded fear of persecution) unwilling to avail him or herself of the protection of the country of nationality or habitual residence.

- Being **unable** to avail oneself of the protection of the country implies circumstances that are beyond the control of the person concerned. For instance, a country may be unable to extend proper protection in a state of war, civil war, or other grave disturbance.
- Being **unwilling** to avail oneself of the protection of the country of nationality or habitual residence means that the person refuses to accept the protection of that country due to his or her well-founded fear of persecution.

The “State protection” element was traditionally understood as referring to the consular or diplomatic protection exercised by a State on behalf of its citizens abroad *vis-à-vis* the authorities of the foreign country in which they find themselves. This may take the form, for example, of intervention in case of detention or in any other situation which requires defending an individual’s rights abroad.

As noted above at 2.2.2.2, if a person avails him or herself of such protection, this may mean that the relationship with his or her government has not broken down, and that such a person does not have a well-founded fear of persecution in the country of origin. However, contacts between an asylum-seeker or a refugee and the consular authorities of the country of origin should not always be considered as indication of the absence of such a fear – for example, the issuance of a passport or certain certificates may constitute administrative assistance rather than consular protection. For further guidance on this issue, please refer to UNHCR’s *Handbook*, at paragraphs 47–50 and 97–100.

More recently, a new interpretation of the meaning of “State protection” in Article 1A(2) of the 1951 Convention has emerged which requires decision-makers to examine whether protection is actually available within the country of origin. Rather than analyzing this as a separate element, the possibility of internal protection should be considered as part of the assessment of whether there is a well-founded fear (see also above at 2.2.2.2). The question is particularly relevant in cases where the fear of persecution is related to acts of non-State agents, and in the context of the so-called “internal flight or relocation alternative”.

2.2.5.1 Agents of Persecution

The notion of persecution is normally associated with the authorities of the country from which the applicant fled. The State

is considered as the source, or “agent of persecution”, if persecutory measures are carried out by its own organs, for example, its security forces, law enforcement officials or civilian administrators. The State’s responsibility is also engaged where groups or individuals who are formally separate from government structures act at the instigation or with the consent of the government (for example death squads, militias or paramilitary forces).

There are also situations in which the persecutors are so-called “non-State actors”. One example would be *de facto* authorities such as guerrillas or secessionists, who are not answerable to the government but who may control parts of the territory. An applicant may also be at risk of persecutory acts at the hands of private citizens, for example members of his or her family or community. In such cases, the fear of persecution will be well-founded if the authorities are unwilling or unable to provide effective protection (see UNHCR’s *Handbook*, at paragraph 65, and above at 2.2.2.2 and 2.2.4).

When assessing claims which involve persecution by non-State actors, decision-makers must review applicable laws, policies and practices, and assess whether the State would actually intervene to protect the particular individual concerned. Applicable legislation may prohibit the harm and/or treatment the applicant would be exposed to, but it is possible that in practice no action is taken to implement it, either because there is no commitment to enforcement, or because the State lacks the power and/or resources to address the situation.

2.2.5.2 *Internal flight or relocation alternative*

If the applicant’s fear of persecution is confined to a specific part of the country, outside of which the feared harm cannot materialize, it may be appropriate to assess whether he or she can reasonably be expected to move to another part of the country and avail him or herself of State protection there. This is known as the “internal flight or relocation alternative”. Where it exists, the applicant may not be eligible for international refugee protection.

In principle, this “internal flight alternative” is relevant only in certain limited circumstances, where the risk of persecution emanates from “non-State” actors such as guerrilla groups who are controlling only part of the country. The determination of whether or not an internal flight alternative exists requires, as a first step, a **relevance analysis**, in which it must be examined whether the area identified is practically, safely and legally accessible to the applicant, and whether he or she would be at risk of persecution (original or new) upon relocation, at the hands of the State or non-State actors. Where the State has been identified as the agent of persecution, the internal flight alternative is normally not relevant,

as there is a presumption that its authorities operate throughout the country.

Where an internal flight alternative is found to be relevant, the second step of the analysis relates to its **reasonableness**. This means determining whether the individual concerned could reasonably be expected to establish him or herself in the area identified and live a normal life there, without undue hardship. This requires an assessment over time, taking into account the original reasons for flight and a consideration of whether the proposed area provides a meaningful alternative in the future.

In practice, the need for an assessment of an internal flight alternative arises only rarely. Guidance on this subject can be found in UNHCR's *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, issued on 23 July 2003 (HCR/GIP/03/04).

Refugee definition of the 1951 Convention – Inclusion Criteria

The requirements for inclusion under Article 1A(2) of the 1951 Convention are met if it is established that the following criteria are met:

- a** The applicant is **outside** the country of origin or habitual residence.
- b** He or she has a **well-founded fear**, that is, a subjective fear of return which has an objective basis, and there is thus a reasonable possibility that the applicant will suffer some form of harm in the country of origin or habitual residence and is therefore unable or unwilling to avail him or herself of the protection of that country.
- c** The harm feared amounts to **persecution**, that is, serious violations of human rights or other kinds of serious harm.
- d** The applicant fears persecution **for reason of a 1951 Convention ground** (race, religion, nationality, membership of a particular social group, political opinion).

2.3 Special Issues

2.3.1 Gender-related persecution

Traditionally, the 1951 Convention has been interpreted through a framework of male experiences. This meant that harm which occurred in the “private sphere”, for example domestic violence, female genital mutilation or rape, was not necessarily acknowledged as persecution, or not considered to be linked to a 1951 Convention ground. As a consequence, the variety of ways in which women’s political or religious dissent might be manifested, for example through their conduct rather than by direct articulation of resistance, was not always recognized as relevant with regard to their eligibility for refugee status. Since the mid-1980s, however, there has been increasing recognition of the ways in which an applicant’s gender may have an effect on his or her claim for refugee status.

Whereas “**sex**” is defined by biology (male or female), “**gender**” refers to the socially or culturally defined identities, status, roles and responsibilities that are assigned to individuals on the basis of their sex, and to the way in which these shape the power relations between men and women. The applicant’s gender may affect:

- The **form** which persecution takes (for example sexual violence and rape of men or women, forced marriage, female genital mutilation, trafficking for the purposes of forced prostitution or sexual exploitation, dowry and other marriage-related harm and discriminatory laws or practices); and/or
- The **reasons** for which persecution is experienced (for example, a homosexual may experience violence or severe discrimination on account of his or her sexual orientation, or a woman may be exposed to punishment by her family or her community as a result of her failure to adhere to the codes of behaviour assigned to her on the basis of her sex).

Not all persecution experienced by women is linked to gender, and in many cases women will experience persecution in the same ways, and for the same reasons, as men. Nor does gender-related persecution only affect women: claims based on persecutory treatment linked to gender may be submitted by men as well as women. UNHCR’s *Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* issued on 7 May 2002 (HCR/GIP/02/01) provide a detailed substantive analysis as well as procedural guidance on this subject.

2.3.2 Refugee claims based on military service obligations

It is generally accepted that States may require their citizens to undergo a period of military service. This is a recognized exception to the prohibition of forced labour under Article 8 of the ICCPR and other international and regional standards. Thus, fear of being forced to comply with military service obligations, or of prosecution and punishment for failing to do so, does not in itself give rise to a well-founded fear of persecution within the meaning of the 1951 Convention refugee definition. However, such a fear could give rise to a claim for refugee status in those circumstances in which the treatment facing the applicant amounts to persecution and there is a link with one or more of the 1951 Convention grounds. Refusal to perform military service may take the form of:

- **Draft evasion:** the applicant has fled or remained abroad in order to avoid being called for military service, or has already been called up for military service and failed to comply;
- **Desertion:** the applicant has already engaged in military service and then escaped or left his or her unit without authorization.

When determining whether, in the above-described circumstances, an applicant has a well-founded fear of persecution, decision-makers must examine the potential consequences of his or her forced return. This requires a full understanding of the applicant's background and profile, and a thorough review of the laws, policies and practices defining military service obligations in the country of origin, including the availability or not of alternative forms of service (see below at 2.3.2.2).

2.3.2.1 Persecution related to military service obligations

Circumstances in which the imposition of military service or punishment for non-compliance may amount to persecution include the following:

- **The obligation to undertake military service amounts to persecution.** This would be the case where the application of a law which imposes a general obligation of military service has the effect of rendering the situation intolerable for a particular applicant, given his or her specific circumstances, and where the only way to avoid this situation is by fleeing the country of origin. This arises most frequently in cases which may involve a breach of the right to conscientious objection (discussed in more detail below at 2.3.2.2). However, persecution could also result from other circumstances and the way in which the duty to perform military service affects a particular individual (e.g. length of service, medical reasons), or from the discriminatory application of a military service obligation (e.g. to certain ethnic, linguistic or religious groups), if the impact on the

individual concerned is sufficiently serious, e.g. because it would in and of itself seriously restrict access to basic means of survival or render his or her situation intolerable. A specific instance in which a requirement to undergo military service would amount to persecution is where conscription as such would be in violation of international law, as is the case, for example, with regard to the conscription of children under 15.

- The **conditions of military service** involve treatment which constitutes serious violations of human rights standards amounting to persecution (e.g. conditions which amount to degrading or inhuman treatment; excessively lengthy or indefinite service; or conditions which prevent religious worship and therefore render the situation intolerable for the individual concerned).
- **Punishment for non-compliance with military service requirements** amounts to persecution, either because the military service obligation itself is persecutory, or because the punishment imposed is excessive, or disproportionately severe in comparison to other draft evaders or deserters, and causes harm which is sufficiently serious to amount to persecution.

Where a military service obligation or punishment for non-compliance amount to persecution, this will give rise to a claim for refugee status only if there is a link with a 1951 Convention ground.

2.3.2.2 Conscientious objectors

Under certain conditions, conscientious objectors may have a valid claim to refugee status. Refusal to serve for reasons of conscience is often based on religious belief or politically motivated opposition to all wars (pacifism) or to the specific nature of the armed conflict in which the military forces of the applicant's country of origin are engaged. Where a refugee claim is based on conscientious objection, the decision-maker must assess:

- Whether the applicant's religious, moral or political conviction is genuine and sufficiently profound (this requires a thorough investigation of the applicant's personal, social, religious and political profile and background);
- Whether military service would require the applicant to engage in conduct contrary to this conviction; and
- Whether there is a possibility of alternative service such as community service, which is compatible with the applicant's conviction, and which is neither excessively lengthy nor punitive in nature (if there is, refugee status will not normally be granted).

As in all cases, eligibility for refugee status requires a link between the feared persecution and a Convention ground. In most cases which involve a well-founded fear of persecution related to

conscientious objection, political opinion and/or religion will generally be the appropriate Convention ground. Further guidance on this subject can be found in UNHCR's *Handbook*, at paragraphs 167–171 and UNHCR's *Guidelines on Religion-Based Refugee Claims*, issued on 28 April 2004.

2.3.3 Refugees *sur place*

As already noted above at 2.2.1, a well-founded fear of persecution may arise **after** an applicant's departure from the country of nationality or habitual residence, either because of events in the country of origin or as a result of the applicant's activities in the host country (see UNHCR's *Handbook*, at paragraphs 83 and 94–96). Applications for refugee status in such situations are usually referred to as "*sur place*" claims. They may be based on:

- Events over which the applicant has no direct control, for example a *coup d'état*, change of government, significant change in government policy, outbreak or escalation of armed conflict, or the disclosure of the names of asylum applicants to officials in the country of origin; or
- Actions by the applicant after his or her departure, for example:
 - Political activity, such as participation in demonstrations against government policies in the country of origin, open engagement in other anti-government activities (e.g. participation in opposition groups in exile, public speeches, writing or publishing articles, or close association with refugees or other known opponents to the government of the country of origin); or
 - Conversion to a religion not tolerated by the authorities in the country of origin; or
 - Unauthorized stay abroad, where this is punished by severe sanctions.

In principle, *sur place* claims must be assessed on the same basis as all other claims for refugee status, that is, the decision-maker must analyze whether each element of the Article 1A(2) definition is satisfied. If the applicant asserts a fear of persecution based on his or her political activities or religious conversion, it needs to be examined whether:

- The applicant's convictions and/or conduct have come, or are likely to come, to the attention of the authorities in his or her country of origin; and
- Whether there is a reasonable possibility that on return the applicant would experience persecution for a reason related to a 1951 Convention ground.

If these conditions are met, the applicant will qualify for refugee status. This also applies where the applicant may not genuinely hold the political convictions or religious beliefs expressed, but

where the mere fact of their expression may nevertheless be considered by the authorities in the country of origin as a hostile act and is likely to give rise to persecution. There is no “good faith” requirement in the 1951 Convention. However, in cases where the applicant has deliberately engaged in activities in the host country which are designed to bring him or her within the refugee definition by creating a risk of persecution in the event of return, the decision-maker must carry out a thorough investigation to establish the existence of each element of the Article 1A(2) definition. If the opportunistic nature of activities designed to bolster claims for asylum would be apparent to the authorities in the country of origin, the applicant’s acts may invite little attention and may not give rise to a well-founded fear of persecution. If they would, however, result in persecutory action, the individual concerned could qualify for refugee status provided all other elements of the definition are also met.

2.3.4 Persons fleeing armed conflict

The refugee definition set out in the 1951 Convention applies in peacetime as well as in times of armed conflict, be it international or non-international in character. While the 1951 Convention does not explicitly refer to those who are compelled to leave their country of origin or habitual residence in the context of armed conflict, such persons could be eligible for refugee status if they have a well-founded fear of persecution for one or more of the Convention grounds. Indeed, the 1951 Convention grew out of the experiences of the Second World War.

Moreover, many of those fleeing today’s armed conflicts do come within the refugee definition of the 1951 Convention because these conflicts are rooted in ethnic, religious or political differences which specifically victimize certain groups, as for example in the case of a military campaign aimed at killing or driving out members of a certain group from a territory that another group wishes to control. Those who flee under such circumstances are at risk of serious harm due to their ethnic origin or their religion, for example. There is no need for the Applicant to have been singled out or individually targeted, nor is there a requirement that he or she suffer from a risk or impact which is different than for other persons. It is also irrelevant whether the group affected is large or small – whole communities may risk or suffer persecution for Convention reasons, and the fact that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim.

Other situations which may give rise to eligibility for refugee status under the 1951 Convention include cases where persecution is related to the armed conflict (e.g. children may be targeted for forced recruitment), but also where persecution is experienced independently of the armed conflict. For example, an individual

may be forced to flee persecution for reasons which have nothing to do with the conflict (e.g. women at risk of being subjected to forced marriage or genital mutilation).

By contrast, women, men, girls and boys who flee from an armed conflict without any element of persecution for a Convention ground are not refugees within the meaning of the 1951 Convention. They may, however, qualify for refugee status on the basis of the extended refugee definitions in relevant regional instruments and under UNHCR's international protection mandate (see above at 1.2.2 and 1.2.4, respectively), and/or under the host country's national legislation (see above at 1.2.3).

Armed conflict in one country often causes large-scale movements of people into neighbouring and other countries. The host country may find itself facing a situation where combatants are mixed in with refugees. As noted above at 1.5.2, refugee status recognition in the context of a mass influx is often done on a *prima facie* basis for all members of a group on the basis of a presumption that they meet the eligibility criteria of the relevant refugee definition. This presumption of *prima facie* eligibility for refugee status does not include combatants.

- Active combatants cannot be refugees, as their activities are incompatible with refugee status.
- Former combatants who submit an asylum application may be admitted into refugee status determination procedures after it has been established that they have genuinely and permanently renounced their military life and can be considered as civilians. Their claims should be examined in individual refugee status determination procedures. It is important to note that a person's past as a combatant is not as such a ground for exclusion from refugee status, although a thorough examination of his or her conduct during armed conflict in light of the criteria of Article 1F of the 1951 Convention will regularly be required (see also the discussion on exclusion under that provision below at 3.4).

Decision-makers should also be aware that in situations where an armed conflict is ongoing in the applicant's country of origin or habitual residence, an internal flight or relocation alternative will normally not be applicable. UNHCR's Guidelines on this subject make it clear that the possibility of returning an Applicant to a specific part of his or her country of origin can be considered only if the person concerned may be returned to a situation in which he or she is able to find safety and security and will be free from danger and risk of injury. This must be durable, not illusory or unpredictable. In most cases, countries in the grip of armed conflict would not be safe for relocation, especially in light of shifting armed fronts which could suddenly bring insecurity to an area hitherto considered safe (see also above at 2.2.5.2)

Summary

Inclusion Criteria of the 1951 Convention Refugee Definition

- This refers to the elements which form the positive basis for making a determination of refugee status, which must be met for an individual to be recognized as a refugee. They are contained in Article 1A(2) of the 1951 Convention.
- The requirements for inclusion under the 1951 Convention are satisfied if it is established that the following criteria are met:
 - The applicant is outside the country of origin or habitual residence;
 - He or she has a well-founded fear, that is, a subjective fear of return which has an objective basis, and thus there is a reasonable possibility that the applicant will suffer some form of harm in the country of origin or habitual residence and is therefore unable or unwilling to avail him or herself of the protection of that country;
 - The harm feared amounts to persecution, that is, serious violations of human rights or other kinds of serious harm; and
 - The applicant fears persecution for reason of one or more of the grounds listed in the 1951 Convention (race, religion, nationality, membership of a particular social group, political opinion).
- Where persecution originates from individuals or entities other than the authorities (so-called “non-State actors”), the applicant’s fear of persecution will be well-founded if the authorities are unwilling or unable to provide effective protection.

Gender-related persecution

- An applicant’s gender (i.e., the socially or culturally defined identities, status, roles and responsibilities assigned to individuals on the basis of their biological sex), may affect:
 - The form which persecution takes; and/or
 - The reasons for which persecution is experienced.

Persecution related to Military Service Obligations

- Fear of being obliged to comply with a military service obligation or of prosecution or punishment for failing to do so may, under certain conditions, give rise to a claim to refugee status if there is a link with one or more of the 1951 Convention. This may include situations where:
 - The obligation to undergo military service amounts to persecution because it renders the situation intolerable for the particular applicant;
 - The conditions of military service involve treatment which constitutes persecution;
 - Punishment for non-compliance with military service requirements amounts to persecution.

Refugees *sur place*

- A person may become a refugee after he or she has left the country of origin or habitual residence (a refugee *sur place*) if a well-founded fear of persecution linked to one or more of the 1951 Convention grounds arises because of:

- Events in the country of origin or habitual residence; and/or
- Actions by the individual concerned after his or her departure, if there is a reasonable possibility that his or her convictions and/or conduct will result in a persecutory response from the authorities of that country upon return.

Persons fleeing Armed Conflict

- May come within the refugee definition of the 1951 Convention, if they have a well-founded fear of persecution for one or more of the five Convention grounds, for example because of their ethnicity or religion.
- Persons who flee from an armed conflict without any element of persecution linked to a Convention ground are not refugees within the meaning of the 1951 Convention but may qualify for refugee status on the basis of extended refugee definitions in relevant regional instruments and/or national legislation of the host State, and under UNHCR's international protection mandate.
- Active combatants cannot be refugees, as their activities are incompatible with refugee status. Former combatants may be admitted into asylum procedures, once it has been determined that they have genuinely and permanently renounced their military activities.

Essential reading

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992)

UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, issued on 28 April 2004 (HCR/GIP/04/06)

UNHCR, *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, issued on 23 July 2003 (HCR/GIP/03/04)

UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, issued on 7 May 2002 (HCR/GIP/02/02)

UNHCR, *Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, issued on 7 May 2002 (HCR/GIP/02/01)

UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001

UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998

UNHCR, *Position on Agents of Persecution*, 14 March 1995

Executive Committee, Conclusion No. 94 (LIII) – 2002 on the Civilian and Humanitarian Character of Asylum

Chapter 2 – Exercises

The issues at stake, both for the asylum-seeker and those making the refugee status determination, are made more apparent when illustrated through case studies. The case studies which follow the review exercise are intended to provide examples of the types and questions and dilemmas you may be confronted with in making the eligibility determination. Please note that in all these case studies, it is assumed that exclusion considerations do not arise (the question of exclusion will be discussed in chapter 3 below).

Review:

- 1 Which of the following statements is **not correct**?
 - a In most cases, the mere fact of having applied for asylum is sufficient to indicate a subjective fear.
 - b An applicant's fear is well-founded if there is a reasonable possibility that the applicant will face some form of serious harm or predicament if returned to the country of origin or habitual residence.
 - c Persecution may take the form of human rights violations but also other kinds of serious harm or intolerable predicament.
 - d If it is established that a person has a well-founded fear of persecution, this means that he or she meets the inclusion criteria of the 1951 Convention.
- 2 Which of the following statements is **correct**?
 - a The Convention ground "race" can only apply to members of a minority group.
 - b The Convention ground "religion" cannot apply if the person concerned does not really believe in the tenets of the religion of which he or she is supposed to be a follower.
 - c All men in a country who are within a certain age group can be members of a particular social group.
 - d Having an opinion on gender roles cannot as such give rise to persecution for reason of political opinion.
- 3 Which is the **correct answer** to the following question: Does refusal to comply with a military service obligation give rise to a valid refugee claim?
 - a Yes, but only if it is based on a genuinely held conviction that war is wrong in all its forms.
 - b Yes, if the obligation to perform military service or punishment for refusing to do to amounts to persecution which is linked to a 1951 Convention ground.
 - c Always.
 - d Never.
- 4 Gender aspects only affect claims submitted by women. **True or false? Please explain.**

- 5 Domestic violence can give rise to a valid claim for refugee status under the 1951 Convention only if the perpetrator is a State official (e.g. a member of the police). **True or false? Please explain.**
- 6 An asylum-seeker has approached the consulate of his country of origin in order to obtain a birth certificate for his son. In your view, which of the following statements is **not correct**:
- a Where contacts between an asylum-seeker and the consular authorities of his or her country of origin concern mere administrative assistance, this should not be taken to indicate that his or her claim to have a well-founded fear of persecution is unfounded.
 - b Where an asylum-seeker has regular contacts with the diplomatic or consular authorities of his or her country of origin, this may indicate that he or she does not have a well-founded fear of persecution, but it would be necessary to establish the nature and purpose of these contacts.
 - c If the country of origin is unable to extend protection to the applicant due to a state of war, civil war or other grave public disturbance, contacts between the asylum-seeker and the diplomatic authorities abroad would not undermine an applicant's claim for refugee status, provided all other elements of the refugee definition are also met.
 - d Any type of contact with the authorities of the country of origin abroad indicates that an applicant does not have a well-founded fear of persecution.
- 7 When determining whether an internal flight alternative applies, the only criterion which needs to be considered is whether the State authorities exercise control over the proposed location. **True or false? Please explain.**
- 8 A person may qualify for refugee status even if he or she originally left his or her country for reasons unrelated to a fear of persecution. **True or false? Please explain.**
- 9 Which of the following statements is **not correct**?
- a Persons who flee an armed conflict without any element of persecution related to a Convention ground are not refugees within the meaning of the 1951 Convention, although they may qualify for refugee status under a regional refugee instrument and the extended refugee definition under UNHCR's mandate, and/or under the national legislation of the host State.
 - b In a mass influx situation, combatants may be mixed in with others fleeing a situation of armed conflict, but only civilians can be recognized as refugees on a *prima facie* basis.
 - c If an asylum-seeker states that he or she was compelled to leave due to an armed conflict in his or her country of origin, it is not necessary to conduct an in-depth examination of his or her claim: such persons never qualify as refugees under the 1951 Convention.
 - d Where an armed conflict is ongoing in the applicant's country of origin, the notion of an internal flight alternative will normally not be relevant.

Case C

Mona (45), a nurse, is originally from Riverland. She left her country three years ago to seek better employment opportunities abroad and succeeded in finding a job in Batavia.

Last year, an armed conflict broke out in Riverland. Armed forces of a neighbouring country invaded Riverland and have since been fighting to try and establish a regime controlled by the ethnic group to which Mona belongs. One of the consequences of the armed conflict is that the security forces of Riverland, which are controlled by another ethnic group, have begun to randomly arrest and detain members of Mona's ethnic group. There are reports that some of those detained were subjected to torture or killed.

Mona never faced any security problems while living in Riverland. However, she believes that it is safer for her to seek asylum in Batavia and submits a request for recognition as a refugee to the asylum authorities in which she explains that she is afraid to return. Batavia is Party to the 1951 Convention and the 1967 Protocol, but not to any regional refugee instrument.

1 Is Mona a refugee?

| | |
|--|--|
| Which instrument contains the applicable refugee definition? | |
|--|--|

List the required elements for inclusion below and consider if each one is satisfied.

| | | |
|----------|--|--|
| a | | |
| b | | |
| c | | |
| d | | |

| | |
|--------------------|--------|
| Is Mona a refugee? | YES/NO |
|--------------------|--------|

2 The asylum authorities of Batavia reject Mona's application because she did not qualify for refugee status when she left Riverland and never faced security problems while she lived there.

As Mona's legal counsel, what arguments would you put forward to support an appeal against this decision?

Case D

Bashir (19) is a citizen of Oberon. He belongs to a minority ethnic group. Fifteen years ago, the Government of Oberon stripped the members of his ethnic group of their citizenship and took their land. The authorities stopped issuing identity documents to members of this minority. Instead, they are designated as “foreigners” or “unregistered” and on this basis their stay in Oberon is tolerated.

Oberon is not a prosperous country, and members of Bashir’s ethnic minority have only limited access to the labour market. They are not entitled to public education nor are they allowed to form political parties or other organizations. Some members of the ethnic group who have spoken out and demanded respect for the human rights of the members of the group have been imprisoned and mistreated.

For all these reasons, Bashir feels that he has no future in Oberon. He crosses the border and applies for refugee status in neighbouring Titania. The asylum authorities in Titania reject Bashir’s application on the basis that “the circumstances on which he based his claim – i.e., that he ‘has no future in Oberon’ – are not foreseen by the 1951 Convention and do not give rise to refugee status.”

1 Do you agree with the reasoning of Titania’s asylum authorities? Please elaborate.

2 Does Bashir meet the inclusion criteria of the refugee definition contained in the 1951 Convention? List the elements of the refugee definition below and consider whether each of them is satisfied:

| | | |
|----------------------|--|--------|
| a | | |
| b | | |
| c | | |
| d | | |
| Is Bashir a refugee? | | YES/NO |

Case E

Silvia (23) is a national of Alphastan, a country whose economy is controlled by organized crime. In recent years, one branch of the local mafia has started sending young women abroad in order to exploit them as prostitutes in Betastan. Most of the women are from small towns and villages in Alphastan. They are taken abroad after being promised relatively well-paid employment as factory workers in foreign countries and signing contracts with local offices established by the mafia. Some government officials have tried to close these offices and stop the practice, but due to widespread corruption within the police and the civil administration, they have not succeeded in doing so.

Once in Betastan, some of the women were able to escape from those guarding them, but in a number of cases, they were detained by the authorities in Betastan and returned to Alphastan, only to be killed by the mafia for having disobeyed. Their asylum applications in Betastan were rejected, because the asylum authorities considered that the women had signed up voluntarily to go abroad and in any case, they simply were the victims of crime. The media in Alphastan, under threats from the mafia, did not report these killings, but renowned human rights organizations abroad have issued a number of reports in which they expressed their concern. These reports also document a pattern of impunity in Alphastan, which is also said to be due to corruption.

Silvia is currently in detention, awaiting deportation to Alphastan. She has submitted an asylum application, in which she stated that she did not want to return, because she feared that the mafia would force her back into prostitution, and that the police could not do anything about it.

Betastan is Party to the 1951 Convention and 1967 Protocol. You are an adjudicator at the asylum authority, and Silvia's case has been assigned to you.

1 In your view, is Silvia eligible for refugee status?

| | |
|--|--|
| Which instrument contains the applicable refugee definition? | |
|--|--|

List the elements of the refugee definition below and consider whether each of them is satisfied:

| | | |
|----------|--|--|
| a | | |
| b | | |
| c | | |
| d | | |

| | |
|----------------------|--------|
| Is Silvia a refugee? | YES/NO |
|----------------------|--------|

2 Silvia also signed a contract with the office established by the mafia in her home town. Is this relevant for her eligibility for refugee status? If so, how? Do you agree with the decisions reached by your colleagues on earlier, similar cases? Please elaborate.

Case F

Milan (37) is a farmer from Verdana. He belongs to a religious minority. His religion is not banned as such, although the Government, which keeps tight control over the opposition, has sometimes prohibited ceremonies, for fear that they might turn into expressions of political dissent. This happened in the capital of Verdana. In Milan's village, the members of his religious minority have always been able to perform their rites without any problems. Milan is an active member of the religious community, but he is not interested in politics.

Some months ago, a political opposition group started an armed insurrection. This group is a secular movement, which is not linked with any religious group. Soon, the group received support from the armed forces of neighbouring country Bantana, and intensive fighting broke out in different parts of Verdana. Milan's village, which is close to a strategically important mountain pass, was particularly affected by shelling from both sides. Fearing for his life, Milan left the village and crossed the border into Amarillo, also a neighbour of Verdana.

Upon arrival, Milan was interviewed by a commission of the asylum authority of Amarillo, which is Party to the 1951 Convention/1967 Protocol and has adopted, under its national legislation, a provision which replicates the wider refugee definition contained in the 1984 Cartagena Declaration. He explained why he had left his country.

1. In your view, is Milan eligible for refugee status?

| | |
|--|--|
| Which instrument contains the applicable refugee definition? | |
|--|--|

List the elements of the refugee definition of the 1951 Convention below and consider whether each of them is satisfied:

| | | |
|---|--------|--|
| a | | |
| b | | |
| c | | |
| d | | |
| Are the inclusion criteria of the 1951 Convention satisfied? | YES/NO | |
| Is Milan a refugee within the meaning of the wider refugee definition applicable in Amarillo? | YES/NO | |

Case G

Lek (22) is a national of Marsia, a country with a one-party system. Having been an orphan from a young age, Lek was admitted into a pedagogical institute, despite the fact that neither he nor anyone in his immediate family was a member of the ruling party. Although he liked going to the institute, life in general was difficult in Marsia because people were dying of hunger due to a famine and different diseases.

Six months before they were due to graduate, the students at the institute were informed of their future teaching posts. Lek was assigned to a school in a remote area of the country. He did not want to go there, as he knew that the economic and health conditions in that part of the country were particularly precarious. Therefore, he decided to leave Marsia so that he could live a normal life somewhere else. Lek crossed the border illegally, without any documents, into neighbouring Saturnia, where he applied for asylum. Lek said that he did not want to return to Marsia because of the economic conditions in his country, which would make it impossible for him to find a job and earn a living.

The criminal code of Marsia prescribes mandatory life imprisonment for any person who has left Marsia without official permission. Moreover, the authorities consider such people to be political criminals. Those without connections in influential political circles are regularly sentenced to death for treason, even if they have never been politically active before. These practices have been criticized in numerous human rights reports and condemned repeatedly by the UN Commission on Human Rights.

Saturnia is Party to the 1951 Convention and 1967 Protocol. It has enacted a national asylum law which contains a refugee definition identical to that set out in Article 1 of the 1951 Convention. UNHCR has an office in Saturnia.

1 Is Lek a refugee?

| | |
|--|--|
| Which instrument contains the applicable refugee definition? | |
|--|--|

List the required elements for inclusion below and consider if each one is satisfied.

| | | |
|----------|--|--|
| a | | |
|----------|--|--|

| | | |
|----------|--|--|
| b | | |
|----------|--|--|

| | | |
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| c | | |
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| d | | |
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| Is Lek a refugee? | YES/NO |
|-------------------|--------|

2 Does UNHCR have a role to play in this case? Please explain.

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Answer key to Chapter 2 exercises

Review:

- 1 d The refugee definition contained the 1951 Convention requires the person concerned to have a well-founded fear of persecution which is **linked to one or more of the five grounds** listed in Article 1A(2). These are: race, religion, nationality, membership of a particular social group, and political opinion.
- 2 c A social group is a group of persons who share a common characteristic other than their risk of being persecuted which sets them apart from others in a society, or who are perceived as a group by society. One such characteristic, which is innate, is sex (male or female). In addition to the shared characteristic of being male, one can distinguish a sub-group or persons who have in common the unchangeable fact of being of a certain age, i.e. between 18 and 45 years old. The group of "men within this particular age bracket" may be perceived by the authorities and/or society as a particular social group, which exists irrespective of whether or not they are subject to persecution.
- 3 b Fear of being forced to comply with a military service obligation, or of prosecution and punishment for failing to do so, does not in itself give rise to a well-founded fear of persecution. However, this may be the case, provided there is a link with a 1951 Convention ground, if the obligation to undertake military service in itself amounts to persecution; where the conditions of military service involve discriminatory treatment or otherwise be in breach of human rights standards, or where the person concerned would be punished for not complying with a military service obligation which is in itself persecutory, or where the punishment is excessive, disproportionately severe, or otherwise not in keeping with internationally recognized standards.
- 4 False Gender refers to the socially or culturally defined identities, status, roles and responsibilities that are assigned to individuals because of their sex – male or female. Thus, a man's gender may also affect the reasons for which persecution is experienced, or the form which persecution takes.
- 5 False Violent acts within the private sphere may give rise to a valid claim for refugee status under the 1951 Convention if the following criteria are met: the applicant has a fear of acts which are serious enough to amount to persecution and the authorities are unable or unwilling to prevent them, provided the reason for the persecution is linked to a 1951 Convention ground, or the State's unwillingness of inability to provide protection is for a Convention reason.
- 6 d If an asylum-seeker has contacts with the diplomatic or consular authorities of his or her country of origin abroad, this may indicate that he or she does not have a well-founded fear of persecution. However, this is not always the case. A request for the issuance of a passport or other documents, for example, may constitute administrative assistance rather than the applicant availing him or herself of the consular protection of the authorities of the country of origin.

- 7 False There are a number of conditions which must be met for the notion of an internal flight alternative to apply. To begin with, an internal flight alternative is normally only relevant where persecution emanates from non-State actors. In countries where an area can be identified which is practically, safely and legally accessible to the applicant, it must also be determined whether he or she could reasonably be expected to establish him or herself there and lead a normal life. The UNHCR *Guidelines on the “Internal Flight or Relocation Alternative”* of 23 July 2003 contain detailed guidance on the subject.
- 8 True A well-founded fear of persecution for one or more of the reasons listed in Article 1A(2) of the 1951 Convention may arise while the person concerned is outside the country of origin or habitual residence – he or she may become a refugee “*sur place*”. This may be due to events which occur there after the person’s departure, and over which he or she has no control, or because of his or her activities abroad, if they have, or are likely to, come to the attention of the authorities and there is a reasonable possibility that they will attract a persecutory response in case of return.
- 9 c Some hold the view that persons fleeing a war or civil war cannot be refugees within the meaning of the 1951 Convention, because the latter does not refer to armed conflict. This is clearly wrong. Anyone who meets the criteria of the refugee definition set out in the 1951 Convention is a refugee, and this is no different for those who have fled a situation of armed conflict. Their fear of persecution may or may not be related to the conflict, and as with all asylum applications, it is necessary to establish whether it is well-founded and linked to a Convention ground. Where these criteria are not met, the individual may nevertheless qualify for refugee status under a wider refugee definition (e.g. on the basis of a regional refugee instrument and/or national legislation, and under UNHCR’s international protection mandate). Often, persons fleeing armed conflict arrive in the host country in large numbers. In such situations, it may be appropriate for the host State or UNHCR to recognize the whole group as refugees on a *prima facie* basis.

Case C

| | | |
|---|---|---|
| 1 Is Mona a refugee? | | |
| Which instrument contains the applicable refugee definition? | | The 1951 Convention, since Batavia is Party to it. |
| List the required elements for inclusion below and consider if each one is satisfied. | | |
| a | Outside the country of origin or habitual residence | Yes. This element is satisfied. |
| b | Well-founded fear | <p>Mona has applied for asylum. In her application, she explains that she is afraid to return. Hence, the subjective element of this requirement (“fear”) is satisfied.</p> <p>There are reports of arrest and detention, torture and killings of members of Mona’s ethnic group. Those targeted were selected at random by the security forces, although such incidents are said to be increasingly frequent and widespread.</p> <p>Putting the two elements together, it would appear that there is a reasonable possibility that she would face such treatment at the hands of the security forces if she were to be returned to Riverland. Her fear is thus well-founded.</p> |
| c | Persecution | Yes. This element is satisfied: arbitrary arrest and detention, torture and extrajudicial killings are serious violations of international human rights guarantees. They amount to persecution. |
| d | 1951 Convention ground | Yes. In Mona’s case, the risk of persecution is linked to her ethnic origin, in the context of an armed struggle for control of Riverland between this ethnic |

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| | | <p>group and another one, which currently controls the country's government. Thus, the relevant Convention grounds are:</p> <ul style="list-style-type: none"> ▪ race (ethnic origin) ▪ (imputed) political opinion ▪ nationality (ethnic origin) |
| <p>Is Mona a refugee?</p> | | <p>YES.</p> <p>Mona meets the inclusion criteria of the refugee definition. As noted in the introduction to the exercises in this chapter, it is assumed that exclusion considerations do not arise (the question of exclusion will be discussed in chapter 3 below).</p> |
| <p>2 What are the arguments against the rejection decision of the authorities of Batavia?</p> | | |
| <p>The fact that Mona did not fulfil the criteria of the refugee definition when she left Riverland does not mean that she cannot qualify for refugee status at the present time. In her case, circumstances which mean that she now has a well-founded fear of persecution in her country of origin have arisen after her departure. She has become a refugee while in Batavia, and has a <i>sur place</i> claim.</p> <p>The fact that she never faced security problems while she lived in Riverland is irrelevant with regard to her current eligibility for refugee status. The analysis of whether or not an applicant comes within the scope of the refugee definition is forward-looking: what needs to be established, as a general rule, is whether there is a reasonable possibility that the person concerned will be subjected to persecution linked to a Convention ground if returned to the country of origin at present or in the future. Past persecution is generally an indication that such a risk exists, but a person's fear of persecution may be well-founded even if he or she has not suffered such treatment previously (see paragraph 45 of UNHCR's <i>Handbook</i>)</p> | | |

Case D

| | | |
|---|---|---|
| 1 Do you agree with the reasoning of Titania’s asylum authorities? Please elaborate. | | |
| No. The asylum authorities of Titania appear to have applied a very superficial analysis: they only considered the words which Bashir used to describe his situation – i.e., that he “had no future in Oberon” – and concluded that this was not foreseen by the 1951 Convention, without examining the reasons for Bashir’s claim. However, in doing so, the asylum authorities have failed to properly determine whether Bashir meets the criteria of the refugee definition. | | |
| 2 Does Bashir meet the inclusion criteria of the refugee definition contained in the 1951 Convention? List the required elements for inclusion below and consider whether each of them is satisfied: | | |
| a | Outside the country of origin or habitual residence | Yes. This element is satisfied. |
| b | Well-founded fear | Yes. The subjective element required (“fear”) is satisfied: Bashir has submitted an asylum application. The treatment of members of Bashir’s ethnic minority have by the Government of Oberon over the past fifteen years is well documented. It involves serious violations of the civil and political rights of the members of this ethnic group (withdrawal of citizenship; prohibition of political parties and other associations; imprisonment and ill-treatment of some who have exercised their right to freedom of expression) and also of economic and social rights (no access to public education). Bashir himself has suffered serious violations of his human rights at the hands of the authorities. It is clear that there is a reasonable possibility that he would continue to be treated in this way if returned to Oberon. Thus, the objective element is also satisfied. Bashir’s fear is well-founded. |
| c | Persecution | Yes. This element is satisfied: the members of Bashir’s ethnic group are subjected to discrimination which severely affects their enjoyment of a number of human rights and amounts to persecution, either individually or |

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| | | certainly on cumulative grounds. |
| d | 1951 Convention ground | Yes. Bashir's fear of persecution is linked to his ethnic origin. The relevant Convention grounds are race and nationality. |
| Is Bashir a refugee? | | <p>YES.</p> <p>Bashir meets the inclusion criteria of the refugee definition. As noted in the introduction to the exercises in this chapter, it is assumed that exclusion considerations do not arise (the question of exclusion will be discussed in chapter 3 below).</p> |

Case E

| | | |
|---|---|---|
| 1 In your view, is Silvia eligible for refugee status? | | |
| Which instrument contains the applicable refugee definition? | | The 1951 Convention, since Betastan is Party to it. |
| List the elements of the refugee definition below and consider whether each of them is satisfied: | | |
| a | Outside the country of origin or habitual residence | Yes. This element is satisfied. |
| b | Well-founded fear | <p>Yes.</p> <p>The subjective element (“fear”) is satisfied: Silvia has submitted an application for asylum to the authorities of Betastan, in which she has stated her fear of return.</p> <p>In her asylum application, Silvia has expressed a fear of being forced back into prostitution. According to available information from reliable sources, the treatment she is likely to face if returned is being killed by the mafia. It is possible, on the basis of reliable country-of-origin information, to establish a reasonable possibility that her life would be at risk, if she were returned to Alphastan. Therefore, the objective element is also satisfied</p> <p>In Silvia’s case, the danger to her life emanates from a criminal organization in her country of origin. However, the State’s responsibility is engaged: due to widespread corruption among security forces and civilian administrators, the State is unable to protect women from the activities of the mafia.</p> <p>In view of the above, Silvia clearly has a well-founded fear.</p> |
| c | Persecution | Yes. This element is satisfied: murder amounts to persecution. |
| d | 1951 Convention grounds | Yes. In Silvia’s case, the fear of persecution is not linked to race, religion, nationality or political opinion. However, it is linked to the fact that she forms part |

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| | | of a particular social group which can be defined as: “women who have been forced into prostitution and managed to escape”. |
| | Is Silvia a refugee? | <p>YES.</p> <p>Silvia meets the inclusion criteria of the refugee definition. As noted in the introduction to the exercises in this chapter, it is assumed that exclusion considerations do not arise (the question of exclusion will be discussed in chapter 3 below).</p> |
| <p>2 (a) Is the fact that Silvia signed a contract with the office relevant with regard to her eligibility for refugee status?</p> <p>(b) Do you agree with the decisions reached by your colleagues on earlier, similar cases?</p> | | |
| <p>a No. It is not relevant. As we have seen above, Silvia has a well-founded fear of persecution for a Convention reason based on the existence of a reasonable possibility that her life will be in danger if she is returned to Alphastan. Whether or not she previously signed up to go abroad – voluntarily or otherwise – does not matter.</p> <p>b No. Rather than focusing on whether or not the women concerned “voluntarily” signed up to go abroad, the adjudicators should have examined the existence of a risk of persecution in case of their return to Alphastan.</p> | | |

Case F

| | |
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| 1 In your view, is Milan eligible for refugee status? | |
| Which instrument contains the applicable refugee definition? | In the first place, the 1951 Convention, to which Amarillo is Party. If Milan is found not to meet the criteria of the refugee definition contained in the 1951 Convention, the asylum authority of Amarillo would need to consider whether he comes within the scope of the wider refugee definition as set out in the 1984 Cartagena Declaration, which it has incorporated into its national legislation |
| List the elements of the refugee definition of the 1951 Convention below and consider whether each of them is satisfied: | |
| a | Outside the country of origin or habitual residence Yes. This element is satisfied. |
| b | Well-founded fear Yes. Milan left Verdana because his village was continuously shelled by both sides, and he was afraid for his life. The armed conflict in Verdana is still ongoing, and as a result, the lives and safety of those living in areas affected by the hostilities continue to be threatened. |
| c | Persecution Yes. If returned to Verdana, Milan would face the risk of death or serious bodily harm, and thus a serious human rights violation which meets the threshold of persecution. |
| d | 1951 Convention grounds No. It would appear that the threats to Milan's life and safety are not linked with any of the grounds listed in Article 1A(2) of the 1951 Convention. The reason why his village is targeted is its strategically important location. This results in indiscriminate threats for the lives and safety of its inhabitants. |
| Are the inclusion criteria of the 1951 Convention satisfied? | |
| NO | |
| Is Milan a refugee within the meaning of the | |
| YES | |

| | |
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| wider refugee definition applicable in Amarillo? | <p>According to the wider refugee definition set out in the 1984 Cartagena Declaration, which Amarillo has incorporated into its national legislation, the refugee definition includes “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order”.</p> <p>This wider refugee definition focuses on the objective risk to an individual as a result of indiscriminate threats, rather than a fear of persecution on a selective or discriminatory basis.</p> <p>In Milan’s case, the criteria of the wider definition are met. Under the asylum legislation of Amarillo, he qualifies thus for refugee status. He also meets the criteria of the extended refugee definition under UNHCR’s mandate, and is therefore of concern to the Office as a refugee.</p> <p>As noted in the introduction to the exercises in this chapter, it is assumed that exclusion considerations do not arise (the question of exclusion will be discussed in chapter 3 below).</p> |
|--|---|

Case G

| | | |
|---|---|--|
| 1 Is Lek a refugee? | | |
| Which instrument contains the applicable refugee definition? | The 1951 Convention, to which Saturnia is Party. | |
| List the required elements for inclusion below and consider if each one is satisfied. | | |
| a | Outside the country of origin or habitual residence | Yes. This element is satisfied. |
| b | Well-founded fear | Lek has expressed a fear of harm if returned to Marsia: he is afraid that the economic conditions there will make it impossible for him to earn a living. Hence, the subjective element of this requirement (“fear”) is satisfied. |

| | | |
|----------|------------------------|--|
| | | <p>However, not being able to find a job is not the only form of harm he would risk. Even though he has not said so himself, information about the situation in Marsia indicates that there is a reasonable possibility that the Marsian judicial authorities would sentence him to life imprisonment for having left the country illegally. Moreover, Lek would be considered a political criminal, and, given his lack of political connections, there is a reasonable possibility that he would be sentenced to death for treason.</p> <p>In view of the above, it can be objectively established that he has a well-founded fear of harm.</p> |
| c | Persecution | <p>It should be noted that the risk of not being able to find a job due to the general economic situation prevailing in the country of origin would not as such amount to persecution unless they are so severe that they deprive the person concerned of all means of earning a livelihood.</p> <p>However, if returned to Marsia, Lek would be put on trial for having left the country illegally. This raises the possibility that he may be fleeing legitimate prosecution rather than persecution. Given the available country-of-origin, the punishment he is likely to be subjected to if returned to Marsia clearly amounts to persecution:</p> <ul style="list-style-type: none"> ▪ Life imprisonment is excessive as punishment for having left the country illegally – as such, it would be a violation of Lek’s right not to be arbitrarily detained. ▪ The imposition of capital punishment for the same offence would also be in breach of fundamental human rights guarantees: under applicable international standards, the death penalty is permissible only for the most serious crimes. |
| d | 1951 Convention ground | <p>Yes.</p> <p>In Lek’s case, the risk of being sentenced</p> |

| | | |
|--|--|--|
| | | <p>to death in breach of international standards protecting his right to life is linked to the fact that the authorities consider him a political opponent because of his illegal departure from the country. Marsia’s criminal code, which prescribes life imprisonment for anyone who left the country illegally, also reflects the Government’s view according to which anyone who leaves the country without permission is a political opponent. Thus, the relevant Convention ground is imputed political opinion. It is applicable despite the fact that Lek was never politically active in Marsia.</p> <p>With regard to the risk of life imprisonment, Lek can also be considered to belong to a particular social group, which can be defined on the basis of an unchangeable characteristic as: “persons who have left Marsia without official permission.”</p> |
| Is Lek a refugee? | | <p>YES.</p> <p>Lek meets the inclusion criteria of the refugee definition. As noted in the introduction to the exercises in this chapter, it is assumed that exclusion considerations do not arise (the question of exclusion will be discussed in chapter 3 below).</p> |
| 2. Does UNHCR have a role to play in this case? Please explain. | | |
| <p>Saturnia is Party to the 1951 Convention and 1967 Protocol. It has primary responsibility for determining applications for asylum submitted on its territory, and it has enacted a national asylum law. Pursuant to Paragraph 8 of UNHCR’s 1950 Statute and Article 35 of the 1951 Convention, UNHCR has a responsibility to supervise the implementation of that Convention by Saturnia. Under certain circumstances, there may be a need for UNHCR to exercise its international protection mandate based on the Office’s 1950 Statute and subsequent General Assembly and ECOSOC resolutions. The information provided in the case summary does not suggest that the asylum determination procedure in Saturnia is falling short of the standards required under the 1951 Convention. Thus, there is nothing to indicate that UNHCR would need to intervene in the present case.</p> | | |

Chapter 3

Eligibility Criteria – Exclusion



Key objectives

Understand the concept of exclusion from international refugee protection

Be aware of the circumstances in which an individual may be excluded from refugee status

Know how to approach an exclusion analysis in cases involving Article 1F of the 1951 Convention

This chapter addresses the issue of exclusion, that is, the circumstances in which persons who meet the inclusion criteria of the 1951 Convention refugee definition are nevertheless denied international refugee protection under the 1951 Convention. The chapter briefly explains the kinds of situations in which the issue may arise and sets out the structure for decision-makers to follow when determining whether a person may be excluded from international refugee protection because they are receiving protection or assistance from a UN agency other than UNHCR or because they are considered undeserving of international refugee protection on account of certain serious criminal acts. It also addresses the consequences of exclusion.

3.1 Introduction

In addition to setting out the positive elements of the refugee definition which must be met if an individual is to qualify for refugee status, the 1951 Convention also stipulates that certain categories of persons are not eligible for international protection under its provisions. The conditions in which this is the case are defined in Articles 1D, 1E and 1F of the 1951 Convention. These provisions are usually referred to as the **exclusion clauses**, although, as seen below at 3.2, Article 1D operates as both an inclusion and an exclusion clause. Paragraph 7(b), (c) and (d) of the 1950 Statute contains provisions which are similar, though not identical, and which must be read in light of the exclusion clauses of the 1951 Convention.

“Exclusion” under Article 1E and 1F means that an individual who fulfils the criteria for inclusion under Article 1A(2) of the 1951 Convention cannot benefit from refugee status because he or she is not in need, or not deserving, of international refugee protection. Article 1D, on the other hand, applies to a special category of refugees, who like other refugees are in need of international protection, but for whom separate arrangements have been made to receive protection or assistance.

Like all exceptions to human rights provisions, the exclusion clauses of the 1951 Convention must be interpreted restrictively and applied with caution. Procedures in which exclusion is considered must offer procedural safeguards and involve a careful examination of the specific circumstances of the person concerned and require a thorough assessment of whether or not the relevant criteria are met. This applies in all cases where exclusion is considered, be it:

- At the eligibility stage, that is, in the course of the examination of an asylum application;
- In proceedings with a view to the possible cancellation of refugee status. **Cancellation** means a decision to invalidate refugee status which should not have been granted in the first place, either because the person concerned did not meet the

inclusion criteria, or because an exclusion clause should have been applied to him or her at the time of the initial determination; or

- Where a person who was properly recognized as a refugee engages in conduct within the scope of the exclusion clauses contained in Article 1F(a) or (c) of the 1951 Convention after recognition, which may give rise to the **revocation** of refugee status.

Exclusion should be distinguished from cessation under Article 1C of the 1951 Convention, which provides for the ending of refugee status because it is no longer necessary or justified. Cessation is discussed below in chapter 4.

Exclusion is also different from the expulsion of a refugee to a country other than the one where he or she fears persecution, which may be permitted on grounds of national security or public order (Article 32 of the 1951 Convention). In the limited circumstances set out in Article 33(2) of the 1951 Convention, the host State may also be permitted to return a refugee to his or her country of origin or habitual residence in application of an exception to the principle of *non-refoulement* (see above at 1.6.1). In either case, the person's refugee status remains in place.

It is important to note that exclusion cases often raise complex and difficult questions and should only be dealt with by decision-makers with the necessary knowledge and skills, with due regard to the guidance provided in the documents referred to throughout this chapter.

3.2 Exclusion of persons who are not entitled to the benefits of the 1951 Convention

As noted above, a special category of refugees is denied international refugee protection under the 1951 Convention because they are receiving protection or assistance from UN agencies other than UNHCR. Article 1D of the 1951 Convention provides:

"This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

During the drafting of the 1951 Convention, Article 1D was incorporated in order to exclude from the benefits of the Convention refugees who were receiving protection or assistance from the United Nations Relief and Works Agency for Palestinian

Refugees in the Near East (UNRWA). These were the “Palestine refugees” who had been displaced from that part of Palestine which became Israel as a result of the 1948 conflict. Since 1967, UNRWA has been providing assistance to a second group of refugees, that is, those Palestinians who were displaced from the Palestinian territories occupied by Israel during the 1967 Arab-Israeli conflict.

In today’s context, both of these groups, that is, the 1948 “Palestine refugees” and the 1967 “displaced persons” as well as their descendants fall within the scope of Article 1D. If such persons are inside the UNRWA area of operations they are excluded from the benefits of the 1951 Convention by virtue of the first paragraph of Article 1D, as they are deemed to be receiving protection or assistance from UNRWA. Currently, UNRWA is operating in Jordan, Syria, Lebanon, the West Bank and the Gaza Strip.

The second paragraph of Article 1D contains an inclusion clause ensuring the automatic entitlement of “Palestine refugees” and “displaced persons” to the protection of the 1951 Convention if, without their position being definitively settled in accordance with the relevant UN General Assembly resolutions, protection or assistance from UNRWA has ceased for any reason. This means that persons belonging to these two groups of Palestinian refugees are automatically entitled to the benefits of the 1951 Convention once they are outside UNRWA’s area of operations.

Article 1D applies to persons having the characteristics of refugees as defined in Article 1A of the 1951 Convention. Therefore, once it is determined that a Palestinian asylum-seeker falls within the scope of Article 1D by belonging to the special group of refugees covered by it, a separate inclusion analysis under Article 1A(2) of the 1951 Convention is not necessary. However, an examination of whether the individual has ceased to be a refugee under Article 1C (see chapter 4) or is excluded from refugee status under Articles 1E or 1F of the 1951 Convention (see below at 3.4) may be necessary depending on the circumstances of the case.

When examining cases involving Palestinian asylum-seekers, decision-makers should refer to the *Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugees* issued by UNHCR in October 2002. This Note contains guidance on the issues raised above as well as other relevant information pertaining to such cases.

It should be noted that asylum applications from Palestinian asylum-seekers who do not belong to either the 1948 “Palestine refugee” or 1967 “displaced persons” group, and therefore do not come within the scope of Article 1D, would need to be assessed under Article 1A(2).

3.3 Exclusion of persons who are not in need of international protection

The 1951 Convention also provides for denial of international refugee protection to persons who have rights akin to those of nationals of their country of residence. Article 1E of the 1951 Convention states:

"This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

This exclusion clause may only apply if the applicant has taken up regular or permanent residence in a country, and if the status given to him or her by that country means that he or she effectively enjoys the rights and obligations of its own nationals. It is of crucial importance that the status provides protection against *refoulement* as well as the right to return, re-enter, and remain in the country where the person concerned has taken residence. Article 1E essentially covers two types of situations:

- A person enters a country and applies for refugee status there, but already qualifies for another status in that country, which is close to citizenship and carries with it greatly facilitated naturalization prospects; or
- A person who has regular or permanent residency in a country and enjoys rights which are *de facto* the same as those of citizenship there moves from that country and claims asylum in another country. Article 1E does not apply, however, if the person concerned has a well-founded fear of persecution in the country he or she has left.

3.4 Exclusion of persons deemed "not deserving of international protection"

3.4.1 Exclusion under Article 1F – general considerations

The notion that some persons do not deserve the benefits of international refugee protection on account of certain serious crimes is expressed in Article 1F of the 1951 Convention, which 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 [or she] 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 [or she] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*

(c) *He [or she] has been guilty of acts contrary to the purposes and principles of the United Nations."*

The rationale behind this provision is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. Article 1F should therefore be applied scrupulously to those who come within its scope.

At the same time, decision-makers should be aware of the serious implications of the application of Article 1F. Exclusion means that a person who meets the inclusion elements of the refugee definition – and is therefore determined to be in need of international protection – is denied refugee status. This may have very severe consequences for the individual concerned. Therefore, decision-makers should interpret the exclusion clauses restrictively and exercise great caution when considering their application.

Article 1F contains an exhaustive list of the acts which may give rise to exclusion from international refugee protection on the grounds that the person concerned is undeserving of such protection. Only conduct which meets the criteria required under one or more of its clauses may lead to exclusion under this provision.

Detailed guidance on the interpretation and application of this exclusion clause can be found in UNHCR's *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* issued on 4 September 2003 (HCR/GIP/03/05) and the accompanying *Background Note*.

3.4.2 Applying Article 1F of the 1951 Convention

Inclusion should generally be considered before exclusion, so as to allow the decision-maker to examine both the reasons justifying refugee status and the factors related to exclusion in a holistic manner. The need for a full examination of all aspects of an individual's case also applies where the application of Article 1F is considered in the context of cancellation or revocation procedures, including where the individual concerned was recognized as a refugee on a *prima facie* basis, for example in a mass influx (see also above at 1.5.2 and 2.3.4).

Article 1F applies if there are “**serious reasons for considering**” that the applicant has committed, or participated in the commission of, an excludable crime. Clear and credible information is needed

to meet the “serious reasons” requirement. While it is not necessary to meet the standard of proof in criminal cases (e.g. “beyond reasonable doubt” in common law systems), the “balance of probabilities” threshold is too low. Likewise, a simple suspicion would not be a sufficient basis for a decision to exclude. The burden of proof lies, in principle, on the decision-maker. In other words, the State or UNHCR must show that there are indeed “serious reasons” for considering that the person concerned comes within the scope of Article 1F. This always requires an individualized assessment of the applicant’s conduct, including where he or she was a member of a repressive regime or a group that commits or advocates violent crimes, or if he or she took part in an armed conflict in the past. In exceptional circumstances, however, a reversal of the burden of proof may be justified. For further guidance on the standard and burden of proof in exclusion cases, please refer to UNHCR’s *Background Note on Exclusion*, at paragraphs 105–111.

When determining whether an applicant who has been found to meet the inclusion criteria of the refugee definition protection comes within the scope of Article 1F and should therefore be denied refugee status, the decision-maker should examine the following:

Step 1: Is exclusion triggered?

In the majority of cases, the question of exclusion does not arise. However, if there are indications that an applicant may have been involved in conduct within the scope of Article 1F, a thorough examination of all relevant aspects is required. Exclusion considerations may be triggered by statements of the applicant him or herself, or any other information which suggests that he or she may have been associated with excludable acts.

Step 2: Are there acts within the scope of Article 1F with which the applicant is linked?

Where the question of exclusion is triggered, decision-makers need to identify the acts which may give rise to the application of Article 1F. The relevant facts must be assessed in light of the legal criteria set out in Article 1F(a), (b) and/or (c). It should be recalled that only those types of conduct which are listed in Article 1F may result in exclusion under this provision. These are as follows:

▪ **Article 1F(a) – “Crimes against peace”**

According to the 1945 Charter of the International Military Tribunal (“London Charter”), a **crime against peace** involves the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing.” Given the

nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity, and only in the context of an international armed conflict (see UNHCR's *Background Note on Exclusion*, at paragraphs 26–29).

▪ **Article 1F(a) – “War crimes”**

Certain serious breaches of international humanitarian law constitute **war crimes**. Decision-makers should bear in mind that only acts which are committed during times of armed conflict, and which are linked to the conflict (the so-called “nexus” requirement), can constitute war crimes. In conducting an exclusion analysis, it is necessary to consider whether the armed conflict is international or non-international in nature, as different legal provisions are applicable to acts committed in either. War crimes may be committed by, and against, civilians as well as military persons.

Although war crimes were originally considered to arise only in the context of an international armed conflict, since the mid-1990s it has become generally accepted that serious violations of international humanitarian law may give rise to individual responsibility directly under international law and thus also constitute war crimes. Acts in breach of international humanitarian law which took place during a non-international armed conflict before that time could not be “war crimes” but may come within the scope of another category under Article 1F.

When determining whether a particular act constitutes a war crime, decision-makers should examine it in light of the definitions contained in the four Geneva Conventions of 1949 and Additional Protocols thereto of 1977, and Article 8 of the 1998 Rome Statute of the International Criminal Court (ICC). War crimes cover such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial. Further guidance on this ground for exclusion can be found in UNHCR's *Background Note on Exclusion*, at paragraphs 30–32.

▪ **Article 1F(a) – “Crimes against humanity”**

Crimes against humanity are inhumane acts (such as, for example, genocide, murder, rape and torture), when committed as part of a systematic or widespread attack against a civilian population. Crimes against humanity may take place during an armed conflict or in peacetime. Any person can commit crimes against humanity, if his or her acts meet the aforementioned criteria. The relevant definitions can be found in a number of international instruments, including, in particular, the 1945 London Charter, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and other Cruel, Inhuman and Degrading

Treatment or Punishment, the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and the 1998 Statute of the ICC. For more details, please refer to UNHCR's *Background Note on Exclusion*, at paragraphs 33–36.

- **Article 1F(b) – “Serious non-political crimes committed outside the country of refuge prior to admission to that country as a refugee”**

When determining whether an act constitute a “serious crime” for the purposes of an exclusion analysis, decision-makers should judge the seriousness of a crime against international standards. Whether or not a crime is “non-political” within the meaning of Article 1F(b) will depend on a number of factors, including, in particular, the motivation, context and methods, as well as the proportionality of the crime in relation to its objectives (see also below at 3.3.3.3).

Unlike Article 1F(a) and (c), this exclusion clause is limited in its geographical and temporal scope. Crimes committed within the country of refuge could not give rise to exclusion from international refugee protection under Article 1F(b). Rather, such acts would need to be dealt with in accordance with the host country's national criminal law process and, in case of particularly grave crimes, could give rise to expulsion under Article 32 or the application of an exception to the principle of *non-refoulement* (see above at 3.1). For more detailed guidance on the interpretation and application of Article 1F(b), see UNHCR's *Background Note on Exclusion*, at paragraphs 37–45.

- **Article 1F(c) – “Acts contrary to the purposes and principles of the United Nations”**

The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter. This exclusion ground would apply to acts which, on account of their gravity and impact, are capable of affecting international peace, security and peaceful relations between States, or serious and sustained human rights violations. In principle, only persons in positions of authority in a State or State-like entity could commit such acts. For further guidance on the kinds of conduct which may fall within the scope of Article 1F(c), see UNHCR's *Background Note on Exclusion*, at paragraphs 46–49.

Decision-makers must also examine whether there is a link between the applicant and the excludable acts. Information on the applicant's background and/or activities which suggests that such a link exists may be provided by the applicant him or herself or other sources (e.g. country-of-origin or other information relevant to the applicant's background and/or profile). Such information must be credible and reliable. Where the information linking an applicant to acts within the scope of Article 1F emanates from the authorities in the country of origin (for example, an extradition request), decision-makers will need to exercise caution and examine

carefully whether the applicant is fleeing legitimate prosecution or persecution, as discussed above at 2.2.3.4.

Step 3: Has the applicant incurred individual responsibility for the acts in question?

Once it has been determined that the applicant is associated with conduct within the scope of Article 1F, decision-makers must examine whether he or she incurred individual responsibility for the acts in question. This will be the case if there is credible and reliable information on the basis of which it can be established that the applicant perpetrated the crime(s) him or herself, or that he or she participated in the commission of crimes by others, for example through planning, ordering or instigating, or by making a substantial contribution, which may take the form of aiding or abetting, or participating in a joint criminal enterprise. Moreover, under certain circumstances, persons in a position of authority in a military or a civilian hierarchy may be held responsible for crimes committed by their subordinates.

Decision-makers must also establish whether there are serious reasons for considering that the applicant acted with the intent (as to his or her own conduct or its consequences) and knowledge (as to relevant circumstances or the consequences of his or her conduct) necessary to commit the crime(s) in question. This is referred to as the mental element of the crime, or *mens rea*.

Where the mental element (*mens rea*) is lacking, individual responsibility does not arise. This may be the case, for example, because of insanity, mental handicap, involuntary intoxication or lack of mental capacity due to immaturity. The latter is particularly relevant for determining individual responsibility of a child (see below at 3.4.3.1).

It is also necessary to examine whether the applicant has a valid defence, that is, if there are circumstances exempting him or her from liability for the crime(s) he or she committed or participated in. A defence may apply, for example, if the applicant acted under duress resulting from an imminent, serious threat against him or herself or another person, or in self-defence. As part of a comprehensive exclusion analysis, decision-makers should examine the possible existence of circumstances which would negate individual responsibility, even if this has not been raised by the applicant.

Guidance on the criteria which must be met for individual responsibility to arise, and on the grounds negating individual responsibility can be found in UNHCR's *Background Note on Exclusion*, at paragraphs 50–63 and 64–75, respectively.

Step 4: Proportionality assessment

If there are serious reasons for considering that the applicant is individually responsible for acts within the scope of Article 1F, the final step in the exclusion analysis consists of assessing whether exclusion would be in keeping with the general legal principle of proportionality. Decision-makers must weigh the seriousness of the crime(s) in question against the potential consequences of exclusion for the individual concerned, that is, the treatment which the applicant is likely to face, if he or she were to be excluded. The existence or otherwise of effective protection mechanisms under international or regional human rights instruments is an important factor in this regard. If it is found that the seriousness of the crimes in question outweighs the risks resulting from denial of refugee status, the applicant should be excluded. If, on the other hand, an applicant who is responsible for activities which fall at the lower end of the scale (for example, isolated incidents of looting by soldiers) would face severe persecution on return, exclusion may be considered disproportionate (see UNHCR, *Background Note on Exclusion*, at paragraphs 76–78).

3.4.3 Special issues

3.4.3.1 Exclusion for acts committed when the applicant was a child

In principle, Article 1F can be applied for crimes committed when the applicant was a child, that is, under the age of 18. However, when analyzing cases of this nature, a number of specific issues must be taken into account.

First, Article 1F may be applicable only if, at the time the acts in question took place, the applicant had reached the **age of criminal responsibility** – that is, the age below which a child cannot commit a crime (as opposed to the age of majority – that is, the age at which a person acquires the full legal rights of an adult). There is no internationally binding standard as to which age should be used, although Article 40 of the CRC recommends that States establish a minimum age. If the age of criminal responsibility is different in the country of origin and the country of asylum, the higher should normally be applied.

If the child has reached the age of criminal responsibility, the next step is establishing whether he or she had the necessary **mental capacity** to commit the crime(s) in question. It is necessary to determine whether the child was mature enough to comprehend the nature and consequences of his or her acts. In cases involving child soldiers, relevant factors in the analysis include the child's age when becoming involved in the armed group; reasons for joining (voluntary or coerced?); consequences of refusal to join; length of time as member; forced use of drugs, alcohol, medication; level of

education and understanding; trauma, abuse or ill-treatment suffered; absence of positive role models etc. If the child did not have the requisite mental capacity, individual responsibility does not arise. The younger the child, the greater the presumption that he or she did not have the necessary mental capacity at the time. The child's maturity and any other relevant factors also need to be taken into account when examining the existence of a defence, as well as during the proportionality assessment.

For further guidance on this subject, please refer to UNHCR's *Background Note on Exclusion*, at paragraphs 91–93.

3.4.3.2 Exclusion in mass influx situations

As noted earlier, exclusion always requires an individualized assessment. Article 1F of the 1951 Convention may never be applied on a group basis. This applies in the context of individual refugee status determination as well as in situations of mass influx, where refugee status is often determined on a *prima facie* basis (see above at 1.5.2 and 2.3.4). If there are indications that certain persons among a group of refugees may come within the scope of Article 1F, this should trigger a review of their eligibility for refugee status in an individual procedure during which both inclusion and exclusion aspects should be considered. Depending on the circumstances, this may lead to the cancellation or revocation of their status (see above at 3.1).

As noted above at 2.3.4, the fact of having participated in armed conflict does not of itself justify the application of an exclusion clause, but the examination of asylum claims submitted by former combatants should include an in-depth assessment of their conduct in light of the criteria of Article 1F.

3.4.3.3 Exclusion and "terrorism"

The question of exclusion frequently arises in the context of crimes referred to as acts of "terrorism". In many instances, it will not be necessary to consider whether such acts give rise to exclusion: where the person alleged to have been involved in "terrorist" crimes fears legitimate prosecution rather than persecution, he or she does not meet the inclusion criteria of the refugee definition and his or her claim will be rejected on that basis (see above at 2.2.3.4). If it is established, however, that the person concerned has a well-founded fear of persecution for reason of a 1951 Convention ground, an exclusion examination is required.

Cases of this nature must be handled with great care. On the one hand, it is important that persons who are undeserving of international protection do not obtain refugee status. On the other hand, the asylum claim of a person who belongs to a particular organization or who is suspected of having committed terrorist acts should be examined in a fair and efficient procedure in which the

context and circumstances of the individual case are assessed against the criteria of Article 1F, including the requirement to establish whether the standard of proof under that provision (“serious reasons for considering”) is met.

Article 1F(b)

Applicable if the crime in question is:

- Serious:** The act would be considered a serious crime in most jurisdictions.
- “Non-political”:** A crime is considered “non-political” for the purposes of this exclusion clause if one or more of the following apply:
 - It was committed predominantly for other motives (e.g. personal reasons or gain);
 - There is no clear link between the crime and the alleged political objective;
 - The act in question is disproportionate to the alleged political objective;
 - The political objective is not consistent with human rights and fundamental freedoms.
- Committed outside the country of refuge;** and
- Prior to admission to that country as refugee:** Before the applicant established physical presence in the host country.

When considering the applicability of Article 1F in such cases, decision-makers should determine whether the specific acts imputed to the individual concerned meet the criteria set out in that provision, rather than focusing on the “terrorism” label. Most acts of violence commonly referred to as “terrorist” will constitute serious non-political offences within the meaning of Article 1F(b) of the 1951 Convention, particularly if they indiscriminately endanger or harm civilians. While they may be politically motivated, they are nevertheless likely to give rise to exclusion, as in many such cases the link between the crime and the alleged political purpose will not be sufficiently close, and/or the means employed cannot be considered proportionate to their goal.

Increasingly, extradition treaties and UN instruments pertaining to certain aspects of terrorism specify that the crimes specified therein are to be regarded as non-political for their purposes. Such a designation is significant in determining the political element of a crime in the Article 1F(b) context, but whether or not the act(s) in question give rise to exclusion should nevertheless be considered in

light of all relevant factors and assessed against the criteria which must be met for this exclusion clause to apply.

Article 1F(c) – “acts contrary to the purposes and principles of the United Nations” – could also be relevant in cases involving terrorist acts, if these acts impinge on the international plane in terms of their gravity, international impact, and implications for international peace and security. Leaders of groups responsible for such acts could come within the scope of this exclusion clause.

As with all cases involving Article 1F, an exclusion assessment with regard to conduct referred to acts of terrorism would need to include a determination on the applicant’s individual responsibility. This also applies where a person’s name forms part of a list of suspected terrorists or if the group he or she is a member of has been designated as terrorist organization by the international community, a regional body or a State. Such designation will regularly trigger exclusion considerations but it does not as such form a basis for the application of Article 1F nor does it in and of itself justify a presumption of individual responsibility for excludable acts.

The applicability of Article 1F to acts considered to be terrorism is addressed in paragraphs 37–45, 49 and 79–86 of UNHCR’s *Background Note on Exclusion*.

3.5 Consequences of exclusion

If it is established that an exclusion clause applies, the person concerned cannot be recognized as a refugee and benefit from international protection under the 1951 Convention, nor can he or she fall within UNHCR’s international protection mandate. The situation of such a person is governed by legislation of the host State applicable to the presence on its territory of foreigners who are not refugees.

While an excluded person is not entitled to the protection against *refoulement* of refugees as provided under Article 33 of the 1951 Convention and customary international law, other international standards continue to apply to him or her. In particular, any individual who would be exposed to torture or other serious human rights violations is protected by a number of international and regional human rights instruments to which the host State is a party. The return of any person to torture or other cruel, inhuman or degrading treatment or punishment is prohibited under customary international law, and as such binding on all States, regardless of whether or not they have ratified the relevant instruments (see also above at 1.6.1).

If an applicant is excluded, his or her family members or dependants are not automatically excluded as well. Their situation must be determined on an individual basis. They will qualify for refugee status if it is established that they have a well-founded fear

of persecution linked to a Convention reason in their own right, even if this fear of persecution results from their being related to someone who was found to be excludable. In such cases, the excluded applicant cannot obtain derivative refugee status (that is, recognition as a refugee of a family member or dependant of a recognized refugee on family unity grounds). The family members and/or dependants of the excluded applicant will be excluded only if they themselves come within the scope of an exclusion clause. See also UNHCR's *Background Note on Exclusion*, at paragraphs 21–22 and 94–95.

Summary

Exclusion

- Means that an individual who meets the inclusion criteria for refugee status is nevertheless denied international refugee protection because he or she receives protection or assistance from a UN agency other than UNHCR or is not in need, or not deserving, of such protection.
- The circumstances in which exclusion from international refugee protection may be justified are provided for in Articles 1D, 1E and 1F of the 1951 Convention.
- Like all exceptions to human rights provisions, the exclusion clauses of the 1951 Convention must be interpreted restrictively. Procedures for the application of an exclusion clause must offer procedural safeguards.
- Those to whom an exclusion clause of the 1951 Convention applies are not eligible for refugee status. However, such persons continue to enjoy protection under other instruments, particularly international and regional human rights law.

Exclusion Clauses of the 1951 Convention

Those not entitled to the benefits of the 1951 Convention (Article 1D):

- Article 1D applies to a special category of refugees for whom a UN agency other than UNHCR has been designated to provide protection or assistance.
- In today's context, Palestinians who are refugees as a result of the 1948 or 1967 Arab-Israeli conflicts, and who are receiving (or are eligible to receive) protection or assistance from the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), are excluded from the benefits of the 1951 Convention while they are inside UNRWA's area of operations.

Those considered not in need of international protection (Article 1E):

- Article 1E refers to persons who are recognized by their country of residence as having the rights and obligations which are attached to the possession of nationality of that country, and who effectively enjoy these rights.

Those deemed not to be deserving of international protection (Article 1F):

- Article 1F provides for the exclusion of those for whom there are serious reasons for considering that they
 - a Have 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 Have committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 - c Have been guilty of acts contrary to the purposes and principles of the United Nations.

Key Points on Exclusion under Article 1F

- The primary purpose of Article 1F of the 1951 Convention is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.

- The types of conduct which may give rise to exclusion are enumerated exhaustively in Article 1F.
- Article 1F should be applied scrupulously albeit with great caution, in view of the potentially very serious consequences of exclusion for the individual concerned.
- Inclusion should generally be examined before exclusion.
- To meet the standard of proof under Article 1F (“serious reasons for considering”), credible and reliable evidence is required. The burden of proof lies, as a general rule, on the decision-maker, that is, the State or UNHCR.

Stages of the Article 1F Analysis:

- When examining the applicability of Article 1F of the 1951 Convention, decision-makers should structure their analysis along the following lines:
 - 1 Is exclusion triggered? If yes:
 - 2 Are there acts within the scope of Article 1F with which the applicant is associated? If this is the case:
 - 3 Can the applicant be held individually responsible for the acts in question? If this, too, is established:
 - 4 Would exclusion be proportionate in view of the seriousness of the applicant’s crime(s), weighed against the potential consequences of exclusion for him or her?
- When determining the applicability of Article 1F of the 1951 Convention, decision-makers should refer to the guidance contained in UNHCR’s *Guidelines and Background Note on Exclusion*, issued in September 2003

Essential reading

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992), paragraphs 144–180

UNHCR, *Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugees*, October 2002

UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, issued on 4 September 2003 (HCR/GIP/03/05) and accompanying Background Note

UNHCR, *Note on Cancellation of Refugee Status*, 22 November 2004

Chapter 3 – Exercises

Review:

- 1 Exclusion means denial of refugee status to a person who does not have a well-founded fear of persecution for a 1951 Convention reason. *True or false?* Please explain.
- 2 The rationale behind the exclusion clauses of Article 1F is to protect the national security of the host country. *True or false? Please explain.*
- 3 Which of the following kinds of conduct could **not** fall within the scope of Article 1F?
 - a Systematic torture of opponents to the regime.
 - b Killing of prisoners of war.
 - c Shoplifting in the country of asylum.
 - d Capturing children of insurgent fighters and threatening their execution unless the insurgents surrender.
- 4 When submitting her asylum application, Ms X is asked to fill in a questionnaire. She writes the following: “Some five years ago, I took part in the civil war in my country of origin. I was part of a rebel group. We were trying to end the brutal oppression of our people by government forces. But we did not succeed. After about one year, we were defeated by the army. After the civil war was over, I returned to work on my farm. I had lost so many friends. I decided never to fight again. I could stay and work normally at the farm until some three months ago, when the government began to threaten former insurgents. After a former comrade of mine was killed, I decided to flee.” As the adjudicator to whom the file has been assigned, you should do the following (please circle the **correct** answer):
 - a Decide that Ms X’s claim is inadmissible because she is a combatant.
 - b Exclude Ms X on the basis of Article 1F(a) – war crimes.
 - c Consult country-of-origin information and decide on Ms X’s application on the basis of her initial statement and any relevant information you can obtain.
 - d Consult relevant country-of-origin information in preparation for the eligibility interview and explore Ms X’s role and activities during the conflict.
- 5 For the standard of “serious reasons for considering” that an applicant has committed acts within the scope of Article 1F to be met, there must be (please circle the **correct** answer):
 - a A suspicion.
 - b Clear and credible evidence/information.
 - c Proof beyond reasonable doubt.
 - d An indictment by a court.
- 6 Mr Y has participated in the murder of a well-known businessman by driving the getaway car. Article 1F may be applicable to him, regardless of the fact that he did not shoot the person himself and that if he had not driven the car, another person was ready to do so. *True or false?* Please explain.

- 7 The application of an exclusion clause of the 1951 Convention means that the individual concerned (please circle the answer which is **not correct**):
- a Does not come within UNHCR’s international protection mandate.
 - b Is liable to deportation under the host State’s aliens legislation.
 - c Is not entitled to protection or assistance under the 1951 Convention.
 - d Is not entitled to protection under international and/or regional human rights instruments.
- 8 Article 1F of the 1951 Convention cannot be applied to acts committed when the applicant was a child. **True or false? Please explain.**
- 9 Which of the following statements is **not correct**?
- a Where the applicability of an exclusion clause of Article 1F is examined in the context of acts considered to be of a “terrorist” nature, the decision-maker should focus on the nature of the acts rather than the label “terrorist”.
 - b Even if certain acts have been designated as “non-political” in extradition law, the analysis of whether or not such acts could give rise to exclusion from refugee status should be conducted in light of the criteria set out in international refugee law.
 - c Given that Article 1F does not explicitly refer to acts of “terrorism”, such crimes are outside the scope of the exclusion provisions.
 - d In terrorism-related cases, as in all cases, an exclusion clause of Article 1F of the 1951 Convention may be applied only if there are serious reasons for considering that the person concerned incurred individual responsibility for acts within its scope.

Case H

A former Latin American dictator has come to a European country to seek specialized medical treatment. When his presence in the country becomes known, human rights groups begin calling for his arrest and trial for human rights offences: during almost two decades in which the dictator ruled his country, the security forces were engaged in widespread torture and assassinations of members of the political opposition as well as persons believed to be supporting, or sympathizing with, them.

Due to all the publicity surrounding the case, the authorities of the dictator’s country of origin, which has undergone significant changes and returned to a democratic government in the ten years since the dictator stepped down, issue a statement to the effect that they will consider commencing a criminal investigation into the dictator’s past upon his return.

Hearing of this, the dictator becomes worried and claims asylum in the host country from his hospital bed.

1 Should the dictator be excluded?
Please elaborate.

2 Which provision(s) of the 1951 Convention would be relevant?

Case J

Eric is a national of Redland who has applied for asylum in Blueland. During his interview with the asylum authority, Eric explains that he belonged to an organization which opposed the authoritarian government of Redland and sought to bring about democratic change. After many years of unsuccessful campaigning, during which a number of the members of the organization were subjected to harassment and threats by the authorities, the organization decided to carry out selective attacks against installations of the police and the military.

Eric was personally involved in one incident, in which he and three other members of the organization set off a car bomb in a busy street of the capital when a military truck passed by. Eric connected the wires of the car bomb, which had been planted by two other members of the organization and was detonated by the fourth in the group. Three soldiers were seriously injured. Two civilians who happened to walk past the car just as it exploded were killed. Eric said that he was sorry about the death of the civilians, which he described as unfortunate but inevitable. This was the only attack carried out by the organization.

Immediately after the incident, the authorities began arresting members of the organization. There are reports from a number of renowned human rights groups according to which some of those arrested were tortured and subsequently disappeared. Eric feared that he too would be arrested. Therefore, he decided to leave for Blueland and apply for asylum. Blueland is Party to the 1951 Convention and 1967 Protocol. It has also ratified the 1984 Convention Against Torture and the 1966 International Covenant on Civil and Political Rights.

1 Which issues does this case raise?

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| List the issues in the order in which they should be considered | |
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2. Does Eric qualify for refugee status?

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| Does Eric meet the inclusion criteria of the refugee definition? List the relevant criteria below and consider if they are met. | |
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| d | |
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| Are the inclusion criteria met? | YES/NO |
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| Do exclusion considerations arise in this case? | YES/NO |
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| If so, which is the relevant provision of the 1951 Convention? | |
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| List the stages of the exclusion analysis below and note the issues which would need to be considered at each of these stages. | | |
| Step 1 | | |
| Step 2 | | |
| Step 3 | | |
| Step 4 | | |
| Does an exclusion clause of the 1951 Convention apply? | | YES/NO |

Answer key to Chapter 3 exercises

Review:

- 1 False If it is found that an applicant does not have a well-founded fear of persecution for a 1951 Convention reason, his or her claim for refugee status should be **rejected**. The individual concerned does not meet the inclusion criteria of the refugee definition. If this is the case, it is not necessary to conduct an exclusion analysis. The **exclusion** clauses of the 1951 Convention provide for denial of refugee status to a person who does meet the inclusion criteria, but who is receiving protection or assistance from a UN agency other than UNHCR, or who is considered not to be in need, or not deserving, of international refugee protection.
- 2 False The rationale behind Article 1F of the 1951 Convention is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses are not concerned with national security considerations. Other provisions of the 1951 Convention are applicable where a refugee constitutes a threat to national security or public order, or a danger to the community of the host State. These are Article 32, which sets out the circumstances in which the expulsion of a refugee to a country where he or she does not risk persecution may be permitted, and Article 33(2), which exhaustively enumerates the circumstances in which it may be permissible to return a refugee to the country of origin or former habitual residence.
- 3 c Shoplifting in the country of asylum does not come within the scope of Article 1F. It is not covered by Article 1F(a) or (c), nor does it meet the criteria set out in Article 1F(b): shoplifting clearly does not meet the seriousness threshold required under that provision. Moreover, the application of Article 1F(b) is limited both in geographical and temporal terms: acts committed by an asylum-seeker in the country of asylum would not meet these criteria. Where an asylum-seeker does engage in such conduct, the normal criminal process of the host country would be applicable to him or her. By contrast, the other examples listed under this question would appear to constitute conduct coming within the scope of Article 1F as crimes against humanity (a) and war crimes (b) and (d).
- 4 d From the information provided, it would appear that Ms X is no longer a combatant and her claim should therefore not be decided to be inadmissible (note that even if there were indications that she could be an active combatant, a determination to this effect would normally require a procedure including an interview with the applicant). However, the information she provided about her past as a participant in an armed conflict makes it necessary to examine the applicability of Article 1F in her case. This always requires an individualized assessment, and a procedure which includes a

personal interview with the applicant and offers him or her an opportunity to consider, and respond to, any evidence linking him or her with excludable conduct. Thus, applying an exclusion clause without further proceedings, or only on the basis of country-of-origin information, would not be in keeping with the requirements of procedural fairness. Therefore, the correct way to proceed is that outlined at (d). Based on careful file preparation, the adjudicator should obtain further relevant information. It is necessary to know what exactly Ms X did during the armed conflict. Depending on the circumstances, she may or may not have been individually responsible for acts within the scope of Article 1F. The decision-maker must examine whether Ms X or the rebel group committed any serious violations of international humanitarian law which would amount to “war crimes”, and if so, whether she was individually responsible for them.

- 5 b The “serious reasons” standard required under Article 1F of the 1951 Convention is lower than that required for a criminal conviction (“proof beyond reasonable doubt” in common law jurisdictions), but higher than the balance of probabilities or a mere suspicion. Clear and credible information from reliable sources is needed. An indictment by a national court may not meet this standard, as the evidence required under applicable legislation may not be sufficient to meet the “serious reasons” standard (although this would be the case for indictments put together by the International Criminal Tribunals for the Former Yugoslavia or Rwanda).
- 6 True A person may be held individually responsible for a crime committed by someone else if he or she makes a substantial contribution in the knowledge that this will assist or facilitate the commission of the crime. The contribution may take the form of practical assistance, encouragement or moral support and must have a substantial effect on the commission of the crime. Driving the getaway car clearly constitutes a substantial contribution. Provided the driver is aware that he or she is thereby helping in the commission of the crime and there are no grounds negating his or her individual responsibility (e.g. if he or she acted under an imminent threat against his or her life and may therefore have a valid defence of duress), it will form the basis of a finding of individual responsibility. Whether or not someone else could have driven the car is irrelevant. What matters is that the conduct of the person concerned meets the criteria required for establishing individual responsibility.
- 7 d A person to whom an exclusion clause of the 1951 Convention applies cannot be recognized as a refugee and benefit from international protection under that Convention. Nor can the individual fall within UNHCR’s mandate. The host State may decide to deport an excluded person, but there is no obligation for the host State to do so. However, despite being unable to access international refugee protection under the 1951 Convention, an excluded individual is still entitled to be treated in a manner compatible with international law, and in particular, relevant human rights obligations.
- 8 False In principle, Article 1F of the 1951 Convention may be applicable to acts committed by persons under the age of 18. However, decision-makers must carefully examine whether they had reached the age of criminal responsibility

and, if so, whether such persons had the necessary mental capacity to commit a crime. It is also necessary to examine whether there are any other circumstances which would negate individual responsibility. If individual responsibility is established, a proportionality assessment is necessary, during which the child’s circumstances and vulnerability should also be taken into account.

- 9 c While it is true that Article 1F of the 1951 Convention does not mention acts of “terrorism”, and that there is not, as of yet, an internationally accepted definition of the term “terrorism”, most of the acts generally considered as “terrorist” come within the scope of the exclusion clauses contained in that provision. In particular, crimes which may be committed out of a political motivation, but which are either directed against civilians or which cause, or threaten to cause, indiscriminate harm to civilians, will normally fall within the scope of Article 1F(b) of the 1951 Convention.

Case H

| 1 Should the dictator be excluded? | | |
|---|---|--|
| <p>In a case like this, it may be tempting to answer this question immediately in the affirmative: someone like this dictator, who led a regime notorious for large-scale human rights violations, could not possibly be considered deserving of international protection as a refugee. And yet, “yes” may be the wrong answer to this question, because the issue of exclusion may well not arise at all.</p> <p>First, we need to examine whether the dictator would have a well-founded fear of persecution for a 1951 Convention reason in the first place – if this is not the case, the appropriate decision would be to reject his claim for refugee status on the grounds that he does not meet the inclusion criteria of the 1951 Convention. The exclusion clauses of Article 1F of the 1951 Convention may only apply to persons who would otherwise come within its refugee definition.</p> <p>On the basis of the information provided in the case summary, it is questionable whether the dictator would meet the inclusion criteria set out in Article 1A(2) of the 1951 Convention. Analyzing each element of the refugee definition in turn, you would need to consider the following:</p> | | |
| a | Outside the country of origin or habitual residence | This element is satisfied. The dictator is in a European country. |
| b | Well-founded fear | <p>The subjective element (“fear”) required is satisfied: the dictator has applied for asylum in the host country.</p> <p>The dictator fears being put on trial if returned to his country of origin, and in view of the statement issued by its authorities, there is a reasonable likelihood that this will happen. You would also need to examine whether, in light of available country-of-origin information, there is a reasonable likelihood that he might be otherwise at risk of harmful treatment.</p> |

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| c | Persecution | <p>If he returns, he risks being put on trial for the human rights abuses committed when he ruled the country. In principle, this would appear to be legitimate prosecution rather than persecution. The country is described as having become a democracy. You would need to examine whether the dictator’s trial and the punishment he could expect would be in keeping with international fair trial standards. If this is the case, he would not be facing persecution, but rather legitimate prosecution. This would most likely be the case, and if so, the analysis would stop here: the dictator would not meet the criteria for refugee status.</p> <p>You would, however, also need to determine whether the dictator could be at risk of persecution for other reasons, for example, whether there would be a risk to his life or physical integrity at the hands of certain groups or persons.</p> <p>If you find that the dictator would be at risk of persecution, you would need to examine whether the State would be willing and able to protect him. If this is not the case, for example, because the new authorities have not yet established full control over the security forces or certain private actors, the dictator may meet the inclusion criteria of Article 1A(2).</p> |
| d | 1951 Convention ground | <p>If it is established that there is a reasonable possibility that the dictator would be subjected to treatment amounting to persecution, it would be necessary to determine whether this would be related to a 1951 Convention ground. Political opinion could be relevant, but also membership of a particular social group – for example, if he and others who held positions of authority during his time in power are now the targets of revenge from those who suffered under his regime, as “persons responsible for human rights abuses under the former regime”.</p> |
| <p>If, based on the foregoing analysis, you were to come to the conclusion that the dictator has a well-founded fear of persecution for a 1951 Convention ground, an exclusion examination would be required.</p> | | |
| <p>2 Which provision(s) of the 1951 Convention would be relevant?</p> | | |
| <p>As outlined above, you would first need to consider the dictator’s claim in light of the criteria of Article 1A(2) of the 1951 Convention. If you find that he meets the inclusion criteria set forth therein, you will need to examine whether he is excludable under Article 1F.</p> <p>During the dictator’s time in office, the security forces committed serious human rights abuses, including, in particular, torture and extrajudicial killings. These acts could come</p> | | |

within the following categories of Article 1F:

- Article 1F(a) – crimes against humanity: this category covers inhumane acts which are widespread or systematic, and directed against civilians
- Article 1F(b) – serious non-political crimes committed outside the country of refuge prior to admission to that country: this category would cover serious crimes committed by a State’s security forces which do not amount to crimes against humanity. Even if the perpetrators of such crimes may have acted with a political objective (e.g. silencing the opposition), these acts could not be regarded as political in nature, as their purpose was inconsistent with human rights and fundamental freedoms.
- Article 1F(c) – acts contrary to the purposes and principles of the United Nations: serious and sustained violations of human rights would fall within this clause, which is applicable, in principle, only to persons in positions of power in a State or State-like entity.

You would need to determine whether the dictator has individual responsibility for acts within the scope of Article 1F. It must be established whether there are serious reasons for considering that he himself committed excludable crimes or has responsibility for their commission by others, for example, through planning, instigating or ordering them, or because of his position of authority during the time in which he ruled the country. If you find that the criteria for establishing individual responsibility are met, proportionality considerations will not stand in the way of the dictator being excluded: in a case like his, the crimes would clearly outweigh the risk of persecution awaiting him upon return.

For details on the application of Article 1F of the 1951 Convention, see UNHCR’s *Background Note on Exclusion* issued in September 2003.

Case J

| | | |
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| 1 Which issues does this case raise? | | |
| It must be established whether Eric is eligible for refugee status under the 1951 Convention. This requires an examination of two issues: | | |
| <ul style="list-style-type: none"> i The inclusion criteria set out in Article 1A(2) of the 1951 Convention, and if they are met, ii Whether or not one of the exclusion clauses provided for in Article 1F of the 1951 Convention is applicable. | | |
| 2 Does Eric qualify for refugee status? | | |
| i Does Eric meet the inclusion criteria of the refugee definition? List the relevant criteria below and consider if they are met. | | |
| a | Outside the country of origin or habitual residence: | Yes. This criterion is satisfied. |
| b | Well-founded fear | Yes. The subjective element (“fear”) required is satisfied: Eric has applied for asylum in Blueland, |

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| | | <p>as he was afraid of being arrested.</p> <p>Eric fears being arrested if he were to be returned to Redland. Whether or not this fear is well-founded must be assessed in light of the available country-of-origin information. From the case summary, it would appear that there is a reasonable possibility that Eric would be arrested and that he may be tortured by State agents if returned to Redland. There is also a risk that he may disappear. Thus, the objective element is also satisfied.</p> <p>Putting the two elements together, his fear of being arrested can be considered well-founded.</p> |
| c | Persecution | <p>Yes.</p> <p>With regard to the arrest and detention which is likely to follow, it is necessary to determine whether this would constitute legitimate deprivation of liberty for the purposes of criminal prosecution rather than persecution. On his own admission, Eric was personally involved in one violent incident which resulted in the killing of two persons and serious injury to three others. In view of this, the authorities of Redland would be justified in ordering his arrest and detention, and in prosecuting Eric for these acts.</p> <p>However, as noted above, there is a reasonable possibility that he will face threats to his life and physical integrity due to torture and possible disappearance if returned to Redland. This clearly amounts to persecution.</p> |
| d | 1951 Convention grounds | Yes. Eric has a well-founded fear of persecution which is related to his political opinion. |
| Are the inclusion criteria met? | | YES |
| ii Do exclusion considerations arise in this case? | | YES (see comments below at Step 1) |
| If so, which is the relevant provision of the 1951 Convention? | | The relevant provision of the 1951 Convention is Article 1F. |
| List the stages of the exclusion analysis below and note the issues which would need to be considered at each of these stages | | |
| Step 1 | Is exclusion triggered? | <p>Yes.</p> <p>Exclusion considerations are triggered by Eric's own statements according to which he was</p> |

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| | | <p>personally involved in a violent incident which caused the death of two persons and serious injury to three others, and his membership in an organization involved in further violent acts which may give rise to exclusion.</p> <p>Thus, there are indications that Eric may have been associated with acts within the scope of Article 1F, and it is necessary, therefore, to conduct an exclusion assessment.</p> |
| <p>Step 2</p> | <p>Are there acts within the scope of Article 1F with which the applicant is linked?</p> | <p>Yes.</p> <p>In the present case, it is the applicant’s association with the detonating of a car bomb in a busy street, which was directed against an army truck and killed two civilians as well as seriously injuring three soldiers which may give rise to his exclusion.</p> <p>This incident must be examined in light of the relevant clause of Article 1F.</p> <p>There is no indication in the case summary this act took place during an armed conflict. Thus, Article 1F(a) – war crimes – is not relevant. Likewise, on the basis of the information available, none of the other categories under Article 1F(a) – crimes against humanity; crimes against peace – are applicable. The same applies for Article 1F(c) – acts contrary to the principles and purposes of the United Nations –, as there are no indications that the acts in question had an impact on international peace and security.</p> <p>Rather, it is necessary to consider whether the acts in question come within the scope of Article 1F(b), that is, whether they are:</p> <p>Serious: causing the death of two persons and seriously injuring three others by detonating an explosive device would be considered serious crimes in most if not all jurisdictions.</p> <p>Non-political: it would appear that the acts in question were politically motivated, but that given the absence of a clear and direct link between the crime and its alleged political objective and the methods used (detonating a car bomb in the capital involved a risk of indiscriminate harm and indeed resulted in the death of two passers-by), these acts failed to meet the predominance and proportionality tests required under Article 1F(b) for a crime to be considered political.</p> <p>The remaining two criteria under this exclusion</p> |

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| | | <p>clause (outside the country of refuge, prior to admission to that country), are also met.</p> <p>Thus, the killing of two civilians and causing serious injury to three soldiers are serious non-political crimes within the meaning of Article 1F(b).</p> <p>It must also be established whether there is clear and credible information linking the applicant to the acts in question. In the present case, this link is provided by Eric’s own statements, which are deemed credible.</p> |
| Step 3 | Has the applicant incurred individual responsibility for the acts in question? | <p>Yes.</p> <p>Through his acts, Eric would seem to have made a substantial contribution to the killing of two civilians and serious injury to three soldiers, and it would also appear to be established that he did so in the knowledge that his acts had a significant effect on the commission of the crime. He can therefore be considered to have incurred individual responsibility through aiding or abetting.</p> <p>There is nothing in the case summary to suggest that there may be circumstances which would negate individual responsibility in Eric’s case (e.g. lack of mental element, or a valid defence) – the asylum authority should nevertheless examine the possible existence of such factors.</p> |
| Step 4 | Proportionality assessment | <p>The acts for which Eric is determined to be responsible are serious crimes. As noted in UNHCR’s <i>Background Note on Exclusion</i> (at paragraph 78), where a person has intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, he or she is unlikely to benefit from proportionality considerations.</p> |
| | Does an exclusion clause of the 1951 Convention apply? | <p>YES</p> <p>However, Blueand has ratified a number of international human rights instruments. Even if he is not eligible for refugee status, Eric continues to enjoy protection against return to torture under these instruments as well as customary international law.</p> |

Chapter 4

Cessation of Refugee Status



Key objectives

Understand the concept of cessation of refugee status

Be aware of the types of situations which may give rise to cessation

Know how cessation relates to refugee status determination

This chapter provides an overview of the conditions in which refugee status may cease, either because of certain voluntary acts of the individual concerned or because of a fundamental change in the circumstances in the country of origin. The chapter examines the relation between cessation and refugee status determination and explains how cessation differs from the cancellation or revocation of refugee status.

4.1 Introduction

Refugee status as conceived in international law is, in principle, a temporary status. Once a refugee can safely return and re-establish him or herself in the country of origin or habitual residence, or obtains the full protection as a citizen of another country, international protection is no longer justified or necessary. If this is the case, the asylum country or UNHCR may decide that his or her refugee status shall come to an end. The circumstances in which such a decision may be permitted are exhaustively enumerated in the so-called “**cessation clauses**” of Article 1C of the 1951 Convention. Similar cessation provisions are contained in paragraph 6A of the 1950 Statute.

Cessation of refugee status requires a formal decision. It results in the loss of refugee status. Given the significant consequences of cessation for the individual concerned – in particular, the ending of protection against *refoulement* as provided for under Article 33 of the 1951 Convention (see above at 1.6.1) –, its application requires careful consideration of whether all relevant criteria are met. The cessation clauses must be interpreted restrictively, and procedural safeguards must be in place, including the possibility for the individual concerned to challenge the application of a cessation clause in his or her case.

4.2 Circumstances which may give rise to cessation

The cessation clauses of Article 1C of the 1951 Convention cover two categories of situations.

4.2.1 Cessation based on certain acts of a refugee

The need for international protection may come to an end if a refugee’s own voluntary acts have brought about a change in his or her personal situation which means that he or she no longer requires international protection as a refugee. The circumstances in which this may be the case are exhaustively enumerated in Article 1C(1–4), which provide that the 1951 Convention shall cease to apply to a refugee if

“(1) He [or she] has voluntarily re-availed himself of the protection of the country of his [or her] nationality; or

- (2) *Having lost his nationality, he [or she] has voluntarily reacquired it; or*
- (3) *He [or she] has acquired a new nationality, and enjoys the protection of the country of his [or her] new nationality; or*
- (4) *He [or she] has voluntarily re-established himself in the country which he [or she] left or outside which he [or she] remained owing to fear of persecution."*

The cessation clauses of this category may only be applied on an individual basis. Guidance on the criteria for cessation under Article 1C(1–4) can be found in UNHCR’s *Handbook*, at paragraphs 111–134; and UNHCR, *The Cessation Clauses: Guidelines on Their Application*, of 26 April 1999.

4.2.2 Cessation based on a fundamental change in circumstances

Article 1C(5) and (6) of the 1951 Convention provide for the cessation of a person’s refugee status if

- “(5) He [or she] can no longer, because the circumstances in connection with which he [or she] has been recognized as a refugee have ceased to exist, continue to refuse to avail him [or her]self of the protection of the country of his [or her] 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 him [or her]self of the protection of the country of nationality;

- (6) Being a person who has no nationality he is, because the circumstances in connection with which he [or she] has been recognized as a refugee have ceased to exist, able to return to the country of his [or her] 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 [or her] former habitual residence.”

This category of cessation clauses may be applicable if the objective circumstances in the country of origin or former habitual residence have undergone a fundamental, stable and durable change, which affects the reasons for the fear of persecution which gave rise to recognition of refugee status. Article 1C(5) and (6) of the 1951 Convention are usually referred to as “ceased circumstances” clauses.

Both provisions contain an exception which allows a refugee to invoke “compelling reasons arising out of previous persecution” for

refusing to avail him or herself of the protection of the country of origin where his or her specific circumstances are such that continued international protection is necessary and justified despite the fact that the situation has generally changed to such an extent that refugee status would no longer be required.

The cessation clauses of UNHCR's 1950 Statute do not provide for the "compelling reasons" exception. However, the exception reflects a more general humanitarian principle, which recognizes that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate.

Cessation on the basis of a fundamental change in circumstances in the country of origin or former habitual residence may be decided on an individual basis, although in most cases where the "ceased circumstances" clauses are applied, this is done on a group basis, through a declaration of "general cessation".

Even if the circumstances have generally changed to such an extent that refugee status would no longer be necessary, all refugees affected by general cessation must have the opportunity, upon request, to challenge the decision to apply it in their case on the basis that they continue to have a well-founded fear of persecution in the country concerned or because the "compelling reasons" exception applies to their particular circumstances. There may also be instances where certain groups should not be included in the application of general cessation because they remain at risk of persecution.

Guidance on the application of the "ceased circumstances" clauses, including the application of the "compelling reasons" exception to certain individuals, can be found in UNHCR's *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, issued on 10 February 2003.

4.3 Cessation and refugee status determination

Cessation does not form part of the refugee status determination process. Article 1C of the 1951 Convention can only be applied to a person who has been recognized as a refugee. It is not an exclusion clause and should not be applied at the eligibility stage, where the relevant inquiry is first, whether the applicant meets the criteria for inclusion under Article 1A(2) of the 1951 Convention and second, if pertinent in the individual case, whether he or she comes within the scope of one of the exclusion clauses of Article 1D, 1E or 1F of the 1951 Convention.

However, certain types of conduct of asylum-seekers which, had they already been recognized as refugees, could lead to the cessation of their status may well have an impact on their eligibility for international protection. For example, frequent visits to the

country where the applicant claims to have a well-founded fear of persecution may cast doubt on the credibility of that claim and/or the well-foundedness of the fear of persecution. Similarly, where an asylum-seeker obtains or renews a passport of the country of origin, this may indicate that he or she is not unwilling or unable to avail him or herself of the protection of that country (see also above at 2.2.5).

It is also important to note that a declaration of general cessation cannot serve as a bar to the admission of refugee claims, either at the time of the declaration or subsequent to it, nor should it be used to designate a country as “safe” for refugee status determination purposes (on the concept of “safe country of origin”, see below at 5.3.1.1). Even if general cessation may have been declared in respect of a particular country, this does not disqualify individuals leaving that country from applying for refugee status: their particular circumstances may warrant international refugee protection despite the change in the country’s situation which gave rise to general cessation. This may be the case, for example, where a person has a well-founded fear of persecution at the hands of a private person or group that the government is unable or unwilling to control (e.g. women who would be at risk of domestic violence amounting to persecution or genital mutilation).

4.4 Distinguishing cessation from cancellation and revocation

Cessation means that refugee status of a person who was properly recognized comes to an end because one of the grounds for cessation enumerated in Article 1C of the 1951 Convention is applicable. Cessation is different from cancellation of refugee status, which means a decision to invalidate a refugee status recognition which should not have been issued in the first place. Cancellation is appropriate if it has been established, in appropriate procedures, that the individual concerned did not meet the inclusion criteria, or because an exclusion provision would have been applicable to him or her at the time of recognition.

Both cessation and cancellation should be distinguished from revocation of refugee status, that is, the withdrawal of refugee status from a person who was rightly recognized as a refugee, but whose conduct after recognition comes within the scope of Article 1F(a) or (c) of the 1951 Convention.

Summary

Cessation

- Refers to a formal decision to end refugee status because it is no longer necessary or justified.
- The circumstances in which such a decision may be justified are exhaustively enumerated in the “cessation clauses” contained in Article 1C of the 1951 Convention.
- Cessation means loss of refugee status and the rights attached to it (including, in particular, loss of protection against *refoulement* as enshrined in Article 33 of the 1951 Convention and customary international law).
- Cessation may be declared by the country of asylum or by UNHCR, either individually or for a particular group of refugee (“general cessation”).
- Procedural safeguards must be in place, including, in particular, the possibility for the individual concerned to challenge a decision to apply a cessation in his or her case.

Grounds for Cessation under the 1951 Convention

Cessation based on certain acts of a refugee

- Article 1C(1–4) provide for the possibility of ceasing refugee status if on the basis of certain voluntary acts of a refugee resulting in a change in his or her personal situation which means that he or she no longer requires international protection as a refugee. These acts are:
 - 1 Voluntary re-availment of the protection of the country of his or her nationality;
 - 2 Voluntary re-acquisition of his or her nationality;
 - 3 Acquisition of a new nationality and enjoyment of the protection of the country of the new nationality;
 - 4 Voluntary re-establishment in the country which he or she fled or outside which he or she remained owing to fear of persecution.

Cessation based on a fundamental change in circumstances

- Article 1C(5) and (6), the so-called “ceased circumstances” clauses, provide for the cessation of a person’s refugee status if the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist.
- For these cessation clauses to apply, the objective situation in the country of origin or habitual residence must have changed in a way that is fundamental, stable and durable.
- Article 1C(5) and (6) provide for exceptions which permit a refugee to invoke “compelling reasons arising out of previous persecution” for refusing to avail him or herself of the protection of the country of origin or habitual residence where this is justified in view of his or her specific individual circumstances.

Cessation and Refugee Status Determination

- Cessation does not form part of refugee status determination. The criteria set out in Article 1C should not be applied at the eligibility stage.

- A declaration of “general cessation” cannot serve as a bar to admission of refugee claims, nor should it be used to declare a particular country as a “safe country of origin” for refugee status determination purposes.

Essential reading

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992), paragraphs 118–139

UNHCR, *The Cessation Clauses: Guidelines on Their Application*, 26 April 1999

UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003 (HCR/GIP/03/03)

Chapter 4 – Exercises

Review:

- 1 Once recognized by the host country or UNHCR, a person's refugee status remains in effect for the rest of his or her life, regardless of what happens in his or her country of origin. **True or false?** Please explain.
- 2 Information has come to light which indicates that a person who was granted refugee status by the host country's asylum authorities four months ago may not have had a well-founded fear of persecution at the time. In this situation, the authorities should (circle the **correct** answer):
 - a Apply an exclusion clause.
 - b Consider whether there is sufficient basis for opening cancellation proceedings.
 - c Initiate cessation procedures.
 - d Declare the initial decision null and void without further proceedings.
- 3 A refugee has made a day trip to the country of origin to visit an old aunt and at the same time get an impression of whether it would still be dangerous for him or her to return. Would it be appropriate to consider cessation on this basis? **Yes or no?** Please explain.

Case K

Fatima is a national of Meridia. Eight years ago, armed conflict broke out between different ethnic groups in that country. About eighteen months later, Fatima fled to Arcadia, where she was granted refugee status under the 1951 Convention on the grounds that she had a well-founded fear of persecution for reasons of nationality and imputed political opinion. Since arriving there she has been granted a temporary residence permit which is renewable every year. Recently, when Fatima went to the office where she normally renewed her permit, she was told that she would have to attend an interview with an officer of the Arcadian Asylum Authority for the purpose of determining whether her refugee status should be considered ceased.

Three years ago, the conflict in Meridia ended with a peace agreement, following which elections were held. In recent months, the authorities of Arcadia have been encouraging refugees from Meridia to return home and have been offering a generous “repatriation package” to assist such persons to return and re-establish their lives there. A number of refugees have returned, but there have been reports of violent incidents during which some of the returnees were attacked by former members of armed groups involved in the conflict.

During the war in Meridia, Fatima was repeatedly raped by soldiers. She became pregnant and had an abortion. Last year she was issued a passport by the authorities of Meridia which had requested her to return there for a few days to testify as a witness during judicial proceedings against a former general accused of war crimes committed during the conflict in Meridia. She does not want to return to Meridia.

In your view, would the circumstances justify the cessation of Fatima’s refugee status? List below the provisions of the 1951 Convention which may be relevant, and discuss the issues which need to be considered.

If Fatima were to travel to Meridia to testify in court, could this give rise to cessation of her refugee status?

Answer key to Chapter 4 exercises

Review:

- 1 False In principle, refugee status is temporary – under certain circumstances, which are exhaustively enumerated in Article 1C of the 1951 Convention, refugee status may cease because it is no longer necessary or justified. This always requires a formal process, and those concerned must be given an opportunity to submit reasons why cessation should not be applied in their case.

- 2 b In a situation where reliable information calls into question the correctness of a refugee status recognition which has become final, it will be appropriate for the authorities (or UNHCR, in case of a refugee status recognition under its mandate) to examine whether there is sufficient basis for initiating procedures with a view to the possible cancellation of refugee status – that is, invalidating it with effect from the time of the initial decision (*ab initio*). It is important to remember that cancellation always requires a formal process, in which it is for the authorities or UNHCR to show that there are grounds for cancellation, and which must offer the individual concerned an opportunity to consider and respond to the information on which a decision to cancel would be based.

- 3 No Making a short visit to the country of origin for pressing family reasons and assessing the situation does not constitute a ground for ceasing the refugee status of the person concerned. In doing so, he or she could not be considered to have re-availed him or herself of the protection of the country of nationality or to have voluntarily re-established him or herself there.

Case K

| | |
|---|--|
| 1 Would the circumstances justify the cessation of Fatima’s refugee status? | |
| <p>In this case, it is necessary to consider whether the changes in the situation in the country of origin justify the application of the “ceased circumstances” clause and if this is the case, whether Fatima would have compelling reasons on the basis of which she should continue to enjoy international protection as a refugee.</p> <p>Another question is whether the issuance of a passport by the authorities of Meridia could constitute a ground for cessation.</p> <p>Thus, you must consider the applicability of the following provisions of the 1951 Convention:</p> | |
| Article 1C(5) of the 1951 Convention | For this cessation clause to be applicable, the change in circumstances in the country of origin must be fundamental, stable and durable, and it must affect the reasons which gave rise to displacement which led to recognition of refugee status. This requires a careful analysis of the situation, particularly in countries where an |

| | |
|--|---|
| | <p>armed conflict has taken place.</p> <p>The information provided in the case summary suggests that the conditions for applying the “ceased circumstances” clause are not met in Meridia. While there is a peace agreement and elections have been held, violent attacks on a number of refugees who voluntarily returned would seem to indicate that the country has not yet returned to peace and stability.</p> <p>Even if this were the case, however, Fatima could invoke the application of the “compelling reasons” exception in her case: given the particularly serious persecution she suffered, she could not reasonably be expected to return.</p> <p>For further guidance, see UNHCR’s <i>Guidelines on Cessation of Refugee Status under Article 1C(5) and (6)</i> (10 February 2003).</p> |
| <p>Article 1C(1) of the 1951 Convention</p> | <p>If a refugee obtains a passport from the authorities of his or her country of origin, this could indicate that he or she no longer fears persecution and has re-availed him or herself of the protection of his or her country of nationality.</p> <p>For this to apply to Fatima, however, she would have had to apply for a passport voluntarily and with the intention of obtaining the protection of the Meridian authorities. This does not appear to be the case. Cessation on this ground would therefore not be appropriate.</p> <p>For further guidance, see UNHCR, <i>The Cessation Clauses: Guidelines on their Application</i> (April 1999), at paragraphs 6–11.</p> |
| <p>2 If Fatima were to travel to Meridia to testify in court, could this give rise to the cessation of her refugee status?</p> | |
| <p>No. On the basis of the information available, a visit by Fatima to Meridia to testify in court would not as such constitute a ground for cessation. Neither Article 1C(1) – cessation on the basis of voluntary re-availing of the protection of the country of nationality (see comments above) – nor Article 1C(4) – voluntary re-establishment in the country of origin – would seem to be applicable. If Fatima were to follow the invitation of the authorities and travel to Meridia for the purpose of appearing in court, she would presumably do so under State protection – however, this would not necessarily be indicative of her willingness to re-avail herself of the protection of her country of origin nor her desire to re-establish herself and live there.</p> | |

Chapter 5

Refugee Status Determination Procedures



Key objectives

Understand the importance of the availability of fair and efficient refugee status determination procedures

Be familiar with the general principles applicable to such procedures

Know about the procedural safeguards and guarantees required under international refugee law

This chapter deals with the procedures to be followed where a State determines whether a person is a refugee. The chapter first sets out the legal framework for, and general principles applicable in, refugee status determination procedures. This is followed by a discussion of the safeguards and guarantees which should be in place where refugee status is examined on an individual basis. The chapter then addresses the question of accelerated treatment of certain asylum applications as well as special airport procedures which have been set up in a number of countries.

5.1 Introduction

5.1.1 Legal framework

The 1951 Convention and 1967 Protocol define who is eligible for refugee status and establish key principles of international refugee protection, in particular, the principle of *non-refoulement* (see above at 1.6.1), but they do not set out procedures for the determination of refugee status. The systems put into place by countries for examining asylum claims vary, as they are shaped by differences in legal traditions, resources and circumstances. It is generally recognized, however, that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention whenever refugee status determination is done on an individual basis. Without such procedures, States would not be in a position to effectively implement their obligations under international refugee law.

International and regional human rights instruments, as well as, in particular, relevant conclusions adopted by UNHCR's Executive Committee, contain the international standards to be observed by States when they set up individual asylum systems under their domestic law. Principles of procedural fairness also apply.

The importance of refugee status determination procedures and of their effective functioning cannot be over-emphasized: a wrong decision might cost the person's life or liberty.

5.1.2 General Principles

It is a general legal principle of the law of evidence that the person who makes a claim must present the evidence necessary for establishing that his or her assertions are true. In the asylum context, however, the special situation of applicants must be taken into account. In most cases, it is not possible for an asylum-seeker to provide documentary or other proof, given the circumstances of his or her departure and the nature of the claims made. Therefore, the responsibility for establishing the facts is shared between the applicant and the decision-maker.

The asylum-seeker has a duty to provide a complete and truthful account of the facts which are material to his or her claim. The adjudicator should be familiar with the objective situation in the applicant's country of origin and aware of relevant matters of common knowledge. He or she must guide the applicant in providing pertinent information and, using all the means at his or her disposal to produce the necessary elements, verify alleged facts which can be substantiated.

The decision-maker must assess the reliability of any evidence and the credibility of the applicant's statements. Credibility is established where the applicant has presented a claim which is coherent, plausible, consistent with generally known facts and therefore, on balance, capable of being believed. In many cases, there will be no documentary or other evidence to corroborate the applicant's statements regarding the facts of his or her case, even after independent research by the examiner. Elements of doubt may remain with regard to factual assertions by the applicant. However, this should not prejudice the claim if the adjudicator considers that the applicant's story is on the whole coherent and plausible. In such cases, the applicant should be given the benefit of the doubt.

Misrepresentations or failure to disclose relevant facts should not automatically lead to a conclusion that the applicant does not have a credible claim. Untrue statements may be due to a variety of reasons, including fear or distrust, the effects of traumatic experiences, or the quality of interpretation. They might be explained in the course of further examination, or re-evaluated when all the circumstances of the case are known.

As already noted above at 2.2.2.2, the standard of proof to be met for a well-founded fear of persecution to be established is that of a "reasonable possibility" that the harm or intolerable predicament feared will materialize if the applicant were to be returned to the country of origin or habitual residence. Where exclusion under Article 1F of the 1951 Convention is being considered, the standard of proof relating to the application of its clauses is that of "serious reasons for considering", which requires credible and reliable information (see above at 3.3.2).

5.2 Fair and Efficient Asylum Procedures

Certain minimum requirements for procedures to determine eligibility for refugee status in the context of individual refugee status determination have been identified in a number of conclusions adopted by UNHCR's Executive Committee which are listed at the end of this chapter. National refugee status determination procedures should offer certain core elements, which are necessary for fair and efficient decision-making in keeping with international refugee protection standards. These are addressed in the following sections.

5.2.1 Specialized Procedure for the Examination of Asylum Claims

All requests for recognition of refugee status should be examined within the framework of specially established procedures.

International protection principles require that countries set up procedures which are fair, non-discriminatory and appropriate to the nature of asylum claims. These procedures must permit a full inquiry to establish the facts and decide on the merits of the applicant's claim. In many cases, a single procedure to assess the claims of all those seeking refugee status or other forms of protection may be the most efficient and effective means of identifying those in need of international protection.

5.2.2 Specialized Asylum Authority

The decision on all requests for recognition of refugee status should be made by a single, central authority.

Asylum applications raise issues which require specialized knowledge and expertise. Best State practice provides for a clearly identified authority with responsibility for:

- Examining asylum applications and taking a decision in the first instance;
- Making decisions on entry, where an application is made at an airport or other border entry point; and
- Examining and deciding on admissibility, where admissibility procedures are in place.

Refugee status determination should be carried out by staff with specialized skills and knowledge of refugee and asylum matters. Examiners must be familiar with the use of interpreters and appropriate cross-cultural interviewing techniques. The central refugee authority should also include eligibility officials with training in the treatment of applications by women, asylum-seeking children or applicants who are survivors of sexual abuse, torture or other traumatizing events.

If a person seeks asylum at the border, immigration or border officials should register the asylum application and inform the applicant of the procedures for claiming refugee status. They should forward the application, together with any other relevant information, to the specialized asylum authority, so that it may interview the applicant and assess his or her claim. Similarly, applicants should be referred to the specialized asylum authority by any other government official before whom they express their intention to seek asylum, and/or by UNHCR.

5.2.3 Access to Determination of Refugee Status

Physical access of asylum-seekers to the territory of the country where they are seeking admission as refugees and, further, access to procedures where the validity of their refugee claim can be assessed are essential preconditions of international refugee protection.

This principle has been underlined repeatedly by the General Assembly and UNHCR's Executive Committee. It applies regardless of the manner in which asylum-seekers have arrived within the jurisdiction of the State. Access to the territory of the country where an individual is seeking international protection as refugees and admission of his or her claim to the asylum procedure are often linked, as many States make the granting of access to the territory dependent on an initial assessment of the asylum application. As noted in chapter 1, any expression of the applicant's intention to seek recognition as a refugee should be recognized as an asylum application and trigger the applicability of protection against *refoulement*.

5.2.3.1 Admissibility procedures

Ideally, all applicants who submit a claim at the border should be admitted to the territory and given a temporary right to remain there until a final determination on the asylum application has been made, irrespective of whether or not they possess personal identity or travel documents. In practice, many countries provide for a preliminary examination to decide on the admissibility of asylum claims and/or admission to the territory. Such procedures are not as such contrary to international refugee protection principles, but a number of requirements need to be met and procedural safeguards should be in place.

There should be a clear distinction between denial of admissibility, which is of a formal nature, and decisions based on an examination of the substance of the claim. Any decision on the merits should be taken in the regular refugee status determination procedure or, where appropriate, in accelerated proceedings (see below at 5.3.1). This distinction should also find expression in the language used in decisions: applications which do not meet admissibility requirements should be "declared inadmissible" rather than "rejected on inadmissibility grounds".

5.2.3.2 Inadmissibility grounds

Entry to the territory or admissibility to the substantive determination procedure may be denied on the following grounds:

- The applicant has already found protection in line with the 1951 Convention and international standards in another country (“first country of asylum”). An application may be declared inadmissible on this ground only if protection in the country concerned is actually available to, and can be accessed by, the individual concerned. Admissibility may not be denied on the basis that the applicant could have found protection in another country.
- Responsibility for assessing the substance of a particular asylum application is assumed by a third country where the asylum-seeker will be protected from *refoulement* and will be able to seek and enjoy asylum in accordance with accepted international standards (“safe third country”).

In either scenario, the decision on entry or admissibility requires an individualized assessment of the asylum-seeker’s situation by the specialized asylum authority. Admission should not be denied if the applicant is at risk of *refoulement* or other serious human rights violations and thus lacks protection in the first country of asylum, or where a third country cannot be considered safe in light of the applicant’s personal circumstances.

5.2.3.3 Circumstances not justifying denial of admissibility

Lack of personal identity or travel documents should never as such be the reason for denying admission to the territory or to the asylum procedure. Other circumstances which should not result in the inadmissibility of an asylum claim include situations where an individual faces deportation or expulsion for another reason and applies for asylum for the first time, or where an applicant whose claim for refugee status was rejected earlier submits a renewed application. In such cases, an individualized examination of the circumstances and the specific situation of the applicant is required, although it may be appropriate to deal with such claims in accelerated proceedings (see below at 5.3.1).

Formal requirements should not pose an obstacle to the exercise of the right to seek asylum. In particular, an applicant’s failure to submit an asylum claim within a certain time-limit should not of itself lead to the claim being excluded from consideration. Where national legislation provides that an asylum application must be submitted “immediately” or “without delay”, such requirements should not be interpreted in a rigid manner. In case of a requirement that the applicant submit his or her claim in person, appropriate provision should be made to ensure that where this is not feasible, for example because an applicant is in detention, it is possible to submit the claim through a representative or in writing.

5.2.4 General Procedural Safeguards

Asylum-seekers should be afforded full procedural safeguards and guarantees at all stages of the procedure.

Given that the decision on an asylum application affects the fundamental rights of the individual concerned and the grave consequences of an erroneous decision, procedural guarantees are an essential element of refugee status determination procedures. Core safeguards which must be available to all applicants throughout the process include the following:

- Access to information, in a language which the applicant understands, about the nature of the proceedings as well as his or her rights and obligations during the procedure;
- The possibility of contacting UNHCR and others (NGOs, lawyers etc.) who may provide advice on the procedure and/or legal representation. Where free legal assistance is available, asylum-seekers should have access to it;
- Assistance of qualified and impartial interpreters, if required.

Other essential safeguards are discussed in the following sub-sections.

5.2.5 Individual Assessment of Each Claim, Including a Personal Interview

The asylum determination procedure should offer the applicant a thorough examination of his or her claim. This should include a personal interview with the decision-maker and an opportunity to fully explain his or her case and submit evidence concerning his or her personal circumstances as well as the situation in the country of origin.

Wherever possible, asylum-seekers should be permitted to present their case in person to a fully qualified official of the authority competent to determine refugee status. The personal interview is extremely important given the difficulty of assessing credibility solely on the basis of an interview transcript or report. A personal interview allows the decision-maker to assess the applicant's manner and demeanour, and to ask supplementary and detailed questions. Qualified and impartial interpreters should be provided by the State.

In cases involving gender-related persecution, interviews should be conducted by eligibility officials and interpreters of the sex chosen by the applicant whenever possible, and the latter should be made aware of his or her right to request this.

5.2.6 Confidentiality

Asylum procedures should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that an application has been made. No information on the asylum application should be shared with the country of origin.

Information provided by the applicant to the authorities in the course of the asylum procedure is confidential and can only be used by the authorities for the purpose for which it was solicited, that is, to determine eligibility for international protection. As a general rule, no information should be shared with the authorities of the applicant's country of origin, nor should such information be released to any third party without the express consent of the individual concerned. The applicant's consent must be freely offered and not obtained under duress.

5.2.7 Decision

All applicants should receive a written decision, whether on admissibility or on the claim itself.

Decisions on an asylum application should be issued in writing. If the claim is rejected or declared inadmissible, the decision should give an account of the reasons. Negative decisions should also contain information on the applicant's right to appeal and, in particular, indicate any applicable time-limits. Where admissibility is denied on the ground that a "safe third country" is responsible for examining the application, the inadmissibility decision should state that the individual concerned is an asylum-seeker, and that the merits of his or her claim have not been examined.

5.2.8 Appeal or Review

All asylum applicants whose claims have been declared inadmissible or rejected on the merits should have the right to at least one full appeal or review by a body that is independent of the first-instance decision-making authority, and the right to remain in the country for the duration of the appeal proceedings.

As noted above at 5.2.7, negative decisions should set out the reasons for inadmissibility or rejection as well as information on how the applicant may exercise his or her right to appeal or review. Applicants should be given a reasonable time in which to do so. The instance dealing with the appeal should have the authority to conduct a full review, that is, to examine matters of fact as well as of law. The appeal procedure should foresee the possibility for a

hearing/interview, as it may be essential for the appeals authority to gain a personal impression of the applicant. The possibility for the applicant to present new facts and evidence is also vital.

Actual appeal or review procedures vary according to the prevailing national system. If the review is made by the same authority that took the first-instance decision, different persons should re-examine the case. In some countries, negative decisions at the admissibility or first-instance stage are reviewed by courts or by quasi-judicial bodies specially set up to deal with appeals in the asylum procedure (e.g. refugee appeals commissions, tribunals, or boards), which combine specialist expertise with quasi-judicial independence.

Appeal or review constitutes an effective remedy only if it means that any measure to remove an asylum applicant whose claim was declared inadmissible or rejected at first instance will be suspended until a determination on the appeal has become final and enforceable. Best practice in this regard clearly spells out that a negative admissibility or first-instance determination – which is sometimes combined with an order of expulsion – becomes enforceable only with the final decision by the appeal authority on the case or on the responsibility for assessing the case, including where the appeal is treated in accelerated proceedings (see below at 5.3.3).

5.3 Special Procedures

5.3.1 Accelerated Procedures

For certain categories of asylum claims, expedited processing may be appropriate. This applies to applications which can be considered manifestly well-founded as well as claims which can be presumed to be manifestly unfounded or clearly abusive.

5.3.1.1 Manifestly unfounded claims

Manifestly unfounded claims are defined as those which are not related to the criteria for the granting of refugee status laid down in the 1951 Convention or any other criteria justifying the granting of asylum. Whether or not an application is “manifestly unfounded” will depend on the degree of linkage between the stated reasons for the applicant’s departure and the refugee definition, although a variety of factors – including fear or distrust, or the quality of interpretation – may make it difficult for an asylum-seeker to articulate clearly and comprehensively why he or she left the country of origin or habitual residence.

Among the categories of applications which are often deemed manifestly unfounded are those from so-called “safe countries of origin”. The concept that applicants from certain countries are presumed not to have a well-founded fear of persecution there may

have merit as a procedural tool, if used to determine which claims are to be given priority and/or examined in accelerated procedures. Designation as a “safe country of origin” may also establish a presumption that claims submitted by persons from that country are not well-founded. Two essential criteria must be met, however, for this to be in keeping with international refugee law:

- a** Any assessment of certain countries as safe must be based on reliable, objective and up-to-date information. If a country decides to establish lists of safe countries of origin, the procedure for adding or removing countries from any such list needs to be transparent, as well as responsive to changing circumstances in countries of origin.
- b** It is critical that each case be examined fully and individually on its merits. Each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin in his or her individual circumstances and to access an effective remedy in the form of an independent review.

5.3.1.2 Abusive or fraudulent claims

Abusive or fraudulent claims involve those made by individuals who clearly do not need international protection, as well as claims involving deception or intent to mislead on the part of the applicant. Lack of appropriate documents or the use of false documents does not of itself render a claim abusive or fraudulent and, as noted above at 5.2.3, should not be the sole reason for denying access to a procedure, since any presumption of abuse needs to be examined to determine its validity.

This needs to be distinguished from situations in which an applicant has wilfully destroyed or disposed of travel or other documents for reasons which are not materially related to the substance of the asylum claim, in order to make an examination of the application more difficult or to avert expulsion. Applicants who refuse to cooperate in establishing their identity and/or are not willing to provide information concerning their claim despite repeated requests to do so may seriously undermine their own credibility.

5.3.1.3 Procedural safeguards and transfer to the regular procedure

The requirements of procedural fairness fully apply in accelerated procedures. In particular, this means that each case needs to be assessed on an individual basis, and the applicant should be given a personal interview with an official of the central asylum authority. As with all determinations on applications for refugee status, the decision that a claim is manifestly unfounded or abusive should be taken by that authority, and there should be the possibility of having a negative determination reviewed prior to the enforcement of any decision to remove an applicant. Access to information and legal advice by UNHCR and qualified NGOs or lawyers is

particularly important to ensure that the applicant understands the procedure.

If major substantive issues arise during the expedited examination, the claim should be transferred to the regular procedure. This will regularly be the case where the question of an internal flight alternative or the applicability of an exclusion clause under Article 1F of the 1951 Convention arises (see above at 2.2.5.2 and chapter 3, respectively).

5.3.2 Airport procedures

A number of countries have established special procedures where an asylum claim is submitted at an international airport. The common feature of these procedures is that a determination on the substance of an asylum application may be made prior to a decision on entry, while the applicant remains at special facilities at or near the airport.

As with all asylum applications, decisions in the airport procedure should be made by the central asylum authority, on the basis of a personal interview with the applicant. In addition, international refugee protection principles require that such procedures provide for specific safeguards and support, as appropriate to the particular situation of the asylum-seeker. This should include legal assistance and social counselling, as well as the right to contact UNHCR.

In many countries which apply such procedures, a decision on a claim submitted at the airport must be reached within prescribed time-limits. If these time-limits cannot be met, the applicant should be admitted to the territory and his or her claim examined in the normal procedure. Procedural fairness also demands a right to appeal against negative decisions, with suspensive effect. Normally, the applicant is required to remain at the airport until a determination on appeal has become final and enforceable.

5.3.3 Accelerated appeals proceedings

Expedited appeals proceedings may be appropriate where a claim has been declared inadmissible on formal grounds, or rejected after accelerated processing or in a special airport procedure. This may involve shortened time-limits for filing an appeal and/or for decision-making by the appeal instance; determination by individual adjudicators instead of a panel; and/or restricted possibilities for further appeal. An appeal interview/hearing would be preferable but may be less essential if an application is presumed manifestly unfounded or clearly abusive. However, where an expedited appeal procedure is in place, it is essential to ensure that the applicant has prompt access to legal advice, interpreters, information about procedures so that he or she still has access to an effective remedy.

5.4 Special measures

5.4.1 Refugee Women

Specially trained staff should be made available for the purpose of interviewing female asylum-seekers. Persecution of women may often take the form of rape and other forms of sexual violations, about which women may be very reluctant to talk. Since the type of persecution suffered constitutes an important element when deciding upon the refugee claim, female interviewers and interpreters should be available. Examiners should be familiar with the ways in which gender may be relevant to determining whether a particular form of harm or treatment constitute persecution (see above at 2.3.1). Adjudicators as well as interpreters should be provided with extensive background information on the situation of women in the country of origin.

5.4.2 Separated and Unaccompanied Children

According to Article 1 of the CRC, a child means any person under the age of 18, unless under the (national) law applicable to the child, majority is reached earlier.

- **Separated children** are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.
- **Unaccompanied children** are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

Special procedural safeguards for the handling of refugee claims submitted by unaccompanied children are set out in UNHCR's *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*. These guidelines, issued in February 1997, are also applicable to separated children. Guidance on how to cater to the special protection needs of children asylum-seekers during refugee status determination procedures can also be found in the *Inter-agency Guiding Principles on Unaccompanied and Separated Children* (2004).

They point to the need for child experts to participate in the process, *inter alia*, to help determine the degree of the child's mental development and maturity. Ideally, an expert with sufficient knowledge of the psychological, emotional and physical development and behaviour of children should be called upon to make the necessary assessment, bearing in mind that children may manifest their fears in ways different from adults. Unaccompanied or separated girls and boys who seek asylum should not be refused access to the territory and their asylum applications should be admitted into the regular, rather than an accelerated, refugee status

determination procedure. Concepts such as “safe country of origin” should not be applied to children.

Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child’s background and who would protect his or her interests. Access should also be given to a qualified legal representative at all stages of the asylum process. The asylum claims of children should be given priority, and they should be examined by specially trained decision-makers and interpreters within the regular procedure. Interviews should be conducted in a child-friendly manner. Cases involving children also call for a liberal application of the benefit of the doubt. Girls and boys whose claim for asylum is rejected should have a right to lodge an appeal, which should be dealt with as expeditiously as possible.

5.4.3 Elderly Applicants

Elderly asylum-seekers are a special group with a lower profile but with particular needs that may be equally pressing. Decision-makers should examine claims for refugee status submitted by elderly men and women in an age-sensitive manner. The applicant’s age may be relevant to the determination of whether or not he or she has a well-founded fear of persecution, for example because of the impact of a particular measure on his or her situation. The applicant’s age may also be a factor to be taken into account in the credibility assessment.

5.4.4 Mentally Disturbed Applicants

If possible, expert medical advice should be sought regarding the nature and degree of the mental illness, and the ability of the person concerned to present a case. Detailed examination of the case will depend on the results of the medical report. As a general rule, the burden of proof on the applicant will be lighter, as statements provided by the applicant should be considered and weighed in light of his or her mental capacity. The examiner will need to rely on other sources of information than the applicant him or herself, and give greater emphasis to objective elements of his or her situation.

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

Summary

Refugee Status Determination Procedures

- Are necessary to enable States to implement their obligations under international refugee law effectively.
- Must be fair, efficient and offer adequate procedural safeguards, in keeping with standards and principles of international and regional human rights law and, in particular, relevant conclusions adopted by UNHCR's Executive Committee.

General principles

- In view of the special situation of asylum-seekers, the responsibility for establishing the facts in refugee status determination procedures is shared between the applicant and the decision-maker.
- Asylum applicants have a duty to provide a complete and truthful account of the facts which are material to their claim. The adjudicator must guide the applicant and, using all means at his or her disposal, verify alleged facts.
- The decision-maker must assess the reliability of any evidence and the credibility of the applicant's statements. Credibility is established if the applicant has presented a claim which is coherent, plausible, consistent with generally known facts and therefore, on balance, capable of being believed.
- Where elements of doubt remain but the story is on the whole coherent and plausible, the applicant should be given the benefit of the doubt.

Fair and Efficient Asylum Procedures

National procedures for individual refugee status determination should offer the following core elements:

- All asylum applications should be examined within the framework of specially established procedures. Preferably, the claims of those seeking refugee status or other forms of protection should be assessed in a single procedure.
- Asylum applications should be examined by a single, central authority, whose staff should have specialized skills and knowledge. Asylum applications made to other State authorities should be referred to the single, central authority.
- Ideally, all applicants who submit an asylum claim at the border should be admitted to the territory and given a temporary right to remain there until a final determination on their application has been made. Admissibility should not be denied on grounds related to the substance of the claim nor solely on the basis that the applicant does not possess personal identity or travel documents.
- Asylum applicants should have access to information, in a language which they understand, about the nature of the proceedings and their rights and obligations. They should also have the possibility of contacting UNHCR and others who may provide advice and/or legal representation. The assistance of qualified and impartial interpreters should be provided, if required.
- Each claim should be assessed individually, and the procedure should include a personal interview with the decision-maker.
- Confidentiality should be respected at all stages of the procedure.

- All applicants should receive a written decision, whether on admissibility or on the merits of the claim.
- All applicants whose claims have been declared inadmissible or rejected on the merits should have the right to at least one full appeal or review by a body which is independent of the first-instance decision-making authority, and the right to remain in the country for the duration of the appeal or review proceedings.

Special Procedures

- Accelerated processing may be appropriate for certain categories of asylum claims, including, in particular:
 - Manifestly well-founded claims
 - Claims which are manifestly unfounded, that is, not related to the eligibility criteria set out in the 1951 Convention or any other criteria justifying the granting of asylum
 - Claims which are abusive or fraudulent, that is, made by individuals who clearly do not need international protection, or which involve deception or intent to mislead on the part of the applicant.
- In countries which provide for special procedures to deal with claims submitted by applicants at an international airport, it is necessary to ensure that decisions be made by the central asylum authority and that specific procedural safeguards and guarantees be in place.

Special Measures for Vulnerable Applicants

- Women asylum-seekers should be interviewed by specially trained staff. Female interviewers and interpreters should be available.
- Procedures for dealing with asylum claims submitted by separated or unaccompanied children should provide for special safeguards and the participation of child experts in the process, as well as specially trained decision-makers and interpreters. Applications by children should be given priority.
- The claims of elderly applicants should be examined in an age-sensitive manner with regard to assessing both the well-foundedness of their fear and credibility.
- If possible, expert medical advice should be sought regarding the nature and degree of mental illness in cases of mentally disturbed asylum applicants.

Essential reading

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited, Geneva, January 1992

UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001

UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998

UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997

International Committee of the Red Cross (ICRC), International Rescue Committee (IRC), Save the Children UK (SCUK), United Nations Children's Fund (UNICEF), UNHCR, World Vision International (WVI), *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, Geneva, 2004

Executive Committee Conclusions related to asylum procedures include, in particular the following:

- No. 8 (XXVIII) – 1977 on Determination of Refugee Status
- No. 15 (XXX) – 1979 on Refugees Without an Asylum Country
- No. 30 (XXXIV) – 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum
- No. 58 (XL) – 1989 on Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection
- No. 64 (XVI) – 1990 on Refugee Women and International Protection
- No. 73 (XLIV) – 1993 on Refugee Protection and Sexual Violence
- No. 82 (XLVIII) – 1997 on Safeguarding Asylum

The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its General Conclusions on International Protection, including the following:

- No. 29 (XXXIV) – 1983
- No.55 (XL) – 1989
- No. 65 (XLII) – 1991
- No. 68 (XLIII) – 1992
- No. 71 (XLIV) – 1993
- No. 74 (XLV) – 1994
- No. 81 (XLVIII) – 1997
- No. 85 (XLIX) – 1998
- No. 92 (LIII) – 2002

Chapter 5 – Exercises

Case L

The Republic of Atlantis acceded to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees in 1985. Shortly after accession, it established a Refugee Determination Office (RDO) and a Refugee Appeals Commission (RAC). The RDO’s task is to examine all asylum applications submitted at the border or within the territory of Atlantis. UNHCR attends all RDO meetings as an observer/advisor. Applicants whose claims are rejected by the RDO can appeal to the RAC, an independent board of appeal, which reviews their claims on matters of fact and law. Applicants are permitted to remain on the territory of Atlantis until a final decision on their claim has been made. The RDO heard about 3,000 cases a year.

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

- 1 All applications must be made at the border or, at the latest, within 48 hours of entering the country. Applications made outside the time limit will be rejected as inadmissible.
- 2 Likewise, applications will not be admissible if:
 - a The applicant was previously in a country which respects the principle of *non-refoulement* and would not have returned the asylum-seeker to the country of origin.
 - b The application is obviously manifestly unfounded or abusive.
- 3 Decisions on whether cases are admissible will be made by the border police. Persons whose claims are not admissible will be immediately expelled from the country. No appeal against this decision is possible.
- 4 If the case is admissible, the applicant will be interviewed by an Immigration Officer, who will send a summary of the interview, along with comments on credibility, to the RDO. The RDO will base its decision on the Immigration Officer’s interview report. It may invite the applicant to an interview if it considers this necessary.
- 5 The RAC will be disbanded. Applicants whose claim was rejected by the RDO may appeal on a question of law to the Administrative Court.

The Government has requested your opinion on whether the proposed changes are in keeping with international refugee law.

1. What comments would you make on the existing procedure?

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

| | |
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| Clause (1) | |
| Clause (2) | |
| Clause (3) | |
| Clause (4) | |

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| Clause (5) | |
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Case M

Mahmood was 14 years old when he arrived in Nordland. He had left his country of origin, Eastland, together with his parents but lost contact with them during their flight. He arrived in Nordland alone. Mahmood approached the police in the capital and said that he wanted to apply for asylum.

The police took down his application, including a written statement, and sent the file to the central asylum authority, the Asylum Office. The duty official at the Asylum Office reviewed the file and declared the claim admissible. He decided that Mahmood's case should be examined in the accelerated procedure for manifestly unfounded claims, because Eastland was on a list of countries deemed to be safe countries of origin.

In line with the pre-established roster, the case was assigned to another official of the Asylum Office. As required under Nordland's asylum legislation, Mahmood was brought to the Asylum Office on the next morning for an interview to establish whether he was at risk of persecution in Eastland.

Mahmood did not speak the language of Nordland. He asked whether there was anyone to help translate, but since both he and the official spoke some English, the latter decided to conduct the interview in English. Mahmood was asked to explain the reasons for his flight. The official also asked him questions about the situation in Eastland. In accordance with the procedure, Mahmood was issued a written decision within one week.

You are asked to comment on the way Mahmood's case was handled. Please list any aspects you consider relevant, positive as well as negative. Where applicable, please explain what should have been done instead.

| Positive | Negative |
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Answer key to Chapter 5 exercises

Case L

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| 1. Comments on the existing procedure: | |
| <p>The first observation is that the existing procedure in the Republic of Atlantis is generally a good one. We do not have detailed information on how the asylum process is regulated, but the structure in place would seem to offer a number of important safeguards:</p> <ul style="list-style-type: none"> ▪ All applicants are permitted to remain in Atlantis until a final decision on their claim ▪ There is a specialized asylum authority which is responsible for examining all refugee claims ▪ UNHCR has observer/advisor status, enabling the Office to monitor the application of the 1951 Convention/1967 Protocol by the RDO ▪ The procedure provides for the possibility of an appeal to an independent appeals authority, which conducts a full review <p>Rather than undertaking revisions which will lower these standards considerably and put asylum-seekers who are eligible for international refugee protection at risk, the Republic of Atlantis should be encouraged to increase the resources in their system. Experience has shown that an increase in staffing is cost-effective when compared with the financial assistance costs of excessively long determination processes.</p> | |
| 2. Comments on specific aspects of the proposed new procedure: | |
| Clause (1) | <p>The provision on time-limits should be changed. ExCom Conclusion No. 15 (XXX) on Refugees without an Asylum Country states specifically in paragraph (i) that “while asylum-seekers may be required to submit their asylum request within a certain minimum time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.” Denial of admission into the asylum procedure on the basis of a time-limit may result in the return of a person who has a well-founded fear of persecution for a 1951 Convention ground – this means that in applying the proposed clause the Republic of Atlantis may act in breach of its obligation to respect the principle of <i>non-refoulement</i>, as enshrined in Article 33 of the 1951 Convention.</p> |
| Clause (2) | <p>Clause (2)(a) is not complete. International refugee law permits the return of asylum-seekers to a “country of first asylum” only in certain circumstances. The fact that the country concerned respects the principle of <i>non-refoulement</i> is not enough. Protection in line with the 1951 Convention/1967 Protocol must be effective and genuinely available, that is, accessible, to the individual concerned. Return to a “safe third country” where he or she could have claimed asylum will be in keeping with international refugee protection principles only if it is guaranteed that the applicant’s asylum claim will be properly dealt with in that country, which in turn requires that the asylum system be fully functioning in practice.</p> <p>With regard to Clause (2)(b), there are two main concerns:</p> |

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| | <ul style="list-style-type: none"> i The meaning of “manifestly unfounded” and “abusive” should be clearly defined along the lines set out in ExCom Conclusion No. 30 (XXXIV) at paragraph (d). ii The criteria for considering an application manifestly unfounded or abusive are concerned with the well-foundedness, and thus the merits, of the claim (see ExCom Conclusion No. 30, at paragraph (e)(ii)). While it may be appropriate to deal with such claims in accelerated proceedings, they should not give rise to a decision of inadmissibility. The draft legislation would need to be amended in this respect. |
| Clause (3) | <p>This clause should be deleted or amended.</p> <ul style="list-style-type: none"> i Decisions on admissibility on the grounds that the applicant can be returned to a “country of first asylum” or a “safe third country” should be made by the specialized asylum authority. The same applies with regard to manifestly unfounded or abusive applications which, as noted above, should not give rise to a decision of inadmissibility. The draft legislation should instruct the border police to register each asylum application and forward it to the asylum authority so that it may interview the applicant. ii There should be a possibility of filing an appeal against all negative decisions, be it at the admissibility stage or at first instance (as would be the case for manifestly unfounded or abusive claims). The applicant should not be rejected at the border, or expelled or forcibly removed from the territory before a final determination on the appeal has been made (see ExCom Conclusion No. 30, at paragraph (e)(iii)). |
| Clause (4) | <p>This provision should be amended. According to this Clause, the RDO will need to make decisions on the basis of the interview report by the Immigration Official, whereas it would make a better decision if it could ask its own questions and judge for itself whether the applicant has presented a credible account. Assessing credibility is very important, and it is best done through a personal interview. The new procedure should therefore include a personal interview with a fully qualified official of the RDO for all applicants (see ExCom Conclusion No. 30, at paragraph (e)(i)).</p> |
| Clause (5) | <p>This Clause should be deleted. ExCom Conclusion No. 8 (XXVIII) on the Determination of Refugee Status states clearly that applicants who are not recognized “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.” A full appeal, which provides for a review of matters of fact as well as law, not just on questions of law, is absolutely essential in any refugee status determination procedure.</p> |

Case M

You are asked to comment on the way Mahmood’s case was handled. Please list any aspects you consider relevant, positive as well as negative. Where applicable, please explain what should have been done instead.

| Positive | Negative |
|--|--|
| <ul style="list-style-type: none"> ▪ Mahmood submitted his asylum application to the police, which forwarded it to the Asylum Office. It was this central asylum authority which took the decision on admissibility. This is in keeping with procedural fairness requirements. ▪ Nordland’s legislation provides for an accelerated procedure for manifestly unfounded claims, which is applicable to asylum-seekers from countries listed as “safe countries of origin” (it is not known what criteria are applied when including a country on this list). The procedure in such cases includes an interview, for the purpose of determining whether the country in question may be deemed safe for the particular individual concerned. ▪ The procedure also provides for the issuing of a written decision. From the case summary, it is not clear whether the decision contains information as to possibilities of appeal in case of a rejection. | <ul style="list-style-type: none"> ▪ Mahmood was 14 years old when he applied for asylum. He had arrived in Nordland on his own. According to the <i>Inter-Agency Guiding Principles</i> on how to deal with asylum applications of unaccompanied children, the authorities of Nordland should have appointed a guardian to protect his interests, and a qualified legal representative to assist him with the asylum claim. ▪ The Asylum Office declared Mahmood’s claim admissible. While this, as well as the fact that the claim was clearly being dealt with swiftly, is a good thing, his application should have been channelled into the regular asylum procedure rather than accelerated proceedings, which should not be used for determining the claims of unaccompanied children. ▪ Linked to the previous point is the fact that, while Nordland’s procedure for dealing with claims submitted by applicants from countries deemed to be “safe countries of origin” provides for important safeguards, it should not have been applied in Mahmood’s case. Concepts such as “safe country of origin” should not be applied to children. ▪ Responsibility for examining Mahmood’s asylum application was assigned to an adjudicator of the Asylum Office according to a pre-established roster. The official concerned may or may not have had specialized training in dealing with claims submitted by children. Whether or not this is the case should not be left to chance – claims submitted by children should only be dealt with by officials with the necessary skills and experience. ▪ Mahmood was not given an interpreter, despite the fact that he had asked for help with translation, and that both he and the adjudicator only spoke “some” English. This raises concerns as it may well have had the effect of significantly reducing Mahmood’s ability to explain the reasons for his flight and rebut the presumption that Eastland was a safe country of origin for him (which, as noted above, should not have been applied to him in the first place). |