

Study of the Grey Zone between Asylum and Humanitarian Protection in Norwegian Law & Practice

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Preface

For the past five years, I have had the privilege of teaching Refugee and Asylum law at the University of Oslo. One of my greatest sources of happiness is seeing many of my former students dedicate themselves to implementing protection principles within policy and practice at KRD, UDI & UNE. I warmly appreciate the Ministry of Local Government's (KRD) initiative to give me the opportunity to contribute to this evolution via this study. I thank Trygve Nordby, Terje Sjeggstad, and the staff members at the Directorate of Immigration (UDI) and the Immigration Appeals Board (UNE) for their openness and cooperation during the research period. I am grateful to Anita Vardøy, Eva Haagensen, Catharina Lurås, Gerd Ingebrigtsen, Anne Bruland, Gunnar Stølsvik, and Erik Aksnes for their assistance and commentary during the research period. Their insight and support was invaluable. The findings within this report are intended to promote increased awareness of the complex nature and dynamism of the field of refugee law in practice.

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Executive Summary

This study is based on a review of 300 cases selected by the immigration authorities which served as a representative sample of the entire caseload for the period of 1998-2003.

The challenge to uphold the standards contained within the Convention relating to the Status of Refugees (1951) as well as other international human rights instruments requires reform of the legislative framework and supporting regulations, increased cooperation among the different institutions addressing refugee issues, improved human rights and refugee law education of caseworkers & lawyers, and reduced external pressure to be effective in terms of production in favour of protection.

The “grey zone” between asylum and humanitarian protection is a result of several factors:

With respect to the Act concerning the Entry of Foreign Nationals into the Kingdom of Norway and its implementing regulations, the study found that the law was unclear: the text of the refugee definition contained in Article 1 of the 1951 Convention is absent and the normative terminology remained undefined.

Review of the cases revealed a lack of systematized approach when discussing “persecution”, in part based on the tendency to rely on past practice instead of developments within theory and practice of human rights and refugee law:

First, there was limited reference to human rights instruments (although this appeared to improve in 2003). Second, recognition of human rights focused on jus cogens rights (of which no derogation is ever permitted), and there was limited cumulative analysis of human rights. Third, persecution committed by non-state Actors was less likely to be recognized as forming basis for recognition of asylum and more likely to receive secondary status. Similarly, persecution occurring within the context of generalized violence or other conflict is often deemed not to merit asylum, but rather humanitarian protection. Fourth, another factor limiting the grant of asylum was the lack of recognition of mixed motives for persecution (criminal + persecutory reasons). Fifth, past persecution often resulted in a grant of humanitarian protection over asylum, regardless of potential evidence of threat of future persecution or possible relevance for application of a “compelling reasons” exception. Sixth, the maintenance of a comparative standard which requires

individuals to demonstrate that they are more at risk of persecution than others also renders recognition of asylum difficult.

The notion of “torture or cruel, inhuman, or degrading” treatment revealed gaps in application due to lack of comprehensive guidelines and variable reliance on proffered evidence (including medical and psychiatric evidence). To some extent, it appeared that criteria for protection on account of compassionate grounds required less analysis than the grounds for legal protection, and hence may in part explain the preference for such protection over asylum.

Reference to the protection categories contained within the 1951 Convention is narrow in scope, “political opinion” appears to be referred to most often over the other categories, however it is interpreted restrictively and “social group”, which is considered to be a flexible category particularly applicable to vulnerable groups such as women, is applied in a limited manner. This renders difficult the establishment of a nexus to the persecution in order to grant asylum.

The lack of harmonization of burden of proof standards pertaining to asylum determination as opposed to non-refoulement analysis relevant for humanitarian protection, as well as maintenance of a high burden of proof, are among the primary reasons why subsidiary protection is given more often.

Another important factor is the merger of credibility determination with protection analysis, asylum is more often given to highly credible applicants, while cases involving doubts regarding credibility or risk evaluation are granted humanitarian protection.

Evidentiary problems complicate the determination: First, partial submission or analysis of evidence. Second, partial identification of protection issues and standards by lawyers and caseworkers. Third, lack of corroborative evidence in areas where documentation is limited due to security concerns limiting entry of international organizations and NGOs. Fourth, merged arguments by lawyers and NGOs pertaining to asylum and humanitarian protection.

The use of standard answers drafted towards exclusion from asylum also promote selection of humanitarian status.

The cases revealed confusion regarding mixed motives of flight (in which fear of persecution combines with economic incentive) as well bias in terms of provision of asylum to persons facing risk of gender persecution based on age, regardless of the existence of common protection needs. Further, the existence of policies as

pertaining certain groups, based on nationality or vulnerable status often results in provision of humanitarian protection rather than asylum based on individual specific circumstances.

Limited reference to un-remedied effects of persecution or presence of new threats in post-settlement situations, as well as variable use of “internal flight alternative”, particularly with respect to situations involving internal displacement situations are additional problems diminishing the grant of asylum. In addition, there appears to be a tendency to formalistically rely on the presence of international organizations to justify a finding of lack of protection need.

There is a need for greater transparency in processing of cases. The failure to place the analysis behind the grant of asylum or humanitarian protection within the decision violates basic principles of due process and inhibits understanding of protection criteria among the lawyers and applicants, as well as the society at large.

There is a need for increased inter and intra institutional communication as different sections within institutions have different practices with regard to the same protection issues, and there is variance between UDI and UNE with respect to asylum policies. Finally, political actors and the media place significant pressure on the immigration institutions to be productive in terms of quantity of decisions and thereby diminish the ability of the caseworkers to improve their protection analysis.

Although it is important to point out areas for improvement, it is equally important to recognize that the caseworkers perform an important function within the society. They take their work very seriously and deserve respect for their professionalism. The provision of protection to those in need is a noble task; their efforts seek to ease the ills of human condition in surrogacy to failed states of origin. In light of this, the caseworkers and the institutions they work for deserve a higher degree of respect within the society.

This report provides recommendations for legal and systemic reform in order to diminish the “grey zone” between asylum and humanitarian protection

1. Introduction

1.1 Purpose

This study arose as a result of concern regarding Norway's low rate of asylum in light of its duty to uphold the 1951 Convention relating to the Status of Refugees (1951 Convention).¹ Specifically, there was a need to examine why the immigration authorities more often grant humanitarian protection than asylum. We sought to examine whether there was lack of clarity or comprehensiveness within the law. Is it interpreted restrictively, or are there other factors affecting the implementation of protection standards?

We also sought to evaluate to what extent are the decisions from Directorate of Immigration (UDI) and the Immigration Appeals Board (UNE) in accordance with the international legal framework. This framework consists of the 1951 Convention on the Status for Refugees, as well as human rights conventions, inter alia Universal Declaration of Human Rights, UDHR, European Convention for the Protection of Human Rights, ECHR, Convention Against Torture, CAT, Convention on the Elimination of Racial Discrimination, CERD, Convention on the Elimination of Discrimination Against Women, CEDAW, Convention on the Rights of the Child, CRC, International Covenant on Civil and Political Rights, ICCPR, & International Covenant on Economic, Social and Cultural Rights, ICESCR) and humanitarian law (i.a. Geneva Conventions and their Protocols, as well as the statute establishing the International Criminal Court, ICC). We referred to relevant soft law and comparative laws and cases, as well as cases from international human rights monitors, such as the Committee Against Torture and the European Court of Human Rights.

This study is intended to provide guidance as to how UDI & UNE may raise the rate of grant of asylum to those applicants meriting protection under the 1951 Convention on the Status of Refugees and how to more clearly delineate the grounds for humanitarian protection. It is my express wish that this study be interpreted as reflecting the possibilities for the elaboration of better standards and improved coordination among the different entities (both state and non-state) charged with the duty of protecting refugees.

The study consists of two reports. The first report, authored by Cecilia Bailliet, provides a general review of the asylum law and cases, highlighting problem areas which help explain the low asylum rate and offering suggestions for rectification of standards, policy, and practice. The second report, Implementation of a Gender Perspective in Norwegian Asylum

¹ Convention Relating to the Status of Refugees, 28 July 1951, U.N. Treaty Series No. 2545, Vol. 189, p.137.

Law, authored by Torhild Holth, provides an analytical evaluation of gender issues pertaining to asylum claims and provides suggestion for the elaboration of guidelines to improve practice in this regard.

1.2 Methodology

One of the limitations of this study is precisely the low rate of asylum. Although we attempted to attain an equal division of cases between asylum, humanitarian protection, and rejection, this was not possible as the latter categories were more numerous. In spite of this, it was possible to highlight key areas of concern regarding interpretation of the protection standards pertaining to asylum and humanitarian protection. An interesting turn was the immigration authorities provision of cases addressing not only “refugee-like” situations involving the threat to life or security but also those addressing health (psychiatric or physical) or other compassionate grounds not relevant to legal protection. Thus, the term “humanitarian protection” may be applied broadly to incorporate both grounds, however within the paper we refer to permit on compassionate grounds in the latter cases.² UNHCR refers to “complementary protection” for both types of cases, while the EU utilizes the term “subsidiary protection” for “refugee-like” situations warranting legal protection. Included within the cases submitted were those receiving a permit for compassionate grounds according to the “15 month rule” which allows for a to be issued to persons who have not received determination of their asylum claim within 15 months (see §21 of the regulations pertaining to the Immigration Act).³ Several of these cases included protection issues which did not receive a decision on point, due to utilization of the 15 month rule. Thus it appeared that some of these cases addressed “grey issues” relevant to the study. We reviewed ca. 300 cases, approximately 250 from UDI and approximately 50 from UNE (UNE cases are highlighted as such, all other cases pertain to UDI). The UDI cases were decided within the period of 1998-2003, the UNE cases were decided in period between 2001 and 2003. With respect to the UNE decisions, we reviewed cases decided by a board leader (qualified as magistrate) alone, as well those resolved in appeals board hearings. The hearings are chaired by a board leader and attended by two lay board members (volunteers). Hence, reference may be made to the decision by the majority and the dissent by the minority. The cases addressed the following countries: Afghanistan, Pakistan, Sri Lanka, Iraq, Iran, Eritrea, Ethiopia, Congo

² Indeed Vevstad calls for clarification of this concept. See Vigdis Vevstad, *Refugee Protection: A European Challenge* 139 (Achehoug 1998).

³ Previously such grant was automatic, now determination of the grant is made on a case by case basis.

(DRC), Somalia, Sudan, Algeria, Former Yugoslavia, Croatia, Colombia, Belorussia, and Russia. We sought to achieve parity between the sexes, although an exact 50-50 split was impossible, as males dominated the caseload. We asked the immigration authorities to provide us with cases that could be considered representative of the asylum cases processed by them. In other words, they selected “average” cases which represented the most common claims presented from each country, and included some particularly challenging cases as well in order to reveal the “grey” areas within the practice thus providing a span of protection issues.

UDI & UNE selected the cases based on criteria we provided them relating to human rights issues, and we sent back cases which we were not satisfied with (mostly manifestly unfounded claims, Dublin cases involving the transfer of asylum seekers back to “first countries” or “safe third countries” for processing of their claims in conformance with the EU system, etc.). The selection was based on the following criteria:

- *Alleged: Persecution for reasons of religion*
- *Alleged: Persecution for reasons of race, nationality or ethnicity*
- *Alleged: Persecution for reason of membership in an organization, student group, occupation, trade union, association, clan, tribe, caste or family*
- *Alleged: Persecution for reason of political opinion, including imputed political opinion and neutrality*
- *Alleged: Persecution for reason of transgression of social norms*
- *Alleged: Past torture or risk of future torture or cruel, inhuman or degrading treatment or punishment (including right to life)*
- *Alleged: Attack on individuals or groups in war or internal conflict (ranging from individual attacks to ethnic cleansing)*
- *Alleged: Intervention against physical or mental integrity*
- *Alleged: Arbitrary arrest, detention or expulsion*
- *Alleged: Violation of the right to property*
- *Alleged: Violation of the right to freedom of movement and choice of residence*
- *Alleged: Violation of the right to culture*
- *Alleged: Violation of socio-economic rights, including the right to food, housing, health, etc.*
- *Alleged: Discrimination in relation employment or education*
- *Alleged: Persecution by Non-State Actors*
- *Alleged: Violation of the right to freedom or personal security*
- *Alleged: Forced recruitment by the State or Non-State Actors*
- *Alleged: Violation of the right to equal protection of the law, effective remedy, and equality before the law*

Further, we requested UDI and UNE to provide us with cases which could shed light on the following issues which we believed would help expose the “grey” area:

- 1) *What type of human rights violations result in a grant of asylum as opposed to humanitarian protection? Do caseworkers examine the scope, duration, and discriminatory effect of a violation in order to identify persecution? Is a cumulative analysis of rights undertaken?*
- 2) *To what extent do the immigration authorities refer to human rights instruments and/or humanitarian law instruments when analysing a case and writing a decision? Do they identify the relevant protection issues and refer to the appropriate standards?*
- 3) *Do caseworkers identify cases of individual or group persecution within conflict situations/post-settlement situations?*
- 4) *Of the five protection categories contained within the 1951 Convention, are some utilised more than others?*
- 5) *Do caseworkers use a comparative or non-comparative approach when evaluating claims?*
- 6) *Is asylum granted to persons at risk of persecution from Non-State Actors? To what extent is the State's (or Non State Actor, such as tribe or international organization) de facto ability and willingness to protect victims and provide effective remedies taken into account?*
- 7) *Are there problems with respect to implementation of the standard of proof in asylum claims?*
- 8) *Do lawyers provide the necessary corroborating documentation, identify protection issues, attend interviews, cite human rights instruments, and provide full argumentation?*
- 9) *Do caseworkers take into account all evidence when presented? Do they respond to arguments/issues made by lawyers? Does the absence of corroborating evidence affect the claim? To what extent is the contextual background taken into account?*
- 10) *Do caseworkers apply the benefit of the doubt? Does the credibility analysis affect the determination regarding protection?*
- 11) *To what extent is medical/psychiatric evidence regarding post-traumatic stress syndrome or torture/rape presented and taken into consideration?*
- 12) *Do the decisions reflect the analysis behind the determination-is it clear to the lawyer and the applicant how the decision was arrived at?*

13) *How are the motives of the persecutor for targeting the victim and the motives for flight of the applicant evaluated?*

14) *What is the role of alleged past persecution in the asylum determination?*

15) *Are there policies which affect the outcome of claim, e.g. with respect to a particular nationality or group (such as unaccompanied children), etc.*

16) *Is the 1951 Convention applied in a discriminatory manner?*

With respect to the report on Implementation of a Gender Perspective in Norwegian Asylum Law, the following criteria were highlighted for case selection (references to some of these cases are included in this report as well):

- *Alleged: sexual attack or threat of such*
- *Alleged: persecution on account of liberal opinions / transgression of social norms – e.g. dress, lack of religious affiliation, single status, maternity out of wedlock, etc.*
- *Alleged: domestic violence*
- *Alleged: risk of forced abortion, forced sterilization*
- *Alleged: persecution on account of opposition to forcible marriage or female genital mutilation*
- *Alleged: threat of honour killing*
- *Alleged: discrimination by the State, e.g. denial of the right to health, education, work (discrimination of socio-economic rights)*
- *Alleged: persecution on account of male family member's political activity or association*
- *Alleged: persecution from Non-State Actors*

The list of specific issues addressed is included in the Gender report.

As pertaining the statistical survey, 171 cases which had received asylum or humanitarian protection were registered (100 men and 71 women). These were evaluated in order to establish the existence of a protection category under the 1951 Convention as well as alleged/implicit human rights violations (past and future). Because the lawyers, NGOs, or caseworkers did not always identify the relevant protection category or the alleged/implicit human rights, we categorized them. The remainder of cases were rejection cases that were initially similarly registered, however discussion of these cases in this report is limited to qualitative analysis intended to complement the discussion of why asylum is not given, as the key issue was the boundary between asylum and humanitarian protection. Hence the statistical survey serves only to highlight the grey area between asylum v. humanitarian protection. It is important to note that the intention is not necessarily to point to legal error, rather to point out the need for a systemized analysis of rights and clarity in the drafting of arguments and

decisions in order to minimize “the grey zone” between asylum and humanitarian protection. It should be noted that some cases are referred to more than once, as they address various issues.

In addition to referring to the UDI & UNE cases, we also consulted internal papers on relevant protection issues and standard answers used by UDI. In order to provide an understanding of how the policy and practice measures up to international standards, we reviewed papers from the United Nations High Commissioner for Refugees (UNHCR), the European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), referred to decisions by international human rights monitors, as well as literature within refugee law, human rights, and humanitarian law. The theoretical framework upon which this study is based follows Von Sternberg, Bayefsky, Fitzpatrick, and Van Kierkan’s recognition of the interplay of international human rights law, international humanitarian law, international criminal law, and refugee law in forming the standards for protection or exclusion thereof refugees.⁴ However given the short amount of time in relation to the amount of cases (this author was given eight months to review 300 cases and write the report), this study pursues a practical presentation of the issues, comparative analysis, and provides recommendations for policy/legal reform as well as highlights topics for further research.

We conducted unstructured interviews with the leaders of the asylum sections in UDI and UNE, and were provided additional insight from caseworkers who delivered cases for review. This author takes sole responsibility for the evaluation of systemic functions, thus the blame for any errors falls on my shoulders alone.

1.3 Outline of the Report

The standards for asylum and humanitarian protection are discussed and compared to other models in Chapter 2 in order to highlight the need for reform in order to provide a better protection framework and to eliminate vagueness in interpretation and application. This review is followed by a qualitative and quantitative evaluation of the case law. It is intended to explore “the grey area” between the grant of asylum and the grant of humanitarian

⁴ Anne F. Bayefsky & Joan Fitzpatrick (Eds.), *Human Rights and Forced Displacement* (Martinus Nijhoff Publishers 2000), Peter J. Van Krieken, *Refugee Law in Context: The Exclusion Clause* (T.M.C. Asser Press 1999), Mark R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff Publishers 2002). See also Richard Plender QC & Nuala Mole, “Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights” in Francis Nicholson & Patrick Twomey, *Refugee Rights and Realities* (Cambridge University Press 1999), and Vigdis Vevstad, *Refugee Protection: A European Challenge* (Tano Aschehoug 1998).

protection. It also seeks to identify examples of cases which received humanitarian protection or protection for compassionate grounds which could have received asylum. Cases which could have received asylum are often downgraded to the lower status. Chapters 3-4 evaluate the role of standard of proof and credibility determination in determining whether an applicant receives asylum as opposed to humanitarian protection. Further gaps are highlighted within the submission and processing of evidence which also contribute to the existence of a “grey area” between asylum and humanitarian protection. Chapter 5 discusses the lack of clarity pertaining to the concepts of “persecution” and “torture or cruel, inhuman, degrading treatment” thus revealing the need for both legal reform to identify the scope of such terms and systemic support in the form of human rights education and other related expertise. The need for evaluation of new persecution threats or un-remedied effects of past persecution in post-settlement situations is also presented. Chapter 6 addresses the protection categories; revealing how narrow interpretation of “political opinion” and limited use of “social group” reduce asylum recognition as it less likely that a nexus will be established to the persecution. Chapter 7 evaluates the variable use of internal flight alternative in situations involving internal displacement situations which limits the grant of asylum. Chapters 8-9 return to the issue of implementation of the refugee definition by discussing exclusion and cessation clauses. It is contended that the lack of reference to the exception to the cessation clause also negatively affects recognition of asylum, in particular with respect to the exception clause, 1 C 5, addressing “compelling reasons” with respect to past persecution. Chapters 10-12 suggest that there are systemic problems which limit recognition of asylum, i.e. confusion regarding the existence of mixed motives for flight (fear of persecution + economic interest), the existence of age bias in the determination process as pertaining gender persecution, the use of standard answers drafted towards exclusion, lack of confidence among caseworkers due to limited human rights education, and external pressure by political actors and media to be productive in terms of quantity of decisions instead of quality of protection analysis.

In sum, the commentary regarding UDI & UNE practice are intended to indicate areas in which the interpretation of the law and cooperation among the different actors working and influencing asylum issues (state entities, NGOs, lawyers, government, international organizations and media) may be improved in order to assure implementation of the 1951 Convention and reduction of the “grey zone” between asylum and humanitarian protection. In the next chapter the clarity and the comprehensiveness of the law is reviewed and suggestions for legal reform are offered.

2. Plain Face Analysis of the Law

2.1 The Need for Textual Incorporation

One problem regarding the practical impact of the Norwegian Act concerning the Entry of Foreign Nationals into the Kingdom of Norway (1988) is the fact that although it incorporates art. 1 A of the 1951 Convention, it does not explicitly set forth the definition of a refugee. It only contains a reference in §16: “*According to the law a refugee is a foreigner falling under the Convention on Refugees, 28 July 1951, Art. 1A, cf. Protocol 31 January 1967*”. Caseworkers may be less familiar with the protection categories when they are not visually present in the law. UNE places the definition at the top of their decisions, thereby facilitating reference to it throughout the analysis. UDI decisions do not always place the definition within the decision. Reform of the law to include the definition in its entirety may serve to promote increased reference to its various elements as pertaining identification and standard of proof. Furthermore, as pointed out by Einarsen and the Norwegian Organization for Asylum Seekers, the official Norwegian translation is stricter than the original “well founded fear” because it utilises “*justifiably fears*” instead of “*well-founded fear*”⁵:

“justifiably fears persecution because of race, religion, nationality, membership of a special social group or because of political views, are located outside the country of which he is a citizen, and is not able, or because of such fear, unwilling to invoke this country’s protection.”

Thus translation and inclusion of the definition would require amendment of the current definition utilized at present.

Recommendation: *§16 should be amended to include the 1951 definition in its entirety on condition of new translation including “well-founded fear”.*

KRD’s proposed regulations include such amendment but utilizes “well grounded”.

⁵ Terje Einarsen, *Flyktningers rettsstilling i Norge* 40 (Fagbokforlaget 1997), Norwegian Organization for Asylum Seekers, oral commentary by Morton Tsjessem, director of NOAS to author. See *Kunnskapsforlagets, Norsk-Engelsk Blå Ordbok* (Ascheoug 1989)- *velbegrunnet* = well-founded.

2.2 Reference to International Conventions/Standards with Respect to Asylum

I examined the asylum laws of European nations, as well as a select number outside the region, in order to understand current trends. The most recent laws are found in Central and Eastern Europe. These nations received assistance from UNHCR and the EU to reform their laws and reflect the current evolution in protection theory. Thus, the most innovative laws were not those of France and Germany, but rather nations such as Albania and Slovenia. (Germany did have a law proposal which was to include recognition of non-state agents and gender persecution, however it was not passed. Furthermore, other reforms or initiatives in UK and Denmark were characterized by UNHCR and NGOs as running counter to protection norms as they sought to limit the grant of asylum.⁶) In terms of “modernizing” the law with respect to asylum, I found two trends among laws from other nations: first, laws which linked asylum to other international conventions beyond the 1951 Convention on the Status of Refugees or human rights in general/or select standards; and second, laws which referred to regional instruments. Below, I present select innovative, modern laws which reflect the latest protection standards and may be considered as possible models for similar innovation in Norway.

The most open example of a law which links asylum to instruments beyond the 1951 Convention is the Law on the Asylum of the Republic of Albania, Chapter 1, Article 1:

*“Under this law the Republic of Albania recognizes the right to asylum and temporary protection to all foreigners who are in need of international protection be they refugees or other persons who request asylum **in compliance with the provisions of this law and the international conventions Albania is a party to.**”*

Article 2 sets forth that “. . . *Asylum enshrines the rights and obligations stipulated in the Geneva Convention Related to the Status of Refugees of 28 July 1951 and the 1967 New York Protocol, **in international treaties Albania is a party to** . . .*” This leaves open the possibility of referring to human rights instruments, humanitarian law instruments, etc. in order to permit an evolution of interpretation of protection standards to meet the changing reality of persecution trends and protection needs without opening the door to frivolous

⁶ The German draft bill is available on the UNHCR website <http://www.unhcr.ch>, as are the Danish reforms (see UNHCR’s Comments on Denmark’s Draft Bill on Amending the Aliens Act, the Marriage Act and other Acts (18 March 2002). On the UK reforms see British Refugee Council, The Nationality, Immigration & Asylum Act: Changes to the Asylum System in the UK (December 2002) available at <http://www.refugeecouncil.org.uk>>.

claims.⁷ This presents an interesting model for consideration when amending the Norwegian law.

Another option is to create a separate category of persons meriting asylum, beyond those falling within the 1951 Convention, but linked to human rights. Traditionally, the notion of asylum was linked to political activists, thus the Constitutions of France and Germany recognize the right of asylum for persons persecuted for exercising political rights, however both instruments were amended to permit limitation based on the European system for processing asylum claims:

Germany Article 16a:

“1. Persons persecuted on political grounds shall have the right of asylum.

2. Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured . . .

(It further recognizes the terms for safe country lists, manifestly unfounded claims, and the right of the State to pursue agreements with third states to process asylum claims).

France, Constitution of 4 October 1958

Article 53-1:

“The Republic may conclude with European States that are bound by commitments identical with its own in the matter of asylum and the protection of human rights and fundamental freedoms, agreements determining their respective jurisdiction in regard to the consideration of requests for asylum submitted to them.

However, even if the request does not fall within their jurisdiction under the terms of these agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France for some other reason.”

(This is an opt-out clause permitting the State to retain jurisdiction over a case in spite of the Dublin Convention)

In keeping with the French model, the Czech Republic’s Act No. 325 on Asylum calls for asylum to be granted to persons “persecuted for the exercise of his political rights and

⁷ Direct reference is made of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the UN Convention Against Torture, the Convention on Civil and Political Rights, the Convention on the Rights of the Child, or other international instruments in order to ground an order of temporary protection (including non-expulsion/deportation) in Article 5.

freedoms” or the 1951 Convention standard.⁸ More recent laws have expanded the notion of asylum from political activism to human rights activities, e.g. the Bulgarian Law on Refugees calls for asylum to be given to “aliens persecuted due to their convictions or activity in protection of internationally recognized rights and freedoms”- thus highlighting individuals as human rights activists meriting protection by the international community. In like manner, Portugal’s Law No.15 is truly innovative as it recognizes the right of asylum for persons persecuted “as a result of activity . . . in favour of democracy, social and national liberty, peace among peoples, freedom and the rights of the human being” in addition to the 1951 Convention standard. In this author’s opinion, identification of activists, either political or human rights activists, for special protection separate from the 1951 Convention definition is unnecessary, given the recent tendency to promote broad interpretation of the definition to incorporate these persons under social group or political opinion.

A third alternative is amending the law or commentary to the law to cross-reference specific standards or instruments, in particular those affecting vulnerable categories, such as children. For example, as pertaining refugee children, the Canadian Refugee Board is instructed to consider the “best interests of the child” (Article 3 of the CRC) when assessing a claim by a minor and consider the relevance of human rights instruments, including the CRC, to evaluate the level of harm which may amount to persecution. Similarly, the Swedish Aliens Act states that “in cases where a child is involved, special attention shall be given to what is required bearing in mind the child’s health and development and the best interests of the child otherwise.” This technique appears appropriate for targeting the special needs of vulnerable categories of persons among refugees, such as children, elderly, disabled, etc., but has the disadvantage of not addressing the needs of the larger group as well as future vulnerable categories yet to be defined. Further specific references may be made to article 37 of the CRC “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”, Article 35 of the CRC: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form” to grant humanitarian protection. One may add that the CRC’s guarantees of the rights to life, survival & development, protection from neglect and exploitation, as well as the Protocol’s prohibition of forced recruitment would provide additional standards for asylum or humanitarian protection. In practice within Norway

⁸ Of interest, it defines persecution as meaning “danger to life or freedom as well as measures causing psychological pressure or any other similar treatment if carried out, supported, or tolerated by the authorities. . . or if such country is not able to ensure protection against such treatment in an adequate manner”

reference and evaluation of the CRC is not always completed in cases involving children. Considering that §4 of the Norwegian Act incorporates human rights treaties to guarantee the rights of aliens, there should be greater reference to this instrument. Furthermore, given that the CRC will soon be incorporated into the Human Rights Act, cross-reference to the Aliens law appears to be highly appropriate

The Immigration Act of the United States, section 101 (42), highlights specific types of human rights violations, forced sterilization or abortion, and links them to a protection ground (political opinion) thereby promoting a grant of asylum due more to the fundamental nature of the interest at stake (right to security of the person, right to family) than the actual motive in the individual case (as it may be argued that the Chinese government has no persecutory intent in promoting its one-child policy):

“a person who has been forced to abort a pregnancy, undergo involuntary sterilization, or has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.”

Within the European Union, the definition of refugee shall mean:

“. . . a third country national, who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, and a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 14 (on exclusion) does not apply.”⁹

The EU Charter of Fundamental Rights of the European Union, Article 18 confirms that “the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.” Thus, within the region there is recognition that the definition contained within the 1951 Convention shall remain the cornerstone for provision of asylum. In contrast, within other regions, countries have adopted expansive regional definitions which extend beyond the 1951 Convention. For example, Belize’s Refugees Act contains a refugee definition which incorporates both the 1951 Convention’s definition as well as that contained in the

⁹ Council of the European Union, Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection, Article 2, 15068/02, 2001/0207 CNS (13 December 2002).

Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Article 4(1):

“owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, he is compelled to leave his place or habitual residence in order to seek refuge. . .”

This permits a broader span of protection to address internal instability which is often the root of forced migration. Colombia’s Decree No. 1598 includes a refugee definition which contains the 1951 Convention standard as well as the definition contained in the Cartagena Declaration on Refugees (1984):

“having fled from his country because his life, safety, or freedom are threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order”.

Within the Norwegian law, these broader categories are addressed under humanitarian protection, thus I address them in the next section.

Although Norway has utilized humanitarian protection to expand protection of human rights, it is possible to clarify the scope and normative framework relevant to persecution via linking it to human rights and humanitarian law.

Recommendation:

- *Commentary to §16 could be amended to include one of the following or a combination of these in order to encourage cross-referencing for analysis of protection needs:*
- *General reference to international instruments which Norway has ratified. One may argue that this has been accomplished in §4 of the Act, but it may be necessary to create a more direct tie to the persecution standard.*
- *Direct reference specific instruments, such as ICCPR, ICESCR, ECHR, CAT, and CRC, etc.*
- *Direct reference to specific standards within these instruments, such as “best interests of the child”*

Within the body of international law, caseworkers did not refer to humanitarian law. Given many asylum seekers come from countries undergoing

war or internal conflicts, the lack of referral to the applicable law is of grave concern. It is possible to identify acts of persecution within the context of war, indeed the ICC statute contains a modern definition of persecution.

- *Therefore, linkage to the Geneva Conventions, their Protocols, as well as the Rome Statute establishing the ICC would be beneficial.*
- *Caseworkers should be required to consult relevant human rights and humanitarian law standards in order to ensure a complete persecution analysis in every case.*

Safe Country determination

The Lithuanian Law on Refugee Status notes that ratification of the 1951 Convention and Protocol, as well as ECHR, and ICCPR should be taken into consideration, along with its actual implementation of these norms in order to declare a country to be “safe”. Czech Act no. 325 on Asylum reviews the State’s respect of human rights and capability to ensure compliance with the human rights, ratification and compliance of international agreements on human rights, and respect for the activity of legal entities to supervise the standard of compliance with human rights. The German Constitution, article 16 A refers to a country’s laws, enforcement practices, and general political conditions. Lithuania refers to the legal system, application of legal norms, and political conditions to determine whether a country is capable of guaranteeing protection from persecution, torture or cruel or inhuman or degrading treatment, as well as violation of fundamental human rights and freedoms. The Slovak Republic addresses the rule of law and democratic order in the nation, as well as protection of human rights and fundamental freedoms, observance and compliance of human rights treaties, and oversight by legal entities. Slovenia evaluates the extent to which a person is able to satisfy his/her basic subsistence needs. The Norwegian law may be amended to contain similar criteria for safe country determination- however this author is opposed to listing some countries as safe within the law, as situations are subject to change and such listing may create a presumption which may negatively affect certain groups or individuals facing special circumstances which depart from general trends.

Manifestly Unfounded Claims

The creation of special units within UDI and UNE to handle manifestly unfounded claims prompts concern due to the fact that the staff is relatively inexperienced (several are just out of school) and has received little training, thus there is a risk that errors will be made resulting in refoulement. . There is concern that the speedy processing of such cases will result in mistakes due to the lack of knowledge of the intricacies of cases from the region as well as the relevant law. Furthermore, there is fear of infection of “manifestly unfounded fever”, as caseworkers witness the spread of classification from one area to another are more often a result of political pressure than strengthened rule of law or improved democratic institutions. Furthermore, interviewers and caseworkers need to be reminded of the importance of identifying why the applicant utilized false papers or destroyed his documents. There are five scenarios in which such action is taken by an asylum seeker:

- 1. To exit the country of origin*
- 2. To enter the country of asylum;*
- 3. To prevent refoulement to the country of origin;*

4. To avoid identification by security agents working as translators or other staff with access to the immigration system, and
5. To present a fraudulent asylum claim. Only the last scenario is sufficient to determine that the claim is manifestly unfounded. The other scenarios are insufficient to override the existence of a protection need.

2.3 Humanitarian Protection

The notion of humanitarian protection has evolved in response to changing trends in forced migration. The definition of a refugee contained in the 1951 Convention is not applicable to persons forcibly displaced on account of generalized conflict, indiscriminate threats (thus lacking targeting for persecution), or other harm not related to specific protection categories contained within the Convention. These persons are referred to as “de facto” refugees as they flee a threat to life or security, and as pointed out by Vevstad the lack of a specific universal instrument applicable to them creates a protection gap.¹⁰ UNHCR considers both categories as meriting the refugee label, indeed UNHCR’s Executive Committee called for protection of both categories under a broader definition. Hence, UNHCR would prefer a standard which refers to torture but also “indiscriminate threats to life, physical integrity or liberty resulting from generalized violence or events seriously disturbing public order with no element of persecution or link to a specific Convention Ground.” UNHCR has also mentioned a similar wording: “threat to life, liberty or security of the person in the country of origin, as a result of armed conflict or serious public disorder”.¹¹

In essence, humanitarian protection may be viewed as a derivation of the non-refoulement standard contained within the 1951 Convention. Article 33 sets forth:

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

Lauterpacht & Bethlehem interpret this standard as having evolved to encompass the prohibition of return of refugees under any of the following criteria: 1) there is a well-founded fear of being persecuted, 2) they face threats to life physical integrity, or liberty (including situations of generalized violence), or 3) they face a real risk of torture, cruel, or inhuman or

¹⁰ Vigdis Vevstad, *Refugee Protection: A European Challenge* 138 (Aschehoug 1998).

¹¹ EXCOM, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, EC/50/SC/CRP.18 (6 June 2000).

degrading treatment or punishment.¹² However, the latter two categories are more often linked to other human rights instruments.

The Immigration Act contains a non-refoulement guarantee which seeks to address the 1951 Convention standard, as well as threat of torture, loss of life, cruel or inhuman treatment, and chain refoulement in §15 (1):

“With the basis in law, a foreigner must not be returned to any area where he or she has reason to fear persecution which can give grounds for acknowledgement as a refugee, or will not be safe against being sent further to such area. Equivalent protection shall be afforded a foreigner who for similar reasons as stated in the refugee definition, will be in obvious danger of losing his or her life or being exposed to inhuman treatment.”

The regulations (§21) call for humanitarian protection to be issued to persons falling under §15 (1). Any foreign national may not be sent to any area where he may fear persecution of such a kind as may justify recognition as a refugee, or where the foreign national will not feel secure against being sent on to such an area. Corresponding protection shall apply to any foreign national who for reason similar to those given in the definition of a refugee is in considerable danger of losing his life or of being made to suffer inhuman treatment. Within Norwegian practice, it is a wide concept which is applied for protection purposes (refugee-like situations) and compassionate grounds. Further, the 1999 Letter from the Norwegian Ministry of Justice recognizes humanitarian protection grounds in situations involving a lack of security due to war or conflict.

Review of legislation addressing humanitarian protection from other countries reveals a trend towards integration of references to human rights treaties or standards. European nations grant protection in situations involving a risk of violation of Article 3 of the European Convention: “No one shall be subjected to torture or inhuman or degrading treatment”, Article 7 of the International Covenant on Civil and Political Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Canadian Act respecting Immigration to Canada and the Granting of Refugee Protection to Persons who Are Displaced, Persecuted or In Danger refers directly to Article 1 of the Convention Against Torture for evaluation of alternative protection grounds beyond the 1951 Convention, as does the Immigration Act of the United States.

The Swiss Law on Asylum calls for protection of persons exposed to “serious harm due to risk of loss of life, physical integrity or liberty, as well as exposure to measures which place an unbearable psychological pressure and call for consideration of grounds for flight

¹² Sir Elhu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* 43 (UNHCR 20 June 2001).

linked to gender.”¹³ Romania’s Ordinance on the Status and Regime of Refugees grants humanitarian protection to persons facing the death penalty, torture, inhuman or degrading treatment, of threats to life, physical integrity or freedom.

The Slovenian Law on Asylum identifies a right of asylum on humanitarian grounds for persons requesting protection due to a threat to their “safety or physical integrity in the sense of Article 3 of the European Convention on Human Rights and Fundamental Freedoms as amended by Protocol Nos. 3, 5 and 8 and complemented by Protocol No. 1, 4, 6, 7, 9 and 11. This is in keeping with the notion that the rights contained in the Protocols are to be interpreted on par with the rights contained in the Convention.

In terms of broader expansion of protection, Portugal grants humanitarian protection to persons fleeing on account of “serious insecurity emerging from armed conflicts or the repeated outrage of human rights that occurs thereon”. This is in keeping with the UNHCR paper on Complementary Forms of Protection of 9 June 2001 which addresses “persons fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no specific element of persecution.”

Indeed, it is interesting that the Swedish Aliens Act recognizes aliens in need of protection as those facing the death penalty, corporal punishment, torture, inhuman or degrading treatment or punishment, external or internal armed conflict, environmental disaster, or facing threat on account of one’s homosexuality.¹⁴

In comparison, we may consider EU Proposal Article 15 C subsidiary protection shall be granted to a person:

“who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in article 15 (death penalty or execution, or torture or inhuman or degrading treatment or punishment of an applicant . . . or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict), and to whom Article 17 paras. 1 and 2 (on exclusion) does not apply, and is unable or owing to such a risk, is unwilling to avail himself or herself of the protection of that country.”¹⁵

¹³ Provisional protection may be granted to persons subjected to a general, serious danger, in particular on account of war, civil war, or situation of generalized violence.

¹⁴ This brings to mind the Guiding Principles on Internal Displacement which contains an innovative definition which extends beyond the 1951 Convention: : “ . . . persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” This extends protection to categories of victims correlating with the regional instruments from Latin America and Africa, revealing an example of expansive drafting to reflect changes in migratory trends.

¹⁵ Council of the European Union Proposal, supra note 7 at Article 2 (e).

The positive side of not amending the law to include definitions of the terminology is that it may actually promote greater flexibility in the interpretation of protection categories, however caseworkers admit to having troubles interpreting the law, finding §15(1) and §15 (2) to be too vague. Whereas as UNE appears to consider the line between humanitarian protection and protection for compassionate grounds to be unclear, within UDI the line between asylum and humanitarian protection can sometimes be difficult to interpret. One of the asylum sections within UDI stated that they have merged the refugee definition with humanitarian protection, in particular para §15(1), and advocate reforming the law to reflect such practice. This would suggest pursuing the model provided by the Law of the Republic of Tajikistan on Refugees:

Article 1- Refugee Definition

A refugee is a person who has entered or is willing to enter the Republic of Tajikistan, is not a citizen of the Republic of Tajikistan, and was forced to leave or is willing to leave the country of his permanent residence due to a well-founded fear of being persecuted on the basis of race, nationality, religious convictions, political opinion, membership to a certain group, or owing to a threat to his life and members of his family, security and freedom as a result of massive violations of public order and other circumstances considerably infringing human rights.

Adopting this model would enable caseworkers to grant asylum to those normally receiving humanitarian protection because they fall outside the scope of the 1951 Convention but nevertheless cannot be sent back due to threat to life, security or freedom in situations of large-scale human rights violations- e.g. Africa. This would not increase the number of people receiving protection, rather it would adjust their status to provide a greater sense of security.

Recommendation:

- *Reform of §15 may insert reference to **freedom (or liberty), safety (or security), and physical integrity**. (See Swiss Law on Asylum). In addition, the category of “**degrading**” should be added to the standard on inhuman treatment.*
- *Another option may be to select specific human rights instruments as forming protection standards, hence the law committee may choose to link the standard on humanitarian protection to the ECHR and its Protocols, and/or require the immigration authorities to refer to standards emitted from the general body of international human rights law and jurisprudence.*

- *It may include within the humanitarian protection section a second category for protection which includes language referring to serious threat to life or person by reason of indiscriminate violence in situations of armed conflict (internal or international), in keeping with the UNHCR paper and EU Proposal, thus transforming the 1999 Letter from the Ministry of Justice into hard law. Inclusion of such reference will permit the law to correspond to the reality of forced migration today.*¹⁶
- *It may elect to adopt a standard which merges asylum with humanitarian protection, thereby permitting asylum to be given to those already given humanitarian protection. A further progressive alternative which would expand the realm of protection would be to include language recognizing the grounds for protection of persons who have fled their countries “on account of natural or man-made disasters wherever the responsible State or de facto authority fails for reasons that violate fundamental human rights, to protect and assist those victims.”*¹⁷
- *Another “plain face” issue is the fact that the standard for humanitarian protection relating to non-refoulement in §15 comes before the definition of refugee in §16. UNE corrects this by addressing §16 first and then addressing §15 issues. It may be helpful to place the non-refoulement standard after the refugee definition issue in order to promote greater coherence in the analysis of protection issues. At present, asylum is considered by some to a status issue more than a protection issue (in part linked to commentary contained in the travaux préparatoires to the law), thus caseworkers consider provision of humanitarian protection to be provision of protection of like value to asylum. Should the standard for humanitarian protection be placed after the asylum standard, it may then be recognized as being subsidiary protection, rendering primary focus to asylum as the principle protection standard.*
- *NGOs and lawyers should be instructed to present arguments in which the claim for asylum and humanitarian protection are considered separately, each based on the relevant human rights criteria.*

¹⁶ See also UNHCR’s Comments on Denmark’s Draft Bill on Amending the Aliens Act, the Marriage Act and other Acts (18 March 2002).

2.4 Compassionate Grounds

The Immigration Act's §8 (2) on compassionate grounds appears to be considered by caseworkers to be vague. This clause has been interpreted within the cases to address a wide span of considerations defined as compassionate grounds, including: age, medical condition/health needs, security and humanitarian conditions in the country of origin (including ongoing war or conflict), educational needs of the children, family considerations, or link to the State (e.g. long period of residence).¹⁸ Although we stated that we did not intend to review these cases, both UNE and UDI provided them to us apparently in order to highlight the prevalent use of compassionate grounds within their practice as both a positive example of protection and a negative example of lack of clarity in legal mandates. The granting a permit for compassionate grounds which is not directly linked to the notion of persecution or legal protection per se may be utilized in cases which actually involve legal protection issues:

- In Case DF, at the UNE level a permit for compassionate grounds (instead of asylum or regular humanitarian protection) is granted to a victim of domestic abuse from Pakistan due the precariousness of the applicant's situation upon return. Her husband and brothers beat her, and her sister in law tried to burn her. Although UNE accepts as credible the long history of abuse and recognizes the unlikelihood of assistance from the State, as well as her lack of independent ability to control her situation, it denies recognition of a "social group" and finds no threat of future persecution, inhuman treatment, or loss of life. The lawyer had argued for recognition of past persecution as evidence of future threat, but this was not followed by the immigration authorities.
- Similarly, in Case DG, UNE grants a permit for compassionate grounds in a case involving a Chechen woman whose husband was killed because of his support to the soldiers. In addition, she assists soldiers by giving them medicine, thus engaging in what may be deemed to be an act expressing a political opinion. She was deemed not credible due to contradictions in her testimony. However she is given subsidiary protection due to health

¹⁷ See International Law Association, Declaration of International Law Principles on Internally Displaced Persons, Article 1 (2) (2000).

¹⁸ See also EXCOM, Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Regime" EC/50/SC/CRP.18 (9 June 2000).

considerations, the daughter's schooling, and the difficult humanitarian and security situation in Chechnya.

One of the problems is that the commentary to the current law is unclear with respect to distinguishing protection grounds related to asylum seekers in a "refugee-like situation" or facing a threat of violation of the right to life or protection from inhuman treatment without offering any further definition or concrete examples of what situations would be included in these categories. At present the commentary to the law recognizes the problem, but does little to rectify it, thus there is a need for reform.¹⁹ Although from a moral perspective, the utilization of the category of compassionate grounds is laudable as the State is offering haven to persons who may not be received in other countries with more stringent policies, it also highlights the need to improve the staff's interpretation of human rights law in order to reach those not affected by compassion issues as well as identify additional legal protection criteria within the compassionate cases. Cases often have cumulative grounds for assistance, hence the analysis should be holistic rather than concentrating on the category which is most easily identified and avoiding difficult questions regarding degree of risk of persecution, severity of human rights violations, standard of proof, etc. which pertain to the legal protection categories. For example, the ongoing security situation in the country of origin may amount to a threat to life lifting the protection ground to §15 (1) or even asylum, thus it may be suggested that within the compassionate grounds cases there may be cases which could have been received other grounds for protection, see Chapter 5.8 on Return: Human Rights in Post-Settlement Situations.

It should be noted that the letter from the Ministry of Justice of 27/06/00 calls for cumulative analysis of cases in which the health issue is tied to violations linked to Convention grounds:

"If health circumstances are due to assaults because of the victim's nationality, race, religion, membership of a social group, or political views, the circumstances can fall under the refugee convention, and if there is danger of similar assaults or other persecution on return, the applicant shall be granted asylum."

¹⁹ See also Eli Fisknes, Utlendingsloven Kommentarutgave 106 (Commentary Ed. 106 to the Immigration Act) (Universitetsforlaget 1994): "It can be difficult to ascertain how far a foreigner shall be considered to fall under §15, subsection one, second item, or shall be considered in accordance with another subsection. For example, in a case it may be unclear as to whether the grounds on which the applicant risks persecution fall under 'similar grounds as stated in the refugee definition' or whether the grounds cannot be regarded as similar to a refugee's. It can also be unclear as to whether the grounds can lead to the applicant risking losing his or her life or be exposed to inhuman treatment, or something less serious. The immigration authorities do not put in much work in finding out whether the applicant can be regarded as falling under §15 subsection one or not, when the individual is in any case granted permission under §8 subsection two of the Act, and permission regardless includes exactly the same rights."

Recently, while preparing a lecture I became concerned about the need for caseworkers to become comfortable assessing contextual situations which at first glance may not appear to be relevant to legal protection, but may actually prove subject to analysis upon closer examination. For example, within Africa, the context of environmental disasters such as floods, famine, AIDS epidemic, ethnic conflicts, protracted conflicts, etc. appears confusing to the caseworkers. How can one approach an individual affected by such widespread problems? Review of literature revealed that experts studying such phenomena have similar concerns and thus elaborate modes of connecting the context to concrete, identifiable violations. In the case of families and children affected by AIDS, Foster & Williamson created a diagram which demonstrates the link between HIV infection to violations of the ICESCR, ICCPR, and CRC (all rooted in discrimination): 1) Inability to maintain an adequate standard of living due to one's reduced ability to work or loss of job due to discrimination, as well as inadequate nutrition (they may be denied access to food or water) lack of access to health care, and shelter (Articles 11, 12, 6 ICESCR), 3) Withdrawal of children from schools as they have to become care providers (thus they are denied education, Art. 28 CRC) or are displaced after being orphaned (Art.16 CRC; 4) Loss of caretakers for children as they are orphaned and left without foster care (Art.20 CRC), 5) Problems with inheritance, widows and orphans are denied their property by other family members (Art. 17 UDHR), 6) Children and women may be exploited in labour, forced recruitment (children may "volunteer" or be given by their relatives to armed groups under the assumption that they will be fed, regardless of the risk of physical and psychological trauma), and sexual trafficking which are condemned by various international instruments (International Labour Organization, ILO, and UN Protocols on forced recruitment and sexual trafficking, and CRC Arts 34-35 & 38) and in turn face increased threats to their rights to life, security of the person (they may be raped), survival & development (Art.6 CRC) 7) General discrimination (Art.2 CRC & CEDAW).²⁰ Analysis of cases emerging from such contexts requires such in-depth analysis, taking a situation from the general background to specific violations, not only with respect to what violations were experienced in the past, but also what future risks exist, and whether this can be linked to Convention Ground as well as what is the ability and willingness of the State of origin to prevent violations, punish offenders, and provide rehabilitation and reintegration for those traumatized by past victimization. Some cases might qualify for

²⁰ Geoff Foster & John Williamson, "A Review of Current Literature on the Impact of HIV/AIDS on Children in Sub-Saharan Africa", 14 (3) AIDS, 275-284 (2000).

asylum, while others humanitarian protection, the main point being that it may be possible to identify grounds for legal protection over compassionate grounds.

Similarly, victims of natural disasters or other environmental reason may be subjected to discrimination in receiving assistance and protection by the State due to their membership in a tribe, political affiliation, etc. Such complaints have been issued recently with respect to Mugabe's distribution of food to those pertaining to the supporters of his political party.²¹ It has been argued that "environmental refugees" may be evaluated by consulting the relevant human rights standards, as a State's unwillingness or inability to remedy the situation affecting one's access to uncontaminated water, sufficient food, basic shelter may violate a person's right to an adequate standard of living and at worst constitute cruel and inhuman treatment.²²

From the caseworker's perspective, it may be easier to grant protection for compassionate grounds than to complete the analysis of the other protection categories, particularly in cases which call for an expansive interpretation of protection that may not be recognized by higher staff members. Furthermore it takes less time to complete a compassionate grounds analysis. When the system focuses on effectiveness rather than protection, the categories most likely to be applied will be those which are less time consuming: rejection on account of lack of credibility or provision of humanitarian protection for compassionate grounds.

In part, there appears to be some reliance on an alleged dualist structure of the State to excuse lack of reference to international norms and jurisprudence as a hesitance in promoting the evolution of international refugee law within the practice. However, due to the incorporation of the ICCPR, ICESCR, and the ECHR, as well as the 1951 Convention's refugee definition within Norwegian law, this argument is no longer valid.²³ One may argue that domestic practice must abide by the international standards as these instruments form legitimate sources of law for interpretation and application by the administrative agencies as well as the courts. It is true that there is wide variation among different nations' practice, which has been commented upon not only in Norway but also by UNHCR itself. Furthermore, the lack of a single international court established to monitor the 1951 Convention may result in complexity with respect to attaining an assessment of international standards in this arena.

²¹ See Mercedes Sayagues, "Zimbabwe's Food Crisis: What Went Wrong" in Reuters (01 Aug 2002).

²² See Dana Zartner Falstrom, "Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment" in *Colo. J. Int'l Envtl. L. & Pol'y* 1 (2001).

²³ See Prop, to the Odelsting No. 46, p. 23 "With this (incorporation) it is emphasised that it is the universal refugee concept which is the basis for who benefits from the Norwegian asylum rules."

The array of actors within the human rights arena which comment on the status of refugees, such as the U.N. Committee against Torture, the U.N. Human Rights Committee, the European Court of Human Rights, provide a diversity of views. However, the trend among theorists is to point out the existence of harmonized approaches among the standards and views of these actors.²⁴ The Preamble of the 1951 Convention refers to human rights norms:

“Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,”

This wording has been interpreted to support reference to international human rights instruments when determining the rights of refugees. Similarly, the Immigration Act (1988) §4 declares that the Law shall be interpreted in accordance with the international rules to which Norway is bound when these strengthen the foreigner’s standing.

Recommendation:

- *First-Guidelines should be created in order to clarify the principles of protection based on compassionate grounds. Such documents should be elaborated in consultation with experts in medicine, psychology, child welfare, etc.*
- *Second- The guidelines should also set forth the standards for lifting a decision to a legal protection category when human rights analysis reveals cumulative grounds for protection, e.g. an analysis involving children utilizing the CRC may lift a case from compassionate grounds to legal protection.*
- *Third- Guidelines should be created to ensure full human rights analysis of cases in order to prevent incorrect downgrading of cases. UDI is elaborating a “human rights checklist”. A similar initiative should be taken by UNE.*

3. Standard of Proof

²⁴ See e.g. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* (UNHCR 20 June 2001); see also Brian Gorlick, *Human Rights and Refugees: Enhancing Protection through International Human Rights Law* (October 2000).

One of the principle reasons why humanitarian protection is given instead of asylum in the Norwegian cases is the maintenance of different burden of proof standards with respect to asylum determination and non-refoulement (there are two prongs: one based on 1951 standard or persecution, and the other based on threat to life, torture, etc.).

A brief review of the international trends reveal that some standards include a reference to a standard of proof. If we consider the European Proposal on Subsidiary Protection, it calls for protection in cases in which substantial grounds have been shown for believing that the person would face a real risk of suffering serious harm (including torture or inhuman or degrading treatment or punishment) (as opposed to the Norwegian standard which does not require “substantial grounds” or “real risk”, but neither includes the category “degrading”).²⁵ The EU proposal recognizes victims of indiscriminate violence, persecution by non-state agents (should the State or party/organisation in control of the territory, or part of it, are unable or unwilling to provide protection) and gender-specific or child-specific persecution.²⁶

One may compare this proposal to the standard contained in the Charter of Fundamental Rights of the European Union, Article 19 (2):

*“No one may be removed, expelled or extradited to a State where there is a **serious risk** that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”*

This standard may be juxtaposed to the “real risk” standard utilized by the European Court of Human Rights and the U.N. Human Rights Committee and the “substantive grounds” standard referred to by the U.N. Committee Against Torture.²⁷ The latter entity has warned against excessive elevation of the standard of proof in cases involving risk of torture, and hence has promoted contextual, holistic assessment criteria for such claims (see infra section on torture and cruel and inhuman treatment).²⁸ Lauterpacht & Bethlehem advocate reference to a merged standard:

*“No person shall be rejected, returned or expelled in any manner whatsoever where this would compel them to remain in or return to a territory where **substantial grounds** can be shown for believing that they would face a **real risk** of being subjected to torture, cruel, inhuman or degrading treatment or punishment.”*

²⁵ Council of the European Union, supra note 7 at Article 2 and Article 15.

²⁶ Id. at Article 2, Article 9 and Article 11.

²⁷ See Lauterpacht & Bethlehem, supra note 6.

²⁸ At present, the law advocates contextual analysis, see Ot.prp. nr. 46 (1986-87) at 103 noting that “Refugee similarity” is no clear concept, but it serves to point out the danger than assault can take place on the basis of lack of a legal system or under disregard of basic norms for treatment of people.”

At present, the practice reveals the use of a **higher** risk evaluation as pertaining non-return on account of **threat of torture** or cruel or inhuman treatment (non-refoulement) as opposed to the standard relating to persecution used in asylum determination.²⁹ In the United States, the burden of proof is higher for the non-refoulement analysis based on the CAT (“more likely than not”) as opposed to the asylum determination standard (“reasonable possibility of harm”). Ideally, the law should achieve a balance between both prongs. However, UNE interprets the degree of risk referred to as pertaining the **threat of persecution** to be somewhat **lower** when evaluating non-refoulement than that utilized when determining the grant of asylum (this refers to the standard utilized in the former situation: “*can fear persecution which may give reason for acknowledgement as a refugee*” as opposed to the standard used in the latter case: “*justifiably fears*” or “*well-founded fear*”).³⁰ This is in contrast to the view held by Goodwin-Gill that the standard of proof should be the same for both status determination and non-refoulement protection- indicating sufficiency of serious risk.³¹ In part, this may help to explain the higher percentage of grants of humanitarian protection instead of asylum.

Lauterpacht & Bethlehem opine that the standard of proof to be utilized in cases referring to establishing the well-founded fear of persecution or real risk of torture, threat to life, physical integrity, or liberty, should be harmonized by common reference to “a reasonable degree” taking in the facts-

*“This threshold will require more than mere conjecture concerning a threat but less than proof to a level of probability or certainty. Adopting the language of the Human Rights Committee and the European Court of Human Rights in respect of non-refoulement in a human rights context, the appropriate test will be whether it can be shown that the person concerned would be exposed to a ‘real risk’ of persecution or other pertinent threat.”*³²

There are variances both in UDI and UNE regarding degree of proof, assessment of risk, etc. It was not possible to determine a single standard regarding evidentiary burdens given the individual variances. Nevertheless, there appeared to be a tendency to maintain a high standard of proof, thereby resulting in a curious practice in which asylum is denied but

²⁹ Consider Terje Einarsen “*Flyktningers rettsstilling i Norge*” (Legal status of Refugees in Norway) p. 58 15 (1)(2) provides protection to persons who based on similarity of refugee grounds are in “obvious danger” of losing their lives or being exposed to inhuman treatment. The theme for evaluation is broader than for asylum, but the requirements are somewhat stricter”, or Prop. No. 46 (1986-87) p 202. See also Prop. to the Odelsting No. 46 (1986-87), p. 103 “There is reason to emphasise that no preponderance of the evidence is required for the conditions to be fulfilled to give foreigners protection against return. In this connection the consequences of any wrong decision taken in the disfavour of the asylum seeker must be considered. The more serious the consequences are, the less will be required to provide the individual with protection.”

³⁰ UNE remarks citing Prop. to the Odelsting No. 46/1986-87, p. 103.

³¹ Guy Goodwin-Gill, *The Refugee in International Law* 138 (Clarendon 1996).

³² Lauterpacht & Bethlehem, *supra* note 6 at 43.

humanitarian protection is granted, based not always on the criteria formulating each level of protection (persecution linked to race, religion, social group, political opinion, or nationality vs. threat to life, torture, or cruel treatment not linked to a refugee definition category), but rather the degree of proof or credibility. Several decisions, particularly at the UNE level, focused on the fact that in order to qualify for asylum, the applicant had to demonstrate a well-founded fear (which they interpret to be a high standard), whereas in order to receive humanitarian protection under 15 (1) the applicant only had to demonstrate that he may fear, therefore cases which contain elements of doubt are considered for humanitarian protection instead of asylum:

- 1) *Where the stated grounds for asylum are not sufficiently proved to be able to used as a basis, but nevertheless where there is any doubt present (purely theoretical doubt excepted) or*
- 2) *Where the foreigner him- or herself triggers a persecution danger only after having left their homeland (sur place).³³*

- Case DH involved a woman of mixed ethnicity from Yugoslavia whose father was killed and house burned down during the war. UNE determined that although it was not “*sufficiently probable that the appellant on return would have good reason to fear being exposed to persecution*” it was possible to “*assume that the appellant could fear persecution on return to his/her homeland*”, thus she was granted humanitarian protection. Of interest is that this case included psychological evaluations indicating the possibility of psychological trauma to the children in the event of return, and this may have resulted in an implicit best interest of the child consideration.
- UNE Case S involved an ahmadiya leader from Pakistan who was arbitrarily detained and abused and was given humanitarian protection instead of asylum based on the variance in standard of proof between asylum and humanitarian protection:

“The situation for the appellant is another than for most ahmadiyahs. He was the the leader of a youth organisation for the ahmadiyahs and in this connection has been active and carried out outward-oriented activity, and has inter alia carried out preaching in accordance with his religious convictionEven though the

³³ (KRD’s proposed regulations would permit sur place refugees to receive asylum, in accordance with the European Council’s Proposal, Article 8, hence that policy would be eliminated.)

stated occurrences are not sufficient to make probable grounds for asylum, the appellant can fear persecution which can give reason for acknowledgement as a refugee.”

Another concern is the fact that the UDI standard answers contained pre-prepared burden of proof analysis (sometimes linked to nationality and protection issue) oriented towards rejection:

“The immigration authorities are of the opinion that the applicant has not rendered probable to a sufficient degree that he, upon return to his home country, is in danger of being exposed to reactions which can be characterised as persecution in the sense of the law and the convention.

”The convention lays the basis for a future-oriented evaluation of whether the applicant upon return to his home land will be exposed to such reaction by the authorities or others. It is not sufficiently substantiated that the applicant upon return to his home country will be exposed to such persecution.”

Pakistan (Kashmir konflikten)

*“In the opinion of the Directorate, the applicant has not substantiated that the problems he has in Pakistan with regard to false accusations can be connected to his political views. The Directorate forwarded a request to the applicant’s advocate * requesting that the original judgement with a translation be presented. This has not been done. The Directorate is therefore of the opinion that it is not proved that the applicant has been convicted of the charges he describes.”*

In contrast, UNHCR has recommended that states employ a generous standard of proof in the individual analysis of claims:

“The applicant has to show ‘good reason’ to fear persecution and that the fear is reasonable and plausible, based on an objective evaluation of the situation in the country of origin. The general civil standard in law, the balance of probabilities, is too strict in that it is difficult for an applicant to establish that persecution will “probably” take place. In addition the possible repercussions of an erroneous decision renders such a level of proof inappropriate. It is sufficient for him or her to show that his or her fear in this connection is a reasonable one. If the asylum seeker satisfies this test, s/he should be considered a refugee even if s/he is unable to prove his or her case in full. S/he should be given the benefit of the doubt, subject of course to also satisfying the test of credibility.”³⁴

The 1998 guidelines highlight that cases involving humanitarian protection based on non-refoulement and *compassionate grounds* do not require “a preponderance of evidence” regarding persecution. The more serious the consequences of return are, the lower the standard of proof is required:

“Concerning the question of protection against return, the situation is that no requirements are made for preponderance of the evidence that persecution will be the result upon return. This

³⁴ UNHCR, An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, European Series, Vol. 1, No. 3 at 35 (September 1995) cited in Brian Gorlick, Common Burdens and Standards: Legal Elements in Evaluating Claims to Refugee Status, UNHCR Working Paper No. 68 (October 2002).

concerns both the relationship with protection pursuant to the Immigration Act §15 first subsection, and in cases where protection is given pursuant to §8 subsection two, even though one is outside protection pursuant to §15. The more serious the consequences of return are, the less is required in practice as regards the degree of probability of this consequence.”

However in the cases reviewed, this was not always the situation. Claims relating to torture or threat to life were denied protection precisely due to the determination that the asylum seeker had failed to meet the standard of proof or risk evaluation, in spite of strong evidence of past persecution:

- Case HC involved a Tamil from Sri Lanka who supported the Liberation Tigers of Tamil Eelam (LTTE) by distributing food. He was suspected of being a black Tiger-charged with suicide missions, thus he was jailed and tortured. The UNE majority rejected due to determination of a lack of risk of future persecution in spite of past torture.³⁵

Similarly, with respect to cases involving a law which may be discriminatory or excessive on its face (black letter of the law), UNE grants humanitarian protection instead of asylum where there is a determination that the law is unlikely to be implemented- it is determined that there is insufficient risk to grant asylum:

- Case HD involving a homosexual from Yugoslavia (where homosexuality is penalized) who also served as informant to the Serbs and feared reprisals from the Albanians, humanitarian protection was given based on the assessment that enforcement of the law was unlikely.

Recommendation:

- *First, the law and/or commentary to the law should be drafted to indicate harmonization of the standard of proof with respect to non-refoulement analysis in cases of a threat of persecution as well as the analysis pertaining to threats to life, freedom, or physical integrity, or risk of torture.*

³⁵ See also Prop. to the Odelsting No. 46 (1986-87), p. 103 “There is reason to emphasise that no preponderance of the evidence is required for the conditions to be fulfilled to give foreigners protection against return. In this connection the consequences of any wrong decision taken in the disfavour of the asylum seeker must be considered. The more serious the consequences are, the less will be required to provide the individual with protection.”

- *Second, the standard of proof utilized pertaining persecution in asylum determination and in the non-refoulement determination should also be harmonized.*

4. Evidence

One important aspect of the asylum system is the collection and analysis of evidence for the establishment of a “well-founded fear” of persecution. The collection of evidence in asylum cases is complex, and the determination of the value of such evidence is equally complicated. Both NOAS and lawyers working with asylum issues assert that at present the immigration authorities do not sufficiently take into account evidence of subjective fear of persecution (including the personality of the applicant, his/her personal and family background, membership in racial, religious, national, social or political group, own interpretation of the situation, and personal experiences), thus dis-empowering asylum seekers with respect to analysis of their need for protection due to primary reliance on an objective basis for such fear. As noted by Vevstad, the exclusion of the subjective view results in a decreased chance of receiving asylum.³⁶ The objective element may be determined by examining the contextual background, examining what has happened to his friends, relatives, or members of same racial or social group, what the laws are and how they are applied, the character, background, influence, wealth, or outspokenness of the applicant.³⁷

However, the gathering of evidence to establish the well-founded fear is often complicated in practice:

- For example, in Case EX, an applicant of Eritrean descent from Ethiopia was deemed to be not credible because the neighbours claimed not to know her. Although her lawyer pointed out the neighbours may be reluctant to admit to their relation to her due to fear for their own security, UDI did not respond to this point. Given the fact that her father had been arrested, there may well be a

³⁶ Vigdis Vevstad, *Refugee Protection: A European Challenge*, 58-60 (Tano Ascheoug 1998) noting that restrictive interpretation which recognizes only objective fear leads to an increase of de facto status instead of asylum. See Terje Einarsen, *Retten til Vern som Flyktning (Right to Protection as a Refugee)*, 384 (CICERO 2000) for an overview of different states’ use of subjective v. objective fear. See also James C. Hathaway, *The Law of Refugee Status 65-90* (Butterworths 1991) for a discussion of the complexity of establishing “well-founded fear”, in particular addressing subjective considerations.

security concern in the neighbourhood. The failure to explore such issues presents a significant protection gap pertaining to the use of evidence. The applicant was rejected, in part because of the cessation of deportations from Ethiopia to Eritrea.

The role of the lawyers in collection of evidence and pursuit of argumentation varies widely. Some provide extensive documentation (human rights reports, medical reports, etc.) and solid argumentation based on legal, policy, or moral considerations; others do not supplement the file in any way whatsoever. One factor which results in limiting the grant of asylum is that some lawyers wait to complete the record by adding documentation (including medical reports confirming torture, etc.) at the appeals level instead of at the first level. Hence, a claim which should have received asylum at the first level may not be given such protection due to lack of corroborative evidence which was available, but is only submitted upon appeal after rejection. In the cases where the evidence is new or the asylum seeker comes forth with new information, this is understandable. Many refugees are reluctant to discuss past torture or rape, so details may not emerge until later in the processing. However, if the late submission is a result of other interests, e.g. conservation of resources, etc. then there is a problem. Lawyers should be provided with sufficient time and resources to complete the files. Similarly, due to resource concerns, in many cases, the lawyers are not present during the interviews, thus increasing the risk of error:

- Case FJ involved a Kurdish woman from Iraq who fears persecution because she broke a picture of Hussein during a parade and received a visit from security agents. She was given humanitarian protection instead of asylum, in part because she was an unaccompanied minor and because her credibility was considered to be dubious as she refused to speak Arabic. Her lawyer was not present in the interview and this may have affected the credibility determination.

Cases which are well-documented may have an increased chance of receiving protection. The provision of legal aid is essential in order to guarantee asylum seekers a chance to meet the burden of proof via completion of their file with additional documents beyond the testimony (such as birth certificates, travel documents, letters from witnesses, letters from the

³⁷ See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees paras. 40-43 (Geneva 1992).

community to confirm integration and good character, reports indicating country conditions and human rights situations), to help clarify misunderstandings or errors, and to explain the lack of evidence. In like manner, lawyers should take care to identify all relevant protection issues and submit full arguments, at times the submission of the claim may be limited to a standard formulation which may fail in these tasks.

Some caseworkers pointed out the need for a medical statement (to document medical or psychiatric conditions relevant to the claim) but did not always make arrangements to ensure that this is carried out. In general, it is assumed that the lawyer is responsible for arranging such consultations. Thus it is important that UDI staff recognize that they have a joint responsibility to ensure that the file is complete, by referring to relevant human rights reports or calling for psychiatric/medical evaluation where needed.³⁸ It is of concern that the pressure placed upon caseworkers to be effective may restrict their ability to gather the necessary reports, letters, or other evidentiary documents to complete the file. At times, UNE has had to call for a medical evaluation which should have been ordered by UDI. Had such initiative been taken, the grant of asylum or humanitarian protection would have occurred at the first level, not the appeals level.

Furthermore, caseworkers vary in their trust in the objectivity of medical and psychiatric reports. Some utilize them directly to substantiate a grant of protection, others dismiss the evidence as being irrelevant or make no mention whatsoever of what the doctor has written.

- Case HJ involved a Yugoslavian minor of Albanian ethnicity whose psychiatric problems due to prior trauma were documented by a psychiatrist. UDI suspected him to be a member of the Liberation Army of Presevo, Bujanovac & Medvedja (UCPMB) and made no mention of the psychiatric report. It rejected him based on the improved situation for Albanians.

Another concern is that the existence of psychiatric disorders may sometimes overshadow existing legal protection grounds, hence the applicant may receive humanitarian protection instead of asylum.

- Case HK involved a family of Albanian ethnicity from Kosovo; the father served as a guard in the prison. He was threatened by Albanians who did not

³⁸ See *Abassi v. INS*, 305 F. 3rd 1028, 1031 (9th Circuit 2002), holding that the Board of Immigration Appeals abused discretion in failing to consider State Department's easily obtainable reports on current country conditions even though the applicant failed to include the report in the application.

like that he had worked for Serbs. He was chased away from his home and shot at. His daughter was gassed in her school by the Serbs and diagnosed as suffering from paranoid psychosis as a result of the trauma at school and seeing her father shot at. The family was given a permit on compassionate grounds instead of asylum, presumably due to the psychiatric health of the daughter. However, one may argue that the father could have classified under social group due to his employment in the prison under the Serbs (thus he was treated as a Serb sympathizer) or the daughter's experience may have possibly amounted to "compelling reasons" to grant asylum in spite of alleged changed country circumstances. Furthermore, the Amnesty report characterizes Kosovo as being plagued by impunity, ethnically motivated killings and assaults, as well as discrimination with respect to employment, health care and education-rendering return of minority groups (and those identified with them) unsafe.³⁹ One may argue that the risk of revenge violence remains real at present.

Other cases reveal good references to a variety of sources (Indeed the UNE country reports are often a composite of sources), such as reports by the U.S. State Department, the Ministry of Foreign Affairs, UK Home Office, Canadian Refugee Board, Organization for Security and Cooperation in Europe (OSCE), International Committee for the Red Cross (ICRC), UNHCR guidelines on specific topics, national lawyers or NGOs, etc. However, some caseworkers may suffer from too much information. For example, there are a plethora of international organizations and NGOs publishing reports on a variety of issues in the Balkans, prompting concern that applicants may receive protection due to the existence of such documentation, in contrast to cases from Africa which may reveal a more severe degree of violations which may not always receive asylum as they are not always capable of verification. In some cases, in spite of reference to such materials, caseworkers may prove hesitant to rely on those materials to ground expansive protection, e.g. protection of women and children arriving from war situations.⁴⁰

- Case EZ involved a woman from Algeria who separated from her abusive husband. Her child was psychologically traumatized due to a bomb attack at her school as well as abuse by her father. UDI referred to the UNHCR Gender

³⁹ See Amnesty: Kosovo Minorities are Prisoners in their own Homes (29 April 2003).

Guidelines and a report by the US State Department, but only granted humanitarian protection instead of asylum based on the perspective that the applicant had a large family to seek support from and the Algerian state should address severe domestic abuse cases-

“The Directorate refers to the fact that the general situation for women as a result of termination of matrimonial cohabitation in Algeria cannot be regarded to be of such a nature that it may be the reason to fear persecution on return to the home country. Neither is there reason to say that the applicant would be especially exposed on return to her home country, even though she and the child have previously been exposed to violence and threats from the husband. In that connection, emphasis is laid on the fact that the applicant has a large family in the home country, and that the Algerian authorities will react to serious assaults which take place within the marriage.”

In fact in the above case, the caseworker noted in the remarks that perhaps a psychological evaluation would be beneficial.

- However, in Case FC, UDI engaged in an thorough analysis of the risk of death penalty applicable to a deserter of the Eritrean army and consulted a variety of reports from various governmental and non-governmental entities in order to ground a decision in favor of humanitarian protection; strangely asylum could have been granted but wasn't.

In other situations, UDI may point to the lack of information in order to ground its assertion that there is no problem:

- Consider Case FD involved a man from Eritrea who was member of the Eritrean Liberation Front (ELF) and handed out pamphlets. The lawyer criticized UDI for wrongfully pointing to the lack of information available with respect to countries in which it may be difficult for studies to be written and disseminated. The applicant received humanitarian protection instead of asylum as the caseworker noted that he was not sufficiently profiled within the party, and there was a lack of information regarding arrest or murder of ELF members.

Other lawyers complained that some caseworkers did not make any reference to the evidence they submitted, hence there was no guarantee that it had been taken into account in the decision. The drafting of decisions should include references to the submitted evidence as

⁴⁰ Compare with *Philomena Iweka Nwako v. INS*, 314 F 3rd 303 (7th Circuit 2002) holding that the applicant had a colorable argument that the BIA abuses its discretion when it failed to consider the State Department's reports

well as an evaluation of their value. The cases we reviewed varied. Some decisions directly referred to submitted evidence, others made partial reference, and others made none at all.

- Case BG, a Kurdish woman from Iraq who received death threats from the Islamist movement and denied wearing traditional garb was denied protection. Her sister was arrested and she was characterized as working for female emancipation and Christianity. Her father was killed on account of his activities on behalf of the Kurds and his criticism of Hussein. Although she submitted medical reports confirming psychological and physical problems, and an arrest order, UDI found her to lack credibility due to insufficient details. Furthermore she was considered to lack sufficient objective information to confirm her allegations, and she was faulted for not having sought state protection. At the UNE level she was rejected placing the onus of taking responsibility for changing the level of risk of persecution on the applicant herself:

"The Board regards it as probable that the appellant, by a continued western "lifestyle" which breaks with muslim customs, can risk provoking muslims with resulting verbal harassment. The Board cannot overlook the fact that the appellant can be exposed to new threats of a penal nature. The Board finds that these circumstances are no more serious than those which must be expected by all who practice a religiously or culturally disputed way of life."

In part this decision appears to be based on a bias against non-state actor abuse, UNE characterizes the acts as criminal acts, noting: *"random criminal circumstances fall outside the area of application the refugee convention is intended to include"*. UNE goes further to state:

". . . two verbal threats, according to practice, do not by their nature or extent fall under the definition 'persecution'. Even an arrest or short term of imprisonment, according to practice, initially fall outside the concept 'persecution'."

UNE determines that the situation at present had sufficiently changed to enable the State to offer her protection. It states that it cannot confirm the validity of the arrest order she submitted and doubts its authenticity, thus instead of giving her the benefit of the doubt or finding some way to verify the authenticity of the document, it issues a rejection.

- In contrast, in Case BH, UDI cited religion as the relevant category and grants asylum to a man from Afghanistan involved in an extramarital relationship

on current conditions in Nigeria.

(she became pregnant and they risked death), thereby identifying him as a victim in like manner to women involved in such affairs- this was a very good example of equal protection as applicable to men. UDI gave him the benefit of the doubt regarding credibility.

Citation of UNHCR paper commenting on the lack of a general need for protection in Northern Iraq appears to negatively affect applicants from that area, in spite of the fact that their specific circumstances may prove contrary to the general situation.⁴¹ Similar problems occur with respect to Montenegro and Southern-Serbia. Analysis of the specific need for protection is often ignored due to the general determination as pertaining the Bosnian and Albanian populations in the area. Even in egregious situations, UDI asserts that such actions do not amount to “persecution within the Convention or the law”, instead amounting to criminal acts to be addressed via the national legal system:

- Case FF involved a woman of Bosniak ethnicity from Yugoslavia whose husband underwent two assassination attempts from the military. She was threatened with rape and kidnapping of her child. She was rejected and advised to seek assistance from the national authorities: “*According to the Directorate’s knowledge of the situation in Montenegro, there is no general need for protection for the Bosnian population in the area.*” There was an absence of discussion regarding the reality of access to justice.

Furthermore, caseworkers appear to rely on the physical presence of international organizations and agencies in certain countries to found the basis for return of asylum seekers, without sufficient consideration of de facto access to protection or individual circumstances:

- Case FG involved an ethnic Albanian from a town which is currently occupied by Serbs. He was rejected in part based on the (formalistic) application of internal flight alternative and the presence of peacekeeping forces, the UN and OSCE in the area. UNE Case FH involving a Serbian man from Croatia who states that he is homosexual and has been harassed, threatened, attacked and discriminated against. The police has not helped him. UNE advised him to seek help from OSCE and cited the closure of the UNHCR as evidence of the safety there. He was rejected. This is in spite of the fact that representatives from these institutions insist that the mere presence of the agencies do not

guarantee a situation of security or dignity for returnees or adequate protection from State actors.

The organizations have also issued reports specifically commenting on the lack of practical effect of certain laws, e.g. amnesties issued for conscientious objectors, but the caseworker may not refer to the information in the analysis of the claim.

- Consider Case FI involving a deserter from Yugoslavia. Although UDI refers to the amnesty law and the UN Office for Coordination of Humanitarian Affairs (OCHA) report questions the effectiveness of the amnesty, UDI does not address this and the claim is rejected.

The Long Arm of Persecution

Case FK involved an applicant who fears persecution due to his marriage to a woman against her family's wishes. Someone wrote a letter to UDI which accused him of committing fraud upon the State via the asylum process. The decision to reject the applicant contained no discussion of the letter as potential evidence of persecution by a non-state actor- the long arm of persecution. Similar concerns are present with respect to situations when the State of origin sends an inquiry (mentioned in the section on exclusion).

Recommendation:

- *The commentary to the law should link evidence to the determination of fulfilment of the refugee definition. The commentary should incorporate subjective criteria reflecting the personal experience of the asylum seeker (as well as those related/associated with him) and expression of fear at equal level to objective criteria when conducting the "well-founded fear" analysis. Reference should be made to the criteria for meeting the subjective prong when reviewing evidence, including discussion of credibility and the benefit of the doubt standard.*
- *The Lawyers Association should issue guidelines regarding the duties of the lawyer specifically with respect to meeting evidentiary demands- provision of supplementary documentation, corroborating testimony, and clear explanations as to whether the claim merits asylum as opposed to*

⁴¹ See U.S. Committee for Refugees, Country Report for Iraq (2002) citing the dependency of displaced persons in Northern Iraq on humanitarian assistance, the lack of adequate shelter, etc.

humanitarian protection. Lawyers should refrain from using standard formulations and present full arguments as well as identification of all protection issues.

- *Lawyers should be given sufficient resources to ensure participation in all interviews.*
- *Caseworkers should ensure that they consult all relevant reports that are available with respect to country conditions or specific protection issues*
- *Caseworkers should evaluate all evidence presented, even when contradictory, and issue response to the submitted evidence in the decision*
- *The government should employ medical and psychiatric specialists in order to conduct in-house evaluations in UDI and UNE which may be better received by the caseworkers.*
- *In addition, staff should continue to receive lectures on the medical and psychiatric aspects of torture and humanitarian violations by experts in the field.*

4.1 Credibility

To some extent, caseworkers may fear making a mistake or setting a precedent which opens the door too widely and thus opt for humanitarian protection instead of asylum. Some caseworkers tend to be more focused on credibility issues than legal protection issues. The use of the protection categories, i.e. asylum vs. humanitarian protection correspond to such practice. When asked how they approach cases, caseworkers often cite credibility as the issue they prioritise, and this may explain in part why decisions focus more on this aspect of determination than discussion of protection categories, the scope of persecution, and the effectiveness of State protection. Some UDI cases placed analysis of credibility before analysis of protection issues, thereby indicating a hierarchy of issues which may run counter to the goals of the 1951 Convention if misapplied. In part this appears to pursue the reasonable goals of establishment of facts and elimination of manifestly unfounded claims. However it is important not to dilute the primary duty to undertake a protection analysis in conformance with the 1951 Convention. Caseworkers should review all evidence, if there exists documentary or other evidence which demonstrates possible protection need, the case

should be reviewed fully, in spite of the lack of credibility of the applicant's testimony.⁴² Consider the case of *Chen v. Canada*, in which the Court held that the Immigration and Refugee Board erred when it failed to determine whether the applicant was a member of Falun Gong in order to evaluate the risk of persecution based on evidence pertaining to members of Falun Gong, irrespective of the lack of credibility pertaining to her testimony regarding past persecution-

"The Board in this case made a finding that it did not believe that the applicant herself had been persecuted but that is not the end of the matter. The applicant can show that the fear the applicant has is based on the acts committed or likely to be committed against others who belong to the same group as does the applicant. There is evidence in the record that members of the Falun Gong group have been persecuted in China. The applicant's refugee claim could succeed based on her membership in the Falun Gong if the Board was to find that members of the Falun Gong group were or were likely to be persecuted "

With respect to asylum claims, the 1998 guidelines recognized the problem of maintaining a high standard of proof, and thus called for implementation of benefit of the doubt:

On the other hand, where the question of status is concerned, i.e. the question of whether asylum shall be granted pursuant to §17 of the Act, the requirement has been made somewhat stricter. To begin with, it has been based on the fact that this requirement concerns a general preponderance of evidence that the applicant really is a refugee.

It has now been determined that the requirement for probability of danger of persecution as a basis for asylum shall be lowered. This means that the benefit of the doubt shall be given to the applicant also in relation to the question of status."

This complements the UNHCR Handbook which calls for implementation of the benefit of the doubt:

196. *It is a general legal principle that the burden of proof lies on the persons submitting the claim. Often, however, an applicant may not be able to support his or her statements by documentary or other proof, and cases in which an applicant can provide evidence of all his or her statements will be the exception rather than the rule . . . Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt*

Asylum appears to be more likely to be granted where the testimony and/or documentary evidence is clear and the caseworker determines that the applicant is highly credible:

⁴² See *Jun Zhu Chen v. Canada* (The Minister of Citizenship and Immigration), 2002 F.T.R. LEXIS 293 (April

- Case U involved a Pakistani man who was a member of a Muslim organization and who ran a printer which issued literature and a newspaper which was repressed by the government. He was subject to 92 formal complaints and was arrested. Furthermore, he received threats that his house would be burned down. His documentation was deemed to be real and UDI granted asylum based on a positive credibility determination and persecution analysis which characterized this as a clear case.
- Consider also Case V involving an Afghan political party leader who feared execution by the Taliban. UDI deemed him to be credible and granted asylum due to the fact that his high position reveals a clear case.
- Case W involved a man from Sudan who was a member of the Sudan People's Liberation Movement (SPLM) South Sudan Student Association (SOSSA) and Southern Sudan Independence Movement (SSIM) and claimed to have been politically active in Germany. In addition, he claimed to have been harassed on account of his Christianity and he was a conscientious objector. UDI deemed him to be highly credible and granted asylum (this case included an excellent analysis in the "*remarks*" on persecution, protection grounds, subjective and objective fear, and non-applicability of internal flight alternative).
- Case FJ involved a man from Algeria who was recognized as a refugee by UNHCR. He was a member of the Islamic Salvation Front (FIS). He gave lectures on religion and was active for the poor. He was arrested twice and tortured; in addition his house was searched. Several members of the party were killed. Because he was considered highly credible, he received asylum.
- Case FX involved a man from Ethiopia who supported the Oromo Liberation Front (OLF) and was subject to re-education and torture. Due to his high credibility he is given asylum.
- Case GE also involved a man from Ethiopia who was subject to torture and arbitrary detention on account of his activities with the Tigray People's Liberation Front (TPLF) and the Relief Society of Tigray (REST). He was given asylum as he was considered to be highly credible.

- UNE Case DU involved a supporter of the Komlali communist group in Iran. He wrote a book which was critical of the regime which resulted in his suspension from his job at the University. He was forbidden from working in public institutions (including schools) on account of his political beliefs. He claimed to have been active in publishing, radio broadcast, and assistance to persons undergoing persecution. He was arrested and tortured. UNE considers him to fall within the “spotlight” of the authorities and recognizes a likelihood of “serious reactions” upon return. He is considered to be highly credible and is granted asylum.
- UNE Case DW involved a former member of PUK (of Kurdish ethnicity) with knowledge of their intelligence activity who wrote and distributed pamphlets. He was interrogated, arrested and threatened. He was considered highly credible and given asylum.

In contrast, cases which arise doubts and call for application of the principle of the benefit of the doubt more often results in humanitarian protection rather than asylum:

- Case FV involved a woman from Iran who claimed to have been subjected to arbitrary detention, intervention of the home, persecutory prosecution, violations of security of the person and inhuman treatment (whipping) on account of her support of the Bahaier. Due to doubts about credibility (in addition to a strange determination that the punishment was not excessive) she was given humanitarian protection instead of asylum.
- Case GL involved a man from Congo who claimed to have been arbitrarily detained and accused of sympathizing with the Tutsis as well as being a spy. He was not considered very credible and was granted humanitarian protection.
- Case FZ involved a man from Congo in danger of death row phenomenon amounting to cruel and inhuman treatment due to his service under Mobutu. On account of a low credibility determination (and the fact that UDI failed to identify social group or political opinion) he was given humanitarian protection instead of asylum.
- Case BU involved a man from Algeria who is a member of an organization for relatives of victims of terror. His brother was killed by Islamists and he

claimed to be targeted by them. UDI determined that his own lack of personal political activity renders the risk of persecution null (thus there was no analysis of imputed political opinion or social group). He was considered to have a lower degree of credibility because he gave another story in Denmark. The caseworker determined that the credibility issues are not material, particularly given the fact that the State is unable to protect him. Thus he was given the benefit of the doubt, but only in favor of humanitarian protection under the 15 month rule, not asylum.

The granting of benefit of the doubt resulting in asylum as well as a permit based on the 15 month rule was also evident in cases deemed to be “old”:

- Case GA involved a man from Congo who was arbitrarily detained for his involvement with the *Rassemblement du Peuples Burundais* (RPB). The benefit of the doubt is given and asylum granted given the long passage of time since the filing of the claim.
- Case GH involved a homosexual woman from Ethiopia where this is penalized. Asylum is granted in part based on use of benefit of the doubt in light of the long passage of time.
- Case GU, involved a woman from Sudan who claimed to have been subject to arbitrary detention, arbitrary intervention of the home and violation of security of the person on account of her religion. UDI doubted her credibility and grants humanitarian protection according to the 15 month rule.

In addition to doubts regarding credibility, other doubts as to likelihood of events, level of risk, identification with protection categories, etc. have a tendency to receive humanitarian protection instead of asylum:

- Case R involved a single, unaccompanied Iraqi Kurdish minor who alleged that members of the Kurdistan Workers’ Party (PKK) political party ran him over due to the fact that his brother had criticized the party in the press. In addition, he alleged that stones were thrown at his house, his electricity was cut off, and explosives were attached to the wall. The Patriotic Union of Kurdistan (PUK) detonated the bomb. UDI failed to sufficiently discuss imputed

political opinion and rejected a grant of asylum due to the fact that they found it unlikely the PKK would conduct such acts in an area controlled by the PUK:

“The Directorate is of the opinion that the applicant has not proved to a sufficient degree that he upon return to his home country will be in danger of being exposed to reactions which can amount to persecution in the meaning of the Act and Convention. The applicant has not carried out political activity of such type or extent that it can give grounds to fear persecution . . .

The Directorate has further noted the applicant’s information regarding his own and his family’s problems with PKK. The Directorate bases its decision on that the PUK is able and willing to protect inhabitants in central districts of its area. . .

The Directorate has further considered the applicant’s information that he had been run over by PKK supporters on motor cycles. The Directorate is of the opinion that this can be regarded as a criminal act which should be reported to the authorities in the area, and that these circumstances cannot be regarded as persecution in the meaning of the Act and Convention. In this case, the Directorate bases its decision on that the PUK is able and willing to give the applicant protection.”

In part the presumption against him was raised by his prior registry under another name in Germany. The grant of humanitarian protection was given instead of asylum due to doubts regarding credibility combined with negative risk determination.

In some cases, caseworkers may be naïve with respect to the context of cruelty and impunity which impregnates countries of origin and result in claims which within the context of a Western democratic society may appear far-fetched:

- Case FO, the applicant worked in a restaurant in Russia and claimed to have been forcibly conscripted to serve in Chechnya as a result of a dispute in which he failed to provide a table for important Duma members. UDI noted that *“it is not likely that central politicians would have used their position to force the applicant to carry out such service only because of a trivial conflict where he as a waiter at a restaurant had to make them wait for a table.”* The fact that the applicant provided the conscription documents were not addressed. Furthermore, his medical documentation confirming a head injury and loss of two fingers were used against him in the sense that the caseworker deemed it to be unlikely that he would be sent to Chechnya.⁴³ Indeed, in my opinion

⁴³ In addition, the caseworker assessed his credibility to be low because he had been convicted of petty theft in Norway. The caseworker reasoned that a “real refugee” would not risk deportation by engaging in theft, thereby revealing a lack of understanding regarding the reality of refugee’s live in reception centers. The caseworker focused a lot on the applicant’s inability to remember dates; the applicant claimed problems due to his head injury, and this was not taken into account by the caseworker.

such an event is quite possible within Russia as well as several other nations characterized by weakness of the rule of law.

As previously mentioned, caseworkers may find it easier to identify compassionate grounds than evaluate the standards for Convention grounds or humanitarian protection. This also appears to affect the use of benefit of the doubt, the standard of proof is often lowered in cases involving compassionate grounds. This results in faster processing of cases, but diminishes actual implementation of the 1951 Convention, as the grounds for protection fall outside of its framework:

- Case T, a Colombian asylum seeker alleged a risk of persecution on account of his refusal to hide weapons for the *Ejercito de Liberacion Nacional* (ELN). Although UDI was sceptical it granted asylum without further investigation of the claim. The applicant's health circumstances (he is HIV positive) appeared to have affected the evaluation of the claim, thus he was given the benefit of the doubt.

The sampling of cases revealed that caseworkers do give the benefit of the doubt, particularly in cases involving vulnerable individuals, such as minors or women, and the cases below include grants of asylum and humanitarian protection, the key difference being the comprehensiveness of the discussion of the relevant rights and protection concerns, in particular regarding the State's role in promoting persecution either directly or via acquiescence of actions by Non-State Actors:

- Case O involved an Iraqi girl forcibly married as reparation for a murder. Her husband tortured and tried to kill her. She fled, but her brothers sent her back. Her mother was killed and her sisters could not help her. She had contradictions in her testimony, but UDI gave her the benefit of the doubt in favor of asylum and completed a good analysis of social group, non-state actors, lack of access to protection, and lack of viability of divorce.
- Case P involved a single, unaccompanied minor from Iraq who fearing execution due to refusal to participate in the para-military group "Army for Jerusalem's Independence". UDI did not find him very credible due to his lack of details, but they gave him the benefit of the doubt for humanitarian protection not asylum with little discussion of the forced recruitment issue either in terms of legitimacy of the action, scope of punishment, etc.

- Case Q involved a Croatian woman and her children who experienced domestic abuse, was threatened with death, and was evicted by her husband without receiving protection from the state due to the husband's professional affiliation with the State. She was given the benefit of the doubt and a permit for compassionate grounds due to her psychological problems, but there was no discussion of social group or the CRC.

Another area to keep in mind with respect to prevention of violation of protection principles, is where there is doubt as to the nationality of a person. There is undeniably abuse within the system among asylum seekers who dispose of their documents and claim a false nationality in the hopes of immigration. However, there are also cases in which the nationality of an applicant may be unclear due to the lack of clear borders between territories, prevalence of nomadic practices, etc. The 1951 Convention does not require persons to actually have a nationality in order to be recognized as a refugee, hence cases should not be rejected for failure to establish a nationality where there exists sufficient explanation. One may consider the Dulane case from the U.S., involving a man of the Ogaden nomadic clan born in Ethiopia but later fled to Somali and attained a Somali passport (thus his nationality was unclear and he admitted this).⁴⁴ The Tenth Circuit Court reversed the Board of Immigration Appeals' decision to reject based on its failure to address whether the applicant established a well-founded fear of future persecution if he returned to Ethiopia or Somalia.

Recommendations:

The immigration authorities emphasize establishing credibility of facts as the first part of analysis, and this is supported by KRD (indeed the report on UNE noted that nemnda meetings dedicated the majority of time to such endeavors, in one case 60-70%, the remaining time divided between country information and legal issues.)⁴⁵ Our primary recommendation is that guidelines should be drafted to include criteria regarding credibility analysis, addressing the following principles, derived from Canadian and U.S. guidelines and practice:

- *Caseworkers should place discussion of credibility issues in the decisions, when hidden in the remarks the applicant and lawyer are*

⁴⁴ Dulane v. INS, 46 F. 3rd 988 (10th Cir. 1995)

prevented from understanding how the determination was made. Only by highlighting the concrete reasons for disbelief, can the applicant understand whether there has been an error, misunderstanding, etc.

- *The applicant must always be given the opportunity to respond to credibility issues, including an opportunity to explain the absence of documents or use of false documents.*
- *Credibility determination should be based on the individual's circumstances and evidence presented.*
- *The individual circumstances should also be considered "in light of what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country".⁴⁶ Reference to the contextual background may buttress claim, however it is important to note that individuals have particular experiences which are not always present in general reports and the absence of such corroboration should not necessarily discount the validity of the claim.⁴⁷*
- *When making a credibility analysis, it is a basic standard of due process that the caseworker point to **specific, cogent, probative grounds for any disbelief**. The caseworker should not point to generalized statements or minor errors or inconsistencies as evidence of lack of credibility. One must point to **substantially inconsistent statements, contradictory evidence, and improbable testimony**. Caseworkers should **refrain** from engaging in **speculation** or **conjecture** to discredit protection need, they must always address the record and the evidence at hand.⁴⁸ The caseworker should never ignore evidence or only evaluate part of the evidence- all oral testimony and documentary evidence must be considered holistically*

⁴⁵ See RH Knoff, Evaluation of the Immigration Appeals Board 64 (RH Knoff February 2002).

⁴⁶ Canadian Immigration and Refugee Board, Evaluation of Credibility in Claims for Refugee Protection 3 (IRB June 29 2000).

⁴⁷ Id. at 47-48, citing Guitierrez, Efrén Alejandro Martínez v. M.C.I. (F.C.T.D., no. IMM-3291-99), Lachowski v. Canada (Minister of Employment and Immigration) (1992, 18 Imm. L.R. (2nd) 134 (F.C.T.D.), Ahortor v. Canada (Minister of Employment and Immigration) (1993, 21 Imm.L.R. (2nd) 39 (F.C.T.D), Selvarajah, Rajikumer v. M.E.I. (F.C.A., no. A-342-91), Heald, Stone, McDonald, April 14 1994, Nebea v. Canada (Minsiter of Citizenship and Immigration) (1998), 45 Imm.LR. (2nd) 61 (F.C.T.D.).

⁴⁸ See e.g. Frimpong v. Canada (Minister of Employment and Immigration) (1989), 8 Imm.L.R. (2nd) 183 (F.C.A.).

and addressing contradictory evidence. The reason for doubting the credibility must be **substantial** and **bear a legitimate nexus to the finding**.

- *Caseworkers should refrain from partial evaluation of evidence: It is entirely feasible that someone who has lied with respect to part of his testimony may nevertheless merit protection due to the existence of other evidence, e.g. medical documentation of past torture, evidence of threat of future persecution to persons similarly situated, documentary evidence addressing negative country conditions etc.*⁴⁹ Thus, the rejection of testimony does not lead to rejection of a claim, if the documentary evidence is reliable. The caseworker should specifically indicate what evidence is disbelieved and why.
- *Minor inconsistencies and minor admissions that do not reveal anything about an applicant's fear for his safety, and thereby do not involve the "heart of the asylum claim" are insufficient to ground an adverse credibility finding.*⁵⁰ The credibility analysis is an important part of decision-making, but it should be considered subsidiary to protection analysis itself.
- *UNE should reverse credibility determinations which are not based on the evidence in the record.*
- *The testimony of an applicant, if credible, should be sufficient to sustain the burden of proof without corroboration.*⁵¹
- *The caseworker should take into account cultural factors, age, education, gender, and psychological disorders which may result in a lack of clarity, confusion or gaps within the testimony.*⁵²
- *Furthermore, there is a need to include the benefit of the doubt standard within commentary to the law, as its inclusion in the 1998*

⁴⁹ See Canadian Immigration and Refugee Board, Evaluation of Credibility in Claims for Refugee Protection 13 & 27 (IRB June 28 2002).

⁵⁰ See e.g. *Chen Yun Gao v. J. Ashcroft*, Attorney General of the United States, 299 F. 3rd 266 (3rd Cir. 2002), citing *Vilorio-Lopez v. INS*, 852 F. 2nd 1137, 1142 (9th Cir. 1988).

⁵¹ See *Georgis v. Ashcroft*, Attorney General of the United States, 2003 U.S. App. LEXIS 9648 (7th Cir. 2003) citing 8 C.F.R. §208.13.

⁵² See Juliet Cohen, "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers", in 18 (3) *International Journal of Refugee Law* 293 (Oxford 2002); see also Walter Kalin, "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing" in 20 *International Migration Review* 230 (1986).

Guidelines appears to have had limited effect, e.g. it is often applied to vulnerable categories or utilized to grant a lower standard of protection (humanitarian protection or protection for compassionate grounds rather than asylum.)

5. Persecution

5.1 The Notion of Persecution

There is no universal definition of persecution. It is subject to varied interpretation among different states, organizations, theorists and even individual caseworkers.⁵³ According to Goodwin-Gill, evaluation of the existence of persecution requires examination of **reasons**, **interests** and **measures**.⁵⁴ Reasons would point to illegitimate ends such as elimination of a minority, attainment of political control, etc. A common error among caseworkers is the assumption that the existence of a non-convention ground motive negates the existence of a convention ground motive. Caseworkers should take care to be aware of mixed motives for persecution. Interests refer to the human rights threatened, civil and political rights as well as social, economic and cultural rights (individual and collective rights), e.g. right to life, right to work, right to association, etc. Measures refer to the acts in both passive in active sense, infliction of physical or mental harm, denial of civic participation, expropriation of property, discriminatory policies, etc.

One must complete an analysis of the nature of the freedom threatened, the nature and severity of the restriction, and the likelihood of the imposition of such restriction. Violation of non-derogable human rights such as the right to life, freedom from torture, or cruel, inhuman, degrading treatment, freedom from slavery, prohibition of prosecution for ex post facto offences, recognition as a person before the law, and freedom of thought, conscience and religion are recognized as persecution. In particular, the rights of freedom of expression, assembly, and movement are deemed to be traditional guarantees of a democratic society and

⁵³ See Vigdis Vevstad, *Refugee Protection: A European Challenge* 63-71 (Tano 1998), Guy Goodwin-Gill, *The Refugee in International Law* 66-77 (Clarendon 1996), James C. Hathaway, *The Law of Refugee Status* 99-133 (Butterworths 1991), Terje Einarsen, *Retten til Vern* 285-325 (Cicero 2000).

thus violation are often deemed to amount to persecution when excessive. Arbitrary interference with a person and his family in his private home, arbitrary arrest and detention, denial of a fair trial, denial of equal protection, as well as violations of the right to liberty and security of the person may also be the basis of a finding of persecution. Denial of employment so as to meet basic needs (food, housing, etc.), expropriation of property without compensation, denial of access to basic education, health care, may also be deemed to be persecution often in a group sense. Furthermore human rights violations may be considered as persecution when evaluated cumulatively, thus increasing the possibility of providing protection to persons undergoing diverse abuses, ranging from socio-economic to civil & political or fundamental & non-fundamental.⁵⁵ In short, review of the facts requires direct linkage the rights contained in the ICCPR, ICESCR, UDHR, CERD, CEDAW, CRC, CAT, etc. in order to ensure full analysis of whether there are grounds for a finding of persecution. Various human rights standards allow derogation in certain circumstances, for example Articles 19, 21 and 22 of the ICCPR, in order to maintain public order, protect national security, public safety, public health or morals, or the rights and freedoms of others. However the caseworker should assess to what extent the measure is rationally related to achievement of such end, whether it is proportional, and whether it is applied in a discriminatory manner.⁵⁶ Caseworkers should refer to human rights in order to set forth a framework for identifying cases of persecution, i.e. persecution exists when the derogation extends beyond permissible **scope** or **duration** or when it is **discriminatory**.

One may consider whether the law should be amended to include a definition of persecution. The Rome Statute of the International Criminal Court contains an expansive definition of persecution: the intentional and severe deprivation of fundamental rights contrary to international law by reason of identity of the group or collectivity, it lists as a

⁵⁴ Guy Goodwin Gill, *The Refugee in International Law*, 78 (Clarendon Press 1996).

⁵⁵ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva 1992), para. 53 “In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in various forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin.) In such situations, the various elements involved may, if taken together produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on ‘cumulative grounds’. Needless to say, it is not possible to lay down a general rule as to what cumulative grounds can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.”

⁵⁶ For example, the International Covenant on Civil and Political Rights, Article 4 states: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

crime against humanity “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender (defined as the two sexes, male and female, within the context of society) or **other grounds which are universally recognized as impermissible under international law**, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court. This creates an open clause which is adaptable to future forms of persecution not previously identified, but which eliminates unfounded claims by requiring a basis in international law.⁵⁷

Alternatively, one may consider incorporating the EU definition of persecution upon adoption. The Council of Europe’s Proposal, Article 11 (1) (a) provides the following definition:

“1. Acts considered as persecution within the meaning of article 1 A of the Geneva Convention must: a. be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or b. be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a)”.

2. Acts of persecution, which can be qualified as such in accordance with paragraph 1, can inter alia take the form of:

- a. acts of physical or mental violence, including acts of sexual violence:*
- b. legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;*
- c. prosecution or punishment, which is disproportionate or discriminatory:*
- d. denial of judicial redress resulting in a disproportionate or discriminatory punishment:*
- e. prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 14, paragraph 2; acts of a gender-specific or child specific nature.”*

Recommendation:

⁵⁷ It has a modern list of violations relating to displacement itself as a crime including: Forced transfer of the children of one group to another is considered genocide, forced transfer or deportation of population is a crime against humanity, unlawful deportation or transfer is a war crime. Transfer of population into occupied territory or out of territory is also a war crime.

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence are war crimes, as are conscripting children under 15 into the armed forces or use in hostilities.

- *The law or commentary to the law should be amended to include a definition of persecution which reads as follows: “persecution is composed of a serious breach of human right(s) beyond permissible scope or duration, or an act amounting to serious discrimination”.*
- *A persecution analysis requires review of the relevant human rights as well as the existence of cumulative violations which may amount to persecution. There should be examination of the proportionality of the measure pursued, the nature and severity of the freedom threatened, and the likelihood of the restriction being applied. The caseworker should weigh the state interest (e.g. maintaining public order, health, etc.) against the individual interest in exercising a right. If the measure is a law or decree, it may be illegitimate on its face (targets one group unfairly, or is excessive), it may be applied in an illegitimate manner (police may enforce it only against a minority, or may carry an arrest order too far in terms of length or terms of detention). KRD’s proposed regulations provide a definition of persecution which omits reference to discrimination but calls for cumulative analysis:*

“Persecution exists when a person risks serious human rights violations or other serious violations, and cannot expect effective protection in their home country. Serious human rights violations or serious violations exist when a person’s life development is threatened to a substantial degree. Even though several violations by themselves cannot be regarded as persecution, they can collectively lead to the foreigner being regarded as persecuted.”

- *In non-conflict situations, reference to the standards contained in UDHR, ICCPR, ICESCR, CEDAW, CRC, CERD, ECHR and other instruments pertaining to human rights shall be consulted to assess persecution.*
- *In situations of conflict and war, violations of the relevant humanitarian legal protections (Geneva Conventions and Protocols, Rome Statute establishing the ICC, and the Convention Against Genocide) shall be taken into consideration when completing a persecution analysis.*
- *The law or commentary to the law may be amended to expand the breadth of application beyond the five protection grounds to include “other grounds which are universally recognized as impermissible under international law” as included in the ICC Statute.*

- *Caseworkers at UDI and UNE should be issued a human rights checklist in order to improve their awareness of the rights relevant to a persecution analysis.*

5.2 Overview of Alleged Human Rights Violations within the Cases

The chart below shows the distribution of alleged/implicit rights (future and past) within the cases, distinguishing between those receiving asylum and those receiving humanitarian protection. It should be noted that all the cases carry an implied reference of the violation of lack of effective remedy and/or basic non-discrimination guarantees. Children's rights are underrepresented because as dependents, their own rights were not always addressed, most often reference to the children's needs or interests was cited as meriting protection on compassionate grounds, not asylum.

The most common rights were the first generation rights, including the right to liberty and security of the person, the right to life, and freedom from torture or cruel, inhuman or degrading treatment (including rape). The two former rights more often occurred in cases receiving humanitarian protection, whereas the latter was more prevalent in those cases receiving asylum.

The rights to property, choice of residence/freedom of movement, freedom of association/right of assembly, and freedom from forced labour were more often found in the cases receiving humanitarian protection, while freedom of expression showed a slight tendency towards asylum. Arbitrary intervention of the home, family or privacy and freedom of conscience (religion) were almost evenly distributed.

Of interest the right to choose one's spouse or consent to marriage was more prevalent in asylum cases, while equal rights as a parent was slightly more prevalent in humanitarian protection.

Socio-economic rights, such as the right to an adequate standard of living, including food, clothing and housing, health, as well as the right to work were more often given humanitarian protection. Although these rights are often deemed to be insufficient to amount

to persecution, there is concern given that these rights are often linked to un-remedied civil and political violations or may occur in a context of systematic discrimination (see in particular the chapter on return). Of further concern is that none of the forced recruitment cases received asylum, instead they all received humanitarian protection.

As with the other tables, many of these cases were given humanitarian protection instead of asylum due to a negative credibility determination, negative risk assessment, or lack of linkage to a relevant protection category. However, the purpose of this table is to highlight the need for understanding and discussion of the relevant rights present within the facts of a case, both among lawyers and NGOs, as well as among caseworkers and judges. Analysis of rights requires understanding of the scope of each right, particularly given the specific circumstances of the individual. For example, a peasant of indigenous descent may describe his forced eviction by paramilitary groups would require assessment of the right to property, under formal law (Constitution or Civil Code, as well as UDHR, Art.17) if he had title/registry or customary law (as protected by ILO Convention No. 169 Art.14), as well as cross-reference to the right to choice of residence (art. 12 ICCPR), the right to an adequate standard of living, including the right to food, etc (Art. 11 ICESCR). Related procedural rights, such as the right to recourse of courts (in practice, not just in theory) would also need to be assessed.

Alleged Human Rights Violation	Asylum Granted	Humanitarian Protection Granted (both §15 (1) and §8 (2))
Right to Life (Art.6 ICCPR)	30	45
Freedom from torture or cruel, inhuman, degrading treatment (including rape) (Art. 7 ICCPR)	33	21
Freedom of expression (right to opinion) (Art. 19 UDHR)	10	7
Right to Liberty/security of person (arbitrary detention & physical integrity) (Art.9 ICCPR)	49	66
Freedom of conscience (religion) (Art. 18 UDHR)	5	4
Right to Choice of Residence & Freedom of Movement (Art. 12 ICCPR)	3	13
Arbitrary interference w/ the home, family or privacy (Article 17 ICCPR)	17	18
Right to Property (Art. 17 UDHR)	6	11
Right to Recourse of Courts (Art.8 UDHR, Art. 2 ICCPR)	3	2

Equal Protection of the Law (Art. 2 & 3 ICCPR)	2	4
Right to Nationality (Art. 15 UDHR)	1	2
Forced Labour (Art. 8 ICCPR)	2	4
Right to Assembly & Freedom of Association (Art. 22 ICCPR, Art. 20 UDHR)	4	2
Right to Union (Art.8 IESCR, Art. 22 ICCPR)	1	0
Right to Adequate Standard of Living, including food, clothing & housing (Art. 11 ICESCR)	2	7
Right to Health (Art. 12 ICESCR)	2	3
Equal Rights & Responsibilities as a Parent (Art. 16 CEDAW)	0	3
Best Interests of the Child (Art. 3 CRC)	4	13
Right to Choose Spouse/Consent to Marriage (Art. 16 CEDAW)	12	5
Survival & Development of the Child (Art. 6 CRC)	0	2
Freedom from Forced Recruitment (Protocol to CRC, CRC Art. 88)	0	7
Right to work (Art.6 ICESCR)	9	13
Right to Culture (Art. 27 ICCPR)	0	1
Other gender rights	1	4

5.3 Reference to International Human Rights Law in order to Identify Persecution within Norwegian Practice

5.3.1. General Background

One of the reasons for the low asylum rate is the lack of a systematized approach to use of human rights standards in the analysis of claims. It should be recognized that both UDI & UNE are undergoing transitions which reflect increased interest in aligning their practice with international standards. However, there is a tendency to separate national practice from international norms, see NOU 1983:47, noting that incorporation of the refugee definition will not change the character of the Norwegian refugee definition which will be shaped by the Norwegian legal system as well as institutional practice and interpretation, given that international decisions may prove to be too “theoretical”, while at the same time recognizing that UNHCR’s opinion and practice from other countries should be given significant weight.

UNE has a subject memorandum (which is neither a guideline nor a practice memorandum) which explains the Immigration Act's §15 (1) (01.03.2002) and begins by advising caseworkers to be conservative in their interpretation of the law, letting European Court of Human Rights set the standard of evolution rather than promoting change at the national level. This inhibits development within the asylum practice as caseworkers are cautioned not be innovative and thus divorced from the perspective that the lack of an international court addressing the 1951 Convention actually places a greater duty on them to be innovative in order to develop protection principles. This is of particular concern given the fact that staff members may not be aware of innovations which have already taken place at the international level due to the fact that they may have little time to read decisions by international human rights bodies or other nation's immigration authorities due to pressure to produce decisions.

There appears to be an erroneous reliance on the principle of "margin of appreciation" relevant to the ECHR which has no relevance to the 1951 Convention on the Status of Refugees, as a basis for excusing national variance from international standards.⁵⁸ The Norwegian immigration authorities have a duty to interpret the 1951 Convention in good faith, in accordance with its ordinary meaning considered in context and light of its objective purpose (Article 31 Vienna Convention on the Law of Treaties 69). Further, they are obliged to refrain from acts which would defeat the object and the purpose of the Convention (Article 18 VCLT), which in the case of the 1951 Convention is humanitarian in nature. The fallible perspective that there is a "margin of appreciation" with respect to interpreting the refugee definition promotes its misinterpretation, as caseworkers may be less inclined to pursue a broad meaning of the terms used within the Convention in order to ensure that their determination is actually in accord with the purposes of the 1951 Convention (as well as other relevant human rights instruments).⁵⁹

One may consider these concerns having been carried over from the prior period in which the Ministry of Justice addressed asylum issues, especially given that a significant percentage of UNE staff were recruited from that Ministry- thus traditions are maintained.⁶⁰

⁵⁸ See "Arguments on gender-based persecution in asylum cases", UNE Subject Memorandum (16.10.2002), "It is a recognised principle of international law that the states, within certain limits and based on their own needs and interests, have a certain freedom - "margin of appreciation"- to themselves decide the further content of their obligations under international law."

⁵⁹ See *Horvath v. United Kingdom*, Secretary of State for the Home Department, 2000 N.R. LEXIS 284, para. 6 (July 6 2000).

⁶⁰ For example we may consider the perspective presented in the "*Memorandum on the Refugee Convention's definition of a refugee – evaluation of Norwegian practice in relation to this proposal for changes* (1998) reveals an attitude which contests the relevance of theory to practice:

UNE seeks to rid itself of identification with the previous entity, and the key to such evolution appears to be incorporation a human rights based approach to analysis of cases. The issue becomes one of the chicken and the egg, how can a caseworker identify a complex issue if he/she has not been exposed to the theory and case law which address such topics? In like manner, how can caseworkers participate in innovative interpretation of refugee law if they do not recognize their own transnational mandate which requires reference to international sources of law as well as national practice.

The reliance of caseworkers on institutional past practice to guide processing as opposed to reference to refugee/human rights theory or comparative/international jurisprudence risks the maintainance of protection gaps. The cases revealed little reference to international human rights conventions. In general, it appeared that discussions of the relevance of international standards were a result of presentation by the lawyers in the claim. Thus, the primary initiative for incorporation of international standards within specific cases is not often internal, but rather promoted by actors outside of the institutions, although both UNE and UDI caseworkers are currently seeking to improve their reference to such norms. In some cases, lawyers cite human rights provisions without directly receiving commentary from the authorities:

- UNE Case B involved a Russian woman of Chechen background who claimed that her husband was killed because of his support to rebels and that she herself fears persecution on account of her provision of medicine to soldiers. Her lawyer referred to EMK, art.14, UDH art. 1, and the 1951 Convention (arts. 1, 3, 4, and 33) without receiving direct response on these standards by the immigration authorities. (One may also argue that the CEDAW is also relevant) He also provided letters of support from the Church in Norway in order to show her contacts with the society. However UNE found her to lack credibility due to contradictions in her testimony. UNE granted her a permit on compassionate grounds instead of asylum:

“When compassionate grounds speak for it, or when the foreigner has a particular connection to the Realm, a work and residence permit may be granted pursuant to para 8 (2) of the Act. The provision is not intended to include circumstances which will be manifested for most applicants. A balance must be struck between circumstances that point towards for and against granting a permit. A

“However, neither is it our impression that the difficult and principled borderline cases arise particularly often in practice. It very often occurs that it is the evaluation of the facts which is central in these cases.”

current theme will be whether return to the home country is inadvisable for the applicant and whether the decision will affect immigration political considerations. After an overall evaluation of the available health information, regard for the daughter's schooling, and the war and the difficult humanitarian and security situations in Chechnya, the Board finds that compassionate grounds exist."

However, even in cases in which the analysis demonstrated a general understanding of human rights issues, the caseworkers did not always make specific references to the relevant international instruments and thus humanitarian protection is given over asylum:

- Case GX involved an Iranian woman and her child, the former claiming forced marriage and violation of security of the person as grounds for protection. Humanitarian protection is given without reference to CEDAW or CRC. Had these instruments been consulted it is possible that grounds for asylum may have been met.

In some cases, the caseworker's determination to give asylum is countered by the supervisor who prefers a lower grant of protection, i.e. humanitarian protection:

- Case X involved a Pakistani woman who was abused and raped by both her father in law as well as the police. Her mother in law later tried to kill her and broke her daughter's leg. This case revealed the embarrassing and worrisome situation in which the caseworker understood the refugee legal principles better than the supervisor, hence while the caseworker identified the issue of a lack of access to justice (in particular given that the police themselves were the offenders), the supervisor incorrectly instructs her to declare the case as falling outside the scope of the 1951 Convention. Neither of them discuss the relevance of the social group category. The caseworker stated that this was among the worst cases that she has ever seen but likewise issued a decision granting humanitarian protection instead of asylum utilizing a standard answer:

"UDI has considered the applicant's arguments and has found that they are not of such type or such extent that they can form the grounds for asylum. The occurrences to which the applicant has been exposed to are criminal circumstances which fall under the general criminal legislation in the home country. These are not circumstances which fall under the Refugee Convention."

Because of this, some caseworkers have stated that they choose to recommend humanitarian protection instead of asylum knowing that it is more likely to be accepted. This combines with the pressure to be effective, in the sense that caseworkers state that it may take five days to convince a supervisor to approve a grant of asylum in a case which traditionally

has not been recognized as falling within the protection category or persecution standard, whereas it would take less time to approve humanitarian protection. Hence in the interest to be effective, the caseworker may pursue only humanitarian protection. Thus, the evolution of the interpretation of the notion of asylum and the relevant protection principles may be somewhat counteracted by the focus on effectiveness as well as the lack of harmonized protection views.

On the other hand, there were also cases where the supervisor corrected misunderstanding of refugee law by the caseworker in order to grant asylum instead of humanitarian protection.

- Case FW involved a woman from Ethiopia who experiences arbitrary intervention of the home and is repeatedly subjected to sexual abuse between 1994-2001 on account of her father's links to the Oromo Liberation Front (OLF). The caseworker incorrectly focused on the fact that the applicant herself has not been politically active: *The applicant has not herself been a member of OLF and she has never carried on any form of activities for the organisation.*"

The supervisor corrected the caseworker by explaining the principle of imputed political opinion and called for provision of asylum.

It should be noted that, recent cases from 2003 (particularly with respect to the Africa section in UDI) reveal improved reference to human rights, while others diminished in quality due to productivity pressures:

- Case FX involved a man from Ethiopia who was subject to re-education, arbitrary detention, torture, arbitrary intervention of the home, and violation of security of the person on account of his activities within the Oromo Liberation Front. UDI directly referred to the CAT and the ICCPR to identify violation of guarantee against torture and grants asylum, in part because the applicant is considered to be highly credible.

It is important to recognize the indivisibility of human rights, as noted in the UN Declaration on Development (1988) and thereby conduct an analysis on the linkage and impact of rights upon each other. For example, the Inter-American Court of Human Rights issued a decision in a case involving street children who were abducted, tortured, and assassinated by police.⁶¹ The Court held the State of Guatemala had pursued double aggression by failing to prevent

⁶¹ Villagran Morales et. Al. Case "The Street Children", I/A Court H.R. Series C No. 63 paras. 189-190 (19 November 1999).

the children from living in misery, thus depriving them of the means for a dignified life and preventing them from full and harmonious development, in addition to violating their physical, mental and moral integrity, as well as their lives.

Of most concern, is that within the practice the standard for receiving asylum appears to be too high. It is often equivalent to the non-refoulement standard contained within the human rights instruments- asylum is given to the most serious violations, such as torture or the right to life, but not often for cumulative violations of other human rights of non-jus cogens category.

Socio-economic rights, such as the right to work are categorically rejected in the analysis of cases. Even when a person may be deprived of his or her right to have a job due to political affiliation or gender, thereby linking the socio-economic right to civil-and political considerations, in general the UDI cases did not reveal that these claims were considered to be relevant to the determination of an asylum claim. As noted by Jean-Yves Carlier, consideration of the disproportionality of a violation of human rights “will be a function of the quantitative and qualitative severity of the treatment, on the one hand, and of the basic human right that the treatment violates on the other. The more fundamental the right in question is (life, physical integrity, freedom), the less quantitatively and qualitatively severe the treatment need be. The lower the priority attributed to the violated freedom (economic, social or cultural right), the more quantitatively and qualitatively severe the treatment must be.”⁶² Although gross discrimination of rights such as work, education and health may amount to persecution, review of the cases did not reveal adherence to this view. Often a permit for compassionate grounds is given in such cases or straight rejection. Further, there appeared to be vagueness with respect to identifying when cumulative acts may amount to persecution, in particular when coupled with a comparative approach- this limits recognition of asylum.

- For example, consider Case GG involving a woman from Croatia who was subject to violations of the rights to work, property, and choice of residence on account of discrimination due to her race and political opinion. Nevertheless she was given humanitarian protection instead of asylum given the perception that the violations are “*not serious enough*” This decision may be appropriate, but it would have been preferable to complete a full discussion of the

⁶² Jean Yves Carlier, “The Geneva Refugee Definition and the ‘Theory of the Three Scales’” in Francis Nichol森 & Patrick Twomey (Eds.), *Refugee Rights and Responsibilities: Evolving International Concepts and Regimes* 37, 45 (Cambridge 1999).

interrelationship of these rights with other rights implicitly related, as discussed above.

- In contrast, see Case GT involved a woman from Eritrea who was subject to arbitrary detention and violation of her rights to nationality, work, and conscience on account of her religion. Although the caseworker originally assessed this to constitute harassment not amounting to persecution, the supervisor corrected the analysis by conducting a cumulative analysis and calling for asylum.
- UNE Case DM involving an applicant of Roma ethnicity from Croatia who is rejected. He lost his job and housing on account of ethnic discrimination. Yet, UDI noted that *"the circumstances that the applicant will be without work and housing on return in any event do not provide grounds for asylum.* Both UDI and UNE recognized that there are problems for minorities in Croatia. They adopted a comparative approach which limits recognition of asylum, given that he was deemed to not be in a *"an especially exposed position in relation to the other minority groups in Croatia"* and thus rejected.
- UNE Case CJ involved an ethnic Albanian from Kosovo who was a well-known artist and a member of the Democratic League of Kosovo. He received threats from the police who later ransacked his house. UDI rejected, noting that he faced no special threat upon return. On appeal it was revealed that he was a homosexual. UNE granted asylum, identifying him as part of a social group which faced threats by Non-State Actors. It was a split decision. The minority disagreed on account of doubts regarding the veracity of the claim and recommended lowering the status to humanitarian protection. The remarks defined persecution as composed of *"reactions which can threaten life and freedom, that is to say, violations of fundamental human rights, will be included, but harassment, discrimination and discriminatory treatment will not as a rule fall under the concept."* The problem with this evaluation is that it does not proceed to explain what are the exceptions which allow discriminatory acts to arise to the level of persecution.

Further remarks assert the following distinctions:

"Murder, torture, death penalty, maltreatment, rape, long-term imprisonment, extensive discrimination and other serious violations of human rights amount to persecution in the meaning of the Convention. Limited harassment and

discrimination, short terms of imprisonment, arrests and domiciliary visits do not amount to persecution in the sense of the Convention.

This correlates with Fisknes who explains persecution as serious violations of human rights:

“The death penalty, torture, long terms of imprisonment and complete exclusion from the work market and educational institutions are examples of serious violations. Rape and other sexual maltreatment are examples of serious violations. Rape and other sexual maltreatment are examples of serious violations which especially women can be exposed to as a part of persecution. Danger of intervention in the home and short-term imprisonment are as a rule not sufficient. The violations must have a certain extent (reach a certain threshold) in order to fall under the concept of persecution.”⁶³

- In Case CK, a roma woman from Serbia who was raped, beaten, and assaulted in her home was deemed to be a mere victim of harassment. Indeed, although UDI referred to a report by the UK Home office confirming lack of protection by the local authorities for the roma, there was insufficient analysis to substantiate denial of protection:

“The Directorate has noted the applicant’s arguments regarding harassment, but is of the opinion that the circumstances invoked by the applicant are not of such extent or have been of such nature that they can be characterised as persecution in the sense of the Act and Convention.

The Directorate of Immigration is aware that national minority groups can be harassed in Serbia, but based on the knowledge the Directorate has regarding the circumstances in Serbia, ethnic groups on a general basis do not have a need for protection. There is no information presented in this case which gives the Directorate reason to believe that the applicant has been in an especially exposed position in his home country. The Directorate has noted that the applicant has been sought out and attacked by persons in his home. The applicant is referred to seek protection and assistance through the police and judicial system in his home country if he is exposed to threats or criminal circumstances. The Convention provides a future-oriented evaluation of whether the applicant upon return to his home country will be exposed to such reactions by the authorities or others. Based on the information in the case, there is no reason to believe that circumstances exist which point to the fact that the applicant upon return to his home country would be in danger of being exposed to reactions by the authorities, single persons or groups which can be characterised as persecution in the meaning of the Act and Convention.

Neither is there any information presented which would indicate that the applicant in the future will be in an especially exposed situation compared with other ethnic roma in the area.”

It is interesting that one of the UDI concept papers contains the following language which recognizes arrest and detention as incorporating persecutory characteristics:

“Reference is made to the fact that the applicant has never been arrested, imprisoned or in another way exposed to violations which can be characterised as persecution.”

⁶³ Fisknes, Eli, Commentary Ed. 181 to the Immigration Act (Universitetsforlaget 1994).

In contrast, several cases from Belorussia revealed non-recognition of arrest and detention as a factor for persecution analysis if it was short term, regardless of whether or not it was arbitrary in character. (See next section)

Recommendation:

- *The erroneous reference to a “margin of appreciation” with respect to the 1951 Convention promotes a narrow interpretation of the refugee definition rather than a broad interpretation in keeping with its humanitarian objectives. The commentary to the law should delineate the standards for interpretation of the Convention in keeping with the standards contained in the VCLT.*

5.3.2 Use of the Convention on the Rights of the Child in the Persecution Analysis

Review of the cases revealed that caseworkers did not always refer to the “best interests of the child” standard or made only superficial reference to the Convention on the Rights to the Child without giving a thorough explanation of how determination was reached when completing the analysis.⁶⁴ The following cases reveal how recognition of asylum is complicated when the CRC’s standards are not taken into account:

- Case C involved an orphaned minor wound up on the streets in order to escape being sold to the Chechen army was raped and jailed due to his lack of papers. Case D involved another orphaned minor who was taken by the Chechens and sexually abused and held as a slave. In both cases there was no reference to the CRC or other international principles against trafficking. Had they been taken into account, it may have been possible to grant asylum. They received permits on compassionate grounds due to their status as unaccompanied

⁶⁴ Yet, in the recent period, UDI has hired an expert in children’s rights and UNE has reversed several decisions involving children, thus providing a signal to UDI with respect to protection issues regarding this vulnerable category.

minors, not asylum. The CRC's provisions on the child's right to survival & development, freedom from cruel, inhuman or degrading treatment, right to protection & care, and protection from trafficking and exploitation call for progressive analysis of cases which identify the interrelationship of socio-economic violations to civil and political violations.

- In Case E, involving an ethnic Serb from Croatia whose husband was beaten up and children harassed. People threw stones at their house and issued threats via the telephone. Although the applicant claimed that her daughter suffered anxiety as a result of the experiences, UDI stated that the rejection did not violate the CRC without stating why. UNE upheld the rejection without discussing conditions of return or the CRC.
- A similar case, Case F, involved an ethnic Serb from Croatia whose father was a leader of political party. He was harassed by various means. People painted slogans on his house and a man ran his tractor in front of the house, terrifying the applicant's child. The applicant stated that his child was psychologically affected by the events. However the immigration authorities rejected without any discussion of CRC.
- UNE Case G involved Kurdish girls subjected to sexual violence by Turkish soldiers without direct reference to CRC. Humanitarian protection was granted instead of asylum.
- Case H involved a woman from Somalia who was shot at while her brother was killed within the context of an ethnic conflict. The immigration authorities stated that the action was "*random*" and did not consider the best interests of her three children thereby opting for a permit on compassionate grounds instead of asylum.
- Consider also Case I involving an Eritrean woman who was drafted into the army and thus deserted. She claimed fear of incarceration and indicated additional lack of support from her family due to her having had three children out of wedlock. UDI stated that the conditions in the prisons could be described as "*spartan, but not life-threatening*" and thus dismissed the threat of incarceration as sufficient grounds to merit protection. Regarding the lack of support of the family, this is dismissed as irrelevant to the asylum determination thus indicating an analysis which runs contrary to the contextual

approach necessary to ensure a gender sensitive protection evaluation. Although the applicant's son was in Norway and her lawyer claimed that separation of the two would amount to inhuman treatment. There was no discussion by the caseworkers of the standards contained in the CRC and CEDAW. Similarly at the UNE level, the decision to reject expresses the view that she will likely be forced to serve in the military rather than go to jail and in addition indicated its policy goal to prevent the practice of parents sending their children abroad in order to get asylum. These conclusions were taken without undergoing a CRC assessment of the best interests of the child, including examination of what the separation upon her entry into the army will mean for the children, especially given the lack of family support for them.

- Consider Case J involving a Bosnian woman from Yugoslavia whose husband was threatened with assassination and she herself was threatened with rape, her children to be kidnapped. The UDI decision classifies the threats and harassment as criminal in character which are to be remedied at the national level within the justice system. However it conducts no analysis of whether access to justice is actually possible in practice. Furthermore, it was noted that the applicant's lack of political activity removes her from the scope of persecution analysis (no evaluation of the race, religion, or nationality categories was performed). When the caseworker finally made a reference to the CRC, this was done in the negative manner, noting that there were no compassionate grounds to consider with respect to the children and thus the case was rejected.

Caseworkers should be instructed to complete such analysis in all cases involving children, whether or not they are accompanied by their parents. (But see Case K, involving an Iraqi woman whose husband was imprisoned and tortured and whose seven year old son was burned on his hands for criticizing Hussein. The child had a PKU food disorder and is mentally challenged, the lawyer specifically cited the "best interests of the child" standard, supplementing it with medical documentation confirming the danger of deportation to Spain given the lack of sufficient health support for victims of such disorder. The applicant was granted asylum.)

However, there are some cases in which the creation of specific soft law with respect to certain groups with children was able to promote protection in practice- although rarely amounting to asylum- most cases involved a grant of humanitarian protection:

- In case L, involving a Colombian man who claims that his daughter was injured due to an explosion in the garden; the applicant was granted a permit on compassionate grounds due to the guidelines for families with children from Colombia in spite of doubts as to merits. This indicates an example of the positive impact of soft law to protect vulnerable groups previously denied full consideration of their needs. Yet it also reveals the negative effect that the caseworkers misinterpret the guideline to discourage individual analysis of the claim and thus disregard their doubts regarding credibility.
- In Case M, involving a Colombian woman who received threats by telephone after her father in law was killed. She feared that her son will be forcibly recruited as her neighbour's son was recently kidnapped. The background context of generalized violence and insecurity actually appeared to negatively affect the processing of the claim, as UDI notes:

“The Directorate is of the opinion that the applicant in her home country has not been exposed to reactions by the authorities which can be characterised as persecution in the sense of the Act and Convention. Neither has the applicant been politically active. The applicant's other problems in his home country are not of such type that they give grounds for asylum.”

The caseworkers fail to pursue an analysis based on the CRC and the best interests of the child, specifically with respect to the threat of forced recruitment, thus rather than grant asylum, she was granted a permit, also due to the guidelines for families with children from Colombia.

These examples may be contrasted with the use of standardized answers that are oriented towards rejection by UDI in Bosnian cases involving families with children that proclaim that the decision for rejection and return is in keeping with the CRC without further discussion:

*“In this context the Directorate has noted that the applicant came to Norway with *child(ren).*

**The applicant's fear for the child(ren)'s future in Bosnia-Herzegovina. Based on the information given in the case, seen in context with the Directorate's knowledge of the circumstances in the area, there are no circumstances which indicate that the conditions in the home country for the child(ren)'s development and growing up are indefensible. After a concrete overall assessment, the Directorate of Immigration finds that there are no compassionate grounds on which to grant a residence permit*

pursuant to this provision. Neither is there any particular connection with the Kingdom which would give grounds for a residence permit. The Directorate is of the opinion that the decision is not in conflict with the Child Convention.”

The existence of this standard answer increases the risk of violation of the child’s right to seek asylum, due process, and right to full consideration of his or her “best interests” as it may be formalistically applied.

Recommendation:

- *Guidelines on Children should be elaborated in order to highlight the importance of recognizing how children experience persecution with reference to the CRC. Children experience different types of violations (such as forced recruitment) and they are targeted for imputed political opinion (based on that of their family) or political opinion when they are activists (demanding labour protection, access to education, food, etc.), social group/religion (female genital mutilation), nationality or race (ethnic cleansing strategies). Application of the 1951 Convention to children requires interpretation via the CRC.*
- *A separate study should be conducted regarding the decisions returning families with children. Due to the existence of the standardized answer drafted towards rejection of this group with respect to Bosnia, I remain concerned that it merits further evaluation. However, there may also be need for a study which addresses other countries as well.*

5.4 Past Persecution

There is a need to espouse a dynamic analysis of the impact of human rights violations from the moment they are effectuated into the future. An act of rape or torture has an immediate impact, but also one affects the long-term fulfilment of personal and professional aspirations, including marriage, childbearing, enjoyment of physical and mental health, pursuit of a career, etc. At present the analysis does not always address the ongoing effects of violations which expand the effects of persecution beyond the past. One may consider the decision of the Inter-American Court of Human Rights in a case involving a university

professor who was detained, tortured and raped by anti-terrorist police. Upon her release, she remained isolated, subject to economic hardship, and suffered physical and psychological harm. The Court identified a type of protection continuum- in which the effects of past human rights violations extend into the future, therefore one cannot determine them to be over after the immediate act is terminated.⁶⁵ This case is directly relevant to the situation of many asylum-seekers, hence analysis of the extent of persecutory effects should reflect the reality of their experience.

Past persecution is considered to be good evidence for a claim of future risk of persecution if the country circumstances have not changed. However, a tactic which inhibited the grant of asylum within the sampling of UDI cases was the alternate focus by the caseworker on past persecution in cases in which the claim alleges a threat of future persecution versus emphasis on future persecution in situations involving past persecution. When the evidence presented for past persecution was high, some caseworkers stated that it is a future threat which is required; when the evidence pointed towards future threat the caseworkers cited insufficient past persecution. This approach promotes rejection of cases, thereby decreasing the likelihood of attaining asylum. When protection is given, it is more often humanitarian protection.

- In Case CN, the applicant claimed to have been arrested and subjected to torture due to his work for the National Intelligence Agency in Congo, UDI stated:

“The Directorate is of the opinion that the applicant has not been exposed to a systematic and individual-oriented persecution in the meaning of the Act and Convention. Reference is made to the fact that the applicant was taken prisoner at the time the disturbances started in eastern Congo and that the violation thus appears to be an arbitrary act on the part of the rebel group. Even though the applicant has been a member of ARN, he cannot be said to have had such a prominent position that he would be especially exposed to assault on return to his home country at present. The applicant’s arguments regarding torture while he was held prisoner by the RCD (Congolese rally for Democracy), do not indicate any noticeable risk for future violations to the applicant upon return.”

Humanitarian protection was given due to the humanitarian situation in the part of the country, and the consideration that internal flight alternative was not an option for him. One may argue that past torture may be considered to be strong evidence of future risk of persecution, alternatively it may highlight the exception to the cessation clause.

- In Case CT, the applicant’s father and brother were members of the communist party in Sudan, both were jailed. The applicant himself was not a member, however he

⁶⁵ Loayza Tamayo, Reparations, I/A Court H.R. Series C No. 42 (1998).

sympathized with the party. In 2000, he was detained and tortured by members of the security section. UDI stated that the father's activities did not give the applicant grounds to fear persecution upon return to Sudan, therefore he had no right to asylum. Furthermore, it was demonstrated that the applicant himself had not been politically active and that he has not been subject to attacks amounting to persecution. UNE was in agreement with UDI's evaluation regarding the lack of membership in the party and the lack of activity:

"The appellant has himself not been a member of any political organisation and has not carried out any form of political activity. However, he has been a party sympathiser. "

UNE stated that his arbitrary detention and interrogation although linked to his father and brother's activities was not an individual persecution directed at him, thereby revealing a lack of understanding of the notion of imputed political opinion (as well as social group). Furthermore, UNE considered there to be no ground for humanitarian protection. The most striking part of this decision is the dismissive attitude towards past torture, as if it is not indication of possible future risk.

- In like manner, in UNE Case CU, the Board majority rejected the applicant from Sri Lanka in spite of past torture, noting *"If he has been exposed to violence of such type or such extent that it can be characterised as torture, this will be due to one arbitrary violation, and cannot be seen as a link in persecution."* The Board minority argued in favor of humanitarian protection due to the fact that his sister was a Black Tiger, and he was member of the group. In another case, the applicant feared persecution on account of his father's political activity and his own political sympathies. There was no analysis of targeting on account of family or as political opinion being sufficient. The immigration authorities required direct, personal activity to establish a threat of persecution. Nor was there discussion of the past torture and detention as possible evidence of threat of future persecution.
- Case CV involved a tutsi from Congo who was tortured in 1998 due to his ethnicity. He also feared targeting because his brother worked for UNHCR. UDI granted humanitarian protection instead of asylum in spite of the existence of two protection categories (race and social group) and failed to consider the past torture as forming a basis for a grant of asylum.

- In Case FR, also involving a man from Congo, humanitarian protection is given instead of asylum. The applicant's family was attacked several times in 1996 due to the applicant's activities for the Union for Democracy and Social Progress. He withdrew from the party and began working for a human rights organization. The police invaded and plundered his house. His wife was kidnapped and his daughter was raped. UDI addresses the supposed lack of spotlight, noting:

“The applicant’s argued activities are not of such type that they can give grounds for asylum in the sense of the Convention or Act. The Directorate also refers to the fact that the applicant left Congo on his own genuine passport, which indicates that he is not being targeted by the public authorities.”

This decision is worrisome given the lack of identification of possible social group due to human rights activities, the possible continuing validity of political opinion in spite of withdrawal of membership of the party, and the events constituting past persecution which may serve to create a presumption of future threat of persecution. In addition, the decision contradicts the normal bias against use of false papers.

- In Case CW, the applicant's father and brother were executed and he was arrested due to his ownership of a music store in Afghanistan which the Taliban accused of being linked to Satanism. The caseworker did not utilize the past persecution as evidence of future threat of persecution, regardless of the severity of the violations. Furthermore, there was no discussion of the link to freedom of expression, right to work, culture, etc. and no discussion of the social group indicating general weaknesses with respect to human rights and refugee law theory. He received humanitarian protection instead of asylum.
- Case FE involving an ethnic Bosniak from Yugoslavia who claims to have worked for the security police in Montenegro and fears assassination by Serbian intelligence. He is rejected based on the determination that he had not experienced past persecution and there was no need for protection in the future.

In contrast, past persecution in cases involving minor girls, is more likely to be cited as evidence of a risk of future persecution, indicating a bias in favor of this vulnerable category:

- For example, Case CO involved a minor girl from Ethiopia of Oromo ethnicity who was kidnapped and forcibly married against her will. Her husband raped and beat her. Although she left him, she was given no protection by her family, as they would send her back to her husband. UDI granted asylum without explaining the reason in the decision. However, the private remarks noted the lack of protection by the family, the lack of viable internal flight alternative, the identification of a social group: “Ethiopian girls who are in danger of bridekidnapping and who refuse to submit to such”, and highlights the kidnapping, rape, forced marriage, and beatings to constitute persecution under the 1951 Convention and the national law (although there is no mention of the CRC or CEDAW). She is given the benefit of the doubt, but the supervisor wrote that if she had been over 18, the conclusion would have been different, thus indicating an age bias. However, if we juxtapose these cases with those of boys, for example the Chechen orphans previously discussed, there appears to be a gender bias. All persons should receive just consideration of past persecution, regardless of nationality or gender.

The cases from Belorussia present the tension resulting from a policy determination that considers claims from this country to be largely unfounded, as opposed to the caseworkers who struggle to uphold this policy in the face of human rights violations and the low level of democracy in the country.

- For example, Case CP involved an applicant from Belorussia who was arrested and abused due to his participation in a demonstration of the “democratic youth”. Although UDI considered the case to address central principles within refugee law and democratic theory, it opted for rejection based on low level of credibility. The analysis revealed a wavering perspective, it discussed the relevant protection category, the seriousness and systematic nature of abuse, and the risk. However, in the end it relied on the credibility determination regarding discrepancies in the testimony to override the protection analysis. The public decision refers to a standardized answer which dismisses the arrest and abuse without fully reflecting the caseworker’s own analysis:

“The fact that the applicant was arrested and exposed to assault cannot be regarded as an indication that the authorities are systematically out after targeting him to such a degree that he risks persecution upon return to his home country.”

- In Cases CQ & CR, a man and his wife from Belorussia were members of an opposition party and distributed papers, participated in demonstrations and collected

signatures. He was subject to persecutory prosecution, arrest and torture. She received threats that their child would be kidnapped. UDI concluded that there was no risk of persecution because the level of activity and profile were too low. UNE went so far as to confirm that the government did not tolerate the opposition and utilized un-democratic means but asserted that he would probably only be sent to jail for two weeks. There was insufficient discussion of discriminatory prosecution amounting to persecution as well as the weight of past torture as evidence of a threat of future persecution and they were rejected. Furthermore, there was no reference to the international standards pertaining to arbitrary detention. See also Case CS involving an applicant from Belorussia in which UDI admitted that “*White Russian police often use hard and undemocratic methods in their treatment*” but rejected the applicant who claimed to have been beaten up by the authorities due to his participation in the opposition.

Recommendation:

- *The commentary to the law should include recognition of past persecution as evidence of future risk of persecution thereby requiring a lowered burden of proof in the absence of changed circumstances in the country of origin.*
- *Specific link should be made to the exception to the cessation clause, 1 C 5 with respect to compelling reasons which would enable a grant of asylum, in like manner to the U.S. regulations, in spite of changed circumstances for exceptional cases involving atrocious, appalling experiences, e.g. severe torture, severe rape during ethnic cleansing.*

5.5 Persecution from Non-State Actors

The increased weakness of states in the face of rising powerful Non-State actors has affected the manner in which one addresses the issue of persecution. Increasingly, new human rights instruments seek to place responsibility for human rights protection on such non-state actors, e.g. The UN Declaration on the Right and Responsibility of Individuals, Groups and

Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Art. 10:

*“No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.”*⁶⁶

When assessing claims involving non-state agents there are two approaches: the first entails addressing the Non-State agent’s persecution of an individual due to affiliation with a protection category and the State’s failure to prevent it or provide reparation (lack of will or ability), the second addresses situations in which the State is unwilling to provide protection to the person due to discrimination based on a protection ground- thus denying equal protection of the law. The 1998 Guidelines sought to remedy the protection gap between cases involving persecution from Non-State Agents linked to the unwillingness of the State to protect the victims as opposed to those cases in which the State was unable to provide protection, the former allegedly receiving asylum and the latter subject to rejection. The Guidelines call for equal protection in both cases, in harmony with UNHCR Handbook para.65:

“Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer effective protection.”

According to UNHCR persecution by non-state actors and persecution occurring within areas of conflict should formulate grounds for recognition as refugees. In these cases, there is a need to discuss fully the absence of state protection to victims (failure to prevent persecution or harm, punish offenders, and provide remedy, as well as the de facto access to protection), (as well as Non-State protection in the case of parochial societies) as well as its potential acquiescence or support of such activity.⁶⁷ The Council of the European Union’s

⁶⁶ One may also consider the draft Human Rights Principles and Responsibilities for Transnational Corporations and other Business Enterprises which cross-references a broad range of international instruments and calls upon corporations and their agents (including security personnel) to refrain from violating human rights, particularly highlighting the need to refrain from displacing persons or forcibly evicting them from their homes (commentary to principle 12). (E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2 (3 June 2002).

⁶⁷ The Inter-American Court has several cases which address the State’s duties to prevent human rights violations; see Velasquez Rodriguez Case, Judgment, I/A Court H.R. Series C, No.4, para 172 (29 July 1988) recognizing the legal duty of states to “take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose an appropriate punishment, and to ensure the victim adequate compensation. If the State apparatus acts in such a way that the violation goes unpunished, and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction.” See also Paniagua Morales et. al. Case, Judgment, I/A Court H.R. Series C No. 37 (8 March 1998) in which the Court imputed responsibility for the detention, disappearance, denial of judicial protection, and murder of victims in Guatemala.

Proposal Directive, Article 9 A (2) defines protection as “*reasonable steps to prevent the persecution or suffering of serious harm inter alia by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection*”

In practice within Norway, of particular concern is the fact that persecution arising from non-state actors, particularly in areas of ongoing conflict is sometimes described as “*random clan conflict*” in the case of Ethiopia or “*purely criminal acts*” in the case of Russia and Colombia.

- Case AL involved an Ethiopian man whose family was killed on account of clan conflicts. The characterization of the events as clan conflicts resulted in a grant of humanitarian protection instead of asylum.
- Case M involving a Colombian woman who received phone threats and fears forced recruitment of her son, the context is not defined as one involving persecution, thus she is given humanitarian protection instead of asylum.

Within Africa, inter-clan violence and discrimination is widespread and often linked to killings, rapes, torture, detention, looting of property. Clans may be considered either as Non-State agents who commit persecution against members of another clan (race or social group category) and are not subject to punishment by the State, or as de facto authorities who prove unable or unwilling to provide protection to persecution victims within the areas they control. Similarly, paramilitary groups, guerrillas, right-wing gangs, mafia, and other actors within Europe, South America, and Asia, increasingly target individuals and groups for abuse, exploitation, and intimidation which may amount to persecution. Access to justice is impeded due the state of absolute impunity in many of these nations. As noted by the U.S. Court of Appeals of the Ninth Circuit, the assumption that the presence of non-political motives for persecution necessarily means the absence of political motives is “both logically a non sequitur and legal error”.⁶⁸

- Case DR, the applicant was from Algeria. He admitted to having participated in the military and claimed to be targeted by terrorists. (He was also a football trainer of a wealthy, Non-Muslim background.) He had contradictions in his testimony but was given the benefit of the doubt. However, rather than receive asylum, he received humanitarian protection due to the lack of past

⁶⁸ Del Aguila v. INS, 2000 U.S. App. LEXIS 6174, citing Singh v. Ilchert, 63 F.3rd. 1501, 1509 (9th Cir. 1995).

persecution, lack of identification of a protection category, and the view that the State of origin could provide adequate protection:

“The Directorate of Immigration is of the opinion that the reactions which the application has been exposed to cannot be characterised as persecution in the meaning of the Act and Convention. The occurrences to which the applicant has been exposed appear as pure criminal acts, and not as a link in persecution in the meaning of the Act and Convention. The occurrences to which the applicant has been exposed appear as pure criminal acts, and not as a link in persecution based on one of the grounds stated in the Convention. The Directorate is of the opinion that the authorities in Algeria will be able to provide the applicant sufficient protection against terrorists.

The deference to protection at the national level runs counter to human rights reports which attest to a persistent state of impunity and links between the State and terrorist actions.⁶⁹ One may argue that this may have been a mixed motive case.

- UNE Case DV concerned a former member of Yugoslavian intelligence in Kosovo (of Albanian descent) whose job was to receive and deliver secret information as well as listen to telephone conversations. He terminated his job in 1997 after being suspected for having passed information on to Albanians. He was interrogated by UDK who threatened to kill him. UDI rejected based on the consideration that there was no threat of persecution from the State and that he had not experienced sufficient past persecution. Furthermore, they did not find him to be credible. UNE grants asylum after determining that the State does not have the ability to protect him against persecution from Non-State Actors:

“The majority finds that the applicant justifiably fears persecution by the Albanian extremists, i.e. in the form of former UCK members. The reasons for this persecution are that he, through his former working relationship will be regarded by them as having a political view, even though the appellant took this work to get an income. In view of the fact that there are still notifications of killings of persons who have been associated with the former regime, the majority is of the opinion that the authorities have the will to give protection, but that the ability to give protection cannot be regarded as sufficient.”

There is a need to link acts to human rights, for example in cases involving extortion or expropriation of property, one may cite violation of the rights to property, right to work, and even right to an adequate standard of living in order to identify criteria for a persecution

⁶⁹ See Amnesty International’s reports on Algeria for 2002-2003.

analysis. In comparison, consider a U.S. case involving an Ethiopian woman of Amharic ethnicity who was raped by a high-ranking government official of Tigrean ethnicity for whom she worked. Shoafera identified mixed motives for her rape: 1) that she was targeted because of her ethnicity, and 2) that the offender found her attractive.⁷⁰ The Court recognized the existence of a presumption in favor of asylum due to past persecution in the form of rape on account of her ethnicity and specifically noted that the existence of mixed motives is insufficient to defeat the asylum claim as long as there is some evidence that the harm was motivated at least *in part* by an actual or implied protection ground. The Court referred to both direct evidence, i.e. her testimony and circumstantial evidence, e.g. documentary evidence confirming ethnic violence in the country. Reference to the contextual background of historic harassment and violence serves to identify systematic discrimination and may be coupled with individual facts in order to grant asylum.⁷¹

Recommendation

- *The commentary should as recognize persecution by Non-State Actors as grounds for protection, due to the State's unwillingness or inability to protect the asylum seeker, persecution by quasi-state or de facto authorities, or persecution by non-state actors where the State has collapsed.*⁷²
- *The commentary to the law should recognize that the existence of mixed motives is insufficient to deny protection- an applicant may be targeted for both Convention and non-Convention grounds, e.g. criminal interests in pursuing extortion may also be linked to targeting on account of political opinion or other protected ground group.*

5.5.1. Effective Protection

The provision of asylum is considered to be surrogate protection granted in light of the State of origin's inability or unwillingness to provide protection to a persons facing threat of human rights violations amounting to persecution. Hence, there is a need to explore what is

⁷⁰ Nigist Shoafera v. INS, 2000 U.S. App. LEXIS 31361 (9th Cir. 2000).

⁷¹ Sternberg, Mark, The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law, 23, 24 (Martinus Nijhoff 2002).

meant by adequate or effective protection by the State. In essence, there is a need to examine the level of rule of law and access to justice within the state of origin.⁷³ The level of democracy within a country may be measured by the enjoyment by its citizens of basic rights and access to government when needed to resolve disputes or ensure abidance by the norms addressing the rights and duties of individuals within the society.⁷⁴ Increasingly, high levels of inequality are accompanied by a lack of security endangering the freedom and well-being of certain groups within nations. Power tactics from non-State actors may render the State dysfunctional to the point where impunity and parallel forms of “justice” reign.

First, it is necessary to examine the formal legal framework and compare it to its actual implementation. A state may incorporate key human rights principles within its Constitution but the courts may well ignore these provisions when deciding upon cases, the police may be unaware of the relevance of such norms to their activities, etc.

The principle that a person shall be entitled to effective remedy for violations of the rights contained within in human rights instruments is enunciated as a right in Article 2 (3) of the ICCPR. Remedy may be provided by judicial, administrative, or legislative authorities, as well as other authorities including alternative dispute resolution mechanisms. Such right is often combined with Article 14(1) of the ICCPR which calls for equality of persons before courts as well as a fair, public hearing by a competent, independent and impartial tribunal when determining one’s rights or obligations in a lawsuit. Thus, determination of access to effective protection requires examination of the responsiveness of police institutions, ombudsman, attorney general’s office, courts, administrative agencies, and the legislature.⁷⁵ Questions as to whether there is discrimination in responsiveness, lack of access due to

⁷² See European Legal Network on Asylum, Research Paper on Non-State Agents of Persecution (Updated 2000 ECRE) for a review of standards, theory, and case law.

⁷³ For a discussion of this issue within the European system, see Carol Harlow, “Access to Justice as a Human Right: The European Convention and the European Union” in Philip Alston (Ed.), *The EU and Human Rights* 187-213 (Oxford U. Press 1999).

⁷⁴ The issue of the rights of non-nationals living within a country is an interesting area to examine. There are diverse approaches among states as to the level of enjoyment of rights of non-nationals as compared with nationals. This may be addressed within the constitution of a nation or separate legislation. The UN General Assembly adopted the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live” (Res. 40/144 of 13 December 1985). This calls for respect of aliens’ right to life and security of the person, protection from arbitrary detention, right to liberty, protection against arbitrary or unlawful interference with the private home or correspondence, right to equality before courts, administrative organs, access to interpretation, right to choose a spouse, marry, found a family, right to freedom of thought, opinion, conscience and religion, right to language, culture and tradition, right to transfer abroad earnings, right to leave the country, freedom of expression, peaceful assembly, right to property, family unity, freedom of movement and choice of residence, freedom from torture or cruel, inhuman or degrading treatment, protection from illegal expulsion, etc.

⁷⁵ See UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers, both adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, (27 August to 7 September 1990).

absence of legal aid, excessive fees, language barriers (where the victim is not provided with translation services). Further, where there is a lack of separation of powers, e.g. the judiciary is dominated by the executive branch (judges may be selected and serve interests of the executive), there will be a lack of independence rendering Article 14 inoperative.⁷⁶ Additional factors would include the levels of corruption, slowness, and inefficiency of courts. The physical location of courts and law enforcement officers is also a relevant factor. Whether the judiciary and other branches are dominated by a minority ethnic group as opposed to the ethnicity of the majority of victims is also relevant to a finding of discriminatory application of the law or limited access to justice. Finally, examination of the provision of restitution, compensation, and assistance to victims, the identification, apprehension, prosecution or conviction of the violator is also recommended.⁷⁷

- There was an exceptional analysis in UNE Case CX, in which asylum was granted to the applicant of mixed Jewish and Chechen ethnicity, whose mother was killed and he was physically attacked and forced to give up his job by the far-right Russian National Unity Party (RNE). The Board noted that his story confirmed that “*Russian authorities do not have the will or ability to protect their own citizens against violations committed by such groups.*” This decision stands in stark contrast to many other cases involving similar allegations of attacks and threats by RNE, mafia, etc. which are dismissed either for being linked to only to criminal law or due to the fact that the State does not officially approve of these acts thus indicating a theoretical possibility of protection by the State.
- See UNE Case GY involving a Russian woman who was institutionalised on account of being a lesbian (a practice confirmed by the U.S. State Department’s Country Report for Russia) and later underwent rape. UNE rejected noting “*Based on the Immigration Appeal Board’s knowledge of the circumstances in the appellant’s home country, the Board has no basis on which to assume that the Russian authorities in general lack will and ability to protect citizens against criminal violations.*” In the remarks, it appears that she

⁷⁶ See *Ola Bahamonde v. Equatorial Guinea*, Comm. No. 468/1991, para. 9.4 (views adopted on 20 October 1993, forty-ninth session.) See also UN Basic Principles on the Independence of Judiciary (adopted by the General Assembly resolutions 40/32 of Nov. 1985 and 40/146 of 13 December 1985).

⁷⁷ See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by the General Assembly, Res. 40/34 of 29 November 1985).

is not considered credible. See also UNE Case GZ involving a Jewish man who claimed to be harassed, threatened, and attacked by RNE while his wife was raped by them. UDI rejected noting-

“UDI is aware that harassment and assault can take place towards Jews in Russia, inter alia by nationalistic organisations such as RNE – The harassment and the assaults to which the applicant has been exposed is not of such nature or extent that it qualifies as persecution. The applicant has been exposed to criminal acts which fall under the penal legislation in Russia, which is neither supported nor accepted by Russian authorities. UDI does not find that the fact that the reports in the opinion of the applicant have not been sufficiently followed up, are circumstances which can give grounds for refugee status. . . In any event, the Directorate is of the opinion that the applicant can choose to live in another place in his home country.” (Thereby advocating internal displacement as a “solution”.)

UNE upheld this analysis noting:

“The acts to which the appellant has been exposed fall under the Russian penal legislation. In spite of the fact that the Russian judicial system has weaknesses, the Russian authorities must be regarded as having a judicial system which functions sufficiently in relation to assisting the appellant. In this connection, reference is made to the fact that the authorities which traditionally emphasise human rights and democratic values are not able to protect citizens at all times against criminal acts. To what extent an individual case is prosecuted by the authorities will be due inter alia to limitations in criminal procedures for prosecution.”

The approach that there is a theoretical possibility of protection given the State’s lack of approval of the persecution has been characterized as “capricious and perverse” by Canadian courts, given that the issue is that there is a group conducting persecution within the State that is unchecked by officials.⁷⁸

See also Case DB, involving a Croatian man who was raped by the police due to either his homosexuality or his ethnicity. UDI rejected based on the characterization that the rape was a “*sign of an isolated and random act*”

and advised the applicant to seek protection from the police or the Organization for Security and Cooperation in Europe, regardless of the fact that the offender was a member of the police. UNE upheld the rejection, and reiterated UDI’s analysis, noting that:

⁷⁸ See Von Sternberg, Mark R., *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law*, 25 (Martinus Nijhoff 2002) citing *Kraitman v. S.S.C.*, 27 Imm. L.R. (2nd) 283 (F.C.T.D.) Canada, in which the Court overturned the Immigration and Refugee Board’s finding that the claimant’s denial of rights to education and employment, and exposure to physical assault, and other forms of threats without receiving response by the police did not meet the Convention standard due to the Ukrainian government’s official policy against racism. The Court cited the widespread discrimination against Jews within the society and the open persecution of Jews by the Pamyat organization in order to find grounds for a well-founded fear of persecution.

“Even though the man who raped the appellant was a policeman, the act must be regarded as a criminal act, without a causal relationship to a Convention ground. The appellant should report the matter and seek protection from the home country’s authorities against such criminal acts.”

The caseworkers should not deny the existence of a protection category merely because there is a national recourse if it is not effective in practice (in the above case, one may query whether the police would provide much assistance given that one of their own committed the offence).

Women in particular may be targeted upon the loss of their husbands, see Case CY involving a woman whose husband was kidnapped on account of his support of rebels, her house was robbed and she felt targeted on account of her husband’s tutsi ethnicity. However she was given only humanitarian protection instead of asylum as the acts are identified as *“arbitrary criminal activity”* “not tied to her link to her husband or her status as a female without the support of a male.”⁷⁹ Had these issues been discussed in detail, she may have received asylum.

- In Case CZ, the applicant was born out of wedlock and belonged to a clan which was oppressed in Somalia. She was beaten, treated as a slave, and underwent attempted rape. UDI provided a blanket statement which appeared divorced from reality: *“Nobody in Somalia risks being exposed to persecution because of social or ethnic membership.”* She received humanitarian protection at the UNE level (it appeared that they found her to be too vague to receive asylum and considered it unlikely that such events would occur in the Northern part of Somalia, and thus lowered her status in part based on the level of credibility). Daley & Kelley argue that domestic abuse cases involve violations of the right not to associate with someone, the right not to be held in servitude, the right to security of the person, and in the worst cases the right to be free from torture or cruel, inhuman, or degrading treatment.⁸⁰
- Case FU, in which the applicant from Somalia is raped, her husband and one child killed. UDI gives humanitarian protection instead of asylum:

“UDI is of the opinion that the applicant does not have a well-founded fear of persecution in the meaning of the Act and Convention on return to her home country. Reference is made to the fact that clan conflicts which are to be found some places in the south of Somalia, in themselves are not sufficient to give grounds for asylum. In the opinion of the Directorate, the reactions and acts to which the applicant has been exposed appear as harassment or purely criminal acts.”

⁷⁹ The remarks included a very good discussion of why internal flight alternative was not applicable due to the economic problems she would endure as well as other problems linked to her ethnicity.

⁸⁰ Krista Daley & Ninette Kelley, “Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence” in 12 (2) IJRL 167 (2000).

Recommendation:

- *There is a need for clarification as to what a real opportunity for effective protection. For example, access to lawyers, independent review of the case by a tribunal, punishment of offenders, provision of restitution/reparation, and non-reprisals or other violations of personal security by actors related to the offender.*

5.6 Persecution in Conflict Areas

It is important to recognize situations in which the conflict and/or gross violations of human rights is based on a protection ground. For example, ethnic/religious/political conflicts which pursue systematic efforts to eliminate the other group require a contextual evaluation of the motives behind the violations. Storey and Wallace suggest that examination of the degree of **legitimacy** of the **objective** of the war and the **proportionality** of the means pursued in relation to such objective helps to reveal persecutory motives within the context of war.⁸¹ Furthermore, they note that the standards contained in the ICC Rome Statute require a review of the **intentionality**, **extensiveness**, and **systematic** nature of the violations committed, thus providing a framework for analysis. (One may juxtapose this with Goodwin Gill's reference to **reasons**, **interests** and **measures** when assessing persecution, discussed in section 5.) Hence, general lack of food during the war would not amount to persecution but direct starvation of a group of civilians as a means of winning the war would violate the Geneva Protocol II and possibly indicate a Convention Ground.

A problem arising within the cases was a tendency to separate the individual experience from the larger context linked to the protection grounds contained within the 1951 Convention, thus denying the applicant a right to asylum.

- For example, in UNE case DA, the Croatian applicant of mixed ethnicity was raped. UNE noted *“The sexual assault to which she was exposed by fellow students in 1991 occurred some time ago, and can partly be seen as a random*

⁸¹ Hugo Storey & Rebecca Wallace, “War and Peace in Refugee Law Jurisprudence” in 95 American Journal of International Law 349 (2001).

criminal act.” This statement is an attempt to separate the abuse from the ethnic discrimination which formed the basis of persecution.⁸²

- In case FS, a woman from Colombia claimed to have underwent arbitrary intervention of her home by paramilitaries who assaulted her companion and forcibly evicted them. She is rejected due to a finding of low credibility, although the lawyer stated that the inconsistencies were due to translation errors and were immaterial. Furthermore, he called upon the authorities to implement the 1998 Guidelines on Non-State agents. UDI noted that the case was manifestly unfounded, finding the context of generalized violence and insecurity as insufficient to substantiate grounds for protection and utilizing a comparative approach which limits recognition of grounds for protection.

“We refer inter alia to the fact that Colombia is a country where persons in general are very exposed to violence and human rights violations. Violence occurs at random and depends on social status, group, age, occupation and political views. It appears that the applicant is not especially exposed in relation to the other inhabitants where violent acts are concerned and there are no grounds for a residence or work permit in Norway.”

Another area of concern which limits recognition of asylum is the maintenance of a comparative approach which requires the applicant’s predicament to be worse than that of other persons in the same country in one of the following manners: 1) that the claimant’s level of risk is greater than the risk level of other persons in other groups, 2) that the claimant’s risk level is greater than the risk level of other persons in the claimant’s own group, or 3) that the claimant is at risk of suffering greater harm than others.⁸³ The Canadian Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations (March 7 1996) call for use of a non-comparative approach which addresses only whether the applicant’s risk is of sufficiently serious harm and is linked to a Convention reason. This view was approved by the Canadian Court of Appeal.⁸⁴ Even within situations of indiscriminate violence, there may be examples of **group or individual risk of serious harm linked to a Convention ground** which may substantiate the persecution claim in order to

⁸² See Farrell, Fletcher, Fischer & Renteln, “War Crimes and Other Human Rights in the Former Yugoslavia” in 16 Whittier Law Review 359 (1995).

⁸³ Immigration and Refugee Board of Canada, Interpretation of the Convention Refugee Definition in the Case Law, Chapter 9, note 10 (December 31 1999), citing Siad, Dahabo Jama v. M.E.I. (F.C.T.D., no. 92-A-6820), Hersi, Nur Dirie v. MEI (F.C.A., no. A-1089-92). See also Isa, Sharmarka Ahmed, v. S.S.C. (F.C.T.D., no. IMM-1760-94), Reed, February 16, 1995.

⁸⁴ Ali, Shaysta-Ameer v. M.C.I. (F.C.A., no. A-772-96), Decary, Stone, Strayer, January 12 1999, cited in IRB, Interpretation of the Convention Refugee Definition in the Case Law, Id.

grant asylum, e.g. ethnic groups may be singled out for attack, human rights activists, journalists, women and children may be persecuted in order to affect political actors or military actors to whom they are related, etc. In fact, the entire population within a country may be subjected to persecution, as long as it is linked to a Convention Ground one may find in favor of protection.⁸⁵ In the absence of such linkage, humanitarian protection may be given for generalized violence. As previously mentioned, the 1999 Letter from the Ministry of Justice on “*Residence on humanitarian grounds*” cites persons fleeing war or conflict situations in which the lack of security renders return not feasible as eligible for humanitarian protection.

Recommendation:

- *The law and/or commentary to the law should be amended to identify protection grounds in conflict situations due to individual and group risk of serious harm.*
- *The commentary to the law should support use of a non-comparative approach which would require evaluation of the individual’s risk of persecution, irrespective of how it measures up to the risk held by others.*

5.7 Torture or Cruel, Inhuman & Degrading Treatment

Within the theory, torture is generally recognized to be persecution. It is distinguishable from cruel and inhuman treatment due to the **severity** of the pain and suffering inflicted, and the fact that such action is **intentional** or **deliberate**. The Convention Against Torture, Article 1, provides the following definition:

“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining for him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”

According to the report of the UN Special Rapporteur on Torture, torture includes: beatings, whipping, burns, electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual violence including rape, administration of drugs in detention, prolonged

⁸⁵ Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* 85 (Martinus Nijhoff 2002), citing *Sullivan v. MEI*

denial of sleep, food, water, hygiene, medical assistance.⁸⁶ Mental torture may be the threat of being killed or that one's family will suffer reprisal, witness of other people being tortured or executed, may be present in the form of omission, such as denial of food or water. Thus, torture is utilized in order to prompt a response by the person undergoing the abuse or by a third person, as a reprisal to a person's acts or that of a third person, or for coercive ends based on an open discriminatory ground. Most importantly, the Convention recognizes that torture may be conducted by a State actor or by a non-state actor acting with the consent or acquiescence of the State.

According to Article 3 of the Convention Against Torture:

"1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The Committee Against Torture calls for parties submitting claims for review to address factors relating to the contextual situation in which such act occurs as well as the presentation of medical evidence to confirm such torture as well as its ongoing effects. These factors should be taken into consideration at the national level as well:

- 1) *Whether the State concerned is one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights. (It should be noted that existence of such pattern in itself is not enough to prove personal risk of torture, likewise the absence of such pattern is not enough to negate personal risk of torture⁸⁷)*
- 2) *Whether the claimant has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity in the past? If so, was this the recent past?*
- 3) *Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?*
- 4) *Has the situation referred to above changed? Has the internal situation in respect of human rights altered?*

⁸⁶ See *Aydin v. Turkey*, European Court of Human Rights (25 September 1997), involving a woman who was arbitrarily detained for three days, raped, beaten and showered with ice water from high pressure jets while being spun around in a tire. The Court held that this treatment amounted to torture.

⁸⁷ See *Tahir Hussain Khan v. Canada*, U.N. Committee Against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995).

- 5) *Has the author engaged in political or other activity within or outside the state concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture where he/she to be expelled, returned or extradited to the State in question?*
- 6) *Is there any evidence as to the credibility of the author?*
- 7) *Are there factual inconsistencies in the claim of the author? If so, are they relevant?*

In addition to torture, the ECHR, Article 3, prohibits “inhuman or degrading treatment or punishment”, and the CCPR, Article 7, prohibits “cruel, inhuman or degrading treatment or punishment” (including involuntary participation in medical and scientific experimentation). For analysis of cruel and inhuman treatment- the caseworker should examine whether the treatment is in accord with public standards of decency and propriety, whether it is unnecessary because there are adequate alternatives, and whether it can be applied on a rational basis with ascertainable standards. Other factors include whether it is applied only to a minority, whether it is applied arbitrarily, whether it has any value in terms of reformation, rehabilitation, deterrence or retribution, whether it shocks the general conscience, or whether it is degrading to human dignity. As with torture, cruel and inhuman treatment may cause physical and/or mental suffering, often linked to humiliation endured (beyond that linked to legitimate punishment) or excessive anguish in anticipation of punishment.⁸⁸ The treatment may also appear to be indirect, for example one may consider the decision of the European Court of Human Rights in the case of Cicek v. Turkey (5 September 2002) involving a mother whose sons were disappeared, she herself was deemed to be a victim of violation Article 3 (cruel and inhuman treatment) because of the uncertainty, doubt, and apprehension she suffered over 6 years.

Review of the cases indicated a need for clarification of the protection principles relevant to cases involving torture or cruel and inhuman treatment. Although in general caseworkers correctly identified acts involving torture, some cases revealed uneven discussion of the scope of torture or cruel and inhuman treatment, a lack of a systemized approach to weighing of situations involving gross, flagrant, mass violations of human rights, as well as a degree of uncertainty regarding the relevance of physical or psychological evidence of acts when considering the claim.

⁸⁸ See The Tyrer Case, European Court of Human Rights, (15 March 1978) and the Soering Case, European Court of Human Rights (26 June 1998).

- With respect to the scope, in Case DC the applicant was both a member and secretary of the Democratic Unionist party in Sudan and was arrested and tortured due to his participation in political demonstration. After his release, he decided to be married. He held a wedding in which alcohol was provided to guests (as the State abided by Islamic law, this was prohibited). The police arrived and promptly arrested him and his guests. He was denied access to court and whipped 40 times due to having imbibed alcohol at his wedding. This case is particularly illustrative because it demonstrates how the State can violate a person's rite of passage to intimidate and punish him. The applicant told his wife that he could no longer live in a country in which people were treated this way. A night which the applicant expected to provide memories of the celebration of love and life, was transformed into an evening involving humiliation, degradation and physical pain. The merger between public and private expands the impact of abuse. The decision by UDI indicated that they did not consider there to be any persecution and did not make any mention of whether the State's actions amounted to cruel, inhuman or degrading treatment, however he was given humanitarian protection. (Furthermore, it is curious that in the *remarks* the caseworker admitted that the applicant's participation in demonstrations presented a risk of future persecution).
- Case DD involved an applicant from Afghanistan who was beaten, stabbed with a bayonet, and whipped by the Taliban for operating a video store. The applicant stated that he feared that he would be executed. In the decision, the caseworker stated that there was no link to religion and that there was no risk of persecution, although in the *remarks* the caseworker expressed a lack of certainty as to whether the case related to political opinion or religion or whether whipping constituted inhuman treatment, thus he was granted humanitarian protection. These doubts would have been clarified via human rights education.
- In Case HL, the applicant from Congo was detained and tortured due to his employment with the National Intelligence Agency. UDI granted humanitarian protection instead of asylum due to the humanitarian situation in the country and the non-existence of an internal flight alternative, noting:

“The Directorate is of the opinion that the applicant has not been exposed to a systematic and individual-oriented persecution in the sense of the Act and

Convention. Reference is made to the fact that applicants were taken prisoner at the time the disturbances started in eastern Congo and that the assaults thus appear as a random act on the part of the rebels. Even though the applicant has been a member of ARN, he cannot be said to have had such a prominent position that he should be especially exposed to violations on return to his home country at present. The applicant's argument regarding torture while he was held prisoner by the RCD does not point to any noticeable risk to the applicant for future violations on return.."

In spite of the claim of past persecution, there is insufficient discussion of future threat by the Congolese Rally for Democracy (RCD) or even the State since he was used by the RCD.

Improved reference was, however, evident in the 2003 cases.

- Case FZ involved a man from Congo who risked death row phenomenon due to his military service under Mobutu. He was given humanitarian protection based on reference to ECHR.
- Case FX involving a man from Ethiopia subjected to torture was given asylum, referring both to the CAT and ICCPR.

The reasons for the different decisions are first: the former case was not considered very credible, but the latter case was considered highly credible and second: the caseworker was not able to identify the relevant protection category in the first case but did so in the latter case.

With respect to contextual evaluation of human rights violations, the more widespread such events appeared the more likely they were cited in cases as evidence of "criminal acts" or generalized, non-specific violence which would not be recognized as formulating grounds for provision of asylum. Thus it appears to have the opposite effect than what the Committee Against Torture intends.

As pertaining evidence, in Case DE, the applicant from Congo claimed to have been hung by the arms for three weeks in the sun, UDI does not call for medical evaluation to confirm torture. His parents were killed by persons linked to the "rebel group" to Kabila. UDI found contradictions in his testimony, concluded that he was not credible, but granted humanitarian protection due to the 15 month rule. The caseworker should have considered asylum under social group or imputed political opinion as his parents were killed due to their participation in rebel groups in Kabila as well as his knowledge as to who the killers were. A medical evaluation may have provided sufficient evidence to allow use of "benefit of the doubt" in order to raise the level of protection. Even in cases where a medical document is

provided confirming a claim of a physical injury which the applicant states is a result of torture, caseworkers may be reluctant to rely on such evidence to grant asylum.

- In Case HI, the caseworker was not convinced that the applicant was of sufficient stature to be targeted for persecution because he was a chauffeur for the military. Chauffeurs may be exposed to information regarding people's whereabouts as well as conversations held while travelling from one place to another. These aspects are not taken into consideration. In spite of his medical documentation supporting the claim of past torture, UDI issued the following remark: *"However, the certificate does not contribute to document the appellant's arguments and the appellant's physical injuries do not in themselves give grounds for granting asylum or protection."*

The Committee Against Torture has confirmed the importance of exhibiting caution with respect to conducting credibility determinations in cases involving torture. Asylum seekers who experience post-traumatic stress disorder may be unable to present evidence in a clear and coherent manner, furthermore- there may be a time delay in the admission of such experience.

Recommendation:

- *The commentary to the law should cross-reference the CAT (Arts. 1, 3) and ECHR (Art. 3). It should contain the basic definition of torture and cruel, inhuman, and degrading treatment and a list of relevant evidence to substantiate a claim.*
- *Guidelines should be issued addressing the interpretation of standards pertaining to torture- cruel and inhuman treatment, referring to the case law of the Committee Against Torture as well as the European Court of Human Rights.*
- *The immigration authorities should consider employing their own experts to conduct an evaluation of post-traumatic stress or other evidence of torture,*
- *UNE & UDI should create an overview of their practice with respect to reference to Post Traumatic Stress Disorder as evidence relevant to a grant of asylum or humanitarian protection, as well as relevance for a finding of the exception to the cessation clause in 1 C 5 of the 1951 Convention.*

5.8 Return: Human Rights in Post-Settlement Situations

An area which may require the drafting of guidelines with respect to potential application of asylum criteria and/or humanitarian protection is that pertaining post-settlement situations involving return. Caseworkers should re-evaluate protection needs according to the security issues pertinent to transitory situations. As pertaining return, it is common within UDI to continue use of the same grounds for protection elaborated prior to a shift in regime or other changed circumstance, e.g. Afghanistan, rather than identifying new protection criteria related to instability or lack of security in the transition phase which reflects human rights analysis based on the conditions for security and dignity upon return as well as renewed evaluation of non-refoulement risk. Hence, the media pounces on UDI querying why the policy is not amended if the supposed persecution threat is gone, not understanding the emergence of new human rights challenges which are present and distinct from the previous threat. Post-settlement societies undergo transitional periods in which democratic institutions are weak, as is the rule of law, resentment against refugees may be strong, and risk of revenge violence may be high. Unresolved property disputes may render return impossible, as will the non-existence of infrastructure such as roads, schools, hospitals, water supplies, housing, etc.

- Case DH involved a family of mixed ethnicity from Yugoslavia. The grandfather was killed and their home was burned down. At the UDI level, the grounds for protection were conscientious objection, but on appeal the claim changed to the children's situation, integration, and rehabilitation needs. The children had been in Norway eight years and did not speak their parent's language. Both parents were working and the children attended school. They submitted the analysis of a doctor who expressed concern for the psychological trauma the children would undergo if returned. UNE granted humanitarian protection, showing the lack of harmony in burden of proof as it was not "*it was not sufficiently substantiated that the appellants on return justifiably fear being exposed to persecution.*", however it opted to "*take as a basis that the appellants might fear persecution on return to their home country.*" Thus we have an implicit best interests of the child analysis without systematic review of the CRC standards which results in humanitarian protection, but not asylum.

- In Case DJ, the applicant was of Albanian/Ashkali descent from Yugoslavia. He fled to Macedonia during the war and returned in 1999. He was subject to arbitrary intervention of the home by masked men, forced eviction and displacement, and destruction of his property (the house was burned down). In spite of this, UDI rejected the application, noting the possibility of internal flight alternative:

“The applicant asserts that there are lawless conditions in Kosovo and that people and families are killed there every day, he refers to the fact that the judicial system does not function and that criminals are never brought before the courts.

It is not sufficiently substantiated that this applicant on return to the home country will be exposed to such persecution.

The Directorate of Immigration has noted the suffering the applicant and his family have been exposed to in Kosovo. We have also noted the applicant’s evaluations of the conditions in Kosovo. However, these conditions cannot give grounds for asylum. In this context we refer to the fact that the Convention provides for future-oriented consideration, and that the conditions referred to by the applicant are a part of the situation in Kosovo. The family moved from Kosovo in July 1990. The applicant will therefore be considered on the basis of return to Novi Pazar in Serbia. . . . The applicant has not asserted anything about the conditions in Serbia that can give grounds for asylum in Norway. The Directorate of Immigration wishes to express understanding that the experiences the applicant has had in Kosovo have been traumatic.

The Directorate has noted the applicant’s argument that he now has nowhere to live in Serbia, lack of housing, however, is not a circumstance that can give grounds for asylum. Reference is also made to the fact that the applicant has family living in Serbia.

The applicant had not received restitution of property, and there was an absence of discussion of the right to property’s link to equal protection, non-discrimination, right to privacy and family, right to recourse. Thus, rejection and return results in a risk of internal displacement. There is a need for closer examination of the protection needs in post-settlement situations.

In other cases internally displaced persons are occupying the property in question and prevent reoccupation of the houses, e.g. Case DK involving an applicant from Yugoslavia of Albanian descent who is rejected. See also Case DL involving a Yugoslavian who was beaten and evicted from his home by the UCK. Albanians moved into his home:

“The episode appears to be more like an isolated and random act which does not give grounds to conclude that these were conscious, consistent and ethnically motivated acts which are also of such severity as must exist such that one can characterise it as persecution. . . . The Directorate has noted that the applicant no longer has anything to go back to. Lack of housing, unemployment, social or financial problems, however, are not circumstances which give grounds for asylum in Norway.”

The approach is de-contextualized, given that the eviction occurred during the period of ethnic cleansing it merited consideration as evidence of unremedied past persecution of which the effects remain ongoing. He was given humanitarian protection because of his Bosnian ethnicity and the general policy not to return them to Mitrovicia.

- UNE case DM involving an applicant of Roma ethnicity from Croatia who is rejected. He lost his job and housing on account of ethnic discrimination. However UDI notes that “*the circumstance that the appellant will be without work and housing on return does not in any event qualify for asylum*”. Both UDI and UNE recognize that there are problems for minorities in Croatia, but adopt a comparative approach which limits recognition of asylum- given that he is deemed to not be in an “*especially exposed position in relation to other minority groups in Croatia*”.⁸⁹ Instead of assessing his individual state of insecurity, he is assessed in relation to others. Furthermore, there is superficial discussion of return conditions.
- In Case DN also involving an ethnic Roma from Croatia, the claim is rejected although the applicant claimed that his house was expropriated by the State and he was subject to harassment, and forced labour. UNE noted:

“UNE has noted the information that the appellant’s residence has been transferred to the state. This is not a circumstance which in itself can give grounds for granting asylum or residence permit. We are aware that cases of administrative discrimination do occur in the resolution of property disputes, but these are not circumstances which are defined as persecution in the meaning of the Act and Convention. It is mentioned that neither the Croatian legislation nor central authorities provide for the occurrence of ethnic discrimination in this area.”

This issue is highly debatable, as there continue to be problems with ethnic discrimination in application of the law in spite of de jure neutrality. In addition, the lack of cumulative analysis as pertaining the other human rights violations also explains why asylum is not given.

In conclusion, UDI cites the focus on future persecution as opposed to past persecution and in addition points out that “*lack of housing, however, is not a circumstance which will qualify for asylum*”. The caseworkers treat the lack of housing as completely unrelated to past persecution. Indeed it formed part of ethnic cleansing strategy.

⁸⁹ In addition, there was no discussion of the exclusion clause which was relevant as the applicant stated that he was accused of war crimes.

There is link between socio-economic rights and civil and political rights, thereby indicating a need for cumulative analysis. The area of property rights is particularly intertwined with ethnic discrimination as forced evictions and failure to provide alternative housing go unremedied due to biased courts and lack of political will among local institutions.⁹⁰ Humanitarian protection is given in the cases where the applicant is of a particular ethnic group which has been identified as falling under a general non-return policy. Hence it is not an individualized approach and it limits recognition of asylum. As long as there is no restitution or alternative housing made available to the applicants, then it is arguable that the effects of the past persecution remain ongoing.

One may consider the case of *Dulas v. Turkey* (20 January 2001), in which the European Court of Human Rights addressed the destruction of a woman's housing by the State's gendarmes resulting in her forced displacement and its consequent failure to provide remedy for such action. The Court held the State to be in violation of ECHR Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) noting that even though the State claimed to be fighting terrorism, the destruction of her home and possessions amounted to inhuman treatment due to the severity of the suffering imposed on her, Article 8 (right to respect for private and family life) and Article 1 of Protocol. No. 1 (protection of property, article 13 (right to effective remedy), and article 25 (not to hinder right to make individual application.) See also *Bilgin v. Turkey* (16 November 2000), in which the European Court of Human Rights held the State responsible once again for its destruction of the home and possessions in violation of the standards listed previously. One must assess the existence of alternative housing and restitution programs in order to understand to what extent the State has succeeded in providing reparation for past violation of property rights and remedial rights.

Recommendation:

- *There is a need for closer examination of the protection needs in post-settlement situations. Guidelines should be created to address non-refoulement and non-return practices that address the human rights issues specific to post-conflict periods. Such guidelines may be referred to by caseworkers as well as issued to the media to increase their understanding of such protection grounds.*

⁹⁰ See Amnesty report for Croatia 2002 available at <http://www.amnesty.org>.

- *Return of refugees must be voluntary (not a result of push factors by the country of asylum) and conducted under conditions of safety and dignity. Return of persons considered to be “de facto” refugees has tended to focus on the conditions of safety and dignity in the country of origin, rather than the will of the person. This has resulted in critique by Sopf with respect to Bosnia-Herzegovina that return to an internal flight alternative is actually relocation which may promote ethnic divisions and rather than repatriation.⁹¹*
- *Before commencing the return, there must be examination of a general improvement in the country of origin based on objective, up to date information. As noted by Fitzpatrick, return of formal and de facto refugees should be based on a change which is “fundamental, stable, durable and effective”. The change must eliminate or reduce to humanely tolerable levels, the risks and dangers that provoked initial flight and that prompted the need for international protection.”⁹² The immigration authorities should examine access to basic services, level of damage to infrastructure (roads, hospitals, schools, water, etc.), the extent of military and paramilitary activity, protection from insertion in hostile areas (anti-refugee sentiment within local population), and the existence of internally displaced persons.*
- *Caseworkers must consider the level of legal safety and restoration of rights-non-discrimination guarantees, amnesties, freedom from fear of persecution or punishment upon return, physical security, protection from armed attack (level of demobilization), mine free routes, access to property/livelihood, freedom of movement (including right to return to one’s home), protection from arbitrary detention or violation of physical integrity, access to schools, respect for family unity, recognition of nationality, and freedom of expression, opinion, and conscience. These standards require the existence of a fair and effective judicial system as well as administrative agencies, enactment of legislation (pertaining to amnesty laws, non-discrimination guarantees, restitution of property or compensation). Further, there is a need for financing of development programs to address socio-economic initiatives which are central to peace consolidation and reintegration of displaced persons.*

⁹¹ Davor Sopf, “Temporary Protection in Europe after 1990: The Right to “Remain” of Genuine Convention Refugees, in 6 Wash. U. J.L. & Pol’y 109, 152 (2001).

- *With respect to persons forcibly evicted from their homes, UDI should formulate joint strategies with the Ministry of Foreign Affairs to explore whether it would be possible to link the financing of alternative housing or compensation programs to the return of refugees, in order to ensure that it is conducted in conformance with international human rights.*
- *Similarly, it should consider improving contact with the Ministry of Defense to share information regarding security & infrastructure concerns with respect to repatriation and other similar issues.*

6. Nexus

One of the grounds for selecting humanitarian protection instead of asylum is the failure to establish a nexus between the threat of persecution and a protection category under the 1951 Convention. The table below includes the cases receiving either asylum or humanitarian protection. It shows how cases which receive humanitarian protection included facts which are possible to relate to a protection category. The decision to grant humanitarian protection instead of asylum is most often due to one of the following alternatives: negative credibility determination/standard of proof determination. Yet, at times it is also due to the failure of the caseworker to identify the relevant protection category. In addition, caseworkers sometimes fail to identify the existence of more than one relevant category.

Protection Category	Asylum Granted	Humanitarian Protection Granted
Political Opinion	45	51
Religion	11	13
Race	10	19
Nationality	8	20
Social Group	39	59

In the following sections, issues pertaining to the interpretation of social group and political opinion will be discussed. Review of the cases revealed that these are the two categories which have proved most problematic in terms of understanding by the caseworkers. Several cases at the UDI level lack reference to which protection category is relevant or what

⁹² Joan Fitzpatrick, “The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of

are the reasons why the applicant does not fall within such category. Caseworkers may also only refer to the protection ground in the *remarks*, thus the lawyer does not know what was the standard under the analysis. In some cases, asylum is granted without any reference to a protection category whatsoever.⁹³ Such cases do not necessarily indicate erroneous decision. Nevertheless, the failure to conduct a structured analysis “delegalizes” the process, rendering an “ad hoc” quality to decisions. In other cases, caseworkers may not sufficiently discuss the linkage between different protection categories, and thereby do not complete a cumulative analysis- as some human rights violations occur due to the person’s race and others due to his/her political opinion. Separately, they may not amount to persecution, however when taken together they may meet the standard. Hence, the pursuit of full evaluation of all the relevant protection categories may increase asylum recognition rates.

It should be noted that the failure to identify the relevant protection category (ies) may not only be attributed to lack of sufficient exposure to theory among caseworkers, but also that of the lawyers representing the asylum seekers. Lawyers may automatically request UDI to grant humanitarian protection because they themselves are unaware that their client may fall within a relevant protection category of the refugee definition. UDI is unlikely to grant asylum when the lawyer does not bother to investigate as to whether the client merits such protection under the definition. Similarly, the NGOs, including NOAS, present letters which conflate argumentation for protection, without distinguishing the grounds for either category. Thus, caseworkers are given no guidance as to which category is most relevant in the individual case.

6.1. Social Group

Temporary Protection” in 13 Geo. Immigr. L. J. 343, 380 (1999).

⁹³ Case Y, involving an Iraqi woman who had a child out of wedlock and faces possible execution by her islamist family. She was abused by her father and brothers and attempted suicide. UDI determines that internal flight is inapplicable, and grants asylum after an appeal by NOAS.

Social group has been characterized as the category which has been most adaptable to the changes in forced migration in the recent period. It has been credited with permitting the 1951 Convention to remain relevant within the changing context of persecution.⁹⁴

This category has been developed extensively within the practice of the U.S., Canada, and U.K. The criteria for identifying a social group has varied widely, e.g.:

- Requirements of an “**common, immutable characteristic**” such as sex/gender, color, language, sexual orientation, kinship/family, tribal or clan membership, or past experiences that a member either cannot change or that is fundamental to the identity or conscience of the member that he or she should not be required to change it⁹⁵; “**Innate or unchangeable characteristic**”⁹⁶
- **Cohesiveness or homogeneity.**⁹⁷ This standard is now avoided by courts
- A) **Voluntary associational relationship.**⁹⁸ It implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.
B) **Voluntary association for reasons fundamental to human dignity they should not be forced to forsake the association** (human rights activists linked to freedom of thought, trade unions exercising human rights) or groups associated by a **former voluntary status which is unalterable due to its historical permanence**⁹⁹, or individuals linked by past associations for which they will be persecuted irrespective of their current status.¹⁰⁰
- A. The **external perception** that the group is **distinct** in society

⁹⁴ Mark R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff Publishers 2002) for a solid overview of this category.

⁹⁵ *Matter of Acosta* Case, 19 I. & N. Dec. 211 (BIA 1996) USA. For a review of U.S. practice with respect to Social Group, see Siobhan M. Kelly, “Social Group-Based Asylum Claims Under the Refugee Act of 1980, 68 U. Cin.L.Rev. 895 (Spring 2000); see also T. David Parish, “Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee”, 92 Colum. L. Rev. 923 (1992). See also Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 Cornell Int’l. J. 505 (1993).

⁹⁶ *Canada (Attorney General) v. Ward* (1993) 2 S.C.R. 69, 739 D.L.R. (4th), Canada.

⁹⁷ Fullerton describes German lower courts as implementing this standard, but Aleinikoff states that the higher courts have not implemented such analysis.

⁹⁸ *Sanchez-Trujillo v INS*, 801 F.2nd 1571, 1576 (9th Cir. 1986).

⁹⁹ *Canada (Attorney General) v. Ward* (1993) 2 S.C.R. 69, 739 D.L.R. (4th), Canada.

¹⁰⁰ *Mater of Acosta*, Id.

B. **“A fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor” – “a recognizable and discrete”** characteristic, such as the poor, civil servants attributed for implementing a government policy subjecting them to targeting by terrorists.¹⁰¹

Goodwin-Gill calls for merger of internal and external analysis including voluntary association, involuntary links such as family, shared past experience, or innate, unalterable characteristics, or perception of others.¹⁰² Aleinikoff calls for definition of a social group which addresses those united by a common characteristic by which they identify themselves or are identified by government or society.¹⁰³ Von Sternberg confirms that there is tremendous evolution in the interpretation of this category, in large part due to expanded reference to human rights norms.¹⁰⁴ The social group is in part defined by highlighting a person’s will to exercise a fundamental human right without discrimination. Thus innovative cases cross reference specific rights, such as the right to liberty or security of the person, particular guarantees contained within the CRC and CEDAW, and as well as general non-discrimination norms. Some cases such as women subject to domestic abuse, exploitation and imprisonment, female genital mutilation, or forced marriage are recognized as social group under combined approaches, e.g. “immutable characteristic + exercise of fundamental human rights without discrimination” (the latter applicable to persons facing forced sterilization), children of police targeted by Muslim terror groups because they are perceived to be anti terrorist (external perception + immutable characteristic of the family), employees of a State actor with knowledge of corruption (combination external perception and immutable characteristic (their knowledge)). Indeed, UNHCR offers a standard for determination of social group which permits review of internal or external factors and has the link to fixed qualities or fundamental human rights:

“ . . . a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often

¹⁰¹ Gomez v. INS, 947 F.2nd 660, 664 (2nd Cir. 1991).

¹⁰² Guy Goodwin-Gill, *The Refugee in International Law* 47(Clarendon 1996).

¹⁰³ T. Alexander Aleinikoff, “Membership in a Particular Social Group: Analysis and Proposed Conclusions”, Background Paper for “Track Two” of the Global Consultations, (UNHCR 2002). He provides a full comparative review of the case law and elaboration of norms pertaining to social group.

¹⁰⁴ Von Sternberg, *Id.* at 195.

be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."¹⁰⁵

There is no requirement that the members of the group know each other or interact with each other, neither is there a requirement that all members of the group be at risk of persecution.¹⁰⁶ One may look at shared interests, aspirations, values, background, ethnicity, caste, clan culture, language, education, family background, economic activity, occupational groups, union activists, or "transgression of social mores". The Council of the European Union's Proposal Directive, Article 12 includes the following definition of social group:

"members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States, gender related aspects might be considered, without themselves alone creating a presumption for the applicability of this Article."

Caseworkers should avoid incorrectly assuming that the social group is defined solely by the fact that is the object of persecution. Further, applicants should not be expected to demonstrate that every member of the group is at risk of persecution in order to establish that a social group exists.¹⁰⁷ Some caseworkers may be hesitant to recognize a protection category because they may assume that this itself will establish grounds for asylum. However the existence of the protection category itself is insufficient. The applicant must demonstrate the existence of a "well founded fear of persecution" linked to the protection category.

The 1998 guidelines identified areas for improvement of protection, yet it remains incomplete. For example, with respect to focusing on the social group category it writes "*etc.*" instead of social group in the first section and then later only discusses gender persecution under this category. Thus, the explanation of what constitutes social group, or for that matter any of the other protection categories is unclear.

The table below shows how both women and men falling under social group may receive humanitarian protection instead of asylum, with women having a higher chance of being classified in the lower category. As mentioned previously, the reasons for such determination are often linked to credibility/standard of proof determination. Nevertheless, it

¹⁰⁵ 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 , HCR/GIP/02/02 (7 May 2002).

¹⁰⁶ Id.

is also apparent that in some cases caseworkers may be unsure of how to identify a social group and establish the nexus to the persecution or may exhibit a bias in favor of other protection categories.

Social Group	Asylum	Humanitarian Protection
Female	18	33
Male	22	28

Within the review of cases the category of social group was not utilized very often, although exceptions were found. Applicants traditionally falling within this category, such as university professors, police, nurses or other medical personnel assisting soldiers, members of family or particular clans, may be rejected or given only humanitarian protection instead of asylum in part due to the caseworkers' or even the lawyers' lack of understanding of the relevance of his profession or family affiliation to the protection ground (other reasons include lack of credibility, negative risk assessment, etc.):

- Case Z involved an Ethiopian man who worked as a teacher in a University. He claimed to be a member of the National Patriotic Front, the teacher's union, and a group which sought to promote democracy, equality and peace. He wrote articles and disseminated information against the government. The government characterized his group as being a terrorist organization and imprisoned him. A new teacher's union was created and the applicant was denied access to his office. He claimed to have been threatened and beaten by police. He presented documentation confirming his status as a researcher. Due to his prior application in Sweden and inconsistencies in his story, he was deemed to be not credible and rejected. However, of concern is the failure of UDI to identify the social group category as relevant due to the applicant's profession.
- Case AA a Bosnian member of the security police in Montenegro feared that he would be assassinated by Serbian military intelligence. He claimed to have experienced two attempted assassinations and was abducted by police eight years ago. UDI fails to identify social group as a category. He is rejected due the assessment that there is a lack of risk of persecution (without discussing the possibility of revenge actions or even referring to the cessation clauses) and

¹⁰⁷ See Aleinikoff, supra note 76.

referral to seek protection by the authorities in Montenegro. Regardless of the issue of risk, this case merited discussion of social group.

- Case AB involving a man of Albanian ethnicity who formerly worked for the Serbian police and was threatened by the Kosovo Liberation Army (UCK) (his house was shot at, he was tortured in the past, and his father in law as well as his friends in the police were killed). UDI granted humanitarian protection instead of asylum, and actually asserted that social group was not applicable even though his affiliation with the police affected him:

“The Directorate is aware that the applicant as a result of his position in the police under Serbian rule can be in an exposed situation. This is nevertheless not a circumstance which can be characterised as persecution in the meaning of the Act or Convention..”

He also characterizes his situation as one not amounting to persecution. Certainly one may argue there is a real risk of reprisals and one may identify a social group. In the alternative, one may argue that he was targeted on account of imputed political opinion.¹⁰⁸

- Case AC addressed the plight of the daughter of a Serbian war criminal who feels threatened by Croatian police and military police. Her home was searched and she was evicted. She tried to attain protection from the State but was not assisted due to her relationship with her father. Furthermore, she was in a mixed marriage and this resulted in a loss of her house and denial of access to jobs on account of her ethnicity. She was given humanitarian protection instead of asylum, due to UDI’s evaluation of the existence of a risk of inhuman treatment upon return juxtaposed to a contrary determination stating that there was insufficient past persecution. The caseworker should have discussed the social group category or imputed political opinion (otherwise the caseworker exhibited good independent reasoning and thorough examination of a variety of sources of evidence). (However, in Case GM, a Croatian man who was forced to dig graves upon order by the military and later served as a witness in the Hague was given asylum, based on political opinion rather than social group.)
- Case AD involved a member of an anti-corruption unit in Belorussia who received threats and claimed to have been physically assaulted by the police resulting in his abandonment of the country. UNE stated that:

¹⁰⁸ See *Melencio Legui Lim v. INS*, 224 F. 3rd 929 (9th Cir. 2000.)

“The circumstances to which the appellant asserts to have been exposed have their background in that the appellant during the performance of his occupation and in a position in the Ministry of the Interior, made allegations inter alia regarding corruption being carried out by persons in higher authority. The treatment of the appellant’s supervisors in these matters and the reactions he received because of it, were a result of his work situation, and do not fall under the Convention grounds ‘race, religion, nationality etc.’ The violations the appellant has described by single persons because of the corruption allegations must be regarded as purely criminal acts which fall outside the Refugee Convention Art 1A and do not give the right to asylum.”

One should note that the decision omits the categories social group and political opinion which are the most relevant to the case, writing instead osv, and indeed fails to conduct an analysis based on that ground. He was granted a permit on compassionate grounds based on the 15 month rule.

In comparison, the United States Court of Appeals for the Third Circuit found grounds to consider granting protection to a man who faced criminal charges fabricated by corrupt government officials in retaliation for past information and testimony he provided in government investigations of official corruption in the Ukraine.¹⁰⁹

- Case AE concerns a member of a counter-terrorist unit in Sri Lanka who claimed to fear persecution from both the Liberation Tigers of Tamil Eelan (LTTE) as well as the police (the latter believing that he worked for the LTTE). He claimed to have been tortured by soldiers, forced to bury bodies, and treated in a degrading manner (forced to eat dog food and the soldiers’ leftovers). He stated the LTTE did try to recruit him and that they killed his brother. He gave full details as to the co-prisoners, the guards, and the conditions in the jail. UDI actually dismissed the facts of the case as having nothing to do with the notion of persecution or the definition of a refugee, noting in the remarks *“I do not think it is natural to include the place of work in this (social group).”* He was rejected without discussion of social group, imputed political opinion, exclusion, or refolement issues.
- Case AF involved the father of a guerrilla soldier in Colombia. His son was killed, he received threats and his house was shot at. Although the applicant’s lawyer correctly pointed out that the father had been and would continue to be targeted on account of his son’s membership in the guerrillas; UDI stated that he did not fit in any of the protection categories, had not met the standard of proof regarding risk of persecution, and questioned his credibility. He was

¹⁰⁹ Derevianko v. Reno, Attorney General of the United States, 2003 U.S. App. Lexis 1739.

granted a permit for compassionate grounds by UNE due to his elderly status and presence of another son in Norway. This case reveals a classic social group/imputed political opinion scenario and the decision should have included a discussion of this category.

- Case AG addressed a relative of a leader of the Socialist Forces Front (FFS) in Algeria who claimed to have been threatened by the Group Islamic Army. His father was executed and the caseworker indicated that he should receive humanitarian protection, but in the end he was rejected. Had the analysis addressed the link to the father as providing a social group/imputed political opinion as well as evidence of risk of future persecution, he might have received asylum.
- Case AH involved the relative of members of the Wadat party (of hazara ethnicity) in Afghanistan who was harassed by the Taliban while his brother was forcibly disappeared. The caseworker did not discuss social group or imputed political opinion, but did conducted an analysis of cumulative grounds for protection. He also referred to a Danish report confirming the disappearances and arrests of hazara people in the area. Due to doubts regarding credibility, he was granted humanitarian protection instead of asylum.
- Case AI concerned a former member of the intelligence police in Afghanistan who claimed to have been arrested, persecuted by the Mujahedin, and fired on account of his religion. UDI did not address his occupation and its link to protection grounds (nor was there any reference to the exclusion clause). He was given humanitarian protection.
- Case AJ involved a nurse who assisted guerrilla soldiers in Colombia by providing them with medical equipment and care for the wounded. There was no discussion of social group or imputed political opinion. She was given humanitarian protection instead of asylum in part due to doubts regarding credibility.
- Case AK addressed a member of an organization for families of victims of terrorism in Algeria. He claimed to be persecuted by Islamists and that his brother was killed by them. The caseworker did not conduct a social group/imputed political opinion evaluation which may have called for

consideration of provision of asylum. UDI gave the benefit of the doubt when faced with doubts regarding credibility, but granted only a permit for compassionate grounds by applying the 15 month rule.

- Case AL concerned a man whose family was targeted as a result of clan conflicts. Members of his family were killed. UDI did not embark on any social group analysis which would highlight individual or group targeting beyond generalized violence. Indeed UDI stated that the assassinations amounted to “*random clan conflicts*” deemed to be criminal acts, not persecution. The applicant was granted humanitarian protection instead of asylum.

One may compare to a U.S. case in which the Board of Immigration Appeals determined that the member of a clan had been detained, beaten and tortured due to clan membership.¹¹⁰ In another U.S. case, the Court characterized the family as a social group which resulted in the imprisonment and torture of a man who assisted his brother to escape after having been imprisoned due to his religious activities.¹¹¹ The Court noted that they targeted him in order to extract information about his brother or to force him to come forward.

- In Case AN, UNE rejected the claim of an applicant who was a journalist who made a documentary film on Serbs who disappeared and was attacked and threatened by state and non-state actors. The majority Board conducted only an analysis on race and referred to the possibility of protection by the local police, but did not conduct a social group analysis due to his professional activities. The minority Board disagreed and cited the severity of threats, the problems with de facto access to justice in Croatia, and problems within the police.
- In contrast, in Case AO, UNE granted asylum to a former member of the Yugoslavian intelligence in Kosovo who received death threats due to the suspicion that he passed out information to the Albanians. The NEMDA majority gave him the benefit of the doubt and applied the category of political opinion, although I would argue that social group is perhaps more appropriate given it is knowledge which subjects him to targeting. Persons targeted due to their knowledge about illegal activities, such as corruption within the state,

¹¹⁰ Matter of H, 21 I&N Dec. 337 (BIA 1996)

may be categorized under “social group” as their knowledge is immutable and is linked to their right of freedom of speech.¹¹²

The UNE reasoning is as follows:

“The majority has found that the appellant justifiably fears persecution by the Albanian extremists, i.e. in the form of former UCK members. This persecution is due to the fact that he, through his previous working relationship, will be regarded by them as having a political view, even though the appellant took this work to obtain income. Considering that there are still reports of killing of persons associated with the former regime, the majority bases its decision on that the authorities have the will to provide protection, but that the ability to provide protection cannot be regarded as sufficient.”

- Consider also Case FP, involving a Russian soldier who deserted the Army after he reported the illegal sale of weapons by soldiers to civilians and was subjected to beatings, threats, detention, and torture.¹¹³ UNE failed to discuss targeting on account of social group due to his knowledge of illegal activities and does not address past torture:

“The Board has considered the appellant’s arguments regarding persecution because of illegal weapon trading. The argument includes circumstances which have no connection with any of the Convention grounds. Illegal weapon trading is a criminal offence which is punishable pursuant to Russian legislation. It is the responsibility of the Russian authorities to make a decision regarding persons who carry on illegal weapon trading. The conditions for regarding the appellant as a refugee because of the argued persecution are therefore not present.”

Some obvious categories, such as human rights activists, writers, religious activists or journalists are granted asylum:

- Case AP involved the editor of a newspaper in Somalia whose office was attacked by gunmen, and the newspaper was banned due to its criticism of the Islamic Court. In addition, he claimed to have filmed militia actions and was arrested and tortured. UDI gave him the benefit of the doubt as to the likelihood of events given his overall credibility. He was granted asylum based

¹¹¹ Gebremichael v. INS, 10 F.3rd 28 (1st. Cir. 1993). Both cases cited in Mark R. Von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* 210-211 (Martinus Nijhoff Publishers 2002).

¹¹² Id. at 196 citing cases from the Canadian Federal Courts, Reynoso v. M.C.I. (F.C.T.D., no. IMM-2110-94), 29 January 1996) involving employees of a Mexican mayor who will be terrorized because of their knowledge of corrupt political practices.

¹¹³ The applicant’s description of torture was very complete, including a treatment called the “Afghanistan” in which soldiers to be punished are dressed in full gear and a gas mask and forced to collect water which has been sprayed on a floor used to dry clothing (40 degrees centigrade.)

on the fact that his clan could not help him, revealing a good analysis of the importance of assessing the role and effectiveness of de facto authorities.

- Case U involved a member of a Muslim organization who ran a printer which issued literature and newspaper. There were 92 official complaints made against him and he received phone threats. His documentation was credible and he was given asylum as UDI noted that it was a clear case.
- Case AQ addressed a writer who wrote about the conflict in Somalia. He was jailed by the United Somali Congress (USC)/ Somali National Alliance (SNA), tortured, and sentenced to death. UDI applies the benefit of the doubt, exhibits excellent analysis and grants asylum.
- Case AR involved a high profile human rights lawyer from Sudan who wrote articles against the military, held a lecture condemning a massacre, and accused the authorities of committing serious violations of human rights. He was also accused of being a member of Al Moatamar Al Watani, arranging meetings, and protests. Because he was tortured and arrested ten times, UDI said that this was a case of systematic persecution and granted asylum.
- UNE Case AS, asylum is granted to the organizer of an illegal teacher's union in Iran. He was interrogated by the Revolutionary Guard, his house was ransacked and they found illegal literature. In addition, one of his colleagues was disappeared and his own wife was whipped and jailed due to his activities. UNE applies the benefit of the doubt in order to grant asylum.

However, even within traditional categories, not all are protected:

- Case AT involving an Eritrean reporter on prisons and member of an opposition group who criticized the regime in public. He claimed to have been threatened by security personnel and arrested. UDI rejected him arguing that he could not be considered to be within the "spotlight" of the State, that there was no threat of execution, that threats by themselves do not amount to persecution, that he would still be under arrest if he really were considered a threat to the state, and that he lacked sufficient credibility because he kept his job for the State. Although there are various points of concern in this case, here I highlight the fact that the caseworker failed to conduct a social group analysis based on his professional activities linked to human rights. By focusing on a supposed

lack of high profile, the caseworker disregards the possibility that his articles on the prisons would potentially result in targeting by the State.

- Case AU, involving a Congolese man who worked for a human rights organization and was a member of the political opposition. He was not recognized as a refugee (although granted humanitarian protection) in spite of the fact that the police invaded his home, his wife was kidnapped his daughter was raped, and he was attacked. UDI stated that *"the applicant's asserted activities are not of such an extent or such nature that they can qualify for asylum in the sense of the Convention and Act."* UDI also cited the fact that he used his own passport as evidence of the lack of a threat of persecution, thus contradicting the normal bias against use of false papers. Instead of humanitarian protection, the applicant should have received asylum utilizing social group and political opinion protection categories.
- One interesting case (UNE Case AV) involved a Kurdish applicant whose father was killed and brothers arrested on account of his refusal to pay fees to the Iraqi government for use of his own farmland. The applicant feared that he will be killed due to his status as an heir to the property and son of a former member of the opposition (his father was considered to sympathize with the Baath party, thus he feared persecution from the Kurds as well). UDI determined that he did not engage in sufficient political activity to merit protection. The discussion did not explore the property ownership issue sufficiently as a basis for a claim based on "social group". This case was rejected at all levels. Had the caseworker completed a combined social group and imputed political opinion analysis as well as a more thorough analysis of the relevant human rights, it may have received protection.
- Case FO involved a journalist who is an ethnic Serb from East Slovenia who made a documentary film on Serbs who disappeared as well as the existence of mass graves filled with Serbs. He was attacked by a Croat and was threatened that he would be killed and his house and car bombed. His cat was killed and he was investigated by the police. UDI rejected, arguing that he should seek protection from the national police. At the UNE level, the Board identified race as the only relevant protection category and thus ignored the social group category which is actually the cause of his targeting. The Board majority rejected the case, reiterating that he should seek state protection and finds a

lack of an objective basis for fear of persecution given its determination of a lack of reports regarding assassination of journalists. The Board minority disagreed due to the severity of the threats, problems with real access to justice, the existence of far-right tendencies within the police.

Regarding women forced to marry against their will or subject to genital mutilation, sterilization, they are defined as social group due to their wish to exercise a fundamental human right:

- In Case AW, the applicant was a woman from Somalia (former widow) who married a man from another clan against her family's will. She was beaten and forced to marry a relative of her late husband. Although both the caseworker and supervisor consider the social group in the end they opted to give humanitarian protection instead of asylum without explaining why they opted for the lower level of protection.
- Cases AX & AY involving a man and a woman from Pakistan. He was imprisoned for having married the woman against her family's will. The woman's father wanted to force her into a marriage with another man. Her father was an influential man related to the Saudi royal family. He sent her to Saudi Arabia and the man was threatened that his sister would be raped should he report the matter to the police. The High Court in Pakistan issued a decision which recognized their right to marry and they became famous. Her father filed a formal complaint accusing her of infidelity and she was placed in house arrest. They were given asylum, thereby providing an important precedent regarding persecution by non-state actors, social group, and de facto infringements on access to justice. However, what sets this case apart from others involving infringement on the right to marry or inverse right not to marry, is that it is a high profile case which received media attention and included a decision from the High Court. Most cases will not have any attention by the media and will rarely result in an action by the courts to protect the victims, as a case from the Sudan illustrates this, a woman asserted that she would be married against her will, UDI rejected noting that this was not enough to constitute a finding of persecution.

- UNE Case BB, the applicant refused to participate in an arranged marriage, she went to Norway and married a man, then divorced. The Board identified the social group and cites the 1998 Guidelines, however it decides not to grant asylum:

“The Board wishes to point out that arranged marriages are very widespread in most Muslim countries, including Kosovo, and can include both women and men. The Board is of the opinion that one should show care about allowing such a widespread culture to provide grounds for refugee status and right to asylum pursuant to the Section 17 of the Immigration Act.”

The Board then considered the standard for granting humanitarian protection under 15 (1): *”In the opinion of the Board, the appellant’s fear that the family will not have any contact with her and that she will not have any network on return clearly does not fall under this provision.”* Finally, it considered a permit for compassionate grounds, noting concern for recognition of a ground which would be applicable to many asylum seekers or recipients of collective protection:

”It is this which is generally referred to as a residence permit on humanitarian grounds. A broad and concrete overall assessment must be undertaken where a series of different types of welfare grounds could be relevant.. It is not such that there must be one decisive factor present. A permit can also be granted in the cases where it is found after an overall assessment of several factors in the matter in question that the conditions are met. Considerations which speak for granting must be weighed against those which speak against, inter alia, immigration political considerations. It is a principle that similar cases shall be treated alike, and it is not the intention that circumstances which will apply to all or very many asylum seekers, or for the manority of those who have residence with collective protection, in themselves shall lead to residence in accordance with the Section 8 (2) of the Immigration Act.

She received a permit based on her vulnerability in the event of return:

“The question for the Board is whether there are circumstances present which separate the appellant’s case from what is to be expected to be the situation for a larger number of the Kosovo-Albanians who have received collective protection in Norway, and whether these circumstances in that case speak for the fact that the appellant should be granted residence.” The Board finds it probable that she on return will be without a network in the form of relatives/friends who can assist her. She has also got into a difficult situation in relation to the man she was to marry. . . The Board has laid emphasis on the fact that the appellant must be regarded as especially vulnerable in the event of return.”

- UNE Case BC, a permit for compassionate grounds is granted to a woman who escaped forced marriage in Somalia. UDI declared that *“the fact that she wishes to avoid arranged marriage does not qualify for asylum.”*” UNE found her credible but noted:

“The appellant will be in a very difficult situation on return to her home country. The situation in Somaliland is regarded as being such that it is in general inadvisable to return to the area. Young, single women would be in a difficult situation, but that is nevertheless not sufficient to regard return as inadvisable. However, it is clear that belonging to a clan is very important in Somalia in general, including Somaliland. In this manner, the appellant is in a difficult situation, since she will be expelled from her own clan. She will therefore be without the clan’s protection where safety circumstances are concerned. In addition, she will encounter discrimination and harassment from her own clan because she broke a contract which was entered into by two clans. Her safety situation will therefore be very uncertain. In that she will be expelled from her own clan, she will also be put into a difficult social situation. The job opportunities, access to health care etc. are connected to belonging to a clan, and she will be among the weakest in society in all aspects.”

UNE granted humanitarian protection, although the same analysis could have been applied to grant asylum. This decision indicated a lack of cumulative analysis- and asserted that there was no risk of death or inhuman treatment.

- In UNE Case AZ, the applicant was a Russian woman who was stalked by a colonel and beaten up in her home. Although she sought protection from the State, this was to no avail. She feared that she will be killed upon return. UDI rejected stating that the events amounted to criminal acts not persecution. At the UNE level, there was concern that she is likely to have problems with the police, but the conclusion was that she should seek an internal flight alternative. UNE went so far as to admit that the police are capable of tracking her down if relocated internally, but decided that this is not likely to happen. In the remarks, there is consideration of a social group category, and recognition of torture at home, but in the end the conclusion is that this is a mere private problem in spite of the fact that the offender is an officer of the State. A permit on compassionate grounds is granted instead of asylum, which is defined as requiring reference to the security situation at home, the woman’s special situation upon return, internal displacement, health concerns, interests of the child, etc. This decision is worrisome because of the failure of the immigration authorities to carry through the social group analysis as well as the downplay of the lack of access to justice and the fact that the persecutor is well-connected to the State’s security apparatus. Furthermore, what is deemed to be criteria for a permit for compassionate grounds could also have been construed to form relevant factors for a grant of legal protection.
- Case BA, the caseworker correctly identifies social group and gender persecution in a case involving a Pakistani woman who was forcibly married to

her cousin and severely abused (including rape). She experienced a miscarriage from the abuse. Her husband tried to set both her and her daughter on fire. However, the caseworker stated that she was unsure how to fit the case into the guideline criteria. Nevertheless, asylum was granted as she is found to be credible and has links to Norway.

- UNE Case BD, the applicant was a man from Yugoslavia who worked as an informant for the Serbs and claimed to fear reprisals from the Albanians and also stated that his status as a homosexual left him at risk. He was rejected by UDI on the grounds that there was no risk of persecution. However, at the UNE level he received a permit for compassionate grounds in part due to his homosexuality, in spite of the fact that the Nemnda minority called for asylum due to the fact that homosexuality was penalized in the law. The majority argued that the provision was unlikely to be enforced. Here we witness a division regarding the perception that persecution may be established by the existence of a law which infringes on a human right on its face alone due to the fundamental nature of the right, the disproportionality of the standard, its discriminatory language, or the lack of an overriding State interest (public order, health, etc.) versus the consideration that there has to be an actual risk of enforcement of the law. This difference of opinion recently resulted in clashes in the courts as well as in meetings between UDI and UNE, as the former espouses a protection view in favor of upholding a risk of persecution based on the existence of such law, whereas the latter promotes the view that actual practice was required to consider the law evidence of a risk of persecution.
- In Case BE the applicant had been raped and tortured by the police, as her father had worked for Mobutu. UDI stated:

“Reference is made to the fact that the above assertions concerning the occurrence where the applicant was raped and abused cannot provide grounds for asylum, since the occurrence appears as an arbitrary criminal act and not an act directed towards the applicant as a link in persecution in the sense of the Act and Convention. When the applicant’s arguments regarding fear of attack because her father was in the military under Mobutu are concerned, it is pointed out that no information has been provided which indicates that the father was profiled to such a degree that the applicant has a well-founded fear of persecution because of it.”

She was granted humanitarian protection, but the case could likely have been considered for asylum either under social group or imputed political opinion.

- Case BF involved a woman whose husband supported rebel groups in Congo, thus she was arbitrarily detained and repeatedly raped. UDI granted humanitarian protection instead of asylum, noting:

“The Convention provides for a future-oriented assessment of whether the applicant upon return to the home country will be exposed to such reactions by the authorities or others. The Directorate is of the opinion that the applicant’s arguments do not provide grounds for asylum since the fear of assault is not related to any of the persecution grounds contained in the Act and Convention. The applicant’s fear of attack is based on that her husband has been accused of joining the rebels in the home country. The Directorate has noted that the applicant says that she has been exposed to several instances of rape while she was in custody. According to assessments, however, these circumstances are not of such a nature as to be regarded as persecution in the sense of the Act and Convention.”

In the *remarks*, the caseworker states:

”I am of the opinion that the applicant’s arguments cannot provide the grounds for asylum (neither are they gender-based persecution). The applicant’s fear of attack is not related to any of the grounds in the Convention.”

There is no consideration or understanding of imputed political opinion, social group, gender persecution, or past persecution as evidence of risk of future persecution.

- Further, in Case BI, asylum was given to a victim of gender-based persecution from Pakistan who married against her family’s wishes and risked honour killing. Her mother threatened her in the newspaper. UDI particularly made note of the lack of access to justice, citing both statistics and reports, and rejected the viability of an internal flight alternative. (This case included an excellent overall analysis, particularly by the Norwegian Embassy in Pakistan.)
- Case BJ involved a woman whose father was a judge who was removed from his post and imprisoned by the Taliban. The applicant herself was a member of the communist party and worked as a teacher for a women’s organization. She was forcibly married to a member of the Taliban who abused her. After her husband was killed she risked being forcibly married to her brother in law. She was considered to be credible and UDI conducted a very good social group analysis and granted asylum.

Recommendation:

- *The commentary to the law should include the UNHCR standards for social group evaluation, which includes the existence of a common characteristic which may be internal or external, innate, unchangeable, or which is fundamental to identity, or conscience or the exercise of one's human rights. The commentary may highlight examples such as occupation, sexual orientation, voluntary association, family, tribe, "transgressor of social mores", etc.*
- *As pertaining women, new gender guidelines are needed- this is discussed in full within the report on Implementation of a Gender Perspective within Norwegian Asylum Law.*

6.2. Political Opinion

The protection ground which is most often utilised by UDI and UNE is "political opinion". At times it appears that this is considered to be the primary focus of asylum. Review of the cases confirms that there is a strong emphasis on political grounds of persecution. Thus, another reason why humanitarian protection is given more than asylum is that the implementation of the protection categories contained within the 1951 Convention appears to be uneven- political opinion is referred to more than other categories, it is misinterpreted to apply mostly to political activity, when applied it demonstrates an elitist bias as political leaders are identified as meriting protection as opposed to non-leaders, and finally, imputed political opinion is often disregarded.

The table below shows that cases which included facts relating to identification of political opinion did not always receive asylum, indeed more often they received humanitarian protection or permit on compassionate grounds. Although most cases are given humanitarian protection because of a negative standard of proof/credibility evaluation, other cases revealed that the caseworker failed to identify the relevant protection category. Furthermore, the statistics demonstrate that women are more likely than men to receive humanitarian protection instead of asylum in spite of facts revealing the relevance of the political opinion category.

Political Opinion	Asylum	Humanitarian Protection
Female	25	37
Male	30	33

6.2.1. Political Opinion v. Political Activity

The interpretation of this category appears to be rather stringent as more often than not the caseworkers required political activity rather than political opinion. Consider the UDI concept paper: *“Neither has the applicant *shown political activity of such nature or such extent that it can give reason to fear persecution * been politically active.”* This is reiterated by UNE:

- Case HI involving an ethnic Kurd from Irak (member of Hizbi Risgari party) who was detained for two years and tortured in a Turkish prison. UNE noted a type of standard of proof with respect to recognition of political opinion, conflating the risk of persecution with the identification of the protection category: *“Where ”political views” are concerned, the Board is of the opinion that the appellant, based on what is available of information has not substantiated that he has carried on political activity to such an extent that he has reason to fear persecution because of such activity.”* However, UNE found him to be targeted by Islamicists and states that there is no internal flight alternative, hence he is granted asylum.

Several decisions directly pointed to the lack of political engagement as grounds for non-recognition of asylum:

- Case HH involving a Sudanese man whose, father and brother were jailed on account of their membership in the communist party. The applicant himself was tortured by security agents. Both UDI and UNE rejected noting *“The appellant himself has not been a member of any political organisation and has not carried on any form of political activity. However, he has been a party sympathiser.”* His arbitrary detention and interrogation is linked to his family’s activities and therefore deemed not to be directed at him.
- One may compare with Case GF involving a female journalist from Croatia who exposed military involvement in extortion and suffered inter alia, intervention of her home and rape. She was given asylum due to her open political activities and its clear link to the ensuing persecution.

It should be noted that some caseworkers reveal a solid understanding of the cultural component of political opinion:

- Case BX involving an artist from Iraq whose exhibits addressed women and independence, as well as the Halabja catastrophe involving a chemical disaster, resulting in persecution by Islamists. He experienced threats and the launching of a grenade into his yard. He was later arrested, imprisoned, and placed in isolation. He feared execution upon return. UDI considered internal flight alternative but discarded it due to the evaluation that State agents could find him. He was given the benefit of the doubt and granted asylum.

6.2.2. The Spotlight

There appears to be a requirement that the applicant have a high profile, be in the state's "spotlight" to merit protection, in spite of the fact that the 1951 Convention makes no such distinction:

- UNE Case BL involving a Kurdish man from Iran who was a member of the communist party which was active in guerrilla warfare. He and his colleagues were arrested in 1998. His friends were tortured. Once abroad, he wrote articles abroad that criticized the Iranian authorities. The UNE Nemnda stated that his articles may provoke a reaction from the government upon return, but that it may not amount to persecution. It granted humanitarian protection, noting that he lacks a high-profile to merit asylum but that:

"The Board is of the opinion that it there is uncertainty as regards the reactions which the authorities could effectuate towards the appellant upon any return, because of his political activity in and outside Iran. This uncertainty warrants the appellant's protection against being returned to his home country."

Thus, the Nemnda did not apply the benefit of the doubt, was reluctant to set a precedent involving sur place actions, and focused excessively on a high profile criteria relating to political involvement which bears no bearing to a context in which the persecution is extended to those at lower levels as well (note the experience of his colleagues.)

- Consider also UNE Case BK, which involved a Kurdish man from Iraq who was active in the Hizbi Rizgari Kordistani party. He sat in a Turkish prison for two years and was tortured. UDI rejected, in spite of the fact that the lawyer asserted that his client was in the "spotlight" of the State. UNE provided the

following standard applicable to establishing the nexus between political opinion and persecution which relies on a certain level of engagement:

“Where ‘political views’ are concerned, the Board is of the opinion that the appellant, based based on what is available of information, has not substantiated that he has carried on political activity to such an extent that he has reason to fear persecution because of such activity.”

In spite of this, the majority of the Board stated that he was in danger of persecution by Islamists and has no internal flight alternative. Thus, it granted asylum. The minority disagreed, believing there to be an internal flight alternative option and that at most he should be given humanitarian protection on compassionate grounds due to his health problems as a result of past torture. The minority’s perspective runs counter to basic protection principles related to political opinion and the role of past persecution in relation to future risk as well as an exception to the Cessation Clause.

- Case GI involving a man who formed part of the G 13. He was responsible for the Berlin Manifesto calling for democratic reforms in Eritrea. He was considered to have a high profile which subjected him to a risk of arbitrary detention and exhibited a high degree of credibility, thus he was given asylum.
- In Case BM the applicant supported the Al-Dawa party in Iraq and was accused of distributing pamphlets. He was accused of helping Iran, tortured, and sentenced to life imprisonment. In 1991 he received an amnesty, but was arrested again in 1995-97. He feared that he will be killed upon return. UDI exhibited a good analysis by giving him the benefit of the doubt, although noting that he should be considered “in the spotlight”, and considered that the government believes him to be politically active in spite of the fact that he is not. He was given asylum.
- Case GE involved a man from Ethiopia who was subject to torture, arbitrary detention, and invasion of privacy because of his involvement with the Tigray People’s Liberation Front and Relief Society of Tigray. He was given asylum based on the view that *“The applicant’s position as former TPLF cadre and member of REST in my opinion indicates that the authorities will be more interested in him than a normal student participating in the demonstrations.”* Furthermore, he was considered highly credible. In contrast in Case GK involving a man who claimed to support the G 13 which called for democratic

reforms in Eritrea, he was given humanitarian protection instead of asylum given that he was not in the spotlight. However, he was considered credible and he had experienced an invasion of privacy and feared loss of life.

- Case GQ involved a female writer who addressed women's rights in Iran, resulting in arbitrary detention and violations of her right to association, freedom of opinion, and security of the person, resulting in a grant of asylum, in part due to her high credibility. Case GR involved a human rights lawyer from Sudan received asylum because he wrote articles criticizing the government.

Thus, the focus on the “spotlight” promotes an elitist approach to protection which runs contrary to the principles of non-discrimination and equal protection of the law. Einarsen has commented that the tendency to focus on the applicant's ability to prove a higher level of risk of persecution as opposed to other persons in the spotlight often results in a downgrading of protection to “*compassionate grounds*”. . Indeed he claims that most “grey zone” receive similar downgrading to a permit for compassionate grounds.¹¹⁴ Reference to the “*spotlight*” approach is derived from Fisknes' analysis of the law:

“The person must be in the authorities' spotlight because of his/her activity. A modest political activity, as for example, participation in a few demonstrations, will as a rule not be enough to substantiate a reason to fear persecution directed towards this particular person in the event of return. Omission to appear for basic training or repetition exercises normally does not qualify either for asylum or residence on humanitarian grounds. Residence on humanitarian grounds, however, was granted i some cases where conscientious objectors/deserters risk stricter punishment.”¹¹⁵

This statement emphasizes the modes of exclusion from protection, instead of highlighting categories of inclusion. In order to be complete, there should be discussion of instances in which participation in protests result in a risk of persecution. As was evident in the cases examined from Belorussia involving participants in marches protesting the government, the tendency was to deny asylum or humanitarian protection based precisely on the notion that such civic action is unlikely to result in persecution. Given that some of the claims asserted incidences of arrest, detention, threats, assaults, etc., it is important to explain that participation in protests may indeed result in persecution by State or non-State actors. Thus examination of the facts and confirmation by other sources, such as human rights reports, may assist the caseworker in granting asylum or humanitarian protection where

¹¹⁴ Einarsen, *Flyktingers Rettstilling i Norge*, 58 (Fagbokforlaget 1997). See also Terje Einarsen, *Retten til Vern som Flykting* 409-412 (Cicero 2000) where he criticizes use of the “spotlight” perspective as increasing the risk of engaging in an analysis which runs counter to the Convention.

¹¹⁵ Eli Fisknes, *Utlendingsloven Kommentarutgaven*, 180 (Universitetsforlaget 1994).

needed. UNE relies on internal country reports to conduct risk evaluations. Hence, it is important that these reports are given to the lawyer so he or she may verify whether the risk evaluation is correct as pertaining the individual case.

- In UNE Case BO, the applicant was a member of a political opposition group in Belorussia who distributed information, organized strikes, and participated in demonstrations. She claimed to be the leader of a local branch of the party and was repeatedly arrested, beaten, and sentenced to five years imprisonment. UDI rejected the claim, noting that she did not have a high enough position in the party to ground the asylum claim, stating in addition “ *The applicant has not shown political activity of such nature or such extent that it can give grounds to fear persecution.*” The Board majority concluded that only high members of parties were persecuted, and in any case her incarceration would be of a short duration. The minority disagreed, stating that there was a risk of persecution. The Nemnda considered the grant of humanitarian protection, noting: “*Granting of residence permit pursuant to this provision can take place where the risk of persecution on return is regarded as being so small that the conditions for asylum are not met, but where there nevertheless can be some doubt*”, thus demonstrating how *doubtful cases* are more likely to be given humanitarian protection rather than asylum. The discussion categorizes issues relevant to the grant of asylum as being only relevant to humanitarian protection issues:

“Even though the Board has not found that the conditions for asylum are met, the Board’s opinion is that there can be a certain danger that she will be exposed to persecution upon return. In this connection reference is made to the fact that the appellant has been active in connection with information on democratic rights and in the fight for them, and that she has got friends and family on her side in demonstrations and other occasions. Based on the explanations she has given, it seems as though she has been exposed to reactions in the home county have been somewhat strengthened as time has passed. There is uncertainty surrounding the political development in White Russia, and oppositional activity is monitored. In the opinion of the Board, the basis must be that the appellant’s activity is known by the authorities in her home town. The circumstances surrounding the forthcoming election make the situation even more uncertain. On this background there is a risk that the authorities will direct a spotlight on the appellant if she returns and that she could be exposed to persecution.”

“In the opinion of the Board, on this background there is room for doubt concerning whether the appellant will be exposed to persecution on return to White Russia, and the Board has found that the appellant must be granted a residence permit in accordance with Section 15(1)(1), cf. Section 8 (2), of the Immigration Act, and Section 21 of the Regulation relating to Immigration.”

**This is a benefit of the doubt case which should have been given asylum but wound up as humanitarian protection because of a lower standard of proof.

- UNE Case BP, involving a female applicant from Belorussia who also led a union, participated and led meetings, strikes, distributed pamphlets, and was beaten for her participation in a march. UNE stated that the violence was random, not individually targeted. There is no discussion of targeting of the collectivity-based on her political opinion/social group.

6.2.3. Imputed Political Opinion

Another issue is a low level of recognition of imputed political opinion. Persecutors may target individuals based on an erroneous assumption that the person holds a political view, in spite of the fact that this may not be true in actuality. Often, such assumption is made with respect to the family members, colleagues, and friends of persons know to hold such opinions. Thus there may be an overlap between imputed political opinion and social group. Similarly, persons may be persecuted for their neutral stance, as the persecutor may wrongfully interpret the neutral stance as a concrete rejection of support of his/her position or as a form of supporting the opposition.¹¹⁶

- In Case BQ, the applicant from Eritrea was held in arbitrary detention for one year because her father left the police and joined the freedom fighters group the Eritran Liberaton Front (ELF). Her lawyer asserted that she herself handed out brochures and disseminated information about ELF. UDI stated that:

“The Directorate is of the opinion that the applicant in her home country has not been exposed to reactions by the authorities which can be characterised as persecution in the sense of the Act and Convention. The applicant’s arguments that her family is wanted because of her father’s activity do not provide grounds for asylum.”

This case showed a dearth of understanding of the seriousness of the arbitrary detention or of the notion of imputed political opinion. The caseworker criticizes her lack of detail regarding her imprisonment and is of the opinion

the State is probably unaware of her political opinion given that she has not orally voiced them (thus ignoring the wider aspect of expression via distribution of information). Thus, the cases reveal contradictory practices with respect to imputed political opinion.

- Case BN, the applicant's father was an Iman who worked with the Al Dawa party in Iraq and opposed the regime. Although the applicant himself was never politically active, he was jailed twice. One arrest was a result of events relating to his mother's illness. The doctor never came to help her, and the father ran to the streets screaming for help. The police came, searched the house and found Islamist books. The applicant was accused of working for the counter party. He was detained for seven years, abused, and forced to sit in isolation for one year. He suffered from post-traumatic stress disorder. UDI presented a very good analysis of imputed political activity. Although there were gaps in the story, the caseworker lowers the burden of proof and gives the benefit of the doubt in order to grant asylum.
- One may compare case FW, involving the woman from Ethiopia who was repeatedly raped from 1994-2001 on account of her father's link to the OLD. She was given asylum due to recognition of the severity of the persecution and the existence of imputed political opinion. This was granted only after the supervisor corrects the caseworker's false perception that the applicant's own lack of political activity is a guarantee of safety from persecution.
- In Case BR, a Kurdish applicant was granted humanitarian protection but denied asylum, due to the fact that the caseworkers do not consider her to have been politically active. The applicant's husband was a member of the political opposition (Hizb al-Moraade al Iraqi and the Iraqi National Congress) and she was forced to distribute pamphlets for the organization. Her husband was arrested, a member of the party was executed, and the security police were looking for her. She feared execution upon return. The decision indicates an incomplete analysis:

¹¹⁶ See *Turcios v. INS*, 821 F.2nd 1396 (9th Cir. 1987) USA, in which the applicant was not aligned with either side of the Salvadorian conflict, but he was subject to arrest and torture after having been seen speaking with a supporter of the left.

“The Directorate is of the opinion that the applicant has not substantiated to a sufficient degree that she upon return to her home country is in danger of being exposed to reactions which can be characterised as persecution in the sense of the Act and Convention.

The Directorate refers to the fact that based on information received, the applicant’s political activity and position has not been of such a nature as to indicate that she was of particular interest to the Iraqi authorities

In its assessment, the Directorate of Immigration has laid emphasis on the fact that the applicant has not been politically active or shown actions which can be characterised as critical of the regime in relation to the Iraqi authorities.”

She should have been considered under the political opinion category due to her husband’s affiliation and its imputability to her as well as her own actions which are classic examples of expression a political opinion. The analysis was incomplete. One may compare with cases from the United States, e.g. in the Rios case in which a Guatemalan woman and her son were persecuted on account of the husband and brother’s affiliation with the military and counter-guerilla activities.¹¹⁷ Mr. Rios was abducted and killed by guerrillas. Ms. Rios was kidnapped, arbitrarily detained, her tendons in her hand were cut, and she was threatened via phone after her release. Her son escaped an attempted kidnapping. The Court highlighted the standard of showing by direct or circumstantial evidence that the applicants held or that their persecutors believed that they held a political opinion and they were persecuted on account of such.¹¹⁸ It cited its precedence confirming that “persecution on account of anti-guerilla sympathies, statements, and activities amounts to persecution on account of political opinion, in another case the Shining Path persecuted the applicant because they imputed to her the political opinions of her husband who was involved with the Peruvian Police Force’s counter-insurgency movement- “(E)ven if Meza-Manay held no personal political beliefs against the Shining Path, she was still eligible for asylum because of the Shining Path’s persecution of her based on imputed political opinion.”¹¹⁹ (The abuses included attempted kidnapping, bomb attacks, phone threats, and abduction and assassination of a relative)¹²⁰ In the Rios & Rios cases it held that the applicants were “perceived to be . . . political opponents” by the

¹¹⁷ Rios & Rios v. Ashcroft, Attorney General, 287 F.3rd 895 (2002).

¹¹⁸ The Court also noted that it has held a finding of persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue. Ernesto Navas, 217 F. 3rd 646, 657 (9th Cir 2000). Where police beat and threaten the spouse of a known dissident, it is logical, in the absence of evidence pointing to another motive, to conclude that they did so because of the spouse’s presumed guilt by association. In the eyes of those who persecute the spouse of a political activist, the activist’s political sins are, by derivation, the spouse’s.

¹¹⁹ Manay v. INS, 139 F. 3rd 759, 764 (9th Cir. 1998).

¹²⁰ See also Ventura v. INS, 264 F 3rd 1150 (9th Cir. 2001) finding persecution on account of political opinion where guerrillas sent threatening letters because they believed him to have anti-guerilla sympathies and attacked and killed his relatives because of such sympathies. See also Del Carmen Molina v. INS, 170 F. 3rd 1247 (9th

guerrillas, and were the intended “targets” of the guerillas’ violent acts. The Court further held that the Immigration and Nationalization Service failed to sufficiently rebut the presumption in favor of a finding of a threat of future persecution due to lack of changed country conditions.

- In Case BS, involving a Kurd from Iraq, UDI failed to address the imputability of the applicant’s brother’s political commentaries against the Kurdish Workers’ Party (PKK) which were published in the newspaper. The PKK searched his home to find his brother, threw rocks at the house, cut off the electricity, and fastened explosives onto the wall, and sent a bomb package to the house (both bombs were detonated by PUK). They abused his family, hurt him so badly that he was hospitalised, and ran him over with a car. UDI provided humanitarian protection instead of asylum, noting doubts about credibility, and based the view that the acts are criminal in nature not persecutory. Further it held the perspective that PUK was capable of providing protection, thus indicating no risk of harm:

“The Directorate is of the opinion that the applicant has not substantiated to a sufficient degree that he upon return to his home country will be in danger of being exposed to reactions which can be determined to be persecution in the sense of the Act and Convention. The applicant has not shown political activity of such nature or such extent that it can give reason to fear persecution.

The Directorate has also assessed the applicant’s information that he has been run over by PKK supporters on motor cycles. The Directorate is of the opinion that this can be characterised as a criminal act which should be reported to the authorities in the area, and this circumstance cannot be regarded as persecution in the sense of the Act or Convention. In this case, the Directorate also bases its opinion on the fact that the PUK has the ability and will to provide protection to the applicant.”

Because he was an unaccompanied minor with two brothers in Norway, he was given a permit on compassionate grounds. However, this case should have had a more thorough discussion of imputed political opinion and social group.

- In Case BT, the applicant was from Sudan. Her husband was disappeared on account of his political activities. Although she claimed to have been arrested, whipped, and raped on account of alleged identification with her husband’s

Cir.1999) finding persecution on account of political opinion where the guerilla sent threatening notes and killed relatives military affiliations.

views, UDI recommended humanitarian protection rather than asylum due to her low level of credibility.

- In contrast see Case GS involving a man from Belorussia who was subject to arbitrary detention, persecutory prosecution, and violation of security of the person due to the imputability of his mother's political activities. He was given asylum.
- In Case AK the applicant's brother was killed by Islamists in Algeria. He became a member of an organization representing family members of victims of terrorism. Instead of recognizing persecution due to political opinion or social group, the caseworker states that there is no political activity. However he indicated concern that the State could not fulfil its protection role. UDI had doubts regarding credibility but stated that they are not material. Hence it gave the benefit of the doubt and granted a permit on compassionate grounds according to the 15 month rule instead of asylum.
- In Case AH, the applicant from Afghanistan (member of the hazara people) was not recognized as a potential victim of persecution due to imputed political opinion in spite of his father and brother's membership in the Wadat party which resulted in his brother's disappearance. UDI referred to a Danish report which confirms forced disappearances and arrests of hazara people in his area. He was given humanitarian protection instead of asylum, in part this may be due to doubts regarding credibility on account of contradictions in his testimony.
- In Case BW, UDI granted a minor, orphaned applicant humanitarian protection based on compassionate grounds, thereby revealing use of moral principles in order to expand protection. However, the same applicant could have been considered for asylum under the social group and/or political protection categories due to her father's sympathy for a political opposition group, the Oromo Liberation Front (OLF) in Ethiopia. The caseworker did not complete such an analysis, thus the applicant received the lower protection category. Strangely, the caseworker states that asylum cannot be given because she lacks a caretaker, this would appear to be in contradiction of article 22 of the Convention on the Rights to the Child which guarantees the right of all children seeking refugee status whether or not they are accompanied by adults

to receive protection and assistance in the enjoyment of rights according to the convention and other human rights/humanitarian instruments.

- In contrast in Case GC, involving a man from Iran who was evicted from his house on account of his family's political involvement, UDI invoked the 1998 guidelines and lowers the burden of proof in order to grant asylum based on threat of persecution based on "imputed political opinion."

Other issues include gender analysis (which is addressed in full in the report on Implementation of a Gender Perspective within Norwegian Asylum Law), however, I include references here in order to provide a holistic overview of protection issues:

- In Case CC, an Algerian woman who refused to abide by Islamic customs regarding dress, makeup, and divorce was attacked and received death threats. She stopped working as a result of the threats. UDI determined that "*It is further remarked that even though she has stated that she has received death threats, she has not been exposed to assault which can be characterised as persecution in the sense of the Act and Convention either by the authorities or fundamentalists.* " UDI did not conduct a cumulative analysis and rejects consideration of the treatment she underwent as a result of her divorced status and Western style dress to amount to persecution. Although she had depression this is not considered as evidence of past persecution. There was no discussion of the political and social impact of her choices, nor was there sufficient analysis of non-state actor persecution and lack of remedy. The lawyer alleged that she was active in favor of women's movement, but this was set aside due to lack of detail and late filing. Although the supervisor advised the caseworker to check the UNHCR Gender Guidelines, UDI granted only humanitarian protection instead of asylum.
- In Cases CD & CE, the female applicants feared persecution by the Sri Lankan State and society because they made food for the Liberation Tigers of Tamil Eelam (LTTE). Although UDI granted them a permit for compassionate grounds (the first due to her links to Norway and psychiatric problems, the second due to her status as an unaccompanied minor without caretakers in Sri Lanka), their actions fitted within the political category and indicate that they could have received asylum. These cases involved interventions of the home, violation of physical integrity, and evidence of

psychological trauma. In the latter case, UDI actually stated that the applicant was not politically active, demonstrating a narrow interpretation of political opinion. This issue is not gender specific, as males can also participate in indirect actions linked to political opinion, see Case GP involving an Iranian man who delivered publications, food and medicine for the Komala movement. He was given humanitarian protection instead of asylum. These decisions correspond to the standardized statement contained in UDI's concept paper for Sri Lanka:

“Reference is made to the fact that Sri-Lankan authorities are aware that the population in LTTE controlled areas voluntarily or forced to a great degree have assisted LTTE with cooking, care of the wounded, digging of trenches and other work. Such assistance to LTTE has not led to reactions by the authorities which can be characterised as persecution in the sense of the Act or Refugee Convention.”

- In Case CF, the wife of a member of the Tamil Ealam Liberation Organization (TELO) member in Sri Lanka feared persecution by the LTTE. She could have been given asylum under the notion of “imputed political opinion” or “social group”. However such analysis was not completed and she received a permit for compassionate grounds due to her psychiatric problems instead of asylum, in part due to doubts regarding credibility/likelihood of events. UDI did not take the psychologist's evaluation sufficiently into account and made a negative inference due to her having crossed the LTTE territory, the assumption being that if she really was at risk of persecution she would never have crossed. The applicant said that she had no choice but to cross the area
- Similarly, in Case CG, the Congolese applicant claimed to be raped (along with her grandmother who eventually died of internal injuries after a second rape) by a Tutsi on account of her Hutu ethnicity and her father's political activity on behalf of the Hutus. UDI failed to discuss imputed political opinion, whether the act may be construed as evidence of future risk of persecution, or the possible application of the exception to the cessation clause. UDI grants humanitarian protection but denies asylum, noting the possibility of internal flight alternative to a Hutu controlled area:

“The applicant's assertion that she is exposed to assault from Tutsi groups does not provide grounds for asylum. Reference is made to the fact that this can be regarded as being an individual-oriented persecution of the applicant. The applicant's fear of being a random victim of the conflicts in the north-eastern part of her home country falls outside the concept of persecution in the Convention.”

- In Case FN, the applicant was forcibly evicted from her home and arrested while her father was killed because he supported the LTTE. UNE rejected, noting there was no risk of persecution, but this case would have merited a fuller discussion of imputed political opinion.
- In Case CH, the applicant participated in demonstrations calling for re-opening of schools in Afghanistan, she was beaten, whipped, and harassed. She was also a member of the communist party. In spite of her political opinions and actions, as well as the punishment endured for such, UDI decided that she did not have a high enough position to be targeted and that participation in protests in itself was not enough to meet the standard for protection. This decision revealed little understanding of the notion of political opinion and in particular reflects an elitist bias which particularly affects women who rarely hold “top posts” in political leadership in Afghanistan.

In other cases, applicants are given humanitarian protection instead of asylum in spite of identification of a relevant protection category:

- Case CI involved a Sudanese woman involved in Christian missionary work who claimed to have a video exposing criminal acts of the authorities (potential combination of religion and political opinion categories). She claimed to have been arrested, raped, and abused. The police raided her house and found alcohol and the video exposing the State’s involvement in slave trade. The caseworker had doubts regarding her credibility because she contradicted herself and decided that her punishment was more due to the presence of alcohol in her house rather than her religious-political activities (thus downplaying the issue of the arbitrary and excessive nature of the punishment itself). The analysis appears superficial regarding both the persecution standard and the protection categories. She received a permit on compassionate grounds according to the 15 month rule.

Recommendation:

- *It is advisable that the commentary to the law include criteria for analysis of imputed political opinion, there is no requirement that the applicant actually hold such opinion, only that he or she is perceived to hold such opinion, nor is*

there a requirement that the applicant should have manifested the opinion in public.

- *Furthermore, the commentary should specifically refer to Article 19 of the ICCPR in order to understand the scope of political opinion in both a passive and active sense (the latter espouse cultural elements of speech as well as option for transnational communication, this is important given the instances in which carriers of messages are subject to persecution as well as persons engaging in artistic expression):*

*“1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others:
(b) For the protection of national security or of public order (ordre public), or of public health or morals.”*

- One may draw also a link to the rights of assembly and association, given that expression of political opinions and demands are often presented collectively via demonstrations which may result in prosecution or persecution by the State or Non-State actors.

Article 21 of the CCPR:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 of the CCPR:

*“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security of public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed force and of the police in their exercise of this right.”*

6.3 Race, Nationality & Religion

Persecution for reasons of race and/or nationality was prevalent in cases from the Balkans, Russia, as well as Africa. In general there did not appear to be a problem recognizing the categories. However these protection categories were not used as often as political opinion. In part this may be due to confusion regarding the definition of the category (e.g. does race include ethnicity?), preference for political category when race or nationality issues are converged with political opinions, or reluctance to recognize ethnic violence/conflict as persecution linked to a protection ground, instead labelling these actions as criminal acts. With respect to the debate regarding replacement of the “race” category with “ethnic origin”, e.g. in keeping with the Estonian Law on Refugees and the Slovak Republic’s Act on Asylum, this may not be necessary if the commentary to the law or guidelines are amended in order to link the category specifically to definition of race contained in Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination:

“In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

This expands the interpretation of race to include ethnicity and directly calls for a holistic analysis of human rights, including civil and political as well as socio-economic rights. In the cases, the evaluation of the acts of discrimination rarely were deemed to meet the threshold amounting to persecution (see section 5 on persecution). Reference to the CERD may assist caseworkers to incorporate such holistic approaches. However, KRD’s proposed regulations replace race with ethnicity.

With respect to the second factor regarding converged protection categories, in many African countries undergoing conflicts involving access to power and control over resources, political parties are often affiliated with tribes. Similarly in Latin America, indigenous people may be subject to repression by other ethnic groups which control both power and property, thus parties or organizations may be linked to such ethnic identities. Caseworkers should avoid selection of one category for analysis when multiple categories are valid, by conducting an analysis under both race and political opinion, it may be possible to identify the elements necessary to satisfy the definition in the 1951 Convention.

With respect to nationality, there may be a misperception that nationality is equal to citizenships. In theory, the notion of nationality within refugee law applies to identities linked to language, culture, tradition- a combination of external and internal factors. One may also refer to CCPR, Article 27:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

As pertaining religion, CCPR sets forth a standard regarding beliefs Article 18:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”

The caseworkers indicated some concern that they feared their practice may be discriminatory with respect to persons who converted to a religion as opposed to persons who maintained a religious identity held by their family, the former less likely to attain protection as opposed to the latter, while other caseworkers asserted that this was most often due to credibility issues. We were not given sufficient cases to explore this issue and recommend that this topic be addressed in a separate study at a later time.

Recommendation:

- *The law should be amended to include a cross-reference to the CERD when addressing race (alternatively race may be replaced with “ethnicity”), the UN Declaration on Minority Rights and the CCPR art. 27 when addressing either nationality or race and CCPR Article 18 when addressing religion. Furthermore, caseworkers should be reminded that many cases may involve cross-over analysis of various protection categories.¹²¹*

¹²¹ See James Hathaway, *The Law of Refugee Status*, 141 (Butterworths 1991) “The possibility of overlap between race and other enumerated factors such as religion, nationality, and membership of a particular social group is thus clear, but presents no real problem since claims may be based on one or a combination of forms of civil or political disfranchisement.” See also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva 1992) paras. 66-67:

“In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above (race, religion, nationality, membership of a particular social group or political

6.4 Conscientious Objectors

One of the most fascinating issues I came across when reviewing the cases was that of conscientious objectors and draft evaders. This issue falls under political opinion, race, religion, etc. depending on the facts. The grounds for conscientious objection is linked to the right of freedom of conscience, contained in Article 18 of the ICCPR and Article 9 of the ECHR. Both the UN General Assembly and the Commission of Human Rights have issued resolutions calling for recognition of asylum to conscientious objectors in accordance with the 1951 Convention.¹²² However, within the cases examined, these types of cases never received asylum. This appears to be due to a lack of understanding of the relevant criteria for analysis. With respect to conscientious objectors and draft evaders, the Fisknes analysis fails to point out the cases in which such persons would be entitled to protection, for example cases in which the draft is discriminatory, e.g. minorities are selected to perform dangerous duties, where the war in itself is considered illegal in the eyes of the international community, where the applicant has a good faith conviction derived from his beliefs, most often linked to religious identity.¹²³ Furthermore, should the punishment for non-performance truly be excessive, it may amount to persecution meriting asylum, not only humanitarian protection. Review of the UDI & UNE cases reveals that the focus is on the proportionality of the level of punishment. Yet the reasoning does not always correspond to the claims by asylum seekers regarding the State's or guerillas' use of forced labour, placement in battalions sent to the front for high risk-duty, arbitrary detention, physical abuse, and conditions amounting to cruel

opinion). It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often, the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his cases to such an extent as to identify the reasons in detail.

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

¹²² UN General Assembly Resolution 22/165 and UN Commission on Human Rights Resolution 1998/77.

¹²³ See Fisknes, *supra* note 94. Goodwin Gill, Guy, *The Refugee in International Law*, 54-59 (Clarendon 1996) provides an overview of the protection standards pertaining this group. See also Emily N. Marcus, "Conscientious Objection as an Emerging Human Rights" 38 *Va. J. Intl L.* 507 (1998); D. Christopher Decker & Lucia Fresa, *The Status of Conscientious Objection under Article 4 of the European Convention of Human Rights*, 33 *NYU J. Intl L & Pol.* 379 (2001); and Marie Grace Maijor, *Conscientious Objection to Military Service, The European Commission on Human Rights and the Human Rights Committee*, 32 *Cal. W. Intl. L. J.* (2001). See also UN docs: E/CN.4/Sub.2/1983/30/rev.1; E/CN.4/1989/30 (20 Dec. 1988); and E/CN.4/L.10/Add.15 (9 March 1989).

and inhuman treatment in prisons, see for example cases from Eritrea & Russia.¹²⁴ UDI's practice concerning draft evaders and conscientious objectors is at times subject to standard answers, e.g.:

"The Directorate has noted the applicant's arguments that he does not wish to do military service. The Directorate of Immigration remarks that avoidance of military service is not a circumstance which in itself indicates persecution. Reference is made to the fact that avoidance of mandatory military service is punishable in most countries, including Norway. Neither does the Directorate have any information that such act will provide grounds for reactions which can be characterised as persecution."

One may also consider the Algerian concept paper which characterizes the Algerian conflict as not being condemned by the international community and rejects the possibility that soldiers will be required to participate in military actions which involve gross abuse of human rights (in spite of human rights reports to the contrary).

The Russian concept paper states that punishment for refusal to participate in the military will not result in an unreasonably long detention. Although it admits that the Russian prison conditions have been criticized (indeed human rights agencies have stated that the conditions may amount to cruel and inhuman treatment), it deems this insufficient to found an asylum claim. This is reiterated by UNE:

"Russian prisons are worthy of criticism, but the risk of imprisonment for desertion, according to UNE's practice, does not provide grounds for asylum or other humanitarian grounds even though UNE regards it as probable that the applicant can be punished."

- Case FN involved a conscientious objector who was himself of Chechen descent and whose own house was burned down. He emphasized his opposition to a war which he considered to be unjust and inhumane: *"It is not war, but slaughter. The Russians try to kill as many Chechens as possible. Both women and children."* UNE rejected utilizing reasoning which prompts concern due to the failure to pursue cumulative analysis or full discussion of the lack of access to justice at the national level. It dismissed allegations of past and future violations due to ethnic discrimination as being insufficient to

¹²⁴ On Eritrea see Amnesty International, "Malta: The government should suspend deportations of Eritreans." EUR/33/001/2002 available at: <http://www.amnesty.org>. The report documents forced conscription, no right to conscientious objection, and the use of arbitrary detention, torture, and forced labour. On Russia, see UNE case FM discussed further).

In comparison see *Lukwago v. Ashcroft*, 2003 U.S. App. LEXIS 9328 (3rd Cir. May 14 2003) involving an Ugandan minor who was captured by the Lord's Resistance Army and forcibly conscripted by them, he underwent physical and psychological abuse, was forced to kill his friend, watch the murder of his parents, view the mutilation of civilians as the killings of two children who unsuccessfully tried to escape the camps- the Court notes that the threat of death amounted to disproportionately severe punishment for refusal to serve. The Court remanded the case to the Board of Immigration of Appeals for examination of whether

merit protection, in spite of its recognition of both the reality of ethnic discrimination and the lack of access to justice:

“The appellant has asserted that he fears for his life in prison, because he is ethnic Chechen. As with circumstances outside prison, the Board is aware that ethnic Chechens are exposed to harassment and partial discrimination in Russia. However, these are not circumstances which pursuant to their seriousness and extent, fall under the Refugee Convention. The circumstance that the appellant’s mother experienced that her house was set on fire is to be regarded as a criminal act subject to Russian criminal law and cannot be connected to any of the persecution grounds in Art. 1 A of the Convention. The appellant is referred to take the matter up with the correct public entity in his home country. The Board is aware that the police and judicial system in the appellant’s home land are suffer partly from a lack of resources, and in some cases corruption, and because of that it can therefore be difficult to render assistance in individual cases. Nevertheless, our basis is that home country’s authorities have sufficient ability and will to assist the citizens of the country concerning criminal acts. Consequently, there is insufficient reason to believe that the appellant upon return to the home country risks reactions from the authorities or others which can be characterised as persecution in the sense of the Convention and Immigration Act.”

Regarding draftees wishing to avoid being sent to Chechnya, the UDI paper notes that the likelihood is small given the assumption that the army utilizes contract soldiers who volunteer, or draftees from the region near Chechnya. There is no analysis of the legitimacy of the armed conflict or the ongoing gross violations of human rights and humanitarian law which have been documented by human rights organizations as well the press.¹²⁵ On the contrary, the paper notes that the Russian authorities can send soldiers and officers to conflict areas without violating international human rights.

- One poignant UNE decision involving a Russian conscientious objector (Case FQ) discussed the complexity of evaluating this issue, especially regarding the need for the Norwegian government to present one voice with respect to assessing a country situation:

“The international community, including Norway, has expressed concern about the human rights situation in Chechnya, for the violations the civilian population is exposed to by both sides in the conflict. However, the international community has not taken the step of condemning the Russian military action in Chechnya, either during the first conflict from 1994-96, or during the last conflict 1999. . . Neither have the Norwegian authorities by Parliament, Government and

Lukwago faces a risk of persecution on account of imputed anti –LRA political opinion or membership in a particular social group composed of former child soldiers who have escaped the LRA.

¹²⁵ See Human Rights Watch, Human Rights Situation in Chechnya, Briefing Paper to the 59th Session of the UN Commission on Human Rights (7 April 2003) available at <http://hrw.org/backgrounder/eca/chechnya/>. See also the website for the International Humanitarian Law Research Initiative: <http://www.ihlresearch.org>.

Foreign Affairs authorities condemned the conflict as being contrary to fundamental human rights.”

In the remarks UNE further noted: *”In the judgement of the secretariate the immigration authorities should then be cautious in assessing the general situation differently than Norwegian authorities otherwise.”* The applicant was rejected.

One may consider a review of the Canadian practice which notes “. . . where military actions violate international standards, the claimant might be forced into association with wrongdoing” and thus constitutes a serious harm amounting to persecution.¹²⁶ It further highlight the possibility that conscription activities which are illegal lack legitimacy under traditional perceptions of the exercise of state authority, and calls for review of the actual practice regarding deserters and conscientious objectors as opposed the de jure penalties. Furthermore, it notes that although a claimant may not have a strong conviction for refusing to serve, his refusal may be interpreted by the State as indicating a political opinion.¹²⁷

Many UNE decisions in this regard repeat the reasoning used in UDI and add that the State lacks the capacity to follow up desertion cases and often issues fines instead of detention as punishment:

- Case FM involving a Russian deserter and claimed persecution by the Federal Security Service. He stated that he deserted because he did not want to kill people. He claimed that his brother deserted and received five years in jail, and that both were attacked in 2002. UDI was concerned about his credibility due to his use of a false identity, but the lawyer explained that the applicant was afraid that the Norwegian police would send the information to the Russian police (an understandable fear from his perspective given the lack of trust of the police in Russia and lack of knowledge of different practice among Norwegian police). The lawyer noted that the threat of an “extrajudicial” punishment for desertion is real and would be a violation of Article 3 of the ECHR. Neither UDI nor UNE addressed this issue directly,

¹²⁶ Canadian Immigration and Refugee Board, Interpretation of the Convention Refugee Definition in the Case Law (IRB 31 December 1999) citing Zolfagharkhani v. Canada (Minister of Employment and Immigration (1993) 3 F.C 540 (C.A.) at 555.

¹²⁷ Ahani, Roozbeh v. MCI (F.C.T.D.; no. IMM-4985-93), MacKay, 4 January 1995 at 5 cited in IRB Id.

The Croatian concept paper also refuses recognition of grounds for asylum based on conscientious objection, noting that the authorities are believed to be combating harassment of ethnic Serbs who serve in the Croatian army.

In general, claims involving conscientious objectors and draft evaders are treated as manifestly unfounded, thus the UNE Secretariat tends to uphold UDI's decisions. Some UNE cases on this topic revealed consideration of several (sometimes all) of the relevant factors:

- UNE Case BY involved a Jehovah's Witness from Armenia who was jailed for two months due to his refusal to participate in the military. He was physically abused, then transferred to a military camp where he worked for two years. Afterwards he was called for military service once again, thus he migrated. He claimed that if he were to be sent back he would be jailed for three years and forced to serve in the military, as there is no alternative form of service available. Furthermore, he asserted discriminatory treatment regarding punishment of Jehovah's witnesses. UDI found the story to be unreliable, as there appeared to be no military activity in the area he cited (this proved to be incorrect according to UNE), that he demonstrated little military knowledge, that the form of contact was unusual (via telephone), and that it was unlikely that he would receive excessive punishment. UNE stated that even if he were jailed for three years, "*such sentence cannot be regarded as punishment of such seriousness and extent that it may be regarded as persecution in the sense of the Act and Convention*" The Board majority granted a permit on compassionate grounds due to the risk that he would be treated in a discriminatory manner due to his religion upon imprisonment. This analysis would ground a grant of asylum and humanitarian protection as well, but here it is used to grant non-legal protection.¹²⁸
- Case GO involved a deserter from Congo who claimed to have left because he did not want to kill people. He was recognized as a refugee by UNHCR, he is given humanitarian protection due to the inability of the caseworker to identify a protection category. The applicant had two children in Norway whose mother was HIV positive; given their eventual dependency on him as sole caretaker he was given protection but not asylum.

¹²⁸ The minority questions the credibility of the applicant and states that the applicant could avoid imprisonment via fines, this is a strange reasoning as if the authorities seem to support corrupt tactics as legitimate mechanisms for protection against human rights abuses.

Other issues included women who feared that they would be utilized as sexual slaves upon drafting into the army:

- Case HA involved a woman from Eritrea who did not report for military service due to her fear of being subjected to systematic rape as well as reasons of conscience. UNE stated that there are no reports available on rape in the military (indeed this is a topic which is difficult for NGOs to gain access to informants for preparation of reports) and that her religion did not counter participation in the military, thus she was rejected.

Of concern is that the link to slavery or cruel and inhuman treatment is rarely drawn, hence cases which call for consideration of jus cogens rights linked to asylum are not addressed fully.

- In contrast see Case GW involving a man from Congo who was forcibly recruited into the military and subjected to rape, cruel and inhuman treatment, and arbitrary detention on account of his political opinion (one may also add social group) and he was given asylum.

It should be noted that there is lesser reference to international condemnation of military actions, in spite of references by lawyers, see Case FM in which the lawyer claims that the war in Chechnya has been condemned by the West as a “*particularly cruel war*”.

Recommendation:

- *Cases involving conscientious objectors and military deserters should be given full, individual analysis given their complex nature. They should not be considered prima facie manifestly unfounded or subject to standardized answers.*
- *Caseworkers are to be instructed in the relevance of conducting a systematized analysis of the legitimacy, extensiveness and scope of action, existence of war crimes (see Geneva Conventions and Protocols) and other criminal activity such as trafficking, extortion, etc. occurring in war. Further, they should examine the extent to which non-discrimination norms are adhered to with respect to recruitment, and the existence of reasons for non-participation*

*relating to conscience or religion. Finally, there is need for review of standards pertaining to excessive punishment- proportionality, likelihood of implementation, discriminatory application, arbitrary detention or detention in conditions amounting to cruel and inhuman treatment, violation of fundamental right of the soldiers themselves, torture, sexual violence and forced labour within the armed forces.*¹²⁹

7. Use of Internal Flight Alternative in relation to Internal Displacement

Another explanation for the low asylum rate is the extensive use of internal flight alternative. All states have the responsibility to protect their citizens. The principle is that a person who can reasonably seek safety in another part of his country is not in need of asylum. However UNHCR recognizes that it is not necessary that the applicant demonstrate that he/she faces a risk of persecution in the whole territory in order to receive asylum, see UNHCR Handbook, para. 91. Furthermore, where the State is the agent of persecution, IFA should not be applied, as it is assumed that the State has access to the entire territory. Hathaway requires the IFA to serve as an “antidote” to the primary risk of persecution, to guarantee protection from additional risk of serious harm, and to grant protection in terms of access to e.g. non-discrimination, employment, public welfare, and education.¹³⁰ Claimants arriving from countries in which the immigration authorities believe there to be internal flight alternatives are sent back, often as a result of a summary evaluation, without a full review of the threat of persecution or threat to human rights in the IFA, as well as complications reaching the IFA.

The Canadian Guidelines on Internal Flight Alternative calls for use of IFA in cases where it would be “reasonable in all circumstances.” It calls for analysis of the risk of persecution in another part of the country, whether it would be unduly harsh to force the

¹²⁹ *Because of the significant number of cases addressing these issues across a span of countries, this author has submitted a post-doc application to conduct a full review in order to establish comprehensive guidelines.*

¹³⁰ James Hathaway & Michelle Foster, Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination (UNHCR 2001). See also Reinhard Marx, “The Criteria of Applying the ‘Internal Flight Alternative’ Test in National Refugee Status Determination Procedures”, in 14 International Journal of Refugee Law 179 (Oxford 2002).

applicant to move to another part of the country, whether there is physical danger or undue hardship with respect to travelling or staying in the new area, are there physical barriers preventing access. One must also consider whether it is likely that the agents of persecution will expand their activities within the foreseeable future. In short, selection of IFA must be specifically grounded in analysis which proves the safety and durability of such option. Furthermore, one must take into account the special circumstances of the elderly, women, children, health, ethnic & cultural ties, political & social affiliation, as well as educational and vocational characteristics in order to determine the applicability of IFA to the individual. Within the United States, consideration of whether it is reasonable for the applicant to relocate would include evaluating whether he/she would face other serious harm in the place of suggested relocation, any ongoing civil strife within the country, administrative, economic or judicial infrastructure, geographical limitations, financial and logistical barriers, violations of human rights norms (civil and political as well as socio-economic), social and cultural constraints such as age, gender, health, and social and familial ties, and circumstances which place the refugee in an illusory unpredictable situation.¹³¹

Among the Norwegian cases, I did find some examples of good analysis of why IFA would not be applicable, e.g. considering the applicant's vulnerability as a woman without economic support, as well as ethnic grounds. However, there was a great deal of variability.

- For example, in Case DO, UDI advised the applicant to move to another part of Kosovo without any discussion of the viability of such move and applies a comparative perspective:

"The security situation in Kosovo no longer indicates that there is a general need for protection for the Kosovo-Albanian populace. The Directorate is of the opinion that the applicant in the future will not be exposed to reactions from the authorities, individuals or groups in the home country, which can be characterised as persecution in the sense of the Act and Convention.

Neither has there been any information presented which would indicate that the applicant in the future will be in an especially exposed situation compared with other ethnic Albanians in the area."

Indeed use of an internal flight alternative analysis should include reference to specific standards pertaining to civil & political as well as socio-economic rights, this decision lacked a systematized analysis of the relevant human rights standards, instead pointing to the existence of UN and OSCE institutions to ground return. He was rejected.

The concept paper contains the following language in a standard answer:

¹³¹ See *Arout Melkonian v. John Ashcroft*, Attorney General, 320 F 3rd. 1061 (9th Cir. September 9, 2002) citing 8 C.F.R. §208.13(b)(3) (2001) and *In re T-M-B*, 21 I & N Dec. 775, 789 (BIA 1997), Rosenberg, dissent.

“The Directorate has noted that the applicant is from the northern part Mitrovica, which at present is populated mainly by Serbs. The Directorate is also aware of the continued difficult and tense situation in this town, but is of the opinion that it is not sufficiently substantiated that the applicant on return to Kosovo will be exposed to persecution in the sense of the Act and Convention.. The assessment of whether the applicant risks such persecution upon return to Kosovo is based on the circumstances in the applicant’s local area. The Directorate is of the opinion that the applicant as an ethnic Albanian will be safe in his local area.”

It should be noted that at present there are ca. 54,000 IDPs in Kosovo, up from 30,000 previously and minorities remain insecure.

One UDI response (reflecting the 1998 position which has since changed with respect to Colombia, but which may be relevant to other countries) characterized the protection gap between use of IFA and prevention of internal displacement, as the immigration authorities actually cited the internal displacement crisis as an example of what the applicant should do:

“We would add that if the applicant’s subjective opinion is that he cannot live in his home town, we would refer him to move to another part of the country such as many hundreds of thousands of others have had to do Colombia.”

The concept paper for Irak offers the following questionable standardized recommendation of IFA, considering that the internally displaced population in Iraq is considered to be between 700,000-1,000,000 and lacks basic conditions of security and dignity:

“The Directorate of Immigration is otherwise of the opinion that the applicant has such connection to Northern Iraq that he/she should be able to seek protection from the local authorities there. Reference is made to the fact that the applicant has lived in the area for a long time.”

Similarly, the concept paper for Somalia contains an IFA recommendation (indeed the leader of the section asserts that IFA considered for all of the African countries)¹³²:

*“The Directorate refers further to the fact that the applicant has *clan and *residence connections to northwest Somalia where the political, humanitarian and security situation has been stable for a long time. It is remarked that UN has been carrying out repatriation in the region for several years.*

*The Directorate also refers to the fact that the applicant has *clan and *residence connections to northeast Somalia where the humanitarian situation is regarded as stable. The political situation in the area seems to be somewhat unstable at times. To a certain degree this influences the security situation in limited areas, without being of such nature that §15 of the Immigration Act prevents return.*

*The applicant’s clan is dominant in the area, and the assessment basis is that he *she can receive sufficient protection there.”*

There are 350,000-400,000 internally displaced persons in Somalia, and conditions for return of refugees are deplorable in spite of UNHCR sponsored returns. There is a lack of

access to water and basic infrastructure. Indeed, the NGOs and UNHCR admit to cycles of returning refugees due to a need for medical assistance or other support unavailable outside the camps. Demining and demobilization initiatives have progressed very slowly, hence there remains a lack of security. The use of IFA does not appear to be appropriate with respect to this country. There is a need to review cases from all countries undergoing protracted conflicts and generalized violence with a human rights approach in order to identify specific grounds for protection.

Several cases reveal very good individual analysis:

- UNE Case DP, in which an ethnic Albanian family was given asylum. Their house was burned down and she had no opportunity to attain a job. Although UDI rejected, noting that the lack of housing and other socio-economic problems were not enough for asylum. At the UNE level, asylum was granted because they will be identified as "Serb friendly" due to past employment in the University and the lack of an internal flight alternative. The majority found *"that there is a foreseeable danger that the appellants can be exposed to attempts to kill them or cause injury to their health or other fundamental human rights regardless of where they live in Kosovo."* The reference to the right to health and general reference to fundamental human rights reveals a holistic approach to protection. The minority did not support asylum, based on the fact that many other persons lost their homes during the war, and did not think that this case distinguished itself. Nevertheless, the two children in the case may have affected the decision, although there was no mention of the CRC. (UNHCR provided a letter which recommended against return due to the danger of winding up as IDP, and NOAS also referred to the children's psychiatric needs, the loss of home, and danger of winding up as IDPs.) In part, this decision appeared to respond to a UNHCR Position Paper on Kosovo recommending against application of IFA due to risk of becoming IDPs, thus demonstrating the influence of such documentation to identify the complexity of return to conditions in which security and dignity are not guaranteed.

However, it appears that when protection is given, it is more common to grant humanitarian protection instead of asylum based on practice as pertaining certain geographic regions, see Case GD involving a woman who claimed that her entire family disappeared after

¹³² See Global IDP Project, Internal Displacement in Africa (2003) available at <http://www.idproject.org>

the Mai Mai militia attacked the Banya people. Although she was not considered very credible, she was given humanitarian protection based on the practice for East Congo.

In sum, the Norwegian government appears to lack a “single voice” with respect to the link between refugees and internally displaced persons: it provides financial support to combating internal displacement crises via grants by the Ministry of Foreign Affairs, but promotes internal displacement via return of asylum seekers by UDI to situations in which security and dignity is not guaranteed.

Given that the number of IDPs in the world is far more than the number of refugees, it is important that the Norwegian government not worsen IDP crises through premature or inappropriate returns. If IFA is not reasonable, the applicant should receive asylum.

Recommendation:

- *There is a need to develop human rights based guidelines for IFA determination, including reference to normative standards such as the UN Guiding Principles on Internal Displacement (which recognizes their rights including the right to seek asylum), the Norwegian Refugee Council's Global IDP Database, and reports from human rights and development agencies.*
- *The KRD proposed regulations include a recognition of internal flight alternative highlight the minimum criteria for determination of the reasonableness of such recommendation: “Det trygge området må være fysisk tilgjengelig for søkeren, det må ikke være vesentlig fare forbundet med å nå dit og søkeren må ikke risikere andre overgrep i det interne fluktområdet som kan begrunne anerkjennelse som flyktning.” This standard should be expanded to include establishment of a lack of risk serious harm not amounting to persecution, guarantee of basic socio-economic and civil and political rights and non-discrimination, and consider the individual circumstances of the applicant.*
- *Reference to international organizations or other non-state actors as agents of protection should not be formalistic, evaluation must be made of the extent to which such actors are actually able to enforce the rule of law, protect*

minorities, and provide remedies for victims in practice. (This recommendation is also applicable to analysis of effective protection.)

8. Exclusion Clauses

The 1951 Convention sets forth that certain asylum seekers may be deemed to be unworthy of protection due to their participation in human rights/humanitarian law violations or criminal violations. It should be noted that exclusion clauses should be applied with caution, they should not be misinterpreted to deny protection to political activists who deserve protection. In the current anti-terrorist climate, the risk of abuse is high, so the authorities should take great care. Furthermore, all asylum seekers should be first assessed for inclusion prior to embarking on an exclusion analysis. An asylum seeker who is excluded from the refugee definition may nevertheless merit humanitarian protection in accordance with 15 (1) and the non-refoulement standards relating to a threat to life or risk of torture reflecting principles contained in the Convention against Torture and the European Convention on Human Rights.

The 1951 Convention, Article 1 F, calls for an exclusion analysis to be conducted:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

In like manner to the refugee definition, within the Norwegian law reference to the exclusion clauses of the 1951 Convention is not explicit. The following citation is contained in §16:

“A refugee falling under the Refugee Convention Art. 1 C-F can be excluded in whole or in part from the rights and the protection which is laid down in this chapter and which does not concern the case handling.”

The law denies non-refoulement protection to persons falling under exclusion or the exception to the non-refoulement standard contained in the 1951 Convention, Article 33:

“Protection pursuant to the first subsection is not applicable to a foreigner who on reasonable grounds is regarded as a danger to the security of the Realm or who has received a final judgement for a particularly serious crime and who because of this constitutes a danger to society. Neither is

protection applicable when there are circumstances present as stated in the Refugee Convention Art. 1 F”.

Since the categories for exclusion are not reprinted within the law, caseworkers may be unfamiliar with these standards. In addition, caseworkers receive little training on the application of these clauses or of the international instruments relevant to these norms, for example the Rome Statute establishing the ICC (1998), the definitions utilized in Nuremburg, the Geneva Conventions and their Protocols, the Convention Against Genocide, the UN Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, etc.¹³³

In comparison, on exclusion, the Swedish Aliens Act identifies various categories which reveal the link between international criminal law and refugee law: terrorists, persons who violate humanitarian violations or are senior officials in governments engaged in terrorism, systematic or gross human rights violations or war crimes, or crimes against humanity, participates in organized crime, etc. (See also Canadian Immigration Act.) Norway has a duty to ensure that persons linked to the commission of such acts not utilize the asylum process as a means of escaping prosecution. The failure to apply the exclusion clauses results in a weakening of the 1951 Convention as protection may be misapplied to those undeserving of the grant of asylum (with the exception of the non-refoulement guarantee which is applicable to all persons under the CAT and ECHR).

Lawyers have a shared burden to evaluate exclusion issues in order not to commit fraud upon the system by presenting a case for asylum which is undeserving without revealing this issue. In the event the lawyer identifies exclusion issues, he or she has a duty to reveal them to the authorities and adjust the application to request non-refoulement in the event that this is applicable should the immigration authority apply the exclusion clause *after* completing the inclusion analysis.¹³⁴ Non-revelation of such issues results in abusive processing of cases. Although the CAT and ECHR’s provisions on non-refoulement may substantiate non-return of this person in spite of exclusion criteria under the 1951 Convention, it is important that the caseworker demonstrate that he/she has completed a full analysis of the exclusion issues. It is necessary to understand to what extent the applicant participated in persecutory acts or other crimes, although the applicant may not “have pulled the trigger” he may have provided material assistance for the pursuit of such actions. In comparison, consider a case from the U.S. which excluded a member of the Committee for Defense of the

¹³³ See generally Peter J. Van Kriekan, *Refugee Law in Context: The Exclusion Clause* (TMC Asser Press 1999).

¹³⁴ See European Legal Network on Asylum, *International Course on the Application of Article 1C and Article 1F of the 1951 Convention Relating to the Status of Refugees* 17-19 January 2003.

Revolution in Ghana (a para-statal entity charged with working alongside the police) who was responsible for identifying persons to be arrested due to their political opinions, several of whom were subjected to torture and or killed.¹³⁵

Recommendation:

- *Asylum seekers should receive an inclusion analysis prior to exclusion analysis and receive non-refoulement protection in keeping with the standards contained in the CAT and ECHR.*
- *The law should be amended to include the text of the exclusion clauses contained within the 1951 Convention on the Status of Refugees, and may include additional categories of organized crime and terrorism: 1) referring directly to the definition contained in straffeloven §147a; 2) referring to the definition of organized crime contained in the UN Convention on Transnational Organized Crime and its Protocols (2000); and 3) referring to the definition of terrorism contained in the International Convention for the Suppression of the Financing of Terrorism (adopted by the UN General Assembly 1999):*

“Any act intended to cause death or bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.”
- *The commentary to the law should contain definitions and explanations of the terminology used in the exclusion clauses. For example: acts of genocide, crimes against peace, war crimes, and crimes against humanity are defined in the Rome Statute establishing the International Criminal Court, Articles 6-8¹³⁶*
- *There should be reference to genocide, hijacking, hostage-taking and offenses against diplomats as non-political offenses to be subject to exclusion analysis. Commentary should set forth the test of **remoteness** of the offense to the political purpose (no close or direct causal link) and the **disproportionate** nature of the offense in relation to its political aim. Serious non-political*

¹³⁵ In the Matter of Kwando Ofosu v. McElroy, Acting District Director of the New York District of the Immigration and Naturalization Service, 933 F. Supp. 237 (U.S. District Court for the Southern District of New York 1995)

¹³⁶ See <http://www.un.org/law/icc/statute/romeofra.htm>

crimes usually encompass homicide, rape, child molestation, wounding, arson, drugs trafficking and armed robbery. The commentary should also address defenses to exclusion regarding mitigating factors pertaining to the commission of the non-political crime, e.g. minor status of the offender, parole, provocation and self-defense, elapse of time since offense, rehabilitation, non-repetition, etc. as well as the standard for balancing the severity of the crime against the severity of the punishment, e.g. would return result in an excessive punishment amounting to persecution/cruel or inhuman treatment?¹³⁷ Asylum seekers are to receive inclusion analysis prior to exclusion analysis and receive non-refoulement protection in keeping with the standards contained in CAT and ECHR.

- *A Special Unit on Exclusion should be established within UDI & UNE in which the staff hold expertise in criminal law, humanitarian law, human rights law, and refugee law. This would enable full evaluation of the various issues present in such cases. Such office should establish direct liaisons to the Ministry of Local Government, the Ministry of Foreign Affairs, Police Security Service, and the Intelligence Unit of the Ministry of Defence. It should be emphasized that support for the creation of such unit should not be misinterpreted to imply elimination of the inclusion analysis prior to the exclusion analysis.*
- *UNE has recently elaborated a subject memorandum on Flyktningkonvensjonen art. 1F (13.09.2002) which should be disseminated to UDI as well as the NGOs and lawyers working with asylum.*

9. Cessation Clauses

I sought to explain the lack of reference to the cessation clauses in order to highlight the lack of clarity within the law, as well as identify another reason for the low asylum rate, i.e. lack of application of the compelling reasons exception in Article 1 C 5 of the 1951 Convention.

The cessation clauses in Article 1 C-E address the modes in which refugee status may be removed when the person is deemed to lack a need of protection:

¹³⁷ See Geoff Gilbert, Current Issues in the Application of the Exclusion Clauses (UNHCR 2001).

“C. This Convention shall cease to apply to any person falling under the terms of section A if: 1) He has voluntarily re-availed himself of the protection of the country of his nationality; 2) Having lost his nationality, he has voluntarily reacquired it; or 3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or 4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or 5) He can no longer because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; 6) Being a person who has no nationality, he is because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence. Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. 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. (This is has been applied to the Palestinians who are protected by the United Nations Relief and Works Agency.)

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.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”(This is applied when the person has “effective nationality” in another country. This may not necessarily include all rights pertaining to citizens, but would include at minimum the right to enter and be protected against removal.¹³⁸)

I shall address the two circumstances most relevant with respect to issues at present: whether the person has voluntarily re-availed himself of protection of the country of his nationality or whether he can no longer, because of a change in circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. The law notes that refugees falling under the cessation clause remain protected from refoulement: *“A refugee who falls under Art. 1 C-E can nevertheless not be excluded from protection against persecution pursuant to §15.”* In like manner to the exclusion clause, I support inclusion of the text of the cessation clauses within the law.

First, there has been discussion recently regarding refugees who return to the country of origin allegedly “on vacation”. There has been a call for removal of asylum status given such travel. According to the Convention, the test is whether the refugee voluntarily, intentional seeks to re-avail himself of protection of the country of nationality, and that he actually obtains such protection. According to Grahl-Madsen, the mere presence in the home

¹³⁸ Guy Goodwin-Gill, *The Refugee in International Law* 94-95 (Clarendon 1996).

country is not enough, rather one must consciously subject himself to the government and there must be a normalization of the relationship between the State and the individual.¹³⁹ Goodwin-Gill calls for consideration of the age of the refugee (as a minor may not understand the nature of such act), the objective of renewed contact, the success of the contact, the repeated number of contacts, and the advantages obtained by such contact.¹⁴⁰ Initiatives to reform the law should not violate the principles regarding cessation established within the Convention. Hence, any attempt to regulate this issue should require analysis of the actual contact between the State authorities and the applicant and its significance, e.g. an asylum seeker who seeks to explore the situation in the country of origin in order to consider a possible return but who does not seek out State protection or wishes to visit a member of the family who is sick should be evaluated differently than those embarking upon regular vacations or pursuing business activities. According to the European Network on Asylum, refugees who act against their will, such as obeying State instructions to file for a national passport (as opposed to someone who files for a national passport without instruction) or who act due to circumstances beyond one's control, for example filing for divorce in the national court in order to assure international recognition should not be deprived of their status.¹⁴¹ Similarly, attainment of birth certificates and marriage certificates should not be considered as availment of national protection.

Second, according to 1 C (5) refugees may lose such status if there has been a fundamental change in circumstances:

“He can no longer, because the circumstances in connection in which he has been recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality.”

The Executive Committee issued Conclusion No. 69 (1992) on Cessation of Status and the UNHCR Handbook provide some criteria for determination of cessation status, however there is a need for further emphasis on the security, durability, and human rights situation.¹⁴² Past practice reveals that cessation has been applied by UNHCR in situations involving independent statehood, transition to democracy, and resolution of internal

¹³⁹ A. Grahl- Madsen, *The Status of Refugees in International Law*, Vol. 1 384 (1966), cited in Goodwin-Gill, *The Refugee in International Law*, 81 (Clarendon 1996).

¹⁴⁰ Guy Goodwin-Gill, *Id.* at 80-84.

¹⁴¹ European Legal Network on Asylum, *International Course on the Application of Article 1 C and Article 1 F of the 1951 Convention Relating to the Status of Refugees* (17-19 January 2003).

¹⁴² UNHCR, *Expert Roundtables, Summary Conclusions- Cessation of Refugee Status* (3-4 May 2001).

conflict.¹⁴³ UNHCR examines the existence of democratic elections, declarations of amnesties, repeal of oppressive laws, annulments of judgments against political opponents, establishment of legal guarantees against the reoccurrence of discriminatory actions which caused the refugees to leave, and dismantling of former security services.¹⁴⁴ The caseworker should review the de facto and de jure guarantees of the rights to life, liberty, non-discrimination (in particular respect for minority rights), due process, fair recourse of courts, and those rights directly linked to democratic participation, freedom of expression, association, assembly, as well as socio-economic rights linked to basic human needs (right to an adequate standard of living). In short, the changes must specifically remove the cause of fear of persecution and generally establish the rule of law. It is essential that determination proceed via full consultation of the refugee himself, thorough analysis of the real impact of return- e.g. are there real opportunities for achievement of an adequate standard of living, including basic rights to food, shelter, health, etc., would return worsen the IDP situation, would it prove destabilizing to the nation, would there be an increased risk of “revenge” violence. Would imposition of cessation cause a break in strong family, social, and economic ties formed in the host country?

Within the review of cases it appeared that caseworkers may refer to cessation of protection need without specific reference to the standards contained within the 1951 Convention:

- Case EE involved an applicant from Yugoslavia (Bosniak ethnicity) who worked for the security police in Montenegro and fears assassination by Serbian intelligence (he claimed that they previously attempted to assassinate him and kidnapped him). UDI issued the following determination:

“In his home country, the applicant has not been exposed to reactions by the authorities which can be characterised as persecution in the sense of the Act and Convention. Neither has the applicant shown political activity of such nature or such extent that it can give reason to fear persecution. According to the Directorate’s knowledge of the situation in Montenegro, there is no general need for protection as regards the Bosnian population in the area. . . The Directorate cannot see that the applicant will be in mortal danger upon return to his home country. It is further commented that the applicant seems to have a good relationship with the Montegran authorities and can therefore be encouraged to seek protection from them if he experiences problems on his return to the home country.”

¹⁴³ Rafael Bonoan, When is International Protection No Longer Necessary: “The Ceased Circumstances” Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973-1999, paper presented at UNHCR Global Consultations on International Protection (24 April 2001).

¹⁴⁴ Id. citing Note on the Cessation Clause.

In other cases it appears that humanitarian protection will be granted to applicants falling under the cessation clause due to a policy decision related to the applicants nationality:

Consider the language in the concept paper for Yugoslavia:

*“*The Directorate has noted that the applicant has been harassed and beaten up by the police during the period*. Nevertheless the Directorate refers to the fact that the episodes asserted took place several years ago, and that the political circumstances have changed considerably since these acts took place. There has been a change in regime where the new president was elected in a democratic election, and it can be mentioned that central persons in authority in the former regime have been removed. * During the period referred to by the applicant, there was also war between Serbs and Bosnians in Bosnia, a war which has now ended. Even though this in no way justifies what the applicant has been exposed to, the Directorate is of the opinion that the overall situation has changed considerably since the episodes took place, and that it is not sufficiently substantiated that the applicant upon return will be exposed to violations which can be characterised as persecution in the sense of the Act and Convention.”*

- Case EG involved an Afghan woman whose fear of persecution on account of imputed political opinion subsided due to the change of regime (her husband was believed to have worked for Najibullahs regime and was arrested by the Taliban (his parents were killed). Nevertheless, she was granted humanitarian protection, most likely in keeping with policy of non-return to Afghanistan due to the instability for reintegration.

Such cases reveal that the application of the cessation principle appears to be formalistic and not case specific. The fact that the country was considered instable for reintegration reveals that the conditions of security and durability with respect to change of circumstances as well as a base level of human rights guarantees was not met, indicating that the applicant may not necessarily be subject to cessation.

- Case EF involved an applicant from Afghanistan who is given humanitarian protection instead of asylum because of the elimination of the Taliban. The applicant’s father was linked to communists. The applicant himself was jailed, whipped and tortured by the Taliban. He claimed they wanted to recruit him for armed combat. Humanitarian protection was given on account of *“the generally extremely difficult humanitarian situation in Afghanistan and in accordance with UDI’s practice.”*

One perception within UDI has been that since the grant of asylum was extended from one to three years. The staff interpreted this to be a signal that a grant of asylum should never be reversed, hence they do not use cessation clauses.

Neither is reference made to the exception to the cessation clause, Art. 1 C 5 which enables the state to grant protection in spite of cessation circumstances due to compelling reasons linked to the atrocity of the experiences suffered by the asylum applicant. This principle is intended to apply to only a small amount of cases, representing egregious examples of past persecution experienced by persons at one point identified as Convention refugees. Within the United States, immigration agencies and courts have held that applicants are eligible for asylum based on the severity of past persecution, and need not show a likelihood of future persecution.¹⁴⁵ In the Lopez case, the court identified the abduction and detention of a woman which resulting in repeated rapes, denial of food, forced labour, and physical abuse at the hands of the Sandinista military (regardless of change in government) as constituting such horrific past persecution meriting asylum.¹⁴⁶ The Court noted for rape to amount to persecution, the persecutor's motive must be linked to a protection ground and explicitly cites imputes political opinion as being acceptable regardless of the veracity of the imputability. The Court went further to highlight the importance of considering such acts under the compelling reasons exception:

“Rape at the hands of government authorities while imprisoned on account of one’s political views can be an atrocious form of punishment indeed. The severity of the harm of rape is underscored by numerous studies revealing the physical and psychological harm rape causes.”

Such exception is relevant to torture and rape victims but unlikely to be applied:

- Case EH involved a woman (Albanian ethnicity) from Kosovo who was raped along with other women during the war and suffered epilepsy afterwards as a result of the trauma. Her husband stated that he would divorce her if upon return, as she could not receive proper treatment in Kosovo. UDI rejected noting:

“The Directorate has noted that the applicant has been raped, but refers to the fact that this occurred three years ago, and that the Convention provides for future-oriented assessment. The Directorate comments further that the situation in Kosovo has changed considerably since 1999, and that there is no longer any general need for protection regarding the Albanian population. . . the Directorate has noted that the applicant has stated that she has been raped and that she contracted epilepsy after the act. Epilepsy,

¹⁴⁵ Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989).

¹⁴⁶ Lopez-Galarza v. INS, 99 F.3rd 954 (9th Circuit 1996)

however, is not regarded to be a sufficient health cause to give grounds for a residence permit. After a concrete overall assessment, the Directorate is of the opinion that no compassionate grounds are present which can give grounds for a residence permit in accordance with this provision.”

UNE rejected the appeal stating the general social and economic problems, including the lack of housing and work are insufficient grounds for protection. Furthermore, they asserted that she could attain medication. No discussion of 1 C 5 was pursued in the decision.

- Case EI a woman of Albanian ethnicity from Kosovo received humanitarian protection instead of asylum. She was abused by Serbian forces and raped several times in the police station as well as in her home. She did not want to return because people saw her get raped there. UDI noted:

“The Directorate has noted the applicant’s assertions of maltreatment by Serbian forces. . . the situation in Kosovo today, however, is completely different than when the applicant left the area. The security situation in Kosovo no longer indicates that there is a general need for protection for the Kosovo-Albanian population. The Directorate is of the opinion that the applicant in the future will not be exposed to reactions by the authorities, individuals or groups in the home country which can be characterised as persecution in the sense of the Act and Convention. Neither has information been presented which would indicate that the applicant in the future will be in an especially exposed situation compared with other ethnic Albanians in the area.”

She was deemed to have some contradictions in her testimony and a lack of clarity, however she was given the benefit of the doubt, but only received humanitarian protection. UDI applied a comparative approach towards the future, but ignored her special circumstances in the past. In short, there is no analysis of 1 C 5, which may have permitted a grant of asylum. In comparison the Canadian trial division has held that if the evidence establishes compelling reasons, the immigration authorities have a duty to consider the exception regardless of whether or not the claimant raises it.¹⁴⁷

Another issue is the difficult circumstances of women who were raped during the war as a part of ethnic cleansing and have given birth to children of mixed ethnicity. UDI considers that the harassment and problems they will undergo upon return do not amount to persecution, thereby indicating a gender bias and lack of sufficient consideration of the

¹⁴⁷ Rasanayagam, Shayananthi Christelda v. M.C.I. (F.C.T.D., no. –816-91), Wetston, July 25 1995 at 4 cited in Canadian Immigration and Refugee Board, Interpretation of the Convention Refugee Definition in the Case Law , chapter 7-9 (December 31 1999).

relevance of 1 C 5, general humanitarian principles, as well as the need to address the “best interests of the child”:

- Case EK involving a woman from Yugoslavia who was repeatedly raped by Serbian paramilitaries and gave birth to a child of mixed ethnicity. The rape may have constituted both a war crime and part of a crime against humanity given the context of ethnic cleansing. She received humanitarian protection instead of asylum. The child is a physical evidence of the past rape and reflects the concept of the effects of persecution extending from the past into the future.

Men may also suffer atrocious or appalling experiences meriting a grant of asylum. For example, in Canada a refugee who was repeatedly subjected to arrest, detention, torture and whose entire family was subjected to a plethora of abuses, including rape, torture, assassination, etc. was considered to have fallen under the exception due to the severity of the treatment he experienced which essentially negate the impact of changed circumstances in the country of origin.¹⁴⁸ In a U.S. case, the court found grounds for a grant of asylum regardless of the change in country conditions given the applicant’s experience having undergone “re-education”, physical and verbal abuse, and deprivation of food in a Loatian camp.¹⁴⁹ See also another U.S. case addressing the extortion, mock trial and sentencing to death of the owner of several gold mines by the Shining Path.¹⁵⁰

In conclusion, it appears that in some cases the caseworkers grant humanitarian protection due to the severity of the experience, e.g. repeated rapes by State and Non-State actors, however it may be argued that the government would be able to grant asylum by specifically referring to the exception clause in 1 C 5:

“Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.”

¹⁴⁸ Juan Carlos Yong-Gueico et. Al. v. The Minister of Citizenship and Immigration, Federal Court of Canada, Trial Division, June 25 1997.

¹⁴⁹ Vongsakdy v. INS, 171 F.3rd 1203 (9th Cir. 1999)

¹⁵⁰ Del Aguila v. INS, 2000 U.S. App. LEXIS 6174 (9th Circuit). In comparison, consider Case EJ which involved a man of Roma ethnicity from Croatia who was physically attacked by military police because he did not want report for military service. His family was killed in the war, his wife was raped, and his house attacked with a grenade. He was forcibly displaced and later stabbed. He lacked a house, job, and means to feed his children. There was no cumulative analysis. UDI rejects noting that there is “no danger of persecution in the future – harassment is not persecution. . . social or financial problems connected to the high rate of unemployment are not circumstances which can give grounds for asylum.” This case reveals lack of focus on past acts amounting to persecution, although it may not amount to 1 C 5 it helps explain why 1 C 5 is never used.

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Recommendation:

- *The law should be amended to include the full text of the cessation clauses contained within the 1951 Convention on the Status of Refugees. Commentary to the law should include reference to the standards contained in the UNHCR Handbook para.119 when referring to 1 C: **voluntariness** of the refugee’s act, **intention** to reavail himself of protection, and actual attainment of such protection via **reavailment**. Identification of the **fundamental nature of changed circumstances** (as opposed to transitory changes) via analysis of de jure and de facto respect for human rights (in particular those relevant to former dissidents and minorities), legal reforms, the security situation, the strength of the rule of law.*
- *Furthermore, such commentary should include recommended basis for invoking the compelling reasons exception contained in 1 C 5 of the 1951 Convention, e.g. experience of atrocious persecution, including torture and severe rape. Further, it should call for consideration of the existence of psychological effect, such as post-traumatic stress disorder and lingering psychological or emotional suffering.¹⁵¹ (However the absence of such disorder would not be sufficient to negate recognition of compelling reasons given the establishment of facts indicating such situation.)*

¹⁵¹ See Adaros-Serrano v. Canada (Minister of Employment and Immigration) (1993) 22 Imm. L.R. (2nd) 31 (FCTD) at 38 cited in Canadian Immigration and Refugee Board, Interpretation of the Convention Refugee Definition in the Case Law chapter 7-|0 at note 50 (December 31, 1999).

10. Mixed Motives & Age Bias

A further issue complicating the grant of asylum is confusion regarding mixed motives and a certain degree of bias within the processing. Although the 1951 Convention and the human rights instruments include non-discrimination guarantees, the asylum practice unfortunately is not always in keeping with the standards. In some countries, immigration authorities may reveal a bias against poor refugees, this is not the case in Norway.¹⁵² However, there appears to be a lack of awareness regarding the prevalence of mixed motives in migration. There is a danger that the more education and resources an applicant has, the less likely he or she may be considered to merit protection, this may be particularly relevant to female applicants (as male elites, particularly those who are active in politics may be protected). Although it is laudable that the authorities provide protection to the most vulnerable categories (in keeping with UNHCR policy), there is concern that failure to recognize cases involving mixed motives (often including those with higher resources) promotes the stereotype of the refugee as a drain on society rather than an active participant. Refugees are entitled to protection, irrespective of whether or not they exhibit high levels of “human capital”. They should be granted an equal right to consideration of their asylum claims without prejudice. Indeed, increased protection for such persons may improve the society’s perception of refugees at large. The existence of economic incentives for migration may be cited as grounds to negate the validity of facts establishing a well-founded fear of persecution linked to a Convention ground. Indeed, in Case AJ involving the nurse from Colombia who was targeted due to her assistance of guerillas, the lawyer highlighted her human capital value but appeared to have worked against her as the immigration authorities may have interpreted this to mean that she should be considered an economic migrant. In another case from Sudan involving a woman with a degree in Petroleum was not granted asylum in part because she was considered too resourceful and strong.¹⁵³ In contrast, within the U.S., the Ninth Circuit Court has recognized

¹⁵² See *Otuñez-Tursios v. Ascroft*, U.S. Attorney General, 303 F. 3rd 341 U.S. Court of Appeals for the Fifth Circuit (2002) in which the Court denies recognition of a motive based on political opinion or social group in a case involving destruction of property, attempted assassination, and death threats against a peasant leader of a land cooperative in Honduras. The dissent by Judge Wiener provides an interesting analysis of mixed motives. Compare with *Del Aguila v. INS*, 2000 U.S. App. LEXIS 6174 (U.S. Court of Appeals for the Ninth Circuit (2000) in which the owner of several mines in Peru was considered to be targeted by the Shining Path for extortion linked to political reasons.

¹⁵³ The fact that she was unable to fulfil her potential in her country on account of her gender was not fully discussed. The caseworkers also ignored her statements regarding the woman’s right to education and freedom

that the asylum seeker may have mixed motives for fleeing to a country, including economic motives, which would not negate the recognition of a protection need where the initial impetus for such flight was linked to persecution.¹⁵⁴

With respect to age bias, a minor child who faces gender persecution is granted priority in terms of receiving protection. Adult women appear to be less likely to receive asylum on the basis of gender persecution. In Case EL involving a woman from Ethiopia who receives asylum after experiencing bride-kidnapping, forced marriage, rape and beatings, the supervisor comments in the *merknader* that if the applicant had been over 18, the conclusion would be different. There appears to be a fear of “opening the door” to too many women.¹⁵⁵ Similarly, asylum was more often granted to minor girls than minor boys (see Chechen cases discussed previously in the section on the CRC who received permits on compassionate grounds).

Recommendation:

- *The law should be amended to include a non-discrimination guarantee addressing race/ethnicity, nationality, religion, political opinion, sex, social status, disability, property, language, or other similar criteria.*
- *Children, particularly unaccompanied minors, as well as mothers with children, and elderly shall be entitled to protection and assistance corresponding to their condition, special rights, and needs.*
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11. Cut & Paste Technique of Standard Answers

One of the most obvious reasons behind the low grant of asylum is the use of standardized answers which identify categories of specific claims as meriting exclusion from protection rather than inclusion. The overwhelming pressure placed on both UDI and UNE to

from circumcision which are forms of political opinions, even if the applicant herself does not characterize them as such. The caseworkers fail to espouse an expansive interpretation of rights to offer her protection.

¹⁵⁴ *Garcia-Ramos v. INS*, 775 F.2nd 1370, 1375 (9th Cir. 1985)- “We do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best. Nor need fear of persecution be an alien’s only motivation for fleeing.”

¹⁵⁵ Adult males who experience post-traumatic stress may not always be granted humanitarian protection for compassionate grounds as may be offered to women or children, thus raising the issue as to whether men have difficulties attaining recognition of their victimization resulting in reversed gender bias. In Case EM, the applicant from Algeria experienced arbitrary intervention of his home by Islamists. Although the medical report confirms post traumatic stress disorder and suicidal tendencies, UDI does not consider this grounds to give protection on compassionate grounds, and rejects him.

be “effective” has resulted in utilization of “cut & paste” techniques in which standard formula responses (*standard answers*) are copied and placed within decisions. Concept papers may address specific groups, such as minorities, or particular issues, such as homosexuality. Many of the concept papers are oriented towards rejection rather than grant of asylum (one notable exception is the UDI concept paper for Chechnya which is drafted in favor of providing protection). Thus caseworkers who refer to such material are more likely to draft a denial instead of a recognition claim. For example, the concept papers for Belorussia include grounds to reject political activists, victims of domestic violence, homosexuals, victims of crime (assaults committed by Non-State agents), and persons lacking employment. The Pakistan concept papers provide language for rejecting political activists (PPP, PML, and KFM), victims of sectarian violence, persons subject to forced recruitment, members of the ahmadi religion, and religious converts. The Russian concepts provide language for rejecting victims of police corruption or mafia, ethnic minorities subject to harassment, conscientious objectors, and homosexuals. These papers provide an indication of the most common grounds for seeking asylum in these countries, of concern is that some of these issues are very complex and require individual analysis in order to ensure that the need for protection has been adequately evaluated. Indeed, the fact that these issues address minority rights, gender persecution, the ability or willingness of the State to protect its own citizens, and fundamental rights to freedom of expression, conscience, assembly and association indicate the need for close scrutiny of cases. It should be noted that Amnesty International highlighted precisely the same issues as grounds for concern with respect to the latter two countries.¹⁵⁶ In like manner, in spite of human rights reports attesting to the serious violations of human rights, UDI’s Algerian concept paper provide language for rejection of the following:

1. *Persons threatened by Islamists, armed groups, GIA,*
2. *Persons alleging forced recruitment by either State or Non-State actors,*
3. *Persons linked to FIS,*
4. *Members of Berber ethnicity and related political affiliation,*
5. *Policemen,*
6. *Christians,*
7. *Homosexuals*
8. *Journalists*
9. *Persons seeking to avoid generalized insecurity and violence*

¹⁵⁶ See <http://www.amnesty.org>.

Thus, the probability for attaining asylum is very slim, as the primary grounds for protection are essentially negated. In like manner, the concept papers addressing Somalia address a myriad of issues prompting concern:

- 1) *Provides language to reject victims of inter-clan violence,*
- 2) *Highlight the general lack of security as not being sufficient to merit asylum,*
- 3) *Characterizes events as linked to criminal acts rather than persecution per se,*
- 4) *Rejects the likelihood of a risk of forced recruitment,*
- 5) *Rejects Al-Itjihad as a viable agent of persecution,*
- 6) *Rejects association with Siyad Barre as grounds for protection,*
- 7) *Recommends internal flight alternative*

The first three issues raise concern regarding possible insufficient individual analysis of the issue of the State's ability or willingness to protect victims against persecution by Non-State Actors, the clans' own protection duties which have already been discussed previously, as was the issue of IFA in light of internal displacement. With respect to the issue of forced recruitment, this issue is significantly complex to merit individual analysis, rather than standardized answers. In particular, considering the existence of reports confirming forced recruitment of children, direct reference should be made to the Protocol to the CRC on the Involvement of Children in Armed Conflicts.¹⁵⁷

Some papers highlight specific categories, such as political activists or journalists who may be targeted and merit protection, this is positive but may also be limiting in the sense that caseworkers may be more inclined to reject persons not falling within these traditional categories. Although these papers leave open the possibility for distinguishing other special cases, they do not provide criteria or guidance pertaining how to identify such cases. Hence it is less likely that they will be highlighted.

A primary concern is the fact some of the UDI concept papers have prepared standardized statements rejecting recognition of Non-State agents as persecutors and/or formalistically referring to the State's alleged ability to provide effective protection:

¹⁵⁷ See UN Security Council, Report of the Secretary-General on Children and Armed Conflict, S/2002/1299 (26 November 2002) highlighting the UN's "limited ability to monitor recruitment or mount responsive interventions because of insecurity and lack of access" in Somalia.

1. *On persecution by islamites in Iraq: According to the Directorate's information, islamites in the area the applicant comes from have not threatened or attacked individuals in such a manner as described by the applicant. The actions which have taken place have been of a demonstrative nature and not directed towards individuals. The presentation lacks details which would substantiate this.*

2 *The security situation in Kosovo no longer indicates that there is a general need present for protection of the Kosovo-Albanian population. The Directorate is of the opinion that the applicant in the future will not be exposed to reactions by the authorities, individuals or groups in the home country which can be characterised as persecution in the sense of the Act and Convention.*

3. *Reference is made to the fact that the clan conflicts which occur in several places in southern Somalia in themselves are not enough to provide grounds for asylum.*

4. *Somalia: In the opinion of the Directorate, the reactions and occurrences which the applicant * and his *her family have been exposed to are purely criminal acts and not a link in the persecution of persons with the applicant's ethnic or social background. Such reactions do not give grounds for asylum.*

5. *Algeria: The circumstance that the applicant has been exposed to extortion*, threatened*, received threatening letters* from Islamites*, the armed groups*, GIA*, Islamic groups*, does not provide grounds for asylum. The Directorate is also of the opinion that the applicant's fear of reprisals if he refuses to give money to the Islamites, is not a circumstance which can provide grounds for asylum. The violations feared by the applicant fall outside the scope of the Convention, in that the concept of persecution in the sense of the Act and Convention does not include violations which are a result of criminal activity. In the opinion of the Directorate regarding this assertion, the applicant can seek protection from the authorities in the home country.*

6. *Russia, the Mafia or criminal acts: The circumstances the applicant asserts as the grounds for his application for asylum cannot be connected to any of the persecution grounds in the Refugee Convention, and do not form grounds for asylum. These are criminal acts which are punishable according to Russian penal legislation. The applicant is referred to seek assistance from the authorities in the home country.*

The Directorate of Immigration is aware that harassment and attacks can occur against jews in Russia, inter alia by nationalistic organisations such as RNE. Such organisations, however, enjoy little support in the Russian population and Russian authorities distance themselves from, and work actively against, anti-semitic attitudes. Based on the Directorate's knowledge of the situation of the jews in Russia, they are not in a position which would warrant a general need for protection under the Refugee Convention. The acts the applicant asserts to have been exposed to are criminal circumstances which are punishable under Russian penal legislation, and the applicant is referred to seek assistance from the authorities in the home country.

7. *White Russia: Gender-related: The Directorate of Immigration is aware that the White Russian police are hesitant to involve themselves in domestic violence cases, and that if they do it, they often clear up the actual case, without any follow-up of the problem. The Directorate of Immigration, however, is also aware that these problems have had greater attention focused on them in today's White Russia. In recent years a number of support organisations and crisis centres have been set up to help women who have ended up in a situation such as the applicant's.*

The Directorate of Immigration is aware that homosexuals are exposed to social intolerance in the White Russian society and that harassment of homosexuals by both private persons and persons in authority does occur. Homosexual practice, however, was decriminalised in White Russia in 1994. Based on the Directorate's knowledge of the circumstances in the country, homosexual groups and organisations carry on their activities relatively freely, even though such groups have difficulties with being registered with the authorities. In the Directorate's opinion, homosexual groups are not exposed to treatment either by the authorities or private persons at such a level as to warrant general protection under the Refugee Convention..

Criminal acts: The violations and acts to which the applicant has been exposed must basically be regarded as criminal acts. The applicant must therefore be referred to seek assistance from the authorities in the home country. The Directorate of Immigration is aware that parts of the police and judicial system in White Russia can function badly and that bribes can occur. Based on the Directorate's knowledge of the circumstances in the applicant's home country, the Directorate does not find that White Russian authorities in general lack will and ability to protect citizens against criminal violations.

The breadth of the issues deemed unworthy of protection here is broad, and of special concern given that they correlate directly with the topics identified by human rights NGOs as meriting international attention. In addition, what is of most concern is that the standardized answers are applied to a broad array of cases, thus a general reference to criminal acts have been used to address reprisals for political activism, rape, torture, intervention of the home, etc. Because the grounds for denial are de-contextualized, it is difficult for UDI to develop a coherent policy with respect to addressing persecution by Non-State actors. Furthermore, there are due process concerns, as the responses infringes on the right to individual analysis.

It is faster to cut & paste from concept papers rather than design individual analysis. This practice may be in violation of the asylum seeker's right to due process, in the sense that it is questionable to what extent his or her right to an independent determination may be realized when the response has been prepared prior to presentation of the claim. Many decisions have identical wording so that it is difficult to distinguish the analysis of one case from the other. In addition, the use of standard answer gives the false impression that there is no analysis behind the decision. Because each asylum seeker is an individual human being with a specific history, the public decision should include an analysis which addresses the unique circumstances of the case.

It should also be noted that this practice is dehumanising to the caseworkers as well. Rather than being encouraged to utilize their individual analytical skills, reasoning, knowledge, and creativity in the elaboration of decisions, the caseworkers are hampered by the cut & paste techniques which inhibit such actions in order to promote general policies and

“effectiveness”. This strategy deprives caseworkers of the opportunity to enjoy intellectual stimulation in the performance of their function, instead the cut and paste technique appears to be repetitive and boring. Some UDI caseworkers indicated that they were expected to produce one decision per day, a goal which was not always possible given the complexity of certain cases. Caseworkers admit that there is a tendency to complete a group analysis instead of individual analysis, although they are working to change this.

The pressure to be effective appears to be an important reason why the analysis contained within decisions at times appeared to be incomplete. The ability to explore issues thoroughly requires time. In one case, a caseworker appeared to be insecure as pertaining his own analysis and choose to paste in an extra argument without sufficiently linking it to the substantive facts at hand. The lawyer appropriately demanded explanation for the grounds for such argumentation but received no response from the authorities. Other lawyers complain that the responses they receive bear no direct relation to the arguments and issue they raise in the claims. This reveals the importance of maintaining lawyers within the system as an oversight to immigration authorities.

A consequence of this technique is a cycle of canned arguments and responses within the asylum system, as some asylum lawyers who were former UDI caseworkers repeat the technique when presenting arguments. They may utilize the same arguments for many clients, thus neither the argument from the lawyer nor the response from UDI may be original. This furthermore compounded in the UNE Secretariat cases which reiterate UDI’s standard answer without necessarily revealing a separate analysis (although many of these cases are indeed manifestly unfounded and Dublin cases). Thus, some asylum seekers may be deprived of an adequate discussion of the individual components of the cases. However, those cases which are deemed to involve protection concerns are submitted for review at the higher instance.

The Board cases included separate, complete analysis. For example, Case EN gives a thorough analysis of a deserter/conscientious objector from Russia, although this author disagrees with the conclusions. The applicant abandoned his post as Captain in the Russian army because he was opposed to the human rights abuses occurring in Chechnya (ethnic cleansing, criminal acts, and acts of terror). His superior informed him that he could make money extorting the local people. He also considered the war to be illegal under international law. Furthermore, he cited religious beliefs as preventing fulfilment of military duties. Finally, he claims to have been persecuted by his superiors who arrested him, removed his papers, attacked him, denied him work, and filed false charges against him. UDI rejected, noting:

“As a main rule, desertion will not provide grounds for asylum. The Directorate does not find any basis to make an exception from the main rule in this case. Based on the Directorate’s knowledge of the circumstances in Russia, the applicant will not risk unreasonable punishment because of this situation. . . The applicant’s arguments are not of such nature that they substantiate a need for protection in Norway under the Act and Convention.”

UNE considered whether the applicant will risk *“disproportionately hard punishment because of this situation, or participation is in conflict with the individual’s genuine political, religious or moral views. However, it is not sufficient that one is in disagreement with, for example, the authorities’ policy in connection with concrete military operations. The question in such case will normally be whether the military operations are condemned by the international community because they are regarded to be in conflict with fundamental human rights*

One may argue that opposition to the specific policy regarding a military action is a political opinion in itself. UNE rejected given the lack of international condemnation of the action (including lack of condemnation by the Norwegian government). The applicant is not considered to have a right to conscientious objection according to ECHR Art.9 on freedom of conscience as this article is deemed not to sanction such interpretation (although this is a point of dispute among theorists). Nevertheless, the caseworkers states that the applicant never had a problem with the war in Chechnya from 1994-2000, that it only appeared to bother him when he was actually sent there. Furthermore, the caseworker states that the facts do not point to any discrimination regarding recruitment, hence this possible grounds for protection is inapplicable.

The supervisor instructed the caseworker to assume that the legal processing will be fair in spite of complaints regarding corruption. She stated that only a small number of persons are prosecuted and amnesties are given. The caseworker referred to Swedish, Danish, UK, and US practice denying asylum to deserters and conscientious objectors.

UNE found no grounds for humanitarian protection, in spite of the fact that NOAS highlighted incidences of physical attack, torture, risk of tuberculosis (citing Norway’s Health Ambassador to Russia, who stated that it would be a gross act to send a person to serve in a Russian prison), and inhuman conditions in Russian prisons. NOAS also cited an Amnesty International report and a British Home Office report which addressed extrajudicial killings of deserters and deplorable prison conditions. UNE’s own Russia Memorandum stated that although the Constitution recognizes a right to alternative services, there is no de facto opportunity for such. De facto punishment is 2 years in jail (on paper it is 7 years). The

supervisor instructed the caseworker that although prison conditions are not the best, they are working to improve them. The decision noted that:

“Punishment for desertion in the appellant’s case is not in the opinion of the Board to be regarded as disproportionately hard punishment, even when one takes into consideration general information regarding conditions in Russian prisons. General fear of contracting tuberculosis cannot change this assessment.”

Although the applicant is rejected, the caseworker carries out a thorough analysis of the relevant criteria for review of the case, referring directly to UNHCR Handbook, para. 171.

- UNE Case EO involved a woman of Chechen ethnicity from Russia whose husband was killed due to his support of rebels and she herself gave medicine to soldiers. She was given a permit for compassionate grounds by UNE instead of asylum due to the general humanitarian situation in Chechnya, health issues, and her daughter’s access to school, but there is an excellent analysis in the *remarks* addressing protection categories, risk of persecution, state responsibility, credibility, and inapplicability of IFA. I suggest that she could have received asylum due to social group or imputed political opinion.

Decisions must be viewed as an opportunity to elucidate and educate practitioners and the public as to the relevant protection norms and their interpretation by the immigration authorities. The use of cut & paste along with the separation between the *remarks* and the public decision inhibits such function, violates due process norms, and promotes misunderstanding of refugee law as well as UDI/UNE practice and policy.

Another common phenomena is the failure to carry out a full analysis of relevant issues. Decisions may highlight several issues without discussing any of them in detail

- UDI Case EP involved a woman from Pakistan who was raped by the police as well as her father-in-law. UDI noted concern in the *remarks* for the applicant’s real access to justice in a situation in which the police themselves are the abusers. Although protection was given in the form of humanitarian protection, the decision rendered little guidance as to what is the threshold for deeming a lack of access to protection at the national level. The caseworker identified social group as the relevant category, but the supervisor stated that the persecution did not fall under Convention grounds- thus the decision classifies the acts as criminal events not covered by the Convention. In spite of

the fact that the caseworker found the applicant credible and considered the case to be among the worst she has ever seen, UDI only granted humanitarian protection.

In spite of this context, many UDI caseworkers do engage in penetrating evaluations of legal issues and even moral concerns, however these discussions are not contained in the published decision, they are contained in the private *remarks*. Some cases cited in this report show this, for instance:

- Case EQ involving the woman from Croatia whose father was charged with war crimes demonstrated a good example of independent reasoning, argumentation, and research
- Case ER involving a woman from Somalia who was forcibly married, raped, and abused contained an excellent analysis of gender persecution resulting in a grant of asylum,
- Case ES involving a woman from Pakistan who was subject to severe domestic abuse and eventually divorced her powerful husband. She received a permit for compassionate grounds in part because of “*the applicant’s difficult social situation in the home country*”. The decision rejects a grant of asylum based on the notions that domestic abuse itself is not necessarily covered by the Convention, that there is no risk of persecution. UDI advised her to seek state protection but did not address the death threat, the husband’s powerful contacts, access to justice in Pakistan, or human rights reports. However the merknader directly addressed the key refugee and human rights issues: it identified social group as the relevant protection category, identified gender persecution, and confirmed the existence of police corruption and discrimination against women who undergo domestic abuse. This is absent from public view, hence no one is made aware that this analysis was conducted as the public decision has a completely different approach.
- Case ET involving a woman from Afghanistan who was given humanitarian protection instead of asylum, although she was whipped and threatened by the Taliban because she worked as a makeup artist, walked alone, showed her hands, and wore white shoes. UDI had a good discussion of social group in the merknader and addressed discrimination against women, but asylum was not granted.

- Case EU involving a man from Somalia who is a writer who addressed the conflicts in Somalia and was jailed, tortured, and sentenced to death. This decision contained an excellent persecution analysis and use of benefit of the doubt in the merknader. Hence, neither the asylum seeker nor the lawyer in the case are made aware of the central discussions relevant to the final decision. Not only does this also present grounds for attack due violation of due process, as the asylum seeker may be deprived of the knowledge of possible grounds for appeal, it also inhibits dissemination of refugee policy and practice within UDI to the lawyers and general public. Thus, another reason why this technique should be abandoned is that it inhibits transparency within the system. It is difficult to develop a coherent refugee practice when the caseworkers do not communicate to the lawyers their reasoning in arriving at a decision. The discussion pertaining the grounds for asylum as opposed to humanitarian protection is hidden.
- In Case EV, UDI presented a solid persecution analysis, specifically highlighting kidnapping, forced marriage, rape and beatings to constitute serious abuse falling within the national and international standard. UDI formulated a category for protection under the social group standard. In addition, it highlighted the risk the applicant faces that her own family will send her back to her husband.¹⁵⁸ It is a shame that the excellent analysis is present only in the remarks, because had it been placed in the decision itself it could have served as a useful precedent for lawyers and other caseworkers, as well as UNE/UDI.

The canned responses are reiterated on both levels, (although less prevalent in Board decisions), and a lack of individual analysis is maintained. It may be that the immigration authorities may be reluctant to set progressive precedents and this appears to be one of the reasons as to why there is a lack of clarity as to what are the grounds for receiving asylum in Norway.

Recommendation:

¹⁵⁸ Case EW also contains an excellent analysis in the remarks. The caseworker elaborates the standard “young girls who are in danger of being kidnapped and are not willing to partake in such.” She cites the Fatin Case as well as Einarsen. She notes the absence of protection by both State and Non-State actors.

- *Use of standard answers by UDI and UNE should be eliminated. The analysis contained in the remarks should be placed in the public decision.*

Chain Refoulement

Although Dublin cases were not of primary interest to this study, some of the most impressive decisions included analyses by caseworkers which disagreed with the evaluations by immigration authorities of other countries, such as Sweden and Denmark. Caseworkers who scrutinised the analysis carefully and arrived at different conclusions than their counterparts in other countries exhibited dedication to the principles of due process and human rights in general. Given the possibility of returning asylum seekers to another state via the Dublin regime, it is essential that caseworkers be encouraged not to be complacent with regard to human rights protection. UDI & UNE should be aware of the recognition rates for each nationality in the countries of return, as well as the existence of safe third country agreements with nations outside Europe. The danger exists that as both institutions receive increased pressure to be effective, review of these cases risks becoming cursory, thus caseworkers need to take care not to engage in formalistic analysis which overlook protection issues. By returning asylum-seekers to countries which have/or will probably violate the non-refoulement principle, Norway risks ultimate responsibility for pursuing “chain refoulement” which is prohibited under §15 of the law.

12. Final Reflections

The grey zone between asylum and humanitarian protection may be diminished by greater coordination between the immigration authorities. At the UDI level, some caseworkers appeared to adopt a strategy of rejecting cases in which they are unsure as to the appropriate response to a particular issue or complex situation. The caseworkers assume that the asylum-seeker will automatically appeal to UNE, which is then expected to provide a signal to UDI as to how to handle such cases.¹⁵⁹ This tactic does not always prove successful in those cases in which the UNE Secretariate adopts the same language and argumentation utilized by UDI with little variation.

At the UNE level there appeared to be a perception is that there are very few cases which result in a grant of asylum because many of the “*doubtful cases*” tend to be granted humanitarian status by UDI, thus they do not appeal. One of the reasons behind such practice may be the caseworkers’ fear or insecurity with respect to embarking on a complex asylum analysis, thus humanitarian status appeared easier to define given the acceptance of a broader, less specific analysis. It appears that that cases which are appealed are considered to often

¹⁵⁹ Some UDI caseworkers point out that UNE has a tendency to overturn their decisions involving children, thereby indicating a policy of improving protection of this vulnerable category.

address issues beyond the “grey zone”. The Secretariate alleges that its cases are primarily composed of manifestly unfounded claims. Thus, it practices a tradition of comity towards UDI, generally upholding their decisions (often repeating the same language). It has never overturned a decision in order to grant asylum, as cases involving a protection issue are assumed to be submitted for further processing at a higher level.

There may be a degree of scepticism towards progressive precedents resulting from full Board hearings, in which two members of the Board may vote in favor of a grant asylum in cases in which the Secretariate’s past practice would have denied such protection. The innovation in protection principles may be deemed to result from the participation of outside actors, some identified with different forms of human rights advocacy work, thus the objectivity of the analysis may be called into question. However, given that one case alone is insufficient to create binding precedent, such decisions may sometimes be viewed as “harmless” anomalies. It should be noted that given institutional resistance to innovative approaches to human rights/refugee law interpretation, the inclusion of outside actors may actually be positive in that their participation may reflect the changes in human rights protection. To some extent, the outside actors may actually be more updated as to such evolution, or they may be less concerned than UNE as to “opening the door” to a wave of new claims via the grant of asylum. Each case requires individual analysis based on the person’s own fear of persecution (regardless of the fact that many others share the same fear). In fact, in comparison, Canadian statistics revealed that in spite of fears that a flood of claims would result from recognition of gender-related persecution, there was no such consequence.¹⁶⁰ On the contrary, asylum claims from women remained at around the same rate as before the promotion of protection standards in their favor. There appears to be pressure on the immigration authorities to restrict a flow of immigration which becomes conflated with the protection analysis. Refugee issues should be separated from general immigration concerns.

As mentioned previously, there appears to be inhibition within UNE with respect to engaging in evolutionary practice which deviates from past practice, possibly due to fear of being accused of engaging in “politics” or of violating asylum seekers rights to equal protection under the law. This effectively stagnates the development of asylum law due to stringent reliance on the past without questioning whether such action may actually prove in

¹⁶⁰ Women continue to form only 34-39% of asylum-seekers to Canada, figures cited by Nahla Valji & Lee Anne De La Hunt, *Gender Guidelines for Asylum Determination* (The University of Cape Town Legal Aid Clinic 1999).

violation of asylum seekers rights to fair determination of claims in light of changes in the understanding of protection needs and rights.

Furthermore, this perspective relies on a myth that the immigration authorities' own practice is devoid of variances among caseworkers and sections. In fact, I found a diversity of approaches to refugee protection among the individual caseworkers and asylum sections. Instead of fearing diversity, the caseworkers need to be encouraged to feel comfortable discussing different opinions with respect to the manifold grey issues within the field of refugee law.

The leaders of the UDI asylum sections state that they have received the signal to raise the asylum recognition rate and consider evaluation of their section's performance to be linked to this rate. This policy does not appear to be pursued at UNE. However, within UDI, they state that the signal was given without accompanying systematic guidelines to show how to grant asylum- e.g. what are the standards to be utilized in wider evaluations and which type of cases merit an upgrade in protection.

- A curious example of the lack of clarity in how to go about raising the recognition rate is revealed in Case N involving a male Chechen applicant who was detained by Russian forces and severely abused on account of his political involvement and ethnic background. His house was burned to the ground and his brother was killed. In the "remarks", the caseworker notes "*In addition we have been notified . . . that we are to be more generous with granting asylum in cases of doubt.*". Nevertheless, UDI grants the applicant only humanitarian protection (further education in humanitarian law would have helped the caseworker identify the acts as constituting persecution in order to ground a grant of asylum).

Thus, there is a lack of clarity as to how policy changes may be translated into practice, as well as which actors oppose the granting of asylum. When in doubt, some UDI caseworkers are more likely to grant humanitarian protection.

- Consider Case FZ involving a man from Congo who deserted Mobutu's military force and faced a risk of arbitrary detention and potential loss of life upon order by Kabila. He is given the benefit of the doubt, and although the caseworker refers to ECHR's guarantee against inhuman treatment in relation to an Amnesty report confirming the

maintenance of a death row practice in Congo, UDI does not identify “social group” or “political opinion” and grants only humanitarian protection instead of asylum.

Caseworkers and lawyers need further education in human rights, humanitarian law, and refugee law. At present, their training is too short, some UDI caseworkers received only one day of training in refugee legal theory. Human rights and humanitarian law was not covered sufficiently. The lack of training creates an anxiety among the staff which inhibits confidence in their job. Thus insecurity pertaining to the understanding of the applicability and relevance of developments within the international arena results in a defensive, insular practice which largely adheres to past practice. Other times, caseworkers rely on their specific country knowledge to contest the relevance of legal protection standards, thus resulting in a battle between contextual knowledge and theory- e.g. a staff member noted that guidelines on gender discrimination in the workplace were not relevant to his cases from the Sudan but perhaps were more applicable in another country.

Staff members should be informed that they are indeed “human rights officers” who are charged with upholding the standards contained within these instruments. The linking of their jobs to humanistic norms may serve to inspire them to pursue a fair, thorough processing of claims. Whereas the current de facto motto within the system appears to be “pursuit of effectiveness”, it should be altered to “respect for human dignity”. In such manner, when caseworkers are given a sense of higher purpose to their jobs can they truly be effective. Specialized courses on women’s issues, minority rights, children’s rights, etc. have been and/or should be pursued. Supplementary education on psychological, sociological, and even medical aspects of the refugee experience should also be pursued. The positive leadership of Trygve Nordby, Director of UDI, indicates that there is will among the leadership to implement changes in practice in order to uphold the standards of the 1951 Convention on the Status of Refugees and relevant human rights instruments.

As aptly noted by Manuela Osmundsen, Co-Director of UDI, there is a need to create an intellectual environment within UDI, to stimulate the sense that refugee work is a science in itself, composed of multidisciplinary influences. Thus, UDI appears to have already embarked on such transition and its leadership recognizes the needs and interests of the staff.

This initiative may be compared with UNE Director Terje Sjøggstad’s encouragement of his staff to pursue greater understanding of the theoretical basis for protection via elaboration of “subject memorandums”, invitation of guest lecturers, and

continued education. Further, he has called for the incorporation of a human rights education program. The staff's high intellectual capacity and curiosity deserve recognition.

In sum, both UNE & UDI have caseworkers who are committed to upholding the goals of the 1951 Convention. Further, they display a wide-range of multi-disciplinary perspectives necessary for conducting a holistic evaluation of human protection needs, as well as strong initiative to attain greater understanding of refugee law. Although it is important to point out areas for improvement, it is equally important to recognize that the caseworkers perform an important function within the society. They take their work very seriously and deserve respect for their professionalism. The provision of protection to those in need is a noble task; their efforts seek to ease the ills of human condition in surrogacy to failed states of origin. In light of this, the caseworkers and the institutions they work for deserve a higher degree of respect within the society.

The most important factor in encouraging further development is for KRD, political actors, and the media to reduce the pressure on the institution to be "productive" in terms of quantity, and instead welcome its initiatives to develop the quality of analysis in order to fulfil a protection role and uphold the standards contained within the 1951 Convention.

Recommendation:

- *UDI has recently appointed a specific legal advisor to address implementation of human rights in practice, however there may be a need for additional staff to disseminate new juridical guidelines to address "doubtful cases" for in-house use by the caseworkers.*
- *UDI should establish sections to tackle specific issues such as gender persecution, forced recruitment, exclusion, and other issues requiring special expertise. This will permit the top caseworkers to concentrate on complex topics and develop a coherent practice which relates to protection principles rather than adhere to general policies regarding the country of origin.*
- *Similarly, UNE should appoint a special legal adviser to disseminate information on the evolution of international human rights and refugee theory and case law, as the caseworkers often do not have the time to keep up with changes at the international level.*

13. Conclusion

Below I present in the form of lists, the conclusions pertaining to the low asylum rate, the grounds for provision of humanitarian protection, suggestions for legal reform, and suggestions for systemic reform in order to eliminate the “grey zone”.

13.1 Conclusions pertaining the Low Asylum Rate

The conclusion of this author is that the low asylum rate is due to the following factors:

- 1) *Lack of clarity and comprehensiveness within the Immigration Act with respect to asylum, humanitarian protection, and permit on compassionate grounds*
- 2) *Lack of education among caseworkers and lawyers within human rights, refugee law, and humanitarian law resulting in:*

Narrow interpretation of the protection categories:.

A. political opinion

i. Reference to political activity rather than opinion

ii. Lack of reference to imputed political opinion

iii. Elitist application of political opinion- leaders are favored over non-leaders

B. social group

- 3) *Lack of harmonized burden of proof standards between asylum and non-refoulement determination, maintenance of an excessively high burden of proof standard*
- 4) *Maintenance of a de facto dualist approach to the role of human rights within the national legal regime*
- 5) *Pressure to maintain a restrictive policy by the government and media*
- 6) *Conflation of general immigration policies with refugee protection policy*
- 7) *Maintenance of a culture of exclusion within the immigration authorities based on reliance on past practice as opposed to developments within theory or international/comparative case law*
- 8) *Limited recognition of persecution by non-state actors and persecution occurring within situations involving generalized violence or protracted conflict.*

- 9) *Failure to identify mixed motives in cases involving acts which merge criminal motives with persecutory motives linked to the Convention protection categories.*
- 10) *Failure to identify mixed motives for migration, economic concerns may coexist with fear of persecution,*
- 11) *Limited use of cumulative analysis of human rights violations which constitute persecution collectively (socio-economic and civil and political)*
- 12) *Use of a comparative standard in cases originating from protracted conflict, applicants have to demonstrate that they are in more danger than others rather than evaluateing the case with respect to the applicant's own well-founded fear irrespective of the fact that there are many others in the similar situation*
- 13) *Conflated arguments presented by lawyers and NGOs-merger of arguments pertaining to asylum and humanitarian protection*
- 14) *Conflated analysis of evidentiary and protection issues by caseworkers, decisions are based more on credibility than protection need-lack of evidentiary/credibility guidelines*
- 15) *Faulty collection and analysis of evidence by lawyers and/or caseworkers- lawyers may fail to submit corroborative evidence, caseworkers may fail to address such evidence when submitted*
- 16) *Use of standardized answers by the immigration authorities which are drafted towards exclusion from protection*
- 17) *Use of standard formulations by lawyers which do not present full arguments or identify all relevant protection issues or standards*
- 18) *Insufficient consideration of past persecution as evidence of future persecution, lack of recognition of the protection continuum pertaining to persecution, alternate emphasis on the past v. the future depending on the facts in order to promote exclusion from protection*
- 19) *Lack of sufficient analysis of the threat of persecution in return situations to post-settlement societies, formalistic reliance on presence of International Organizations to justify lack of finding of protection need*
- 20) *Misapplication of Internal Flight Alternative in situations with internal displacement crises- Lack of comprehensive guidelines to establish criteria for analysis*
- 21) *Insufficient intra and inter-institutional communication*

- 22) *Lack of application of the exception to the cessation clause, Article 1 C 5 of the 1951 Convention*
- 23) *Excessive pressure to be productive in terms of quantity of decisions instead of quality (protection is sacrificed in favor of production)*
- 24) *Tendency towards group evaluation in UDI based on nationality, ethnicity, sexuality etc.- provision of asylum, humanitarian protection, or rejection linked to group membership rather than individual evaluation*
- 25) *Tendency towards age bias within the asylum determination process- Lack of non-discrimination standard within the law, absence of guidelines on women and children*
- 26) *High number of manifestly unfounded claims, in part due to lack of regular migration alternatives*

13.2 Conclusions pertaining the selection of humanitarian protection instead of asylum

The reasons for selection of humanitarian protection instead of asylum are:

- 1) *Use of a lower burden of proof for the non-refoulement evaluation granting humanitarian protection based on threat of persecution as opposed to the asylum determination also contingent on a determination of a threat of persecution. The applicant may fail to meet standard of proof on risk of future persecution (“justifiably fears”), but may meet lower standard of fear of persecution for non-refoulement (“may fear”)*
- 2) *Use of higher burden of proof for threat amounts to threat of torture amounting to humanitarian protection as opposed to standard utilized in the asylum determination*
- 3) *Lack of reference to “subjective” criteria relevant to establishing a “well-founded fear” of persecution, reliance on objective criteria which limit consideration of individual variances from general trends.*
- 4) *Maintenance of comparative standard in cases originating from nations undergoing generalized violence or internal conflict. Applicants have to*

demonstrate that they are in more danger than others rather than evaluateing the case with respect to the applicant's own well-founded fear irrespective of the fact that there are many others in the similar situation.

- 5) *Failure to identify Convention grounds in the execution of the war-targeting, the objective of the war may be linked to Convention Ground.*
- 6) *Partial application of the 1951 Convention protection grounds:*
 - a. *Social group which is considered to be a flexible category is rarely applied.*
 - b. *Political opinion is referred to more than other categories, and it is applied in a limited manner:*
 - i. *Reference to political activity rather than opinion (which would include passive forms of opinion)*
 - ii. *Lack of reference to imputed political opinion- there is no requirement that it should be actually expressed or that it actually be held by the applicant as long as the persecutor believes it to be true.*
 - iii. *Elitist application of political opinion, leaders are favored over non-leaders (use of the spotlight approach)*
- 7) *Preference for jus cogens violations over non-jus cogens violations, insufficient cumulative analysis of human rights.*
- 8) *Lack of consideration of relevant human rights standards, including CRC, CEDAW, etc. dependents such as child not always evaluated separately*
- 9) *Non-recognition of mixed motives-*
 - a. *Identification of criminal motives is utilized to deny asylum, regardless of the fact that there may be other motives linked to the 1951 Convention categories.*
 - b. *Asylum seekers may have both an economic interest and a fear of persecution which prompts migration*
- 10) *Insufficient analysis of the de facto ability of the State or its willingness to protect the applicant:*

- a. *Reliance on general reports or the presence of international monitors inhibits finding in favor of the individual.*
- b. *Applicant is faulted for his failure to seek protection in State of origin*
- c. *Reference to State's alleged lack of support for persecutory acts by Non-State actors, irrespective of whether it actually takes measures to punish offenders*

11) Merger of credibility determination with protection analysis. Asylum is given to highly credible applicants, while cases involving credibility doubts or doubts regarding risk of persecution are granted humanitarian protection

12) Pre-determined policies regarding groups. Humanitarian protection will be given according to nationality or other select group identity, limiting grant of asylum as it is assumed that protection is given with the lower status. Compliance with guidelines for group, e.g. families with children, unaccompanied minors, Chechens

13) Shifting practice regarding time of persecution. When evidence points to past persecution, the caseworker argues that future risk is necessary. When the evidence points to future risk, the caseworker states that there is insufficient past persecution. There may lack of recognition of past persecution:

- a. *Violations are deemed not to be severe enough*
- b. *If severe, violations are deemed to amount to harassment or criminal acts often committed by Non-State actors*
- c. *Violations are characterized to be a consequence of generalized violence (thus lacking individual targeting)*
- d. *Lack of consideration of past persecution as evidence of risk of future persecution*
- e. *Lack of consideration of extreme past persecution such as torture or severe rape which may merit consideration of Article 1 C 5 of the 1951 Convention. Failure to apply the exception to the cessation clause in cases involving*

compelling reasons, severe torture or rape linked to Convention Ground. Although these would address only a small percentage of cases, it merits attention.

- 14) Confusion regarding mixed motives pertaining to flight (the existence of economic incentives may be deemed to overshadow protection need) and uneven protection relating to the age of the applicant- adult females threatened by gender persecution may be denied protection given to minor girls*
- 15) Insufficient evaluation of the threat of persecution in post-settlement situations*
- 16) Focus on compassionate grounds, e.g. health, minor status, etc.*
- 17) There are changed circumstances in the country of origin, such as shift in regime but lack of stability renders return unfeasible, e.g. Afghanistan*
- 18) Lack of corroborating evidence, e.g. dearth of reports on forced recruitment of children or adults in Asia, the Middle East, and Africa, lack of medical documentation or other documentation*
- 19) Partial submission of evidence, arguments or identification of protection standards and issues by lawyers, partial evaluation of submitted evidence by caseworkers*
- 20) Application of 15 month rule leads to non-consideration of asylum or humanitarian protection issues*

In contrast, cases receiving asylum include high profile political actors who are highly credible (good memory of events, sufficient details, etc.), or in the case of gender persecution, have caseworkers with a solid understanding of human rights and refugee law.

14. Summary of Recommendations for Legal & Systemic Reform

14.1 Recommendations for Legal Reform

The summary of recommendations for Legal Reform, including amendment of the law and regulations, as well as identification of topics to be addressed in the form of guidelines are as follows:

- *Incorporation of text of definition, exclusion, and cessation clauses of the 1951 Convention, correction of the Norwegian translation of the definition. Commentary to the law should clarify that the 1951 Convention does not refer to a “margin of appreciation” in its interpretation. Such view is erroneous. Interpretation of the refugee definition must conform to the standards set in the Vienna Convention on the Law of Treaties, i.e. good faith interpretation in accordance with its ordinary meaning considered in context and light of its objective purpose (which in the case of 1951 Convention is humanitarian in nature).*
- *Commentary to the law may seek to cross reference to human rights and humanitarian law instruments in order to establish standards for protection and exclusion- general reference to international instruments that Norway has ratified, reference to specific instruments such as ICCPR, CAT, etc., or direct reference to specific standards within the instruments such as “best interests of the child”.*
- *Commentary clarifying framework for analysis of persecution:*
 - ***Reasons-** Motives for persecution based on discrimination linked to Convention Ground*
 - ***Interests-** Identification of human rights affected- cumulative civil and political as well as social, economic and cultural rights*

- *Measures- Acts or omissions affecting human rights- consider proportionality, discriminatory application, duration, scope, etc. For example, infliction of harm, denial of participation rights, discriminatory policies, etc.*
 - *Reform of the standard for humanitarian protection: Inclusion of reference to freedom, safety, and physical integrity, Inclusion of “degrading” treatment.*
 - *Commentary explaining subjective and objective elements of well-founded fear. Subjective criteria should be on par with objective criteria.*
 - *Commentary should address what is meant by “effective protection by the State of Origin”- explanation of state ability or willingness to protect applicant from persecution- investigate, prosecute, provide remedies, etc. Reference to international organizations or other non-state actors as agents of protection should not be formalistic, evaluation must be made of the extent to which such actors are actually able to enforce the rule of law, protect minorities, provide remedies for victims, etc.*
 - *Recognition of Non-state actor persecution due to State’s unwillingness or inability to protect, persecution by quasi state or de facto authorities, or persecution by non-state actors where the State has collapsed*
 - *Harmonization of burden of proof standards utilized for asylum determination as well as non-refoulement determination- for both prongs of threat of persecution, as well as threat of torture, loss of life, freedom or physical integrity.*
 - *Incorporation of benefit of the doubt standard within the commentary to the law.*

- *Creation of evidentiary/credibility guidelines highlighting that caseworkers should place credibility analysis in the public decision in order to permit applicants and their lawyers to understand how the determination was made and whether there was error or misunderstandings*
 - 1) *Recognition that credible, uncontroverted testimony of an applicant is sufficient to sustain burden of proof without corroboration*
 - 2) *Credibility determination should be based on the individual's circumstances and the evidence presented*
 - 3) *The applicant must given an opportunity to respond to credibility issues, including absence of documents or use of false papers*
 - 4) *Recognition that caseworkers have a duty to consider all evidence presented, even if contradictory.*
 - 5) *Caseworkers should point to specific substantial reasons within the record for disbelief, and avoid speculation or conjecture or reliance on minor inconsistencies*
 - 6) *Recognition that past persecution creates a legal presumption in favor of asylum which may be rebutted by the State if there are changed circumstances.*
 - 7) *Recognition that the existence of compelling reasons for being unwilling or unable to return to the country would permit provision of asylum in accordance with IC5 of the 1951 Convention.*
 - 8) *Consideration of contextual situation, for example evidence of gross, flagrant or mass violation of human rights in the country of origin in cases alleging torture, consideration of evidence addressing persons in similar situation, reports on country conditions. Caseworkers should consult all available reports on protection issues and country conditions.*
 - 9) *The caseworker should take into account cultural factors, age, education, gender, and psychological disorders which may result in vagueness or gaps within the testimony*

- *Commentary explaining “imputed political opinion”- need not be enunciated in public, nor actually held by the applicant. The proposed KRD regulations address this.*
- *Definition of social group in harmony with UNHCR model- the existence of a common characteristic which may be internal or external, innate, unchangeable, or which is fundamental to identity or conscience or the exercise of one’s human rights.*
- *Cross reference to human rights standards relevant to the protection categories, e.g. CERD for race, UN Declaration on Minority Rights for Nationality (although nationality may belong to a group establishing the majority of a country (when repressed they are treated as inverse minorities), CCPR art. 18 for religion, CEDAW for social group (and others), Arts. 19-22 for political opinion, etc.*
- *Creation of Gender Guidelines (see report on Implementation of a Gender Perspective in Norwegian Asylum Law) and Guidelines for Children which use the CEDAW and CRC as frameworks for protection analysis. Review and study of the cases involving return of children to the Balkans is recommended.*
- *Recognition of possibility of identifying persecution of individuals and groups within generalized conflict.*
- *Elimination of use of standardized answers or automatic relegation to “manifestly unfounded” determination in cases involving conscientious objectors and deserters. Increased reference to humanitarian law/international public law, as well as other relevant human rights and refugee law principles, including non-discrimination norms, proportionality in punishment, freedom from inhuman treatment, etc.*
- *Recognition of a non-comparative approach- cases should be evaluated with respect to whether the applicant’s risk is of sufficiently serious*

harm and is linked to a Convention Ground, not whether it is greater than the risk of others.

- *Clarification that the existence of mixed motives is insufficient to deny protection, e.g. persecution may occur in situations involving merged criminal and discriminatory motives linked to a persecution ground.*
- *Clarification that the existence of mixed motives for migration is insufficient to deny protection, an asylum seeker may flee because of threat of persecution linked to a Convention ground and in addition seek economic security, one factor does not negate the other.*
- *Elaboration of a non-discrimination standard to inhibit bias in asylum determination based on race/ethnicity, nationality, religion, political opinion, sex, social status, disability, property, language or other similar criteria.*
- *Recognition of need for a new non-refoulement analysis in post-conflict situations- Creation of guidelines to address return- addressing criteria of voluntary, safety, and dignity (See recommendations in chapter 5 addressing infrastructure, military/paramilitary activity, anti-refugee sentiments within local population, existence of IDPs, non-discrimination guarantees, protection from armed attack, respect for family unity, access to schools, protection from arbitrary detention, etc.)*
- *Creation of guidelines to clarify the grant of a permit based on compassionate grounds, in consultation with experts in medicine, psychology, child welfare, etc. This should also clarify the standards for lifting a decision to a legal protection category when the human rights analysis reveals cumulative grounds for protection.*
- *Commentary to the law should cross-reference the CAT and the ECHR, including commentary containing the basic definition of torture and*

cruel, inhuman and degrading treatment and a list of relevant evidence to substantiate a claim. Guidelines should be issued addressing the interpretation of standards pertaining to torture and cruel, inhuman and degrading treatment, referring to the case law of the Committee Against Torture and the European Court of Human Rights.

- *Commentary on exclusion may cross-reference straffeloven's definition of terrorism, as well as the Convention on Transnational Organized Crime and its Protocols (2000) and the International Convention for the Suppression of the Financing of Terrorism (adopted by the GA 1999). It may cross-reference the ICC Statute as well as the Geneva Conventions and Protocols.*
- *Recognition that an inclusion analysis should be performed before exclusion, and the principle of non-refoulement is applicable.*
- *Address the protection gap between use of Internal Flight Alternative and promotion of internal displacement: UNE & UDI should review their practice with respect to use of Internal Flight Alternative. Common guidelines for IFA application to be developed. Reference to the Norwegian Refugee Council's Global IDP Database is advisable for caseworkers considering use of IFA.*

14.2 Summary of Recommendations for Systemic Reform

The recommendations for systemic reform are as follows:

- *Improve education of caseworkers and lawyers working in the system with respect to human rights, refugee law, and humanitarian law. Decisions should respond to developments within theory and international, comparative case law. Both institutions should hire staff with special expertise in human rights law, refugee law, humanitarian law, etc. to improve dissemination of evolving protection standards among caseworkers.*

- *Furthermore, there is a need to improve communication between the immigration authorities and the NGOs working with asylum issues. At present the actors appear to be somewhat polarized from each other and there is a need for improved communication via direct consultation, increased seminars, etc. Research institutions and Universities should continue to collaborate with the immigration authorities to develop protection standards and disseminate theory within practice.*
- *Improve transparency: The asylum system in Norway continues to lack transparency. Both UDI & UNE espouse openness, transparency and legitimacy within the society as key goals to be attained. With respect to openness, the institutions have increasingly sought to make information available, respond to media inquiries, and invite the media to observe internal proceedings. However, the current climate is very charged, to some extent, the media's presentation of cases and institutional function has retained a "sensationalistic" feel, rendering the attainment of a balanced understanding of the relevant protection issues to be difficult. In addition, within the institutions the battle against the culture of secrecy appears to be a difficult process as some staff members use the veil to shield mediocre work, while other caseworkers' excellent work remains hidden. Greater openness would promote improved performance within the institutions and increase the society's understanding of asylum practice and policy.*
- *In the case of UNE Board decisions, this author considers the analysis in general to be of sufficient calibre so as to merit publication of decisions in order to benefit practitioners and scholars in and outside of Norway. (In contrast, secretariate decisions which just reiterate UDI's standard answers have little independent value, other than highlight the need to avoid such practice). In the case of UDI, the decisions range widely among the different sections and between caseworkers, thus UDI should disseminate selected decisions based on the quality of analysis. The quality of the decisions can be raised if the analysis contained in the "remarks" replace the standard responses, and the structure were to follow the UNE model of reiteration of the 1951 Convention definition, brief review of facts, identification of the relevant issue, discussion of the legal standards (criteria for asylum vs. criteria for humanitarian protection), and application of the facts to the law. UDI should eliminate the use of standard answers which are drafted towards exclusion.*

Dissemination of Norwegian asylum practice and policy is sorely needed at present. The society at large needs to be educated as to the grounds for provision of protection to asylum seekers via direct information, not indirect analysis provided the media reflecting political biases instead of objective legal reflections.

- *Improve participation by lawyers and NGOs: Lawyers and NGOs should be instructed to present arguments in which the claim for asylum and humanitarian protection are considered separately, identifying all protection issues based on the relevant human rights criteria. Lawyers should avoid the use of standard formulations and fulfil evidentiary requirements at the first level, as well as upon appeal. Lawyers should be given sufficient resources to attend interviews.*
- *UDI should establish special sections to tackle specific issues such as gender persecution, forced recruitment, and other issues requiring special expertise. This will permit analysis based which focus more on protection principles rather than policies relating to particular countries.*
- *Expand professional expertise pertaining to torture and trauma: The immigration authorities should employ their own experts to evaluate post- traumatic stress or other evidence of torture.*
- *Improve expertise on exclusion: UDI should evaluate the special and delicate nature of these cases. This author supports the creation of a Special Unit on Exclusion within UDI &UNE in which the staff hold expertise in criminal law, humanitarian law, human rights is to create a special unit within UDI on exclusion. This would enable full evaluation of the various issues present in such cases. Such office should establish direct liaisons to KRD, UD, PST, and FO-E in order to enable further exploration of the issues, as these cases often cross boundaries between institutions, e.g. foreign policy, intelligence, asylum, etc. It should be emphasized that support for the creation of such unit should not be misinterpreted to imply elimination of the inclusion analysis prior to the exclusion analysis. In order to uphold due process rights, the integrity of the asylum process must be maintained by upholding asylum seeker's rights to full analysis of all relevant*

protection issues, including protection from refoulement. Exclusion should not be abused and great care should be taken not to wrongfully sanction political activists who actually merit protection.

- *Create Joint Strategies for Addressing Return of Refugees: UDI, the Ministry of Local Government and the Ministry of Foreign Affairs should explore whether it is possible to link the Ministry of Foreign Affairs' programs which financing of alternative housing in post conflict situations to the return of refugees in situations where forced evictions linked to ethnic cleansing remain un-remedied. The Ministry of Defence may provide assistance with respect to evaluation of security and infrastructure for post-conflict return.*
- *Address the tension between Protection v. Productivity: The media and the government have promoted the notion that the processing of cases has to go faster without considering the price that the asylum seekers and caseworkers have to pay. Caseworkers and leaders assert that this pressure negatively affects decision-making because they seek to pursue quantity instead of quality.*
- *The State should pursue a substantive discussion of the need to open regular immigration channels, and thereby reduce abuse of the asylum channels via presentation of manifestly unfounded claims.*
- *The Judiciary should receive training in Refugee Law by UNHCR, the NGOs, and the universities in order to ensure proper oversight of the immigration authorities in accordance with international norms*

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