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DIVERSE ENNER

Dear Partners,

Please find enclosed for your information copies of the following documents, provided by our Headquarters in Geneva.

- + • Note on burden and standard of proof in refugee claims, December 1998
- $\frac{0}{0}$ • Update to the Background Paper on Refugees and Asylum Seekers from Afghanistan, January 1999 (AFGHANISTAN - Bilag nr. 139)
- + • UNHCR Position Paper - Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle"), February 1999
- $\frac{0}{0}$ • UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers, February 1999 (Kan remitteras i sekretariatet)

Yours faithfully,

Carl Söderbergh
Refugee Law Training Officer

Distribution:

UNHCR counterparts in the Baltic and Nordic countries

NOTE ON BURDEN AND STANDARD OF PROOF IN REFUGEE CLAIMS

I INTRODUCTION

1. The purpose of this Note is to set out basic considerations relating to the degree of proof necessary before a refugee claim should be accepted.
2. Procedures relating to the determination of refugee status are not specifically regulated in the international refugee instruments. There are no requirements as to whether such procedures must, by nature, be administrative or judicial, adversarial or inquisitorial. Whatever mechanism may be established for identifying a refugee, the final decision is ultimately made by the adjudicator based on an assessment of the claim put forward by the applicant in order to establish whether or not the individual has established a "well-founded fear of persecution".
2. In examining refugee claims, the particular situation of asylum-seekers should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian. On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood. Nonetheless, not all levels of likelihood can be sufficient to give rise to refugee status. A key question is whether the degree of likelihood which has to be shown by the applicant to qualify for refugee status has been established.
3. The terms "burden of proof" and "standard of proof" are legal terms used in the context of the law of evidence in common law countries. In those common law countries which have sophisticated systems for adjudicating asylum claims, legal arguments may revolve around whether the applicant has met the requisite "standard" for showing that he/she is a refugee. While the question of the burden of proof is also a relevant consideration in countries with legal systems based on Roman law, the question of standard of proof is not discussed and does not arise in those

countries in the same manner as in common law countries. The principle applicable in civil law systems is that of "*liberté de la preuve*" (freedom of proof), according to which the evidence produced to prove the facts alleged by the claimant, must create in the judge the "*intime conviction*" (deep conviction) that the allegations are truthful.¹ Having said this, and while the common law terms are technical and with a particular relevance for certain countries, these evidentiary standards have been used more broadly in the substantiation of refugee claims anywhere, including by UNHCR. Therefore the guidelines provided here should be treated as applicable generally to all refugee claims.

4. This Note examines issues relating to the burden and standard of proof applicable in normal refugee status determination procedures where the substance of the claim is examined. Issues relating to burden and standard of proof applicable in accelerated or expedited procedures are discussed elsewhere in a separate IOM-FOM.

II BURDEN OF PROOF

5. Facts in support of refugee claims are established by adducing proof or evidence of the alleged facts. Evidence may be oral or documentary. The duty to produce evidence in order affirmatively to prove such alleged facts, is termed "burden of proof".²

6. According to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. Thus, in refugee claims, it is the applicant who has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and

¹ See Jean Pradel, "Droit Pénal Comparé".

² Black's Law Dictionary, West Publishing Co; 1990.

evaluate all the relevant facts.³ This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.

III STANDARD OF PROOF - GENERAL FRAMEWORK AND DEFINITIONAL ISSUES

7. In the context of the applicant's responsibility to prove facts in support of his/her claim, the term "standard of proof" means the threshold to be met by the applicant in persuading the adjudicator as to the truth of his/her factual assertions. Facts which need to be "proved" are those which concern the background and personal experiences of the applicant which purportedly have given rise to fear of persecution and the resultant unwillingness to avail himself/herself of the protection of the country of origin.

8. In common law countries, the law of evidence relating to criminal prosecutions requires cases to be proved "beyond reasonable doubt". In civil claims, the law does not require this high standard; rather the adjudicator has to decide the case on a "balance of probabilities". Similarly in refugee claims, there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is credible.⁴

³ The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states in para 196 that "...while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."

⁴ Handbook, para 195 states "...It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements."

9. Obviously the applicant has the duty to tell the truth. In saying this though, consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors.

10. As regards supportive evidence, where there is corroborative evidence supporting the statements of the applicant, this would reinforce the veracity of the statements made. On the other hand, given the special situation of asylum seekers, they should not be required to produce all necessary evidence. In particular, it should be recognised that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.

11. In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.

12. The term "benefit of the doubt" is used in the context of standard of proof relating to the factual assertions made by the applicant.⁵ Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the "benefit of the doubt".⁶

IV STANDARD OF PROOF IN ESTABLISHING THE WELL-FOUNDEDNESS OF THE FEAR OF PERSECUTION

13. The phrase "well-founded fear of being persecuted" is the key phrase of the refugee definition. Although the expression "well-founded fear" contains two elements, one subjective (fear) and one objective (well-founded), both elements must be evaluated together.

14. In this context, the term "fear" means that the person believes or anticipates that he/she will be subject to that persecution. This is established very largely by what the person presents as his/her state of mind on departure. Normally, the statement of the applicant will be accepted as significant demonstration of the existence of the fear, assuming there are no facts giving rise to serious credibility doubts on the point. The applicant must, in addition, demonstrate that the fear alleged is well-founded.

15. The drafting history of the Convention is instructive on this issue. One of the categories of "refugees" referred to in Annex I of the IRO Constitution, is that of persons who "expressed valid objections to returning" to their countries, "valid objection" being defined as "persecution, or fear, based on reasonable grounds of persecution". The

⁵ This term is applied in the criminal law context relating to proof of facts by the prosecution where if there is a reasonable doubt in proving the case, the benefit of the doubt must be given to the accused.

⁶ See Handbook, para 203-204.

IRO Manual declared that "reasonable grounds" were to be understood as meaning that the applicant has given "a plausible and coherent account of why he fears persecution". The Ad Hoc Committee on Statelessness and Related Problems adopted the expression "well-founded fear of persecution" rather than adhered to the wording of the IRO Constitution. In commenting on this phrase, in its Final Report the Ad Hoc Committee stated that "well-founded fear" means that a person can show "good reason" why he fears persecution.⁷

(c) Threshold

16. The Handbook states that an applicant's fear of persecution should be considered well-founded if he "can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable...".

17. A substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well-foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish "well-foundedness", persecution must be proved to be reasonably possible. Attached as an annex is an overview of some recent jurisprudence, by country.

(d) Indicators for assessing well-foundedness of fear

18. While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the

⁷ The Ad Hoc Committee on Statelessness and Related Problems was established in accordance with Economic and Social Council resolution 248 B (IX) of 8 August 1949. This resolution requested the Committee to consider the desirability of preparing a revised and consolidated Convention relating to the international status of refugees and stateless persons and, if they considered such a course desirable, draft the text of such a convention. The report of the Ad Hoc Committee is contained in UN Doc. E/1618.

personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.

19. The applicant's personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account.⁸ Relevant elements concerning the situation in the country of origin would include general social and political conditions, the country's human rights situation and record; the country's legislation; the persecuting agent's policies or practices, in particular towards persons who are in similar situation as the applicant, etc. While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor.⁹ By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin.

VI CONCLUSION

20. In so far as evidence is concerned, refugee claims are unlike criminal cases or civil claims. Subjective elements asserted are particularly hard to prove and a decision on credibility will not normally rest on "hard" facts.

⁸ See Handbook, para 43.

⁹ It may be noted that in this context, the applicant's individual temperament, personality and character are relevant in so far as they serve as factors in the evaluation of the likelihood of the applicant becoming exposed to persecution. Grahl-Madsen. *op.cit.* states "...it is apparent that the likelihood of becoming a victim of persecution may vary from person to person. For example, a well-known personality may be more exposed to persecution than a person who has always remained obscure. Also, some persons are more strong-willed or more outspoken than others, and therefore more susceptible to attract the attention of the authorities than other people."

The adjudicator will often need to depend entirely on oral statements of the applicant and make an assessment in light of the objective situation in the country of origin.

21. As regards "well-foundedness" of the fear of persecution, while an assessment of this element is inherently speculative in nature, it is not pure conjecture, nor does it amount to drawing strict legal inferences. Deciding on the "likelihood" or "possibility" of an event happening lies somewhat in-between and must be justifiable based on valid grounds.

22. It is pertinent to note the following guidance offered by the Handbook: "Since the examiner's conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding".

ANNEX

Overview of some recent jurisprudence

United States:

In the case of INS v. Stevic¹⁰ the Supreme Court made a clear distinction between the standard applicable in withholding of deportation proceedings and asylum proceedings. The Court held that in order to qualify for withholding of deportation, an alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned; that is, the applicant has to show "clear probability of persecution". In contrast, with regard to the standard applicable in asylum proceedings, it pointed out that a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility".¹¹

This distinction was re-emphasised by the Supreme Court in the later case of INS v. Cardoza-Fonseca.¹² In that case, the Supreme Court, by referring to the legislative history of the 1980 Refugee Act, as well as the plain language of the Act, stressed that the terms "refugee" and "well-founded fear" were made an "integral part" of asylum procedures and that to show a "well-founded fear of persecution" an alien "need not prove that it is more likely than not that he or she will be persecuted in his or home country". Justice Stevens stated that "one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place". On the basis that it was Congress' intention to define "refugee" in the 1980 Refugee Act to be in conformity with the 1967 Protocol, the Court examined the drafting history of the 1951 Convention and concluded that the "standard, as it has been consistently understood by

¹⁰ 467 U.S. 407 (1984)

¹¹ 467 U.S. 424-425.

¹² 480 U.S. 421 (1987).

those who drafted it, as well as those drafting the documents that adopted it, certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a 'refugee'." The Court then reaffirmed the standard stipulated in the Stevic case, that of "a reasonable possibility".

United Kingdom:

In providing guidance on the standard of proof applicable in cases which involve analysing the likelihood of a future event occurring, the House of Lords rejected the use of the "balance of probabilities" test ("more likely than not") which is applicable in civil cases. In Fernandez v. Government of Singapore,¹³ which is a case relating to the 1967 United Kingdom Fugitive Offenders Act,¹⁴ Lord Diplock stated that "there is no general rule of English law that when a court is required, either by statute or at common law to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens". The Court took into account the relative gravity of the consequences of the Court's expectations proving wrong either one way or the other, and concluded that it was not necessary to show that it was more likely than not that the individual would be detained or restricted if returned; a lesser degree of likelihood sufficed, such as a "reasonable chance", "substantial grounds for thinking" or 'a serious possibility'.

In the case of R.v Secretary of State for the Home Department ex parte Sivakumaran,¹⁵ etc. the House of Lords took into consideration the gravity of the consequences of an erroneous judgement and called for a test less stringent than the "more likely than not" standard. It ruled that the fear is well-founded if there is reasonable degree of likelihood that the person

¹³ [1971] 1 WLR 987.

¹⁴ Section 4(1)(c) of the Act prohibits the return of a person in regard to whom it appears that he "might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reasons of his race, religion, nationality or political opinion."

¹⁵ [1988] 1 All E.R. 193.

will be persecuted for one of the reasons mentioned in the Convention if returned to his country.

Australia:

In the case of Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs,¹⁶ the Australia High Court endorsed the standard stipulated in the cases of ExParte Sivakumaran and INS v. Cardoza-Fonseca, but preferred to equate it to the term "real chance". Mason C.J. said, "When the Convention makes provision for the recognition of the refugee status of a person who is, owing to a well-founded fear of being persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns." Dawson C.J. stated that "for the sake of uniformity", he preferred a test which "requires there to be a real chance of persecution before fear of persecution can be well-founded". He explained this to mean something "more than plausible" since "an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him, to have no foundation", at the same time, there need not be "certainty" or "even probability that (a fear) will be realised". Similarly, McHugh J. said, "Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as 'well-founded' for the purpose of the Convention and Protocol".

Canada:

In Canada, the Court of Appeal, in the case of Joseph Adjei v. Minister of Employment and Immigration, rejected the "more likely than not" test stating "It was common ground that the objective test is not so stringent as to require a probability of persecution..". MacGuigan J. adopted a "reasonable chance" standard which was equated with "good grounds for fearing persecution" and "a reasonable possibility" of persecution. This

¹⁶ [1989]CLR 379

reasoning was followed in the later case of Salibian v. Canada¹⁷ in which the Federal Court of Appeal stated that "the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin"..

¹⁷ [1990] 3 F.C. 250.

UNHCR POSITION PAPER

Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called "Internal Flight Alternative" or "Relocation Principle")

The Issue

1. Determination of claims to refugee status which involve analysis of whether the fear of persecution extends to the whole of the territory of the country of origin have posed particular problems in recent years. The refugee jurisprudence of a number of countries is increasingly placing emphasis on the need to have explored relocating internally as a pre-requisite to seeking asylum. The possibility of accessing safety elsewhere inside the country of origin has been styled "internal flight alternative", or more recently the "relocation principle" and is being used increasingly as a bar to consideration of claims for refugee status.

2. The use of this notion to deny access to refugee status determination, rather than situating it within the framework of the status determination analysis, is wrong in UNHCR's view, and has the potential seriously to distort refugee law. Moreover, where it has been given a place in individual status determination procedures, it is commonly applied without a proper understanding of how it relates to the criteria for refugee status and without due regard for the circumstances in the displacement area and the reasonableness of relocating internally as opposed to seeking asylum. This is especially so when it is applied in an accelerated procedure, without adequate attention to the specifics of the individual case.

3. The purpose of this note is to set out UNHCR's understanding of the notion, its relationship to basic refugee protection principles, and the considerations which should guide its use as a tool in assessing claims for refugee status.

The Context

4. The 1951 Convention relating to the Status of Refugees is the foundation upon which the global system of refugee protection is built. The principles expressed in or underlying the Convention and the spirit in which it was adopted

have informed its interpretation and the development of regional instruments and protection systems. These principles include a number of human rights tenets, the most important for the purposes of this discussion being the right to leave one's country, the right to seek asylum and the entitlement to protection against return to a situation of danger.

5. While the right to seek asylum is not explicitly included in the 1951 Convention, it is nevertheless implicit in its very existence. Provisions of the Convention which are particularly relevant to the right to seek asylum include the prohibition on the imposition of penalties for illegal entry (Article 31), the prohibition on expulsion (Article 32), and, of course, the prohibition on *refoulement* (Article 33). The right to seek asylum is articulated in other universal and regional instruments¹ and has been repeatedly acknowledged in various international fora, including through conclusions of UNHCR's Executive Committee and resolutions of the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the General Assembly.²

6. *Non-refoulement*, the principle prohibiting return to the frontiers of territories where a refugee's life or freedom would be threatened, is perhaps the single most important refugee protection principle enshrined in the 1951 Convention.³ A similar *non-refoulement* principle appears, as well, in other universal and regional instruments.⁴ As noted above, it in turn works to uphold the right to seek asylum in the sense that it prohibits turning away refugees at

¹ The right to seek asylum is recognised in Article 14, Universal Declaration of Human Rights (UDHR); is set out in the United Nations Declaration on Territorial Asylum (Preamble and Article 1) and is reconfirmed in the Vienna Declaration and Programme of Action at Article 23; it also appears in various regional instruments: the African Charter on Human and Peoples' Rights (Article 12 (3)), the American Convention on Human Rights ("Pact of San Jose, Costa Rica" (Article 22 (7))) and the Cairo Declaration on Human Rights in Islam (Article 12).

² See for example Executive Committee Conclusion No. 82 (XLVIII) - 1997, CHR Resolution 1998/49 (Human Rights and Mass Exoduses), Sub-Commission resolution 1997/29 (Freedom of Movement and Population Transfer); and GA resolution A/RES/51/75 of 12 February 1997.

³ Found in Article 33 of the 1951 Convention, and recognised by many authorities to be a norm of customary international law.

⁴ A more general right not to be returned to a country where there is a risk of torture or cruel or inhuman treatment is also found, either explicitly or by interpretation, in other human rights instruments, the most prominent perhaps being Article 3 of the Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights and Fundamental Freedoms. Similar prohibitions are found in African, Middle Eastern and American human rights and refugee instruments.

borders and returning them to situations of danger. Both the right to seek asylum and the *non-refoulement* principle are predicated upon the ability to leave one's country, or to remain outside it, in order to avoid risk of persecution. Without this fundamental basis as the starting point, the international framework for refugee protection could not work.

7. The internal relocation notion, which advocates staying within the borders of one's own country and trying to find safety there, rather than leaving and seeking asylum abroad, rests on understandings which are basically at odds with those underlying the fundamental refugee protection principles. For this reason, UNHCR cannot agree that internal relocation amounts to a "principle" of refugee law; it is rather, in UNHCR's view, a factor or possibility to be analysed in the course of status determination in some individual cases. Caution has to be exercised where this notion is involved, not least because of its potential incompatibility with the right to seek and enjoy asylum from persecution.

Internal Relocation and the Refugee Definition

8. Article 1 of the 1951 Convention relating to the Status of Refugees defines a refugee as someone who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country. The core concept of the definition is the existence of a well-founded fear of persecution.

9. The judgement to be made in cases where relocation is an issue is whether the risk of persecution that an individual experiences in one part of the country can be successfully avoided by living in another part of the country. If it can, and if such a relocation is both possible and reasonable for that individual, this has a direct bearing on decisions related to the well-foundedness of the fear. In the event that there is a part of the country where it is both safe and reasonable for the asylum-seeker to live, the "well-founded fear" criterion may not be fulfilled. The analysis about possible internal relocation can be a legitimate part of the

holistic analysis of whether the asylum-seeker's fear of persecution is in fact well-founded.⁵

10. UNHCR's approach to analysing cases of this nature is set out in paragraph 91 of the *Handbook on Procedures and Criteria for Determining Refugee Status*.⁶ It explains the elementary idea behind the notion from a perspective which is much more favourable to the asylum-seeker than does the developing jurisprudence, and does not refer to the "internal flight" terminology which has subsequently been utilised, and which appears to have contributed to confusion about how to use the notion:

91. The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

11. As this paragraph indicates, in order for internal relocation to be relevant, the asylum-seeker must, in some localised part of his or her country of nationality, experience a serious problem, or risk of serious harm, on Convention grounds, and there must be other places within the country to which the fear or risk does not extend. As is clear from the *Handbook*, this is essentially a factual, evidentiary question to be addressed when assessing the claim, not beforehand to preclude analysis of the substance of the claim. Furthermore, the viability of relocation as an alternative to flight depends also on the reasonableness of the proposed relocation in all the circumstances of the individual case.

12. Clearly, therefore, there are two key points to be addressed in analysing when and how the internal relocation notion may usefully contribute to determining well-foundedness of fear in any particular case. These are its **relevance** in the individual case, and the **reasonableness** of the relocation for the person concerned.

⁵ It is evident from the foregoing that the expansive use of this notion is not advocated by UNHCR; this note is in response to the current perceived misuse of the concept, and analyses how and when its limited use may be warranted.

⁶ United Nations High Commissioner for Refugees, Geneva, 1979, re-edited 1992.

The Relevance Analysis

13. This analysis requires an objective assessment of the situation in the part or parts of the country proposed as alternative or safe locations.⁷ Evidence must be available to show that the risk giving rise to the asylum-seeker's fear of persecution does not extend to that part of the country, and that the area is generally habitable.

14. Factors which will be relevant to consider include, among others:

- the **actual existence of a risk free area**, which must be established by evidence;
- the **stability** of the area and the likelihood that safety will be a durable feature;⁸
- the **accessibility** of the area (both internally and from outside the country);⁹
- its **fitness for habitation**, that is, persons living there must not have to endure undue hardship or risk.¹⁰

⁷ While it is clear that objective information is at the core of this analysis, the analysis must always be made against the circumstances of the individual claim.

⁸ The unfortunate nomenclature of "internal flight alternative" has fed the confusion about which time or date is determinative to deciding status when relocation is a consideration. Refugee status determination is always prospective, and decision-makers must have regard to what is likely to occur in the future to the asylum-seeker, and not only what has happened in the past. Thus the determinative consideration in such cases is whether the asylum-seeker could reasonably live safely in the relocation site now and for the foreseeable future, and not primarily whether that site was an "alternative" at the time of flight. The existence of the alternative at the time of flight will, nonetheless, be a relevant consideration in considering the claim in its entirety, but in a practical sense the time of decision and the time of return are more important.

⁹ As an asylum-seeker whose claim is being determined is necessarily outside his or her country or origin, the issue of safe return will be a relevant one for the decision-maker. If the area where the claimant's fear would no longer be well-founded is not accessible from outside the country and return would have to be effected through an area which would give rise to a well-founded fear, then refugee status ought not be denied on the basis that the asylum-seeker could find internal protection, as that protection is not in fact accessible. The analysis must take into account the reality of the situation at the time of the determination. In addition to concerns about legality of return, relevant considerations will include having regard to natural barriers which mean it is difficult or dangerous to reach the area, such as a lake, a river, a mountain range; or man-made barriers which have the same effect, such as having to cross the front lines in a war, areas where there may be landmines, strafing, snipers or other forms of attack, or military or other checkpoints through which it will be difficult and/or dangerous for the asylum-seeker to pass.

¹⁰ Conditions in the area must be such that a relatively normal life, in the context of the country concerned, can be led. An alternative in the middle of a desert, without access to food or water, is not a habitable alternative.

The Reasonableness Analysis

15. It also has to be demonstrated that, in all the circumstances, it would be reasonable for *this* asylum-seeker to seek safety in *that* location, in order to overcome his or her well-founded fear of persecution. In assessing this question, there are probably as many considerations as there are different circumstances of asylum-seekers and of countries; thus it is not possible to define them all. However, it may be helpful to list some of the issues which may usefully be explored.

16. **The claimant's personal profile** will be important. Factors to be considered might include, but are not limited to:

- age
- sex
- health
- family situation and relationships
- ethnic and cultural group
- political and social links and compatibility
- social or other vulnerabilities
- language abilities
- educational, professional and work background
- any past persecution suffered, and its psychological effects

17. **The country's particular political, ethnic, religious and other makeup** will also be important. Elements which should be taken into account may include:

- the existence and legality of government-sponsored population transfer programmes¹¹
- government policies of segregation or other limitations on freedom of movement and choice of residence¹²

¹¹ That arbitrary forced population displacement is contrary to international law is recognised and elaborated, inter alia, in the *Guiding Principles on Internal Displacement* recently communicated to the Commission on Human Rights by the Representative of the Secretary-General on Internal Displacement (see Annex, note 13). Refugee status determiners ought not risk assisting ethnic cleansing campaigns by failing to recognise victims of such displacement as refugees when their fundamental rights are violated on account of race, religion, ethnicity, political opinion or membership of a particular social group.

¹² These rights are set out in universal instruments: the UDHR (article 13(1) and the International Covenant on Civil and Political Rights (article 12); and in regional human

- numbers, ethnicity, religion and related features of others already in the area in question, and the area's absorption capacity.

Conclusion

18. In summary, the so-called "internal flight alternative" is not an easy answer to refugee claims, and cannot be used as a "short-cut" to by-pass refugee status determination or to decide cases in an accelerated procedure. The "possible relocation" analysis may be relevant, in the individual case, to an assessment of the well-foundedness of the fear of persecution. However, the analysis must include assessment of the safety and reasonableness of internal relocation in all the circumstances of the specific case at issue.

Standards and Legal Advice Section

Division of International Protection

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rights treaties: African Charter on Human and Peoples' Rights (article 12 (1)), American Convention on Human Rights "Pact of San Jose" (article 22 (1)), Protocol No. 4 to the European Convention on Human Rights and Fundamental Freedoms (article 2), and the Cairo Declaration on Human Rights in Islam (article 12).

Annex: Some Related Issues

Relocation and State Agents

1. UNHCR has long held that the possibility of internal relocation cannot be a relevant consideration where the feared agent of persecution is a state agent, as these are presumed to be able to act throughout the country. UNHCR continues to believe that in the overwhelming majority of cases involving a fear of state agents of persecution, the availability of a safe internal alternative will not be a relevant consideration.

2. This assertion deserves a caveat, however, in the sense that the presumption that state agents are able to act throughout the territory under the state's nominal control is a rebuttable one. It may be open to a status determination authority to find, on appropriate evidence, that in fact the state is not in control of its entire territory, and thus it may, in certain factual circumstances, be possible to conclude that internal relocation would be a safe and reasonable alternative.

3. The issue of the durability of the proposed relocation would, in such circumstances, have to be very carefully considered, as the issue has most usually arisen where war or internal conflict existed. Where there is a volatile situation, for instance, where battle lines are moving frequently, the durability of any proposed safe location behind such lines is questionable.

Relocation and Internally Displaced Persons

4. The presence of internally displaced persons who are receiving international assistance in one part of the country is not in itself conclusive evidence that an asylum seeker who has fled the country could, instead, have chosen to relocate and join the group of internally displaced.

5. Internally displaced persons may be fleeing violence and its consequences, and may not be fleeing persecution. In such cases, the presence of internally displaced persons will have little relevance to the situation of asylum-seekers and refugees whose claims are based on a fear of persecution. Even where

persecution is at issue, displacement may not have resolved their situation and the threat of persecution may well remain a part. Again, this is a factual assessment which has to be made, case by case. A further consideration is that the standard and quality of life of the internally displaced persons may not be sufficient to support a finding that living in the area would be a reasonable alternative to flight.

6. The sad reality is that many thousands of internally displaced the world over do not enjoy basic rights and have no opportunity to exercise their right to seek asylum outside the country. Thus, although there now exist standards¹³ largely agreed by the international community, the implementation of those principles and the effective exercise of those rights by internally displaced persons are by no means assured in practice.

7. It is worth noting in this context that the *Guiding Principles* referred to above explicitly confirm in section 2 of Principle 2, that they are not to be used to weaken or undermine other important human rights, particularly the right to seek asylum, as follows:

2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

Relocation and the Burden of Proof

8. Resort to the relocation notion has sometimes imposed an additional burden of proof on a claimant for refugee status. In addition to showing that he or she has a well-founded fear of persecution in one or more parts of the country, the applicant has also been called upon to show that there is no part of the country in which the fear is not well-founded. This is not correct. The use of the relocation notion should not lead to shifting burdens or additional burdens. The usual rule must continue to apply, i.e. the burden of proving an allegation rests on he (or she)

¹³ *Guiding Principles on Internal Displacement* communicated to the Commission on Human Rights at its 54th session in 1998 by the Representative of the Secretary-General on Internal Displacement, Mr. Francis M. Deng (E/CN.4/1998/53/Add.2)

who asserts it. This is consistent with paragraph 196 of the *Handbook*¹⁴ which states:

...while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.

¹⁴ See note 6 above.