

The making of UNHCR's guidance and its implementation in the national jurisdiction of the United Kingdom, Norway and Sweden

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Acronyms and Glossary.....	iii
Preface	
.....	v
1. The making and implementation of UNHCR’s guidance – key findings and recommendations.....	7
1.1 Summary.....	7
1.2 Key findings.....	8
1.2 Recommendations.....	10
2. Introduction.....	12
2.1 The rationale for the study.....	12
2.2 Methodology.....	12
3. UNHCR’s supervisory functions under the 1951 Convention.....	14
3.1 The supervisory powers of UNHCR in Article 35(1) of the 1951 Convention.....	14
3.2 The supervisory regime of the 1951 Convention	15
3.3 Authoritative guidance produced under the auspices of Article 35.....	16
3.4 Dissemination and publicity of the position papers.....	18
3.5 The legal character of the guidance.....	19
4. The Genesis of the UNHCR’s “position papers”.....	20
4.1 Division of International Protection (DIP) and the subsections POLAS and SDPIS....	20
4.2 The making of Guidelines on International Protection.....	23
4.3 The making of “Notes”.....	27
4.4 The making of Court Interventions/Amicus Curae.....	29
4.5 The making of the Eligibility Guidelines.....	33
5. The national implementation regimes in the UK, Sweden and Norway.....	50
5.1 Design.....	50
5.2 The three countries selected for case study.....	51
5.3 The roles of the Ministry, the office of first level decision-making and the courts.....	53
5.4 Provisions and principles relevant to the duty to cooperate.....	56
5.5 Implementation by the immigration authorities.....	60
6. Case study: time and place of implementation of the 2002 guidance on the Internal Flight Alternative (IFA) and Gender Related Persecution (GRP).....	79
6.1 Implementation of the two categories of international protection.....	79
6.2 Time and place of implementation of IFA-recommendations	81
6.3 Time and place of implementation of GRP-recommendations.....	88
6.4 Commonalities pertaining to IFA, Gender and evidentiary issues.....	92
7. Concluding remarks.....	96
7.1 The perception of UNHCR’s guidance in the national jurisdictions of the UK, Sweden and Norway.....	96
7.2 On implementation techniques.....	97
7.3 Why do national jurisdictions differ in their speed of implementation?	97
7.4 Are some of the distinguishing characteristics of UNHCR debatable?.....	99
8. Hovedfunn – norsk sammendrag og leserveiledning:.....	104
Annex.....	109

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Acronyms and Glossary

1951 Convention	The 1951 UN Convention Relating to the Status of Refugees	
Convention refugee	Person recognized as a refugee under the criteria set out in Article 1 of the 1951 Convention	
Complementary Protection (CP)	Formal permission given under national law or practice to reside in the country to persons who are in need of international protection on refugee-like grounds. Within UNHCR's mandate to supervise needs for complementary protection under the "extended refugee definition" (used interchangeably with "Extended Refugee Definition, cf "Subsidiary Protection").	
COI	Country of Origin Information	
COI-unit	For the purpose of this study: the unit within the national immigration authorities that produces reports on COI.	
COIS	The UK COI-unit within the Home Office	
Country of asylum	Country where the asylum seeker has lodged an application and where the government will do RSD.	
Country of concern	Country where the asylum seeker may be returned to if protection is not granted.	
Durable solutions	UNHCR overall goal that will allow refugees to rebuild their lives by aiding: voluntary repatriation; local integration; or resettlement to a third country in situations where it is impossible for a person to go back home or remain in the host country.	
ECJ	European Court of Justice (of the European Union)	
ECHR	European Convention on Human Rights	
ECtHR	European Court of Human Rights (in Strasbourg)	
Extended Refugee Definition	UNHCR's mandate extends its authority to supervise needs for person who risk serious harm for refugee-like reasons (used interchangeably with "Complementary Protection").	
GRP	Gender Related Persecution	
Government doing RSD	Administration in the country where the asylum seeker has lodged an application and where the government is responsible for doing RSD	
Landinfo	Norwegian COI-unit within the Directorate of Immigration	
LIFOS	Database administered by the Swedish COI-unit	
Inclusion Clause	Defines the criteria that a person must satisfy in order to be a refugee, cf Article 1(A)2 of the 1951 Convention	
International Protection	Protection for convention (1951) or convention-like (any of the three complementary protection regimes) reasons	
IFA	Internal Flight Alternative	
ICJ	International Court of Justice (in Haag)	
ICJ Statutes	The Statutes of the International Court of Justice	
Landinfo	The Norwegian COI-unit	

Lifos	The database run by the Swedish COI-unit	
Migrationsverket	The Migration Board – first level decision-making in Sweden	
Non-refoulment	Principle of international law that concerns the protection of individuals from being returned to places where their lives or freedoms could be threatened. It pertains to refugees under Article 33 of the 1951 Convention, but also to under the extended refugee definition, and is also recognized in various regional human rights regimes, such as Article 2 and 3 of ECHR.	
Prima facie refugee	A person recognized as a refugee, by a State or UNHCR, on the basis of objective criteria related to the circumstances in the country of origin, which justify a presumption that the person meets the criteria of the applicable refugee definition (cf. Complementary and Subsidiary Protection).	
Protection on convention grounds	Person recognized as a refugee under the criteria set out in Article 1 of the 1951 Convention	
Protection on convention-like	Person recognized in need of protection under the extended refugee definition on one of the three complementary protection regimes	
RSD	Refugee Status Determination	
Safe Country of Origin	The country of a person’s nationality or habitual residence where effective protection can be sought or secured. A safe country of origin does not generally produce refugees.	
Subsidiary Protection	A form of complementary protection granted by EU member states when “serious harm” is established in accordance with Article 15 of Council Directive 2004/83/EC (Cf “Complementary Protection”)	
The UK APIs	The UK Asylum Policy Instructions binding upon first level –decision-makers	
The UK Border Agency	First level decision-making in the UK and a division of the Home Office	
The UK OGNs	The UK Operational Guidance Notes guiding first level –decision-makers	
UN HRC	The UN Human Rights Committee (supervises the UN Convention on Civil and Political Rights)	
UN HCHR	United Nations High Commissioner for Human Rights (having the nine “core” UN human rights treaties under its umbrella)	
UN HCR	United Nations High Commissioner for Refugees	
Utlendingsdirektoratet (UDI)	The Directorate of Immigration – first level decision-making in Norway	

Preface

The author of this report has been appointed by the Norwegian Directorate of Immigration. The design of the study is guided by the topics delineated by the Directorate of Immigration's notice for tenders on a study on the making and implementation of UNHCR's recommendations given under the auspices of Article 35 of the 1951 Convention Relating to the Status of Refugees. The final design and the findings of this report are the results of an independent research and analysis conducted by the author while employed at **the Law Firm Hestenes and Dramer & Co** with the invaluable assistance of colleague and **advocate Stine Laier Nybø**. The project was given a five month working period that was executed within three months in the fall of 2009 and two months in the spring of 2010.

The author is grateful to the staff at the Department of International Protection at the UNHCR Geneva Headquarters and to the staff at national immigration offices in the UK, Sweden, Netherlands and Norway for their kind assistance and willingness to participate in interviews.

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1. The making and implementation of UNHCR's guidance – key findings and recommendations

1.1 Summary

This study is aimed at all stakeholders involved in the process of determining the protection need of asylum-seekers. It provides a detailed description of the genesis of UNHCR's guidance (position papers) based on interviews with key personnel at the Division of International Protection at the Geneva Headquarters. It further explores what qualities may be attached to the writing of the position papers that enables UNHCR to give authoritative guidance on protection needs. It provides insight into the UNHCR's own rationale for why and how it produces its position papers, by discussing the research strategies, methodology of assessing Country of Origin Information and the reasoning that goes into the legal analysis. Finally, a view is offered as to how to understand the legal characteristic and significance of these non-binding "soft law" recommendations in national jurisdictions.

Section 3 starts out with a description of the legal basis for the production of UNHCR's guidance (or "position papers") on international protection needs. A description of the different types of position papers UNHCR produces under the auspices of Article 35 of the 1951 Convention is also given.

Section 4 explores the meaning and content of the "obligation to cooperate" with UNHCR's supervisory functions, by describing the rationale and effort that goes into the making of the different position papers. This part of the study provides insight into the rationale for why UNHCR takes strong positions on protection needs; what qualities may be attached to the research and analysis that give UNHCR's guidance its credibility? Examples given are in relation to working conditions and challenges concerning reliable sources when writing the Eligibility Guidelines on Iraq, Afghanistan or Sri Lanka and Iran. The issuance of the position papers may result in dialogue with governments where issues pertaining the sourcing and the conclusion are discussed. Dialogue with signatory states does not represent the only avenue of implementation, however. UNHCR's guidance in court interventions has represented an important alternative in jurisdictions, and a subsection also describes the consideration that UNHCR takes into account in order to assess whether an intervention is likely to succeed or not.

Sections 5 and 6 provide a description of the organization and reception process of the position papers in three select states.

Section 5 explores the implementation regimes in three national jurisdictions of the UK, Sweden and Norway. How may the basic organization of the immigration authorities affect implementation? Who handles implementation and what approach is taken as to whether to implement? Section 6 ventures into a case study on the speed and degree of implementation of UNHCR's positions regarding the Internal Flight Alternative and Gender Related Persecution illustrate how the different organizational traits has affected the decision to implement the guidance on these two concepts.

Finally, some observations are provided on signatory states' obligation to cooperate with UNHCR in its supervisory functions: Are UNHCR's different position papers received as intended? Why may states sometimes arrive at different conclusions than UNHCR on international protection needs? And what may constitute good reasons for not adhering to a recommendation in one of UNHCR's position papers?

1.2 Key findings

My analysis, based on interviews with key personnel at the UNHCR headquarter in Geneva and at the three national administrations, together with publicly available information and a limited search in the archives, shows that there may be additional values to UNHCR's position papers that needs to be drawn in when states consider *not* to follow its recommendations. Once the recommendations are received, there ought to be procedures ready to provide accurate evaluation even when the decision is to implement, partly to clarify that the amendment should include the whole recommendation, and partly by providing a more accurate reference (either by transformation or transcript) to the document. Furthermore, the various recommendations have different functions that cannot be assumed to be known. It may be necessary to put the recommendations in a legal context, especially where country-specific recommendations are concerned, as they offer special challenges since they combine legal and factual insight. The different qualities and functions of own COI-unit should be defined in accordance with the factual insight the UNHCR imparts.

On the obligation to cooperate: States are expected to adhere to all of UNHCR's recommendations written under the auspices of Article 35 of the 1951 Convention, including the country specific ones that combine legal and factual insights.

On the intended function of UNHCR's guidance: UNHCR's role in monitoring international protection needs is highly dynamic. In order to fulfill its mandate, UNHCR produces, on the basis of need and resources, position papers on protection needs.

A key function of the guidance is to produce *a comprehensive set of guidance* to difficult issues pertaining to protection needs. UNHCR may detect a need in its monitoring of a governments' decision-making, where conflicting national jurisprudence or variances in recognition rates may demonstrate a need.¹

The country-specific guidance is usually written on an escalation of violent conflict, grave human right breaches or targeting of particular groups from areas producing a high number of asylum-seekers. The country-specific guidance may therefore have *the additional function of foreshadowing the whole decision-making process* after the credibility of the asylum-seeker has been established. The country-specific guidance stands until UNHCR's monitoring of the situation gives information of a substantial change that warrants a change of position.²

Another significant function of the guidance is to direct the decision-maker in how to arrive at *the correct interpretation and application of the legal concepts*. Existing sources may be lacking or unclear. The guidance is not a source of law, as only sources of law may give expression to binding norms, but rather attempts to reflect accepted practices in national jurisdictions and to *merge diverging views* in national jurisdictions. The guidelines are not intended to be regarded as promoting any particular (national) legal theory, expand on existing principles or creating new law.³

The position papers are also intended to provide guidance from a *neutral international authority* not party to an adversarial process to give particularly well researched general statements on protection needs.

Certain *distinguishing qualities* may be attached to the position papers that are closely linked to UNHCR's "functions" under Article 35 of the 1951 Convention:

¹ Subsection 4.2.

² Subsection 4.5.

³ Subsection 4.1.

- UNHCR has an exclusive mandate in collecting facts pertaining to protection needs;
- over 50-years of experience and a global network of offices monitoring refugee flows;
- on-ground presence in or around the country of concern, and sometimes an extended mandate of presence;
- a possibly exclusive combination of factual and legal insights;
- a rigorous clearance and review process; and
- giving general “neutral” statements not being party to an adversarial process.⁴

On national implementation: A case study conducted on the implementation regime of three national jurisdictions show that they all claim to recognize UNHCR’s guidance as “significant” and to generally adhere to its recommendations. *National implementation usually takes place by adapting UNHCR’s views* when producing new instructions or notes. Reference may be made to UNHCR, for instance for reasons of legitimizing practice change, or may not be mentioned at all. National case-workers and decision-makers may therefore not be expected to be familiar with or directly use the different position papers, *indicating a further research and training need.*⁵

The national jurisdictions give careful consideration to whether or not to adhere to a recommendation. However, UNHCR’s position papers are regarded as one part of several important documents that are consulted. Other statements of law or facts may support different conclusion on protection needs.

What may influence state adherence? The existence of *independent courts or tribunals* may be seen as the most significant factor that influence implementation in national jurisdictions, both in the courts themselves and at the administrative level. The existence of independent courts may not lead to speedy implementation if the courts are not activists. *Restrictive courts* will take on a view of International Refugee Law where UNHCR’s guidance is perceived to expand on existing obligations and creating new rights. *Activist courts* will in comparison accept the dynamic in character of International Refugee Law.

A second significant factor influencing implementation may be whether the administration perceive the guidance as being *correct* or *helpful* to the good offices and efficiency of decision-making.⁶ The use of *non-binding country specific guidance* (such as the UK OGNs) and institutional safeguards for the preferred use of Country of Origin Information (COI) may also be conducive to implementation.

What may influence a decision not to implement? Decisions not to implement are not necessarily clearly stated, or not produced until litigating in the courts. This makes comparison more difficult, however, the examples provided indicate:

- emphasis of *the recommendations’ non-binding character* (may be stated by both administrations and restrictive courts);
- reception that takes place in *the political realm* of the Ministry may be less conducive to the distinguishing qualities of the legal reasoning of the recommendations;
- in the case of country-specific guidance, claims of having “*better*”, *other or more up-to date sources* provided in the report of their own or other governments’ Country of Information-units (COI-units) or by global think-tanks.⁷

⁴ Section 4.6

⁵ Subsection 5.4.

⁶ Subsection 5.3 and section 5.5.

⁷ Subsection 5.4, 5.5 and 4.5.

How may the governments' own assessments of a country specific situation compare to the particular competence and value of UNHCR's recommendations? As decisions not to implement tend to rest on differences of facts, the role and emphasis placed on governments' own COI-units becomes significant. The COI-units' reports *do not so easily compare* with the factual component of UNHCR's guidelines:

- the COI-units' reports *do not engage in a legal analysis* and the facts may therefore have a different focus and will not give guidance as to the significance to protection needs;
- the COI-reports *differs in the research and writing process* by:
 - being *more the product of one or a few of the expert staffs within the COI-unit*, whereas UNHCR's papers rest on the experience of the whole organization of global network of offices with on-ground presence in or around countries of concern;
 - being more of the government's expert's opinion as no comparable process of clearance and review is attached; and
 - possibly relying on a different approach to gather and assess COI if relying on country visits.⁸

The final decision not to implement may also rest on *different views of human rights*. Governments may have a different view on how to apply legal concepts such as "risk of persecution" for a person belonging to an exposed group, or when assessing whether an Internal Flight Alternative is relevant and "unreasonable", that indicate *a further research or training need*.

1.2 Recommendations

Policy:

For reasons of harmonizing national practice with that of other jurisdictions:

- Consider that timely implementation of UNHCR's recommendation may be helpful to the consistency, efficiency and good offices of first level decision-making.
- Consider delimiting binding instructions to the interpretation and not the application of legal concepts in country-specific cases.

Organizational routines:

For reasons of efficiency and good offices:

- Decisions on whether to adhere to UNHCR's interpretive recommendations should consider the likelihood of implementation in other national jurisdictions, as fast implementation may ensure consistency and efficiency at first level decision-making.
- When adhering to UNHCR's guidance, new instructions or notes should include clear reference to the position paper, and transcription or transformation of key sections should be considered.
- If considering *not* implementing a country-specific recommendation, the different characteristics of the reports of their own COI-units should be regarded
- If deciding not to implement a recommendation, clearly stated and transparent reasons should be produced that responds to the particular competence and position of UNHCR.

⁸ Subsection 4.5 and 5.5.3.

- Provide training on the intended function and the added value of the different position papers to the decision-making process.
- Consider how further research on how decision-makers refer to and use UNHCR's recommendations may provide new recommendations on how to further streamline decision-making, in particular in regards to the country specific guidance.

2. Introduction

2.1 *The rationale for the study*

How to implement the position papers of UNHCR is a voiced concern of states, particularly in regards of the country-specific Eligibility Guidelines. Decision not to implement may be motivated by a consideration of the push-/pull-effect. How are the recommendations to be understood, and how should they be compared with other statements on law or facts? What goes into the making of the position papers and how may self-procured information on the security and human rights situation compare to that of UNHCR?

This study provides a detailed description of the writing process of the different position papers produced by UNHCR and the distinguishing characteristics that allow UNHCR to take a strong position on protection needs. The different stages pertaining to the decision to write, the outlining of the paper, the research and the drafting, all provide a useful basis for a better understanding of why UNHCR perceives its own position papers as particularly persuasive.

The particular sourcing problems pertaining to the assessment of the Internal Flight Alternative in the Eligibility Guidelines on Afghanistan, Iraq, Russian Chechnya and Sri Lanka are explored. Also, comments are given on the sourcing problems on issues pertaining to Gender Related Persecution in the case of Iran. Which challenges does UNHCR experience when assessing information and sourcing these aspects of these papers, and how does UNHCR aim to solve such disagreement in an ensuing dialogue?

States may also have difficulty in comparing how they proceed with the assessment of the recommendations. Different organizational traits may influence the decision of whether to implement. Also, decision on whether to implement may be partial and tend to draw out over a longer period. As the “force” of UNHCR’s non-binding recommendations is in the soundness and persuasiveness of the legal reasons, a long-term perspective on the question of implementation may allow for a comparison of the approach of states.

Focus is given to the protracted concept of the Internal Flight Alternative and the need to mainstream Gender Related Persecution. UNHCR’s recommendations on the Internal Flight Alternative are frequently in question because of the potential effect on governments’ recognition rates. Also, the recommendations on Gender Related Persecution have also been thought to affect the recognition rates of a potentially large group of asylum-seekers.

2.2 *Methodology*

This study relies on four different methods of collecting data: analysis of publicly available legal documents, interviews, questionnaires and a limited archive research.

When possible, the interviews were conducted in focus groups. The interviews with UNHCR took place at the Geneva Headquarters with key personnel at the Division of International Protection. Focus group interviews were also conducted in London and Amsterdam with representatives from the legal unit, the COI-unit and the policy unit. The equivalent representatives in the offices of first level decision-making in Sweden were conducted by telephone as travel to Stockholm became difficult for the researcher. Interviews with Norwegian authorities were conducted in Oslo.

The interviews were semi-structured, set out by using a topic guide that was given to the interviewees in advance. The topics were based on the set of topics described in section 2.1 above. The topic guide also referred to a questionnaire that was relied on by the interviewer

during the interviews if necessary. When new issues arised during the discussion of the topics, these issues were followed up or included in the interviews of the other focus groups.

The data were analyzed by transcribing the interviews and coding the text thematically. The codes were constantly reviewed an in some instances redesigned.

A key question to this study is to identify which distinguishing characteristics that may be attached to the Eligibility Guidelines and whether the three states in the case study recognizes these same characteristics. The description of the writing process imparts a model for UNHCR's research and writing. As no field study has been conducted, the operational use of these principles may entail compromises and shortcomings that were not identified during the interviews. However, as the interviews allowed for an in-depth discussion on particular cases, some topical issues and challenges were identified.

The interview with key personnel in the three jurisdictions followed the same design of in-depth interviews based on open-ended thematically organized questions. The methodology benefits from being able to conduct in-depth interviews with focus groups. Where "live" interviews or telephone interviews were not possible, relevant questions from the questionnaire were presented and a written response was received. These responses were not particularly useful as much of the value of the data collected in the focus groups were derived by way of the discussion form.

Differences in the basic organization of the reception process have served as bench-marks for comparison of how the position papers are regarded in national jurisdictions. Institutional theory may claim that the development of human rights norms in national jurisdictions may be affected by the place (Ministry, first level decision-making or courts) of implementation.⁹ The responses given in the interviews were intended to clarify or add further reason to the organizational differences. The small selection of states and the lack of archive research do not allow for making many or strong comparisons based on responses given in interviews. In a few instances however, similar answers were volunteered and supported conclusions of an "agreement" between states (as for instance that UNHCR is not regarded as entirely neutral when pronouncing on protection needs).

Initially four countries, the UK, Sweden, Netherlands and Norway, were selected for the case study. As initial findings showed that Netherlands did not prioritize the assessment of UNHCR's position papers, a study of its reception process was not pursued further.

Ethical considerations were ensured by informing all participants before conducting the interviews of the aim and the potential use and benefits of the study. All participants were offered ample time to read through the text for comments.

⁹ JOSÉ E. ALVAREZ *International organizations as law-makers* (2005); ANDREW MORAVCSIK "Explaining International Human rights regimes: Liberal Theory and Western Europe *European Journal of International Relations* 2 (1995) pages 157-189; and Christian Joppke "The Legal-domestic Sources of Immigrant Rights: The United States, Germany and the European Union" *Comparative Political Studies* 4 (2001) pages 339-336.

3. UNHCR's supervisory functions under the 1951 Convention

3.1 The supervisory powers of UNHCR in Article 35(1) of the 1951 Convention

United Nations High Commissioner for Refugees (UNHCR) was created before the convention it now supervises. In 1949 the General Assembly gave UNHCR its mandate and in 1950 it adapted its statutes.¹⁰ The Convention Relating to the Status of Refugees (1951 Convention) was concluded in 1951, where Article 35 gave supervisory powers to the functions of the already existing UNHCR with its mandate and statutes.¹¹ In the clear wording of Article 35(1) the state parties took on *a duty to cooperate* with UNHCR in its supervisory role:

“The contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provision of this Convention.”

Article 35 has a direct link to the sixth preamble paragraph of the Convention, which states the object and purpose of the obligation to cooperate:

“That the United Nations' High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with the problem will depend upon the co-operation of States with the High Commissioner.”

As the clear wording of Article 35 shows, the obligation refers to any “of its functions” irrespective of their legal basis.¹² The obligation of states under Article 35(1) is therefore not limited to UNHCR guidance on the inclusion criteria when doing *convention* Refugee Status Determination (RSD), but also on protection needs based on *convention-like* grounds under the Extended Refugee Definition.

The legal basis for pronouncing on protection needs for convention-like grounds flows from its mandate and is often referred to as Complementary Protection. Presently, three different regional Complementary Protection regimes exist; the African 1969 OAU Convention, the South American 1984 Cartagena Declaration and the EU Qualification Directive Article 2(e) and Article 15.

¹⁰ General Assembly Resolution 428 (V) of 14th December 1949; and UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>

¹¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 and General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations, Treaty Series, vol. 606, p. 267. The Conference adopting the 1951 Convention was convened pursuant to resolution 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950.

¹² The duty to cooperate with UNHCR's in any “of its functions” is reiterated in Article II(1) of the 1967 Protocol to the 1951 Convention. This reiteration of the state parties' obligation held together with the mandate and statute, makes it exceedingly clear that the obligation extends to protection on both convention and convention-like grounds, see WALTER KÄLIN “Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond” ERIKA FELLER, VOLKER TÜRK AND FRANCES NICHOLSON (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) p 616-7.

The inclusion criteria under the extended refugee definition differ in that it requires no established nexus to any of the five convention grounds. It also requires the establishment of protection needs for convention-like reasons of war or general lack of security. Persecution in terms of a real risk to life, security or grave human rights violations must also be established. Complementary Protection is therefore a right-based form of protection based in other Human Rights Conventions and Humanitarian Law, and gives a different status than protection on compassionate grounds that states give after a discretionary assessment. CP is in some states and regional regimes referred to in law or practice as Subsidiary Protection, cf. for instance the EU Qualification Directive Article 15.¹³

State parties' obligation to cooperate with UNHCR's position on international protection needs extends to all issues concerning the interpretation and application of the granting of international protection on convention or convention-like grounds.

3.2 The supervisory regime of the 1951 Convention

The supervisory regime of the 1951 Convention has some distinguishing characteristics compared to the supervisory regimes of other UN Human Rights Conventions that are all placed under the umbrella of the Office of the High Commissioner of Human Rights (HCHR).

The 1951 Convention preceded by 14 years the first of the nine so-called "core" human rights conventions which are now all under the umbrella of HCHR.¹⁴ The 1951 Convention has a supervisory regime that is both distinct and different from the supervisory bodies of the core human rights conventions.

The nine "core" conventions all share the same High Commissioner. In comparison, the 1951 Convention is unique in having its own High Commissioner. UNHCR may therefore be able to pronounce solely on refugee and humanitarian protection needs, without having to make prioritizations on a broader set of human rights.

Furthermore, the nine "core" conventions established new supervisory bodies which created its statutes in the aftermath of the conclusion of the treaties. UNHCR's authority and functions are in comparison particularly strong as the parties to the 1951 convention assessed and accepted an already existing supervisory body with its statutes and its mandate.

Finally, UNHCR's authority takes on an executive character by being able to take the initiative to give general responses on both law and facts to ongoing humanitarian concerns. The monitoring regime leaves out both periodical reporting mechanisms and an individual complaint procedure, and therefore does not take on the role of responding to reports put before them or of "overruling" individual cases. The wording of Article 35(1) where states have taken on a duty to cooperate with "its functions" has thus created a duty of a highly dynamic character that follows the changing role and mandate of UNHCR.¹⁵

¹³ The Council Directive 2005/85/EC of 1 December 2005 on Minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter: EU Qualification Directive).

¹⁴ The so far nine "core" UN Human Rights treaties have been concluded in the period from 1956 to 2006. They concern racial discrimination (1965), civil and political rights and economic, social and cultural rights were concluded (1966), women (1979), torture (1984), children (1989), migrant workers (1990), enforced disappearance (2006) and disabled persons (2006).

¹⁵ The drafting history of Article 35 shows that the parties explicitly considered the strong obligation the wording created for the state parties. This acknowledgement led to the adoption of a French proposal to exclude Article 35 from the list of Articles to which no reservations can be made, cfr Article 42, see WALTER KÄLIN page 617 with further reference to "Draft Article 30 of the Working Group" reprinted in *The Refugee Convention 1951, The Travaux Préparatoires Analysed, with a Commentary by the Late Dr Paul Weis* (Cambridge International Documents Services, Vol. 7 1995) page 10-16. None of the present state parties has made reservations subject to

3.3 Authoritative guidance produced under the auspices of Article 35

Within the organization of UNHCR, the term “position paper” serves as colloquial terminology and a common denominator for all the documents produced where UNHCR’s Division of International Protection pronounce on the interpretation or application of International Refugee Law.

Formally, before a court or an administration, UNHCR would refer to these recommendations as the “guidance” of UNHCR, and by this formally placing them within the ambit of state parties’ obligation under Article 35 of the 1951 Convention to cooperate with UNHCR’s function of “supervising the application of the provisions of this convention.”

UNHCR has developed a practice of creating different types of position papers on the basis of Article 35 of the 1951 convention, which all have a separate process and function. The different authoritative statements are the Handbook, Guidelines on International Protection (GIP), Notes, *Amici Curae* for the purpose of court interventions, Advisory Notes, Eligibility Guidelines (EG), Interim Guidance and Updates.

All of the GIPs and the recent Eligibility Guidelines have an introductory statement referring to UNHCR’s functions under Article 35 of the 1951 Convention. The *amici curae* always include a section regarding the interest of UNHCR’s standing before the court that stipulates the particular elements of Article 35 of the 1951 Convention. The updates and interim guidance do not have an introductory statement referring to Article 35. However they do have an introductory statement relating its purpose to the relevant Eligibility Guideline and should therefore also be seen as part of UNHCR’s functions under Article 35 of the 1951 Convention:

The Handbook (1979, re-ed. 1992)

The dissemination of legal commentaries started with the request of the Executive Committee of the state parties of the convention to UNHCR “to consider the possibility of issuing – for the guidance of Governments – a handbook relating to procedures and criteria for determining refugee status.”¹⁶

Guidelines on International Protection (GIP) (2002-)

Following the Handbook, which has gained widespread acceptance among the state parties, in 2002 UNHCR started publishing *Guidelines on International Protection* (GIP) that are meant to accompany the Handbook on particular issues concerning the interpretation of Article 1. The GIPs are all produced within the mandate of “Agenda of Protection” and as a result of a Global Consultation held in 2001.¹⁷

As of 2009 UNHCR had published eight GIPs altogether. In 2002 it issued two GIPs on Gender-Related Persecution¹⁸ and Membership of a Particular Social Group.¹⁹ In 2003

Article 35.

¹⁶ Executive Committee of the High Commissioner's Programme at its twenty-eighth session.

¹⁷ Agenda for Protection UN Doc A/AC.96/965/Add.I, 26 June 2002, Goal 1, Objective 6; Executive Committee Conclusion No. 92 (LIII) (2002) para a).

¹⁸ UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01 at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>

¹⁹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol*

UNHCR issued three GIPs concerning the Cessation of Refugee Status,²⁰ the Internal Flight Alternative,²¹ and the Exclusion Clause.²² These five claim to synthesize the diverging views of experienced state parties, judges, academics, NGOs and refugee representatives as discussed under the Global Consultations meetings that took place in 2001. The preparatory papers and conclusions of the roundtable meetings were collected in a separate publication from 2003.²³ In the ensuing years UNHCR published a GIP on Religion-Based Refugee Claims in 2004,²⁴ and a GIP on Trafficking in 2006,²⁵ which also draw on the Global Consultation from 2001. In 2009 a GIP on the refugee child was published. Another two are pending, one on family unity which is expected in 2010 and one on gang resisters.

Notes, Guidance Notes or Background Notes (1995 -)

Since 1995 UNHCR has also published legal *Notes, Guidance Notes or Background Notes* on issues concerning the interpretation of the refugee definition in Article 1 of the 1951 Convention, but which do not claim to be based on or directly derived from the extensive process of thorough exchange of view between the state parties and experts under a Global Consultation.

So far UNHCR has published *sixteen* such Notes on the following select topics: Agents of Persecution (1995); Burden of Proof (1998); the Cessation Clauses (1999); Fair and Efficient Asylum Procedures (2001); Article 1 (2001); Article 1D relating to Palestinian Refugees (2002); the Exclusion Clauses (2003); Procedural Standards (2003); Cancellation of Refugee Status (2004), Coercive Family Planning Laws or Policies (2005); Mass Influx Situations of the Exclusion Clauses (2006); Individual's Membership of a Family or Clan Engaged in Blood Feud (2006); Extradition (2008); Sexual Orientation and Gender Identity (2008); Article 1E (2009); and Female Genital Mutilation (2009).²⁶

Amici Curae or court interventions (1980's -)

UNHCR produces *amici curae* for the purpose of court intervention. This opportunity to influence courts' application of International Refugee Law is a priority of UNHCR. It

Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02 at:

<http://www.unhcr.org/refworld/docid/3d36f23f4.html>

²⁰ UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03 at:

<http://www.unhcr.org/refworld/docid/3e50de6b4.html>

²¹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04 at:

<http://www.unhcr.org/refworld/docid/3f2791a44.html>

²² UN High Commissioner for Refugees, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <http://www.unhcr.org/refworld/docid/3f5857684.html>

²³ ERIKA FELLER, VOLKER TÜRK AND FRANCES NICHOLSON (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003).

²⁴ UN High Commissioner for Refugees, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06 at: <http://www.unhcr.org/refworld/docid/4090f9794.html>

²⁵ UN High Commissioner for Refugees, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07, available at:

<http://www.unhcr.org/refworld/docid/443679fa4.html>

²⁶ All available in *Refworld* at <http://www.unhcr.org/refworld/rtd.html>

represents an opportunity to set precedents in national jurisdictions on complicated or contentious issues. Intervention also represents an additional avenue to influence states to implement their recommendations that also is different as it allows for the emphasis of legal academic reasoning.

UNHCR's ability to intervene in court cases depends on whether national civil process allows for it. Common law countries, such as UK, USA, Canada, Australia and New Zealand, as well as the legal system in Russia, have for long recognized UNHCR as a "friend of the court" (*amicus curae*) that may give written legal expert statements on a particular issue of International Refugee Law. In addition, regional human rights courts also give UNHCR the opportunity to intervene in pending cases. As of recent, a harmonization process of the civil procedure of all European countries has introduced the concept of *amicus curae* in countries such as Sweden and Norway as well.

Eligibility Guidelines (1980's -)

UNHCR's country- or issue-specific *Eligibility Guidelines* (EG) are exceptional among the position papers as they pronounce on both facts and law. The Eligibility Guidelines have had some varying nomenclature. They may be identified, however, as statements responding to the criteria for receiving international protection in a particular situation. The Eligibility Guidelines differ from the GIPs by including both a factual and a legal component, and where the legal one is one of application of the principles of International Refugee Law. Furthermore, the Eligibility Guidelines differ from the GIPs, as they pronounce not only on the inclusion criteria for convention protection, but also on inclusion criteria for convention-like protection.

Interim Guidance and Updates to the Eligibility Guidelines

The factual situation being subject to change, UNHCR may publish *updates* or *interim guidance* pertaining to a specific situation.

3.4 Dissemination and publicity of the position papers

The different GIPs, Notes and Eligibility Guidelines are identified by being given a month and date. The GIPs are in addition given a serial number after the year (GIP/02/01 and GIP/02/02), making it possible to trace each one. The Notes and the Eligibility Guidelines are not possible to trace in the same manner, and there is no other system in its dissemination that allows for the overview of when the series started and how many papers that are issued.

UNHCR regards their GIPs, the different Notes and the Eligibility Guidelines, as public statements. Historically, UNHCR has had some ambivalence as to whether their position papers should have a fully public status or be restricted to dissemination to its own staff, state parties and NGOs. As of the 1990's the policy has been that all position papers belong to the public domain. Some of the updates and interim guidance have a semi-official status. They may be produced upon request of some state parties. Dissemination is usually left to the discretion of the regional and local offices. UNHCR is currently reviewing the usefulness of this semi-official status of some of their recommendations.

The GIPs, Notes and Eligibility Guidelines are not printed or notified in a UNHCR-run series or publication. Until the launching of the UNHCR-run web-page *Refworld* in 2007 UNHCR relied on the state parties and NGOs, which were included on a recipient list, on the further dissemination of the position papers. In addition, notification of the issuances of a GIP was given in the journal *International Refugee Law Quarterly*. This did not ensure their intended

publicity, and in practice the effect of the recommendations was that of a bilateral relationship with states. UNHCR is planning to publish the existing GIPs as an annex to the Handbook.

3.5 The legal character of the guidance

UNHCR's position papers are not a source of international law. They are not binding or capable of binding national decision-makers, as only sources of international law is capable of expressing binding norms.²⁷ UNHCR's recommendations are expressions of non-binding "soft law." The intended significance of its recommendations is to offer guidance on difficult or contentious issues of facts or law. The "persuasiveness" of the recommendations thus refers to a standard of legal accuracy and precision that rests on UNHCR's exclusive position and over 50 years of experience with monitoring humanitarian protection needs.

The non-binding guidance takes on particular importance to state parties to the 1951 Convention as they have undertaken a duty to cooperate with UNHCR's functions. States must give careful consideration to the recommendations. As the guidance is subject to an assessment and comparison of other documents pertaining in order to determine protection needs, it may become significant to national implementation to understand the rationale, research and clearance that goes into the different position papers.

²⁷ The sources of international law as stipulated in Article 38(I) of the Statute of the International Court of Justice creating binding norms are: treaties, customary international law and general principles of law. In addition, as subsidiary sources that may express binding international norms: judicial decisions, the writing of renowned publicists and perhaps acts of international organizations (such as the General Assembly).

4. The Genesis of the UNHCR’s “position papers”

This section gives a description of the genesis of the guidance written under the auspices of Article 35 of the 1951 Convention subsequent to the issuance and reediting of the Handbook (1979, 1992). This guidance takes form in different types of “position papers” produced at the Department of International Protection (DIP) at the Geneva Headquarters. The following description is the researcher’s interpretation of the writing process based on several focus-group interviews with key personnel at the Geneva Headquarters of UNHCR. As an archive or case was not permissible and no field-study has been conducted, the following does not account for or reflect the possible nuances and compromises that may take place in practice.

4.1 *Division of International Protection (DIP) and the subsections POLAS and SDPIS*

UNHCR’s position papers are produced at the Geneva Headquarters by the Division of International Protection (**DIP**). DIP is headed by the Assistant High Commissioner of Protection. It houses the main legal units of UNHCR, where the Protection Operations & Legal Advice Section (**POLAS**) produce the interpretive papers (the GIPs, Notes and Court Interventions); and where the Status Determination & Protection Information Section (**SDPIS**) collects Country of Origin Information and produces the papers applying International Refugee Law on the basis of their factual assessments (the Eligibility Guidelines and the Country Briefing Folders).²⁸

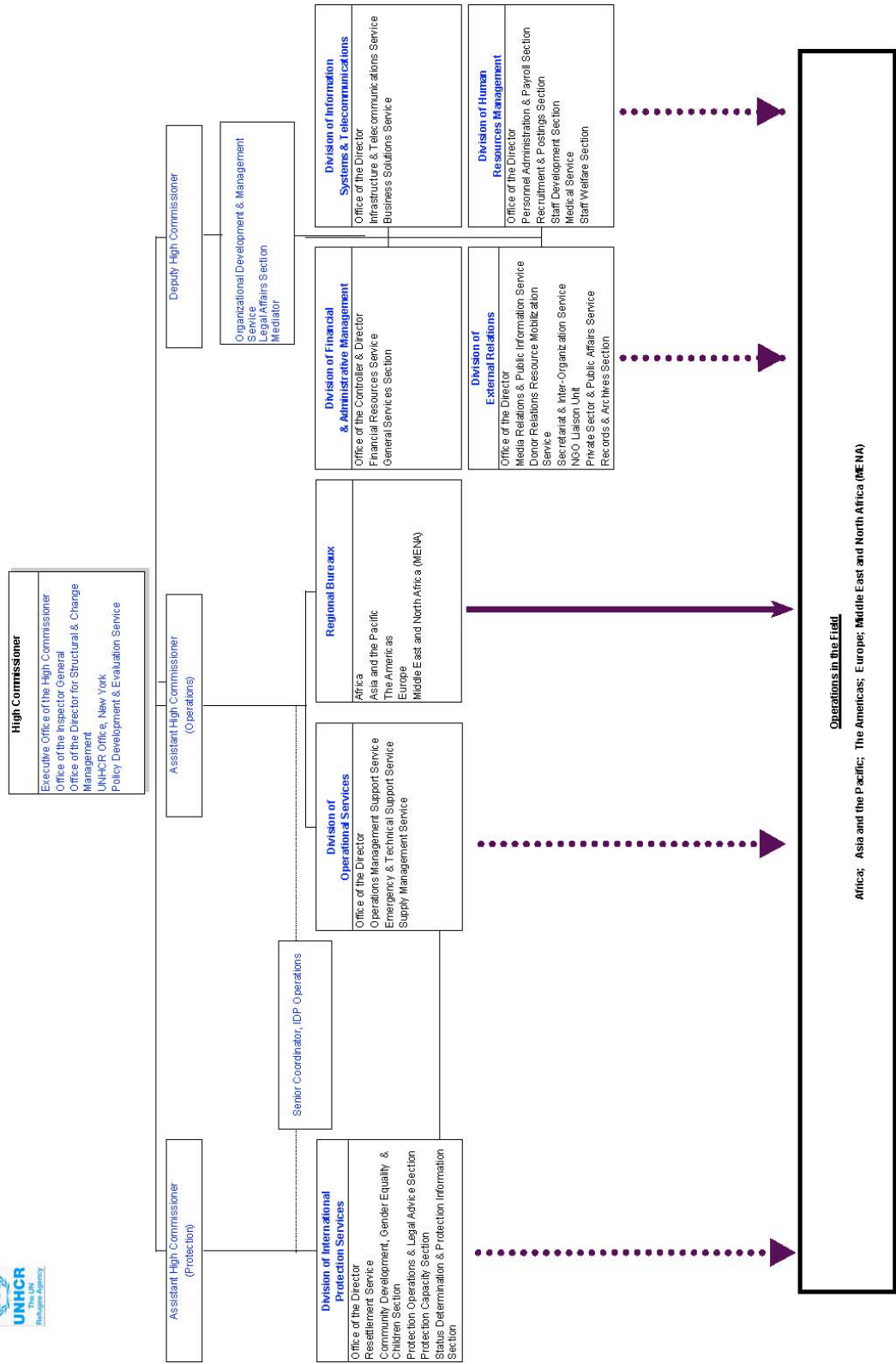
The core function of POLAS is to develop standards and principles for Refugee Status Determination and durable solutions. POLAS also provides support and facilitates the work of the ExCom conclusions. One of POLAS’ objectives is to integrate human rights standards into the work of UNHCR. That is also why it looks into different human rights standards when discussing the concept of persecution in the GIPs and the Notes. POLAS also provides drafting support and legal advice to regional offices considering intervention in a particular court case, where the function of UNHCR is to pronounce on the general points of law that has come up in the case and not on the individual facts.

SDPI’s core function is to monitor and assist the implementation of quality Refugee Status Determination-procedures to the field offices of UNHCR and to governments. In addition to producing the Eligibility Guidelines and the Country Briefing Folders, it partakes in writing Advisories for Return. SDPIS also has the function of ensuring access to relevant protection information and by providing guidance to field operations, governments, the judiciary, NGOs and legal practitioners engaged in Refugee Status Determination and other protection-related activities. This includes administering the Webpage *Refworld*.²⁹

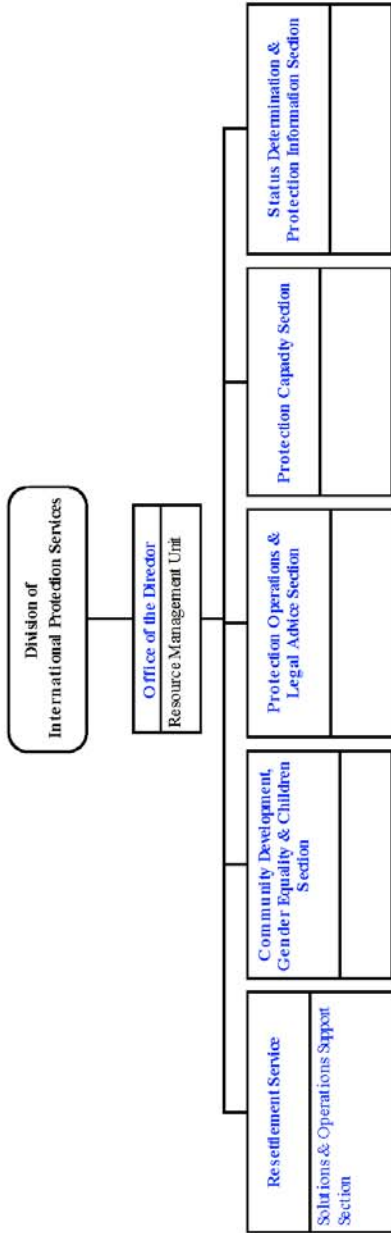
²⁸ www.refworld.org Country Briefing Folders do not contain recommendations or the policy or position of UNHCR as they do not contain an analysis on protection needs. The Country Briefing Folders contain general background information, information relating to the legal context of the country, human rights, international protection considerations regarding particular groups, and additional information. SDPIS produces Country Briefing Folders on the top countries of origin and plans to update the Country Briefing Folders regularly. The documents are found by accessing “country information” on home page of *Refworld*.

²⁹ <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES STRUCTURE as at 1 January 2007



UNHCR Divisions and Bureaux as at 1 January 2007



4.2 The making of GUIDELINES ON INTERNATIONAL PROTECTION

4.2.1 Summary: what is a Guideline on International Protection (GIP)?

POLAS has produced seven GIPs so far and two are in the making (see subsection 3.3 above). The legal basis for producing the GIPs flows from the statute, the mandate and article 35 of the 1951 Convention which gives UNHCR the function to monitor and report on its interpretation. At the head of the GIPs the following introductory note is included:

”UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the UNHCR Handbook on Procedures and *Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*. ... ”

The aim of a GIP is to analyze international legal principles, jurisprudence, international instruments and standards, in order to provide guidance in that particular area. The intended readers of the GIPs are UNHCR staff that does mandate RSD, closely followed by governments doing RSD. UNHCR also has in mind practitioners and others who have an interest in the process.

The GIPs deal exclusively with the legal criteria of the inclusion clause in Article 1(A)2, cessation and exclusion. In comparison to the Eligibility Guidelines the GIP are about the interpretation of the different elements of Refugee Status Determination and not its application pertaining to the factual situation in a particular country. The GIPs are intended to complement authoritative comments given in the Handbook and may fill in gaps or elaborate on some of the sections in the Handbook.³⁰

The GIPs have their own research and clearance process connected to them. The research process emanates from the Global Consultations of 2001 where state representative and experts discussed divergent views on important issues of International Refugee Law. Unlike the other position papers, the GIPs are therefore developed within the context of Agenda for Protection and their production was endorsed by the Executive Committee to the 1951 Convention.

The discussion papers for the Global Consultations are collected in a book published by UNHCR.³¹ Each GIP is the result of and draws these discussions, and they attempt to merge the states’ and experts’ diverging views as presented on the Global Consultation meeting. The clearance process is also different from the Eligibility Guidelines, as the GIPs are the result of an open clearance process.

As with the other position papers, the GIPs are published on *Refworld*. In addition UNHCR plan to publish the GIPs in an annex to the Handbook.

³⁰ The background paper *Refugee Protection in International Law* stipulates the quality of research that presumes the legal significance and intended use of the GIPs, see TÜRK and NICHOLSON “Refugee protection in international law: an overall perspective” *Refugee Protection in International Law Global Consultations* (2003)

³¹ ERIKA FELLER, VOLKER TÜRK AND FRANCES NICHOLSON (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003).

4.2.2 Decision to write

The decision to write a GIP rests with the director of DIP. As with any position paper produced at the UNHCR, the decision is based on the principle of an assessment of need weighed against available resources.

Due to the separate research process attached to the GIPs, the decision to write has so far been developed within the context of Agenda for Protection and endorsed by the Executive Committee. The topics dealt with refer back to the identification of significant differences in the interpretations of important or difficult issues of International Refugee Law.

The priority given to the guidance on the Internal Flight Alternative and Gender Related Persecution as the first two position papers coming out of the 2001 Global Consultation was due to an assessment of the overarching importance of these issues. For example the GIP on GRP emanated from differences as to whether gender should be understood as an “inherent characteristic” or as “social perception.”

4.2.3 Outlining the paper – defining point of law to be addressed

The first step of writing is for POLAS to determine what points of law to address. A preliminary research of collecting national court decisions is conducted, and a basic outline is drawn up and circulated to the officers in the field for feedback.

Sometimes POLAS or a consultant prepares a certain background note before deciding on the outline and further research. A background note will go in to details on jurisprudence and national laws and serves as a tool to make the GIPs and Notes. In the end, such background notes may also serve as an attachment to the GIP or Note, in order to ensure that the position paper becomes sufficiently lucid. The book published by UNHCR on the 2001 Global Consultation includes the background notes made for several of the existing GIPs. A background note does not, however, have the function of explaining the motive for making a GIP, as it will not reflect the discussion of states and the other actors at the meeting.³²

4.2.4 The initial research

The research conducted by POLAS aims to provide information that allows for presenting a position on the accurate interpretation of law, based on state jurisprudence, laws and theories. The research should reflect that the position of UNHCR is normally not to side or agree with one theory or approach, but to provide a balance of the different approaches and the different positions that all states may agree with.

The research process does not aim or expect to find a consensus of state parties. As a non-binding instrument, the position papers do not have the function of reflecting binding norms. The focus of the research is therefore more to describe and analyze variances in state practice with the aim to identify a norm that is likely to take on legal force at some point in the future.

The aim of the research does sometimes require for UNHCR to discard one of two irreconcilable approaches. For instance, in writing the GIP on “particular social group” there

³² The Note on *Procedures* has a description of the motives and reasons for UNHCR to give guidance in general. Procedural Standards for Refugee Status Determination Under UNHCR's Mandate 20th November 2003 <http://www.unhcr.org/refworld/docid/42d66dd84.html>. I.e. the basis for its position on cancellation, DIP refers to its use of sources. As the 1951 Convention and 1967 Protocol do not specifically address the issue of cancellation, UNHCR maintains that general principles of law apply and that national jurisdictions apply very similar legal criteria and requirements. The Note then sets out to describe the legal framework established by international refugee law and applicable general principles that delimits the conditions under which the invalidation of a refugee status recognition is lawful, while at the same time ensuring that those who claim to have a well-founded fear of persecution under the 1951 Convention be protected from arbitrary or discriminatory cancellation of their status.

were two approaches existing between states: the “protected characteristics” and the “social perception.” States were involved in the research and to present their points of view during the 2001 Global Consultations. Under Canada’s lead, the position arguing in favor of their protected characteristic approach was presented, in competition with the sociological approach. It was not possible to reach a consensus between the two positions during the meetings, but the discussion clarified the points of disagreement. During the subsequent consolidation of the research, UNHCR took the position on the preferred interpretation of “particular social group” as one of “social perception”, leaving some states such as Canada with conflicting national practice.

4.2.5 Review of first draft

When the first draft is produced POLAS circulates it both internally and externally for review of its academic qualities. POLAS cooperates with academics, NGOs, the association of national refugee law judges, UNICEF, HCHR and other UN Agencies to conduct peer reviews. The comments received are incorporated as much as possible. Compared to the Eligibility Guidelines, where UNHCR does not consult with outsiders, this review process of the GIPs may be said to have more safeguards.

4.2.6 Clearance process

The clearance process of the GIPs contains many feedback loops and rewrites in order to ensure a thorough process that improves the quality.

The clearance process starts with the draft being peer reviewed within POLAS and sent to its head for approval. Usually the draft is declined and goes back for rewrites. When approved by the head of POLAS, the draft goes to the director of DIP, a consultation which usually also results in a rewrite.

The comments from the head or the director may concern material issues or policy considerations. Material issues may regard that one aspect of the paper is not well enough researched, or that there may be a need for more case law references. Policy issues may regard a measure of the potential affect on Refugee Status Determination. In example, as with gender and the convention ground “a particular social group”, the definition of UNHCR can potentially encompass a large number of people. However, the policy assessment is not supposed to be based on how to limit the size of the group or the potential impact on migration, but a measure of how to present an interpretation that may receive this kind of response by states. Policy considerations may also come into play if the research and draft end up pushing the issue of concern into unexplored territory that may detract from the credibility of the rest of the paper.

Policy considerations may in addition deliberate on how the proposed interpretation may be distinguished from situations that normally are not thought of as producing refugees. The GIP in the making on gang related violence is said to illustrate this point, as gangs occur both in refugee producing countries and industrialized nations. Insofar as gang related violence is a legal issue, it will be determined on basis of previous doctrines and jurisprudence pronouncements on “particular social group.” Some court decisions have rejected the notion that those who flee from gang related violence can be regarded as a “particular social group”, while others have recognized it. On the background of the findings of conflicting court practice, further research of the GIP demands an elaboration and analysis of what protective characteristics gang resisters may have in common that make them eligible for refugee status. Policy considerations may concern how the legal criteria of gang resisters will apply in countries that have problems with gangs but are not regarded as refugee producing countries. Not detracting from the legal findings, the head and the director may need to stake out the

more strategic points of the position of UNHCR by commenting on questionable interpretations that in example would lead to gang resisters of the mafia in industrialized states would fall within a social group and become refugees.

4.2.7 Dissemination and the intended effect of the GIP

All the GIPs are made readily available by accessing the link pertaining to Refugee Status Determination on the homepage of *Refworld*.³³ In addition; UNHCR is planning to publish them as an annex to the Handbook.

As with any guidance given by UNHCR, the intended effect is that they are received by national decision-makers as professional products as correct statements of law. The GIPs may in form be considered as “one step above” the Eligibility Guidelines, because they point back to the Global Consultations and because an open process of review and clearance is attached to it. However, the difference in the research and clearance process is more a result of the Eligibility Guidelines requiring a more closed off process to ensure UNHCR’s neutrality and objectivity as they pronounce on the particular situation in a country.

4.2.8 Follow-up of implementation of the GIPs

States are normally well oriented about the writing of a GIP and its general content due to endorsement of the ExCom and the open review and clearance process. The final conclusions of UNHCR may still raise issues of whether or not to adhere to its recommendations. The response of states usually comes to UNHCR’s knowledge as part of the monitoring of the regional or local offices. The monitoring of state implementation will at any event depend on the transparency of the practice at first level decision-making and the appellate tribunals.

³³ At <http://www.unhcr.org/refworld/rsd.html>. The page is accessed by consulting the “Special Features” heading in the middle section of the *RefWorld* home page and accessing the link the “Refugee Status Determination.” On this page all the GIPs are collected under the heading “UNHCR RSD Handbook and Accompanying Guidelines,” and all the Notes are found under the heading “UNHCR Policy Documents Related to RSD.” The page explains that the “Special Feature” on refugee status determination is regularly maintained and contains legal, policy and operational material. Even if, the Eligibility Guidelines or a link to the Eligibility Guidelines are not included as part of the policy documents and there is no link to UNHCR’s Court Interventions.

4.3 The making of “Notes”

In addition to the task of writing GIPs, POLAS also have the function of producing other thematic legal position papers that are called Notes, Guidance Notes and Guidance. The difference in nomenclature has no formal significance and is merely the result of having chosen titles that are preferred in the particular legal culture the paper is intended for.

For the purpose of this report they will be referred to as “Notes.” As of 2009 UNHCR had published 16 “Notes” all together:

- [Guidance Note on Refugee Claims relating to Female Genital Mutilation](#), May 2009
- [UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees](#), March 2009
- [UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity](#), 21 November 2008
- [Guidance Note on Extradition and International Refugee Protection](#), April 2008
- [UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual’s Membership of a Family or Clan Engaged in a Blood Feud](#), 17 March 2006
- [UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees](#), 7 February 2006
- [UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies](#), August 2005
- [Note on the Cancellation of Refugee Status](#), 22 November 2004
- [Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate](#), 20 November 2003
- [Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#), 4 September 2003
- [Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees](#), 2 October 2002
- [Asylum Processes \(Fair and Efficient Asylum Procedures\)](#), 31 May 2001
- [Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees](#), 1 April 2001
- [The Cessation Clauses: Guidelines on Their Application](#), 26 April 1999
- [Note on Burden and Standard of Proof in Refugee Claims](#), 16 December 1998
- [Agents of Persecution - UNHCR Position](#), 14 March 1995

In the past, most of the Notes have emanated from some of the issues that came up at the 2001 Global Consultation. However, some have also come about due to the identification of a need in a different context or due to a request. A request for a Note could come from a field office, the DIP can themselves identify a need to develop a paper, or the regional bureau may report on the result of an ongoing dialogue with governments doing Refugee Status Determination. Though rarely, a request may come directly from a government. For instance, the Note on Female Genital Mutilation (FMG) originated from the direct request of a particular government due to an influx in the number of asylum claims made on fear of persecution on such grounds.

The decision to write a Note is in any case more independent of the 2001 Global Consultation and ExCom endorsements, and more detached from the meeting and hearing of states. The Notes therefore serve the function of UNHCR being able to produce interpretive papers based on internal decisions.

The decision will be based on need and resources. The assessment of need requires identification of a real difficulty for UNHCR's staff or governments to apply a certain concept of law. It is within POLAS' functions to evaluate the request. POLAS is expected to base its evaluation on an assessment of the scope of the problem, which points of law that are inconsistently addressed, and whether there exists a too strict or inaccurate application of the criteria.

When a need is identified by POLAS, the head and the director will have to determine its priority against available resources. The assessment of need against resources usually results in an assessment of identifying the biggest protection gap. For example, we know that children's asylum claims have been overlooked and ignored and that a significant protection gap exists.

The research of Notes does not have the same thorough consultation process behind it as the GIPs, but they share the same rigor in the research and clearance process. As with the GIPs, national jurisprudence, relevant human rights standards, doctrine and previous statements are researched and the drafts are submitted to external review of their academic quality. For example, the Note on sexual orientation was reviewed by the association of national refugee law judges. Notes finally go through the same clearance and review process with several loops of comments and rewrites.

The Notes are all listed on *Refworld* by accessing the link "Refugee Status Determination" on its home page.

As with its other position papers, UNHCR expects states to adhere to the Notes. Even if the Notes lack the outside roundtable of the GIPs, the Notes are intended to be received as papers with equal significance. The issues addressed in the Notes are based upon or derived from the position and principles of states in the GIPs. The difference in form is therefore the assumption that a new hearing is not required. The rigor of the research and clearance process of the Notes is otherwise supposed to be the same and should therefore be received as being as correct and standing on good principles as any GIP.

4.4 The making of COURT INTERVENTIONS/AMICUS CURAE

4.4.1 Summary: What is a court intervention/amicus curae?

UNHCR has for many years intervened in asylum cases before national courts by producing *amicus curae* or advisory opinions to guide the court in its legal interpretation. As all such interventions, UNHCR's *amici* provide expert legal advice to the courts in the area of International Refugee Law. All such interventions are done under the auspices of Article 35 of the 1951 Convention.

UNHCR has a general interest to intervene in national court cases as it represents an alternative avenue to influence the implementation of International Refugee Law, in addition to monitoring the capitol level. Amicus curiae may provide a powerful tool for UNHCR to exert pressure on administrations to implement principles of International Refugee Law, as the administrations will have to relate to their own high court decision. Court intervention may also provide for an effective tool by being stronger and more precise on the principle to be decided upon than the GIPs, which are general statements on the criteria for Refugee Status Determination.

The effect of UNHCR intervention in national courts will of course depend on its degree of independence and power of review, and whether the civil procedure allows for such intervention. Common law systems have a long tradition for allowing such intervention. Due to recent reforms of the civil procedure in civil law countries in Europe, court intervention is now generally available to UNHCR in this region.

Decisions to intervene will be based on an assessment of need and resources. The assessment of need is based on how the outcome is likely to affect national Refugee Status Determination, and whether the decision may create precedence within their own jurisdiction and perhaps also affect other national jurisdictions. Other organizations' possibility to push cases may result in a decision against intervention. UNHCR's formal presence in the decision-making process may favor intervention.

Many court interventions have been done in common law countries, such as the UK and US courts. However, regime-changes in the eastern European states allowing for the adoption of modernized laws in civil procedure led to many interventions in Russia and some of the Baltic States. Intervention is also done in cases decided by regional courts, such as the ECtHR.

Court interventions are in the public domain and many of those done in English are now posted on *Refworld*. As of 2009, 40 such court interventions were registered. 13 of the interventions happened before UK courts, and 13 before US courts.

4.4.2 Placing of request for court interventions

Requests for the writing of a court intervention usually emanate from any of UNHCR's local offices which have within their mandate to monitor national practice. The local offices may have become aware of a case themselves, by way of an NGO or an advocate.

The field office which wishes to intervene must follow internal guidelines on how to go about seeking clearance with the DIP at the Geneva Headquarters. The local office must provide a statement describing both the process before the national court (brief statement of facts), and the principles addressed (key questions of law, potential precedent, what to gain out of intervention). The local office must also include a reasoned argument for the use of DIPs

resources on intervention. Usually the local office bases their request on considerations of consistency of the RSD application in a particular national jurisdiction.

UNHCR may also become aware of a possible need for intervention before regional international tribunals, such as ECtHR.

Requests for intervention will be reviewed by DIP. Requests usually require a fast process due to procedural time limits of the courts. Requests may be in writing, or it may be dealt with by way of a telephone conference due to time constraints, and it may involve several offices (regional and field) to run through what was at stake in the case.

The decision of whether to intervene or not is supposed to involve an assessment of how to balance need against resources. Essential to the assessment of need is whether the case is pertinent to protection needs and whether it is important for UNHCR to take on a lead agency role. The assessment of resources may turn on the potential of the case setting a precedent, the number of asylum-applications that are likely to be affected and whether the decision may affect other national jurisdictions.

4.4.3 The assessment of need and resources for intervention

The case must be pertinent to protection needs

UNHCR always retains the possibility to decline a request. The question of why it is necessary and worthwhile to intervene has to be considered carefully. The assessment should consider whether the legal question raised is pertinent to the protection regime in the national jurisdiction. A need may be demonstrated by the identification of a “protection gap” where UNHCR’s statistics on groups of asylum seekers originating from countries where UNHCR has produced Eligibility Guidelines may be compared with the acceptance rates in European countries. The protection gaps may also be evident by way of publicly available information, such as the asylum system in Greece where a need immediately presents itself as pertinent.

The assessment of need has in some instances also involved an evaluation of whether the legal action may be a mean to achieve protection for the individual, even if there is no clear prospect of winning a precedent setting decision.

A lead agency role? The presence of NGOs and the legal community

UNHCR will also assess whether other agencies will take the lead in ensuring national implementation of International Refugee Law, allowing it to direct its resources elsewhere. The presence of NGOs may not in itself indicate that UNHCR does not need to take on a lead agency. In several countries, NGOs may be present but not sufficiently independent of the government. Lack of independence may be due to particular nationalistic environment. In the case of Kazakhstan and Belarus, NGOs and the civil society has difficulty to enter the field, creating a need for UNHCR to take on a lead agency role. In other countries, the less dramatic protectionist tradition may have left a tradition of NGOs being semi-independent.

In the case of Russia, NGOs are less present and UNHCR is therefore pushed to the front of the scene. In cases where the field of the protection of Refugees may be described as “empty”, UNHCR may be more likely to have a high number of interventions.

UNHCR may also be expected to take into account whether the local legal community is able to push principled cases that will make intervention more likely to succeed. A living legal community, such as that in the UK, provides an example that has worked in favor of UNHCR intervention. In the case of Russia, the local office in Moscow has in the context of writing *amicus curae* also trained Russian lawyers with the aim that they will start their own asylum-

practice. These lawyers are now well established and able to win cases without the need for intervention by UNHCR and the need for writing *amicus curae* has decreased.

The potential of setting precedents – are the national courts sufficiently independent?

When a need is identified, UNHCR may be expected to prioritize its resources by predominantly selecting cases that have a potential value of setting precedent within the national jurisdiction. The assessment of whether the case can set a precedent will depend on whether the courts are perceived as sufficiently independent in their rulings of the government's immigration policy, in terms of being free of corruption but also in the sense of having sufficient powers of review. UNHCR may also look to countries of "best practice", where the recognition rate of convention refugees is above concern, as these jurisdictions may be expected to be more likely to give weight to UNHCR's guidance. Such assessments are probably not decisive as courts in countries with recent regime-changes such as Russia and some of the Balkan states also have proved receptive to UNHCR guidance, even if recognition rates do not place them as "above countries."

The potential of affecting other asylum-applications – the volume of RSD done by the government

A case may also be prioritized if the government does a high number of RSD on asylum-seekers from the country of origin where the protection gap is identified. If a pertinent case stands before a national court in countries that receive many such asylum applications the case is likely to be prioritized. For instance, Greece's zero recognition rates for Iraqis in a period where UNHCR had recommended they should receive a prima facie assessment of international protection, clearly demonstrated a need for intervention.

The potential of influencing other national jurisdictions

Decisions from some national courts may in addition provide the added benefit of being read by many and given weight within other national jurisdictions. The UK has received a particular focus in the context of court intervention, not only due to UNHCR's strong legal community and the independence of the courts. As a common law country precedence has stronger weight at the appeals level and UNHCR has found that the House of Lords has delivered very sophisticated judgments on issues of International Refugee Law. As the judgments are also written in the English language, they have the potential of being read by many.

The formal presence of UNHCR in government's RSD

In a few national jurisdictions, UNHCR still has a formal presence in the government's Refugee Status Determination-process. In such cases, court intervention may be decided because the action is more likely to succeed due to its presence and vote in decision-making process.

In the case of France, UNHCR has a formal position in the Refugee Status Determination-process at the airport under the accelerated procedure. If UNHCR-staff detects an element in a case that is not manifestly unfounded, they have the vote to turn the case to the regular procedure and UNHCR has a voting role and is part of the three judges on the quasi judicial appellate body.

4.4.5 Writing and approval

Usually the writing of an *amicus curae* starts at the field office. Sometimes the assignment is given to a refugee law expert. If intervention is done at one of the regional courts, the writing will be a joint effort involving several offices.

When the draft is completed, the paper is sent to the regional office and the Geneva Headquarters for approval. The clearance process is internal.

4.4.5 Evaluation

After the amicus is submitted and the court has handed down its decision, the court may have differed from UNHCR's interpretation on a precise interpretation of law. In such cases, the result may lead to the production of new position papers, by way of Notes etc. For example, the upcoming paper on "gang resisters" came about as a result of some national courts rejecting the notion that gangs could form "a particular social group."³⁴ A negative result may also lead to subsequent interventions because UNHCR has not managed to give a sufficiently lucid guidance. Certain issues of law may not be readily understandable to the courts and may require several attempts at intervention.

In cases where also subsequent attempts at intervention are unsuccessful, UNHCR will most likely retain their position but agree to disagree. For example, when the Haitian asylum seekers were intercepted at high seas, UNHCR took the position that the procedures linked to Article 33 of the 1951 Convention applied and intervened before the US courts. The US Supreme Court finally rejected this interpretation, but UNCHR has not changed their position.

A high court decision adapting UNHCR's position does not necessarily guarantee that lower courts will follow. A successful intervention will therefore not eliminate the need for continuous supervision.

4.4.6 Dissemination

All of UNHCR's court interventions or *amicus curae* are in the public domain. Many of them are posted on the "UNHCR Court Interventions/Amicus Curae" page on *Refworld*.³⁵ The page explains that the submission of *amicus curiae* briefs, advice to lawyers and other similar interventions, are part of the activities carried out by UNHCR in the exercise of its supervisory function under Article 35 of the 1951 Convention. Once posted on *Refworld*, the *amicus curae* may also be circulated on the standard email recipient list.

³⁴ See subsection 4.2.6 on production of Note on gang related violence due to inconsistent national court practice.

³⁵ At <http://www.unhcr.org/refworld/type,AMICUS,UNHCR,,0.html>. This page is accessed by consulting the "Browse by" menu on the left hand side of the *Refworld* Home Page and accessing the link "Document Types." Select the link "Court Interventions/Amicus Curae." This page may also be accessed by consulting the "Categories" menu and selecting the link "Legal information" and under the tab "Publisher" accessing the link "UN High Commissioner for Refugees." However by this route only 36 court interventions are posted.

4.5 The making of the *ELIGIBILITY GUIDELINES*

4.5.1 Summary: What is an Eligibility Guideline (EG)?

One of the functions of the Status Determination & Protection Information Section (**SDPIS**) within DIP,³⁶ is to produce Eligibility Guidelines. SDPIS is also given the task of producing COI-updates and editing the database *Refworld*. SDPIS consist of five people.

As with the GIPs, UNHCR's authority to produce Eligibility Guidelines is derived from Article 35 of the 1951 Convention. UNHCR intends for the recommendations in the Eligibility Guidelines to be given the same weight in national jurisdictions as the GIPs and Notes. At the head of many of the Eligibility Guidelines an introductory note is included referring to UNHCR's supervisory role under Article 35:

“UNHCR issues its *Eligibility Guidelines* pursuant to its responsibility to promote the accurate interpretation and application of the above-mentioned refugee criteria as envisaged by Article 8 of its Statute, Article 35 of the 1951 Convention and Article II of its 1967 Protocol and based on the expertise it has developed over several years in eligibility and refugee status determination matters.”

The main function of the Eligibility Guidelines is to give authoritative statements on the interpretation and the application of the Refugee Criteria in a country, a region or a specific situation. Whereas the GIPs only deal with legal assessments, the Eligibility Guidelines are specifically geared towards the factual conditions concerning a specific issue, region or country. UNHCR expects both its factual and legal assessments to be adhered to by states. In the introductory note of many of the Eligibility Guidelines, it is stated that their recommendation:

“should be weighed heavily by the relevant decision-making authorities in reaching a decision on the asylum applications concerned.”

The factual component gives an objective assessment of the human rights and security situation in the country of concern, and the legal component recommendations on how to apply the refugee criteria on the facts.

The legal component will always pronounce on the protection needs for convention reasons, and usually also includes recommendations for convention-like reasons. In addition, an advocacy on forced returns may be added.

Advocacy regarding conditions for forced return also lies within UNHCR's “functions” within the meaning of Article 35, as it is part of its mandate to seek durable solutions. However, as conditions of return falls outside of the right-based underpinning of convention- and convention-like protection, the recommendations are not to be regarded as an authoritative legal statement within the ambit of states' treaty obligations.

As with the GIPs, the Eligibility Guidelines come about as a result of an extensive research process that includes its whole network of offices. The clearance and review process is internal. Unlike the GIPs, the Eligibility Guidelines are therefore more the exclusive product of UNHCR, as they are not based on a roundtable discussion among states and UNHCR does not consult governments in the making of the factual and legal assessments. The principle of evidence collection and assessment and the rigor that goes into the research, clearance and review is usually referred to by a statement of the Eligibility Guideline being:

³⁶ See section 4.1 above for a organizational map of the legal sections at the UNHCR Geneva Headquarters.

“...are researched strictly and are written based on factual evidence provided by UNHCR’s global network of field offices and information from independent country specialists, researchers and other sources, rigorously reviewed for reliability.”

When writing the Eligibility Guidelines, SDPIS involves and cooperates with field staff, local offices, regional bureaus, as well as the country desks and the legal staff at POLAS. Its global network, long-standing experience in monitoring protection needs, the rigor that goes into the methodology of collecting and assessing facts pertaining to refugees, and its neutrality as not being part of an adversarial process are all believed to give the Eligibility Guidelines an added value to national decision-makers.

Whereas the GIPs are given a number in a series, the Eligibility Guidelines are given the month and year to distinguish between different position papers on the same topic or country (i.e. Afghan Security Update of 8th October 2008, Afghan Security Update of 23rd June 2008 etc.).

Since 1984, UNHCR has produced over 100 publicly available Eligibility Guidelines and updates regarding the conditions and criteria for protection need and return that are posted on *Refworld*. In addition UNHCR writes letters of a semi-official status to governments regarding updates in a country of concern. These letters are disseminated by the regional and local bureaus and not posted on *Refworld*.

4.5.2 The request for papers

The Eligibility Guidelines come about in response to a specific, identified need. It can be due to the registration of widely inconsistent recognition rates, to the lack of guidance due to sudden changes in the security situation, or due to some particular difficulty in doing RSD in a country or region. Such situations create a need for guidance and for UNHCR to fulfill its function of ensuring harmonious interpretation of protection needs. The Eligibility Guidelines seek to meet this need by producing authoritative statements on the application of the inclusion criteria based on a careful research of the risks in the country of concern.

In principle, it is possible for anyone to request a paper or an update. The usual venue is that requests emanate from some level within UNHCR. However, requests have also come from states, courts, NGOs and individuals. Where a request originates from is not made transparent or reflected in the final paper.

Requests from within UNHCR may emanate from a particular bureau or field operations that have difficulties doing RSD on a particular case load. The purpose of the request will be that they are in need of global guidance from Headquarters on how to deal with particular groups or situations. Requests may also emanate from the unit at the Geneva Headquarters that monitors the RSD recognition rates. They may have registered that recognition rates are not harmonized across field offices or across states indicating a protection gap.³⁷

Requests based on the identification of a protection gap illustrates that the initiative to write an Eligibility Guideline is not always a result of a pro-active initiative, but sometimes on the basis of a protection need. A request may also come from a representative from the Headquarters that has noticed discrepancies under a country mission. If a “top 15 country of origin” lacks guidance, this may in itself point to a need for an Eligibility Guideline due to the sheer quantity of applicants.

Requests from states usually concern a call for an update of an existing Eligibility Guideline. Many such requests from states were generated at the time when UNHCR did security

³⁷ The Status Determination and Protection Information Section, see page 24 for chart of organization structure.

updates on Afghanistan. In particular, the Nordic countries were very active for the purpose of updates on IFA and forced return. Chechnya makes for another example where states for long had welcomed an update. UNHCR takes the request of states into careful account; however states may not influence the decision of writing an Eligibility Guideline or an update as it would affect the neutrality of the whole process of writing.

ECtHR's case load may also generate a perceived need for Eligibility Guidelines or updates. Within the last years UNHCR has become aware of the wish of ECtHR for updates on Sri Lanka and Somalia. In the case of Sri Lanka, ECtHR had put a moratorium on all of the court's decisions awaiting the UNHCR update. The ECtHR has also put on hold the decision of a Somali case until the publication of the UNHCR update on Somalia.

Requests from individuals or NGOs do occur, albeit rarely. One such example was the case of Afghanistan in 2006 and 2007, where NGOs and individuals approached UNHCR for updates concerning IFA and forced return. The proper section of UNHCR to approach for NGOs or individuals will be the regional office, as DIP and its subsections are purely for the mandate of UNHCR.

4.5.3 Decision to write

The assessment of need is an internal decision taken by DIP and based on the internal standard for review and clearance process in the Internal Office Memorandum.³⁸

- a protracted or problematic issue;
- a current and topical nature;
- changed circumstances in a country of origin; or
- a group or issue that affects several offices or even regions; in addition the following may be taken into account:
 - varying recognitions rates; and
 - the extent to which there is a need for UNHCR to pronounce on a particular caseload

Based on this list, the first step in the writing process would be to determine whether the extent of the problem warrants a paper. The problem would probably have to present itself as one of concern, or one that is particularly difficult to handle when doing Refugee Status Determination. The extent of the problem may be further documented by sending a request to the RSD-unit (see sub-section 4.1 figure 1) that may conduct a preliminary inquiry of particular problems with certain groups or issues at the field offices.

If there is a recognized need for a paper, the second step would be to evaluate whether it would be helpful to the multiple actors who read the papers, such as UNHCR, states and NGOs, and not only the institution who presented the request. This is to ensure that the assessment of need is based on an objective analysis, and not the result of a pro-active initiative from within or outside of UNHCR. If a need is established, this will be communicated to SDPIS.

The existence of a need will have to be weighed against available resources at the SDPIS. A decision has to be made as to where the most difficult case load is and where UNHCR may have the most impact in its own and states' decision making.

³⁸ The internal memorandum is abbreviated "IOMFOM."

The Eligibility Guideline and update on Chechnya

Working conditions

The writing of the 2003 Eligibility Guideline on Russian Chechnya was difficult due to the general security situation combined with a limited mandate of presence. UNHCR only holds two field offices and its presence is not for the reason of registering or monitoring the human rights situation but for doing relief work. From its two offices UNHCR may go on regular missions, but working conditions are difficult as all missions are in need of armed escorts and even UNHCR may not always be perceived as neutrals.

UNHCR does hold a privileged position however as one of a few agencies that are allowed in Chechnya and the only one that works with refugees. There are not many other international observers that register COI on the ground in Chechnya and the ones that do will all be at risk if reporting on human rights violations.

The decision to write the 2003 paper was not based on a need to guide own staff, as UNHCR does little or no RSD on refugees from Russian Chechnya in the surrounding countries. The “need” for the papers was with the European governments as the flow of Chechnyan asylum-seekers goes directly to Europe. Chechnya further illustrates that an extensive mandate of on-ground presence is not a precondition for writing an Eligibility Guideline. How to source the paper was part of the assessment of whether to write, as UNHCR could not quote NGOs as they either had been or were at risk of assassination. Sourcing of the paper was made possible by using its network of offices located in the surrounding areas.

Special characteristics

In the 2003 paper UNHCR took the position of a *prima facie* need of protection due to generalized violence in the area. It also rejected the possibility of an IFA in other parts of Russia. The paper also delineated exposed groups, one being women in need of protection for one or more of the convention reasons. As information gathered on the ground was limited, manipulated or tried to be controlled, the paper relies on much of the same information as is otherwise publicly available, such as the reports of the US Department of Interior or the UK COI-units reports. The local field officers did however provide an additional added value of being able to corroborate and correct the draft COI.

Response to calls for updates

Some years after publishing the 2003 paper, UNHCR received request for updates. UNHCR did recognize that the situation had changed, but it was less clear whether the changes warranted an update. In 2009 it decided to write an update. Even if the situation was still precarious with recent assassinations and bomb attacks, the situation was assessed to no longer warrant a *prima facie* need for protection. It maintained however that there is no applicable IFA. In addition some new groups were now at risk that had not been at risk before. One such group was of expatriates who had returned to their area of origin.

In April 2009 an interim guidance was published with a *de facto* public status, but which was communicated bilaterally, distributed to local UNHCR offices and NGOs. The letter summarized UNHCR’s thinking on the protection need of asylum seekers from Chechnya and was meant to replace the 2003 guidelines that had become obsolete. As the update is only two pages long, it cannot replace the 2003 Eligibility Guideline in a satisfactory manner. A group of countries has placed specific questions regarding the letter, placing UNHCR with the question of whether to continue writing letters or come up with a new paper.

As of the fall of 2009, DIP has requests for Pakistan (9th on RSD by government), Ethiopia (11th on RSD by government), Sudan (6th on RSD by UNHCR) and Iran (7th on RSD by UNHCR). At present it is not possible for DIP to comply with all of these requests. DIP aim to reorganize their resources so that they can serve the top 10 countries for UNHCR and for governments.

The case of Iran

Types of papers produced

UNHCR publishes different types of country reports and press updates on Iran. It has not however written an Eligibility Guideline on Iran. A decision to write a paper on Iran has to consider the security issues of its local staff, or even that UNHCR will lose its mandate of presence. As with the assessment on whether to write on Eritrea, the value of writing a paper on Iran has to be weighed against the value of being able to continue the relief work it is otherwise allowed to do for refugees coming to Iran. Once the decision of writing is made, it is UNHCR's policy that the security issues shall not affect the content of the paper or what is written.

Working conditions

The working conditions for UNHCR are very different from that of Afghanistan and Iraq. In some respects it seems to be more likened to that of Russian Chechnya in terms of that reliance on information gathered from within the country, whether it be its own offices, NGOs or governments' country visits, will suffer from confidentiality issues. The oppressive regime in Iran also poses an additional difficulty as being specialists on intelligence.

A research and writing process would include the collation of such information gathered from within Iran, however it would probably not be deemed as very useful if not sufficiently corroborated from other sources. Information from the monitoring refugee flows in neighboring countries will in such situations prove to be more reliable.

Distinguishing characteristics

The strength of UNHCR's position in writing on Iran lies in its long standing and exclusive presence in the neighboring countries such as Turkey. Neighboring offices receive information directly from across the border and may be able to corroborate with the information in claims where they assess RSD. They therefore have a massive library of COI on Iran. Even if they cannot conduct on-sight visits in places of human rights abuses from their vantage points from across the border, they do receive much information that is considered of greater value than information gathered from inside Iran. Even if this information is not quite as good as the information coming out of Afghanistan on Afghanistan, the neighboring offices provide far more information than what is found in the public domain.

Another added value of UNHCR giving an assessment of the security or human rights situation may also be how the COI is used, both in terms of assessing its reliability and in terms of applying it to protection needs. Based on the principles it applies when assessing COI, UNHCR will probably not assess sources from within Iran as reliable even if they have had long standing contact with the source or even if the source present him- or herself as particularly reliable. As with the case of any oppressive regime, sources may not speak entirely freely and they usually have limited knowledge of the situation. Its position across the border gives the opportunity to compare the information gathered in Iran and draw the conclusion that sources from within Iran are not reliable.

Assessment of gender

UNHCR has access to a vast amount of reliable COI regarding vulnerable groups within Iran, including political opponents, ethnic and religious minorities, women and homosexuals. The position of women and of homosexuals are (along with converts) particularly difficult in relation to fear of persecution from within their own family or local community. In the case of Iran, UNHCR has taken a different position on states that say that converts and homosexuals may be safe if they are discreet. This difference may in part be due to a different assessment of the facts, and partly due to a different view of human rights. UNHCR has in a recent intervention before the ECtHR argued that the individual should not be expected to hide his or her orientation. In some cases where the orientation is tolerated if not acted upon, governments may in addition expect the individual to live in a manner that does not provoke a threat. UNHCR may in such cases be expected to adapt a position that even if he or she is generally careful, no person can be expected to manage in the long run, as they are not trained professionals.

Assessment of risk

The difference in opinion is also a matter of how risk is assessed. UNHCR may take the position that when the punishments are as severe as stoning, hanging, beheading or mutilation there should be no requirement of a high insurance that these individuals may be entrapped in their social mores. On the other hand, some states seem to pose the question of whether any person within the group (i.e. homosexuals) is at risk. Such an approach of risk assessment either being a question of a *prima facie* nexus – which the COI rarely supports – or requiring a fairly strong indication of individual circumstances beyond that of the sexual orientation, may create a protection gap where the risk shown in the COI is not treated as a quantitative probability. It is not likely that UNHCR would take an approach of a *prima facie* nexus in the case of Iran (saying that all homosexuals will be persecuted) or requiring the existence of particular individual reasons before establishing protection needs; but instead presuming that the COI show that all homosexuals (where credibility has been established) run the risk of persecution.

In order to ensure that its decision to write is based on an independent and broader perspective of protection needs, DIP will not feed back to governments' with expressed needs due to influx of asylum seekers. Similarly, the assessment cannot be expected to take into account priorities spelled out in the Agenda for Protection.

The issues on the Agenda for Protection and the need of states may however tend to reflect issues that are protracted, problematic and current and therefore a high priority of DIP. One such example is gender which is an exceedingly important issue both for DIP and for Agenda for Protection. To DIP gender has a very high priority, not because GRP has to be particularly problematic to interpret or apply, but because of the importance of fixing focus on gender as a mainstream convention ground.

The final decision to write an Eligibility Guideline is a joint decision between the Headquarter and the Regional Bureau. The joint decision is meant to ensure that resources are not spent on a paper that the regional director in the end says is not a desired product.

The joint decision at the directorial level involves an assessment of whether policy issues exist. Relevant policy issues may be expected to be the extent to which the Eligibility Guideline will have an impact on national or own Refugee Status Determination.

Policy considerations may also concern whether the mere issuance of a paper will put UNHCR local staff at risk or endanger its relief work in the country of concern. Eritrea may provide as an example where the writing of an Eligibility Guideline could risk UNHCR's mandate of presence some years ago when having activity on the ground. As the activity on ground decreased, this concern did no longer pose such a concern and a paper on Eritrea was published in 2009. Past incidents also illustrate how the publication of an Eligibility Guideline in fact led to loss of mandate, as was the case with Uzbekistan where the local government requested UNHCR to leave. UNHCR's mandate in Russian Chechnya is also known to be precarious, but the publishing of Eligibility Guidelines has so far not led to a loss of mandate.

Apart from issues pertaining to the security of local staff and refugees receiving relief, the policy considerations on the directorial level are not supposed to be influenced by the wishes of the country of concern. The country of concern will almost always have an issue with the production of a paper that will address human rights violations by state or non-state actors, and UNHCR claims that it does not let such considerations color the decision-making process.³⁹ Even if UNHCR may not be able to publish an Eligibility Guideline, they may still give guidance in a less conspicuous format.

³⁹ The influence of geo-political considerations on UNHCR's mandate has been the topic of recent interviews on the directorial level, see FORSYTHE, D "UNHCR's mandate: the politics of being non-political" *New Issues in Refugee Research* (2001).

Once a decision is taken to write, the conditions in the country of concern can be expected not to affect the content of the report, as may for instance be illustrated by the 2009 update on Chechnya where UNHCR upholds its recommendations regarding the Internal Flight Alternative.

Where the request has emanated from, has no influence on whether the paper is written and how it turns out in the end. The decision to write is not transparent, but upon question UNHCR will confirm that an Eligibility Guideline or an update is in the making, if it can be presumed that the state, organization or person asking is not trying to influence the process.

4.5.4 Outlining the paper – assessing the terms of reference

SDPIS is expected to start the drafting process by assessing the terms of reference, or make an outline of the paper. This may take place by SDPIS going back to the field office to ascertain which main categories of claims the field is confronted with and the particular problems the claims raise. SDPIS should also set out research strategies for obtaining Country of Origin Information, and also the legal framework it needs to consult.

Research strategies for the factual part may be expected to be a matter of identifying sources that will match up with the relevant categories of claims for the particular country. For instance if the claims identified at the initial stage are mainly about religion or gender, the sources that are most likely to give such information should be listed. If the claims raise a larger set of sub questions, as for instance the example of draft evasion in Eritrea, there may not be resources to cover all and SDPIS has to make a decision to focus the research on particular problems. The final text may however not reflect that the exposed groups described in an Eligibility Guideline may be the result of a prioritization in the initial stages of research, and that some groups may have been left out. It would amount to an incorrect use of their Eligibility Guidelines if it were interpreted as an exhaustive detail of all exposed groups.

Research into the legal terms of reference may raise the issue of whether application of the law on the facts represents a development of the principles in the Handbook, GIPs and Notes. For example, the issue of possible Internal Flight Alternatives usually warrants an analysis of the three different Complementary Protection-regimes (see subsection 3.1 above). For instance, in the case of Eritrea, where no internal armed conflict exists, the broader definition of Complementary Protection would probably not be applicable as defined for instance in Article 15 c) in the Qualification Directive. However Complementary Protection under Article 15 a) and b) might be relevant. For government Refugee Status Determination by African countries, a similar analysis has to be made of the AOU Convention.

4.5.5 Principles for evidence collection and assessment

Country of Origin Information may be regarded as a discipline of its own, with its separate methodology. UNHCR, as other professional entities that do evidence collection and assessment, bases its writing on principles of source selection and validation that are commonly agreed upon.

The Eligibility Guidelines and updates on Afghanistan

The working conditions of UNHCR

The genesis of the Eligibility Guidelines on Afghanistan took place on the field. Similar to the situation in Iraq, UNHCR's extended presence allowed for the writing of its own registration and writing of COI. In comparison to the situation in Iraq, UNHCR had a long standing presence in Afghanistan and much

information was already registered. At the time of writing the 2005, 2007 and 2009 papers UNHCR's mandate in Afghanistan was also somewhat broader, compared to the mandate in Iraq. The difference today is more a matter of degree.

The particular situation of UNHCR in Afghanistan is that the office for a long time has been involved in a fully fledged return situation. In Afghanistan, UNHCR also has a particularly clear mandate of having a monitoring role in refugee needs and facilitating the returnees. This includes registration of how the government is treating those individuals in terms of human rights and securities. It also positions UNHCR to have access to a number of different sources, which allows for extensive cross checking.

Because of UNHCR's extended presence and ability to monitor the situation by being present in 170 out of 400 districts, NGOs may not be used as a direct source but a way to assess whether what is already reported in previous reports is still the situation on the ground. However, the assessment of the situation in the North is more difficult. UNHCR does not have a lead agency role as their presence is impaired and the reports on human rights and security incidents is more from the perspective of safety of humanitarian workers, which is not necessarily the same as the risk for instance a Hazara from Ghazni would face.

Special characteristics of the papers

The special characteristics of the 2009 Eligibility Guideline on Afghanistan also led to the paper taking a long time in the making. One of the reasons why was due to the decision of DIP that the Eligibility Guidelines should also pronounce on international protection needs of people, from indiscriminate harm due to generalized violence.⁴⁰ In the process of collecting evidence on this issue, interviews conducted with refugee Hazaras going back and forth from Pakistan detected that the area was clearly not unsafe for everyone. These findings did not support a statement that the whole region should be precluded from return *prima facie*. UNHCR therefore changed its position between the 2007 and the 2009 papers, by recognizing that people migrate for many reasons in order to provide a more balanced impression of the protection needs.

Feedback and evaluation

The Eligibility Guidelines are generally well received, particularly in regards to the description of the security situation. Some states have, however, disagreed on UNHCR's recommendations on the requirement of sufficient links (or social network) in possible areas of relocation. States claiming different factual assessments based on own or others' visits to the country would probably not compare to UNHCR's method for collecting information based on its extended presence, unless extensively corroborated by other sources.

Response to calls for updates

Afghanistan was for some years the only place where UNHCR gave security updates. The security issues in Afghanistan made it difficult to up-hold its in-house policy of recommendations standing until a new paper is written. The security situation is difficult as violence moves around due to the system of clan protection and that clan domination may shift, disintegrate or relocate. The interim security updates were not meant as guidelines but something for states to consider. UNHCR had difficulty using them and eventually stopped issuing new ones. In the update of the 2009 Eligibility Guideline it was declared that no more security updates are to come.

The particular task of collecting and assessing facts in the context of protection needs has produced guidelines both within UNHCR and the EU.⁴¹ The importance of correct collection

⁴⁰ The mandate protection need is equivalent to EC Article 15 c which pronounces on indiscriminate harm due to generalized violence. In the definition of UNHCR this protection need leads to convention status and not to Complementary Protection.

⁴¹ UNHCR UN High Commissioner for Refugees, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004 at: <http://www.unhcr.org/refworld/docid/403b2522a.html> [accessed 28 October 2009]; and European Union, *Common EU Guidelines for Processing Country of Origin Information (COI)*, April 2008, available at: <http://www.unhcr.org/refworld/docid/48493f72.html> [accessed 28 October

and application of Country of Origin Information to the Refugee Determination Process has also been endorsed by statements of the International Association of Immigration Judges (IARLJ) and various national administrations such as the UK's Home Office Asylum Policy Unit. UNHCR in addition provides internal training on the principles of evidence collection and assessment for its staff that does Refugee Status Determination that also form the basis of the works of SDPIS when researching an Eligibility Guideline.

The Eligibility Guidelines usually have an introductory statement referring to the general principles of evidence collection and assessment. If a particular situation warrants it, the principles applied are also stipulated in the paper.

Evidence collection and assessment should be regarded as a combined effort of international cooperation. UNHCR relies on many of the same sources that governments and NGOs rely on. In practice it is therefore a certain extent of overlap with the work of the different entities processing Country of Origin Information; SDPIS will consult available information from governments doing RSD, NGOs, UN Special Rapporteurs and global research centers consulting, and these entities may interview UNHCR on some of the same issues that the Eligibility Guideline in production is to address. The rationale for writing an Eligibility Guideline is not to publish Country of Origin Information that may claim exclusiveness. SDPIS is expected however to present the operative "best use" of the sources that to a large extent are commonly available. This "best use" refers back to a rigorous standard for the collection of credible information.

The assessment of credibility of a source is to be based on the principle of corroboration. A fact must be corroborated by many different sources before UNHCR may attach *credibility* to it, and a less neutral source requires a correspondingly strong corroboration. The source does not necessarily have to be immensely *reliable* if it can be regarded as credible on a particular issue. For instance, statements by refugees coming across the border from the country of concern may only be regarded after credibility is established and if sufficiently many report on the same facts.

Information collected in countries with oppressive regimes raises particular issues pertaining to credibility and corroboration. Oppressive regimes often practice censorship and citizens may be under the threat of severe punishments. Such situations make it difficult to control the credibility of information collected from within the country of concern. SDPIS may be expected to be cautious to rely on information gathered from its own field offices in the country of concern, as the information is difficult to control for credibility. All sources are subject to restrictions and being inside the country it is difficult to have correct information. SDPIS may therefore prefer to rely on UNHCR's presence around the country of concern.

Due to conflicts or oppression in the country of concern, there may be a lack of information or an information gap. Instances of information gaps are sometimes reflected in the text of the Eligibility Guideline.

2009]; and Austrian Red Cross/ ACCORD, Researching Country of Origin Information; A Training Manual, 2004 updated 2006

The Eligibility Guidelines on Iraq

Working conditions

The genesis of the two last position papers on Iraq took place on field level. The involvement of DIP was to look at the quality of the document from a drafting, sourcing and editing point of view. UNHCR's own presence, the returnees approaching protection centers, UNAMI security reports and the reliance on a consultant who is considered an international expert on the subject of Iraq complemented the usual sources of NGOs, own staff and diplomatic presences.

UNHCR's extended mandate of presence allowed for the reliance on its staff's contact with the population, both returning IDP and individuals remaining in the country. It allowed for the registering information that covered all of the country's center and south, and most places in the north. UNHCR also had protection centers where returned returnees approach lawyers and social workers for assistance on issues of documentation and restitution of property. These returnees allowed for a valuable corroboration of information on protection needs.

Special characteristics of the papers

The first return advisory published before the 2006 and 2009 papers, was not sourced. It was made possible due to the extreme violence that took place in the country. It was nevertheless given as an advocacy and coined in terms of "absorbed reached capacity." Both Iraqi papers are unique in the wealth of information it contains on the physical, legal and material safety conditions in various parts of the country. They are also unique documents in terms of being incident based. Usually when writing an Eligibility Guideline, UNHCR mainly collate information and does little registration on the ground in the country. The Eligibility Guidelines on Iraq represented a special case as no agency had registered information beforehand. Because UNHCR was also the only agency with the expanded presence in Iraq, it decided to conduct the lengthy task of registering security incidents and human rights violations.

Even if it is unusual for UNHCR to register all information themselves, it did make it possible to take an unusually strong position of recommending *prima facie* need for protection for all in 2006, still for the central governances. The research pointed to a vast number of incidents that were widespread and repeated. Many security incidents also concerned neighbors and thereby an individualized risk that served to corroborate a *prima facie* need for protection. The conclusions were based on an assessment of all the various methods of projecting casualties that all drew a picture of high amount of violence. In 2009 the incidents had dropped somewhat, requiring a need to refine the *prima facie* conclusion to parts of the country.

Feedback and evaluation

The first return advisory published before 2006 was not sourced but possible due to the extreme violence that took place in the country. The advisory was coined in terms of "absorbed reached capacity" and was clearly advocacy and it was determined that such guidance worked best if kept in the political context. The content is tied to the *prima facie* for certain groups. Upon publishing the first paper a few countries had a negative reaction to UNHCR's recommendation of a *prima facie* need for protection, but the factual basis for the paper was not discussed. The second paper caused some countries to present different positions on access to areas for the purpose of relocation. Even if the Iraqi papers were generally well received in part due to the extensive research that enabled UNHCR to take an unusually strong position *prima facie* need for protection, UNHCR will probably return to assess the COI registered by others or their own field offices and to write shorter papers.

Response to calls for updates

The strong position taken by UNHCR created likelihood for governments to more quickly point to change circumstances based on more recent information. Its monitoring of the situation did not result in a change of position until 2009. As with other conflicts UNHCR monitored the situation. New reports from other agencies and governments' fact finding did not reduce protection needs. It also had a hot line for receiving internal updates from its office in Lebanon assisting repatriated refugees.

When writing the second paper, a more detailed forward political analysis was included in response to anticipated calls for updates. The analysis explains which elements should be in place before the situation may become acceptable. The projected risk arising from the upcoming election was given particular attention.

For example, the Eligibility Guideline on Eritrea from April 2009 discusses the issue of lack of independent reporting outside the country.⁴² The position paper quotes the Eritrean governmental sources pronouncing on its view on the issues of female draft evaders, even if it was the only source reporting out of Eritrea. However, as a substantial amount of evidence gathered from neighboring countries pointed to the opposite description to that of the Eritrean government, the information from the government was not assessed as reliable.⁴³

Assessment of reliability should not encroach on the neutrality of the process. For example, when writing on Sri Lanka, some of the information from Tamil-Net may be collected, because it was corroborated from other sources and did not deviate from the totality of information coming out the country. Even if the source itself is not regarded as reliable, leaving out the information would amount to exclude one side and compromise the neutrality of the research. Public statements by the government in the country of concern are therefore also included – if corroborated by other sources.

4.5.6 Production of first drafts

The writing of the first draft coincides with the evidence collection and assessment. The writing and collection will usually be a combined effort of several units within UNHCR, under the lead and guidance of SDPIS and in conjunction with the field offices in or around the country of concern.

SDPIS is expected to ensure that all relevant available information is gathered from the public domain, including information from own sources and staff.⁴⁴ In order to be deemed relevant, the SDPIS will have to assess the credibility of the information. In cases where UNHCR is given an extensive mandate of presence, the organization as a whole may also benefit from information flowing from its relief-work and contact with government representatives or non-State-actors. In this context UNHCR does have a privileged access to governments that most NGOs or governments doing Refugee Status Determination do not have.

4.5.7 Evaluation of first drafts and review on the regional level

SDPIS also has within its functions to administer the review and clearance process of the drafts, and is also responsible for carrying out suggested changes and rewrites.

The first step of the clearance and review process will usually be to return information submitted by the relevant field offices and bureaus with comments from SDPIS in order for the section to complete a first draft. A first draft will then be submitted to POLAS to get relevant feed back on legal analysis. When the first draft is corrected and approved at this level, it should be turned over to the director of DIP and the director of the regional bureau for approval and signature.

⁴² UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, April 2009 footnote 1 at: <http://www.unhcr.org/refworld/docid/49de06122.html>.

⁴³ Compare page 12 of the Eligibility Guideline, with pages 18 and 19.

⁴⁴ There is a huge amount of public domain material available to all entities that write on Country of Origin Information. Information is produced by Amnesty International, Human Rights Watch, OECD and many other international organizations. In addition government bodies, EU and various UN treaty bodies also produce relevant information that professional entities, including UNHCR, look at. The media, academic institutions and global think tanks are also regarded as important sources.

At the directorial level, the draft is usually declined and goes back with a set of comments to SDPIS.

The comments from the directorial level may regard insufficient Country of Origin Information and requests for the capturing of additional information in order to have a finding sufficiently substantiated. The comments may also regard legal or policy issues, requesting better legal support for a recommendation or an advocacy. Comments regarding legal or policy issues will be sent to POLAS or the head of the regional bureau for correction.

Examples may be found where first drafts have been stopped completely due to significant lack in quality. However, as the initial assessment of need presumes continuation, only exceptional circumstances may warrant discontinuation of the writing process.

4.5.8 Rewriting of drafts – final clearance process

The rewriting of the drafts usually involves several feed back loops where it goes back for corrections and improvement. In order to ensure the best quality of the Eligibility Guidelines, rewrites is said to have become the rule and not the exception.

In the final clearance process, most of the comments will usually relate to the legal analysis and how the paper articulates the application of the legal framework to the problem at hand. Comments regarding facts will probably be more about form than substance. If there are still gaps in the Country of Origin Information, feed back will probably go to the regional officers for correction where a staff member is given the task to communicate with the field office whether they are aware of a particular issue.

The wording of the recommendations is another focal point. The wording of the inclusion criteria must be using UNHCR's terminology in the GIPs and in the 1951 Convention. POLAS will therefore be part of the final loops of the rewriting process too. The issues may be expected to concern situations where guidance cannot be derived from previous GIPs, Notes or Eligibility Guidelines. The particular wording needs to be balanced so that it is not too narrow in its scope and can be applied to different situations.

Even the last stages of rewrites such issues were told to crystallize the need for collecting more information on state jurisprudence.

The very last loop of rewrites may often be about achieving the right balance in the paper and rethinking the recommendation given. The drafters may have presented many pages of severe human rights violations and grave security issues and only a few regarding improvements. The total impression of the papers will be that there is a dire need, but if the conclusion is that UNHCR recommends a more restrictive policy (less need for protection) this does not compare well with the factual basis of the paper. In the final rewrites SDPIS then has to consider whether there are grounds for amending the recommendation or whether the recommendation should stand and there is a need to balance the impression of the situation in the country of concern.

When the paper presents itself as coherent and balanced out to fit the recommendations, the directors will cosign the paper for joint publication. Because the position of UNHCR is relevant to states obligation to cooperate under Article 35, the Eligibility Guidelines should achieve a level of substantiation and balance that presumably exceeds that of other entities producing Country of Origin Information.

The Eligibility Guidelines on Sri Lanka

Genesis and working conditions of UNHCR

The genesis of the 2006 and particularly the 2009 Eligibility Guideline on Sri Lanka was on the field and the regional offices of UNHCR. In Sri Lanka, UNHCR has more than 200 staff members dealing with RSD and repatriation. UNHCR also has long standing experience with the country from having been present for more than 20 years. The field presence is large and its mandate with the government includes that UNHCR assists on how to return internally displaced in the liberated areas. These circumstances has allowed for UNHCR to monitor the situation and to compare COI written by other actors with that of their own experience.

Sri Lanka is an operation that differs in many aspects from Iraq and Afghanistan in terms of relation to the government and sourcing. On the one hand, UNHCR is in the unique situation of being able to openly discuss and assess the human rights situation with the government. Even if the open dialog allows for an extended presence in terms of actually being able to register COI, the government (and the insurgents) may have strong issues with this information being reported. UNHCR has several times experienced that despite the exceedingly open dialogue, government officials repeatedly harass those giving negative reports. Government officials have also tried to intimidate different NGOs into making erroneous statements as counter-information. The harassment did not stop even when confronting the government with their information having been checked out as incorrect. The research strategy therefore has to consider how to protect sources that normally may be quoted. In this, UNHCR ended up with looking up other types of sources for the the same thing as the NGOs, such as newspaper articles.

In comparison to other missions who also might have dialogue with the local government, the extended mandate of UNHCR may allow for an actual analysis and checking of information presented by the government that would be more a matter of qualified guess-work for any other agent collecting COI.

Special characteristics of the papers

The strengths of UNHCR position in assessing COI in Sri Lanka may be illustrated with the case of internally displaced, where UNHCR in its on-going dialogue with the government was able to check and confront their statements and actions on ground. The conditions for forced returns of the internally displaced changed dramatically soon after issuing the December 2006 Eligibility Guideline. In December 2006 UNHCR had issued an Eligibility Guideline that was based on thorough research that opened up for the return of internally displaced to the North. An unforeseeable development of the situation of the insurgents demanded a need for an update amending UNHCR's position. In early 2007 the Headquarters received reports from the field that indicated a need for a new position. The situation had dramatically changed with the TMVP (Carrona fraction of LTTE) taking the lead among the Tamils and the LTTE disappearing. In March 2007, the government decided on forced returns of internally displaced in an attempt to show that the situation was normalized. The internally displaced were transferred to centers or villages. UNHCR issued a press release taking a position against this treatment as there were no insurances that the people returned voluntarily, and in particular in the areas that had not been demined by the military.

Due to the particular tradition of conducting an open dialogue with the government in office, UNHCR routinely put its protest before them wanting a discussion of certain conditions for return of the internally displaced. UNHCR required demining of the villages, school facilities, a principle of voluntariness and that the return operation was led by civilians and not the military. UNHCR conducted some visits to monitor if the situation was in line with these three criteria. In certain areas the criteria for return was not satisfactory. Returnees were not given safe conduct; women were harassed, the military was still in charge of the returns, and the militaries occupied some schools, excluding the possibility of education. In addition, new problems had arisen as the government denied the returnees the same food rations as others in the camps. UNHCR was allowed to distribute food, and new negotiations with the authorities started. The government acceded to the situation and improved the security in some of the centers and villages, the schools were evacuated and they accepted to return only certain families, and not single women. However, on the issue of voluntariness the government did not accede to UNHCR's requests.

In order to illustrate the importance of the principle of voluntariness, UNHCR put before the government the facts concerning the voluntary return from a large Diaspora refugee camp in India where UNHCR is not allowed in.

The refugees from the Indian camps, who had not been to Sri Lanka for many years and did not receive direct information from the return areas, were very motivated to return. But when they arrived and saw that the conditions in the villages were not as promised, word was given back to the camp in India and the flow of returnees stopped. UNHCR was able to convince the government that this emphasized the need for voluntary return and that the reason for the big Diasporas abroad were closely tied to reasonable and basic needs of the refugees.

Feedback and evaluation

The different use of sources led several states to question the findings of UNHCR. Upon the publishing of the 2006 Eligibility Guideline on Sri Lanka several states went into dialogue with UNHCR on how its findings were extensively corroborated but that they could not reveal their staff sources due to fear of repercussion from government and insurgent representatives. The dialogue led to the adaption of UNHCR's position. In its evaluation of the 2006 Eligibility Guideline, UNHCR consider how to amend the problem where it could not provide a full sourcing of the COI without exposing local staff for risk of retaliation. So far the policy of providing bilateral updated country information for ad hoc request may be continued as long as most countries did accept the recommendations.

UNHCR's main research strategy was then decided to attempt, through many meetings with the government, to have them accede to the reporting of the Sri Lankan Human Rights Council. As this approach was not entirely successful, UNHCR started sourcing information by referring to articles in newspapers that were officially edited in Sri Lanka. They have the strength of being local sources that are not perceived in the same negative manner by the government as NGOs. The government tends also to accept articles when the source cited in the article is an official representative and when they have not contradicted the incident upon time of publication. It also used the UK COI-unit reports as a source in order to protect the on-ground presence of their own staff or NGOs.

Another feedback on the 2006 Eligibility Guideline was that its assessment of exposed groups and the IFA criteria was too generic. The DIP kept this in mind when it did the legal analysis and specified IFA for the individuals that meet the inclusion criteria for Refugee Status in the 2009 Eligibility Guideline. It also decided to state the groups at risk in a more defined way and link it more clearly to the five grounds. The aim was to make sure that not only Complementary Protection was being considered and give the idea that there is a protection need, not only because there is a war, but also because there are extended human rights violations that are linked to the five convention grounds. These changes seem to have been accepted as the regional office has started to notice more usage of the 1951 Convention in their recognition rates in some countries. However, other countries are still more focused on the war situation in Sri Lanka, indicating that the nuanced statement of the 2009 Eligibility Guideline was not so easily assessed.

The coming of the 2009 Sri Lankan paper also affected government reception by way of the ECtHR applying Rule 39 (requests for interim measures). France and UK stopped issuing rejections of Tamils until the publishing of UNHCR's paper in order not to clog the court.

Similar to the Iraq and Afghanistan papers, the 2009 Sri Lankan EG also included an advocacy on forced returnees. For the people without refugee or complementary protection needs, the paper added an advocacy on forced returns that was particularly strong as it linked the policy concern of UNHCR to the issue of having a long-term perspective on the security assessment when doing RSD. UNHCR suggested that no forced returns should take place in the transition period because it is not entirely possible to determine what could happen to the returnees. The in-place confinement of 300,000 returnees without freedom of movement suffering from the widespread human rights violations and placing a heavy burden on the local government had created an inscrutable situation that advised against involuntary return until the confinement issues were resolved. Some countries did adapt the advocacy, although their basis for implementation was less clear.

Response to calls for update

The Sri Lankan paper makes for a special case in terms of reception by governments doing RSD. It is one of the few Eligibility Guidelines published in a stable period and this could have created greater resistance of adherence. However, some countries accepted completely the position of UNHCR that the country is in a

transition period, some accepted most of it but not the IFA recommendation, and a few disagreed on a general basis.

4.5.9 Types of recommendations given (the legal component)

The recommendations given by UNHCR in the Eligibility Guideline to be published is found in the legal component at the end of the paper, or at the end of the relevant sections of the paper. The legal component contains recommendations that regards three different concerns, and where only two of them falls within the ambit of Article 35 of the 1951 Convention. The legal component will:

- always include a recommendation addressing protection needs for convention reasons (the Refugee Definition);
- usually include recommendation addressing protection needs for convention-like reasons (the Extended Refugee Definition); and
- often include an advocacy regarding the conditions for forced returns.

The recommendation on refugee status will pronounce on the need to recognize protection due to one or more of the five convention reasons (race, religion, nationality, membership of particular social group, or political opinion).⁴⁵ This recommendation will include a statement on the relevant legal criteria for protection of different exposed or vulnerable groups that may suffer persecution for one of the convention reasons. For instance, it may pronounce upon the exposure and vulnerability of women in general or of certain groups of women, and it may pronounce upon the relevance and reasonability of relocation to another area of the country of nationality as the Internal Flight Alternative is a composite or a sub-issue to the determination of convention refugee status.

The recommendation regarding protection needs for convention-like grounds will likewise speak on the inclusion criteria for Complementary Protection. Recommendation on Complementary Protection speaks to the protection needs of individuals who face serious threats to life or security due to war actions or general unrest. These individuals may not be able to point to a threat of persecution due to one of the five convention grounds, but under an extended definition of “refugee” they are still in need of protection even if no nexus as to the traditional refugee reasons can be identified.

This recommendation will be based on any of the three regional regimes for complementary protection and not the 1951 Convention.⁴⁶ The different CP-regimes raise issues as to whether the criteria for protection and the standards of proof are the same. Normally, the Eligibility Guidelines therefore deal with CP in a generic manner, possibly with the exception of the EU Qualification Directive which explicitly has stipulated the criteria in Section 15.

Finally, the advocacy regarding conditions of return may be identified as a separate recommendation attached at the end of the legal component or in a separate letter distributed

⁴⁵ For instance, in the 2009 Eligibility Guideline for Iraq, by consulting the table of contents, section III (pages 18-21) directs the reader to the recommendations to the “overall approach to the assessment of international protection need of Iraqi Asylum-seekers.” The first paragraph (12) sets out that UNHCR “continues to consider all Iraqi asylum-seekers from the [...] five Central Governorates to be in need of international protection.” The paragraph also contains a recommendation pertaining to the prima facie approach. The following paragraph 13 concerns its recommendations on complementary protection for asylum-seeker from the same area. In paragraph 14-16 the remaining areas are dealt with. Paragraphs 17 and 18 regard the recommendations on the Internal Flight Alternative, and paragraph 19 concerns exclusion. Section IV.A (pages 22-61) contains a detailed analytical breakdown pertaining to inclusion under the refugee definition. The rest of the paper (section V-VIII is devoted to providing a detailed resume of the information that supports UNHCR’s recommendations.

⁴⁶ There are three different regional regimes for Complementary Protection: the Cartagena Declaration, the AOU and the European Directive.

to the local offices with instructions of further bilateral dissemination. The obligation to cooperate with UNHCR's recommendations regarding forced return is not one that may be relied upon by individual or other state parties, but a matter of the bilateral relationship between UNHCR and the state parties.

Questions of forced returns are often further delineated in subsequent three-party agreements between UNHCR, the host state and the state of nationality. The three-party agreements cannot be relied upon by an individual before the courts, as no individual rights may be derived from them.

UNHCR words their advocacy on forced returns in terms of "absorbed reached capacity", "managed return" and "gradual return." These are terms that are developed in contexts where host countries return a large number of asylum-seekers and the rationale for the advocacy may therefore not be readily understandable to countries returning comparatively few.

4.5.10 Dissemination and follow up

Approved and signed drafts are to be disseminated by SDPIS which sends out a note on the alerts list. The alerts list consists of all the local offices, most of the industrialized nations, countries where UNHCR has offices, NGOs and government counterparts. If needed, the local offices may be instructed to inform actors in civil society. If the request for an Eligibility Guideline has emanated from the need of a judicial body, that institution is also alerted.

All Eligibility Guidelines and updates are also made publicly available and are posted on the "[Country/Situation Specific Position Papers](#)" page on *Refworld*.⁴⁷ Even if the Eligibility Guidelines have always been considered public statements by UNHCR, the onset of Internet and in particular the creation of *Refworld* has enhanced their official status considerably. Before the onset of Internet the Eligibility Guidelines were in practice a bilateral relationship between UNHCR and the states, even if not intended as such.

The local UNHCR offices also receive instructions as to how to advocate for the position taken in the Eligibility Guideline, in an attached note.

In cases where UNHCR has produced updates to an Eligibility Guideline, such updates usually take the form of a two or three page letter. Such letters are produced on the basis of requests from states concerned with the currency of UNHCR's position. Because the recommendations in the Eligibility Guidelines stand until amended by a new Eligibility Guideline, there should be no principled need for such letters. However, UNHCR is seen to comply with the repeated requests of states in order to give a reasoned opinion as to why their position on the eligibility criteria regarding the country of concern in principle remains the same. Due to the bilateral character of the letters, they have a semi-official status and are not posted on *Refworld*.

⁴⁷ At <http://www.unhcr.org/refworld/category.POLICY.UNHCR.COUNTRYPOS...0.html>. This page is accessed by consulting the "Browse by" menu on the left hand side of the Home Page and accessing the link "Document Types" and then selecting the link "[Country/Situation Specific Position Papers](#)." On this page, select the tab "Publisher" and access the link "[UN High Commissioner for Refugees](#)." This page represents a collection of the Eligibility Guidelines and updates from UNHCR and it allows for the delineation of papers related to the country of concern (<http://www.unhcr.org/refworld/type.COUNTRYPOS.UNHCR...0.html>). The page also consist of background notes and discussion papers that are not considered Eligibility Guidelines og updates on Eligibility Guidelines. Neither does the page explain the relevance documents presented, but they are regarded as part of UNHCR's policy documents as the page may also be accessed by consulting the "Categories" menu provided on the left hand side of the Home Page by accessing the link "Policy Documents." This link will give access to the "Refworld Policy Collection" page which explains that it consists of mainly UNHCR policy documents that are regarded as "useful to provide guidance to decision makers as the majority of the documents in the collection cover asylum policy on countries, specific situations or thematic/subject matter based issues." On this page the tab "Type" reveals the link to the "[Country/Situation Specific Position Papers](#)" page.

The few countries where UNHCR still does Refugee Status Determination on behalf of the government receive notice that policy papers implementation is created. In most countries however, there is no formal or structured feed back as to the degree of implementation and adherence. The task of following up the adherence to the guidelines becomes a division of labor between the headquarter and the local office. The further dialogue about the Eligibility Guidelines usually takes place on the capitol level, and sometimes in regional fora, such as Eurasil. Dialogue on the capitol level has in the past for instance considered why UNHCR recommended a prima facie need of protection on conventional grounds in the 2007 Iraqi paper, or on the concept "security problem" in the 2005 Afghanistan paper. Both the Afghanistan and the 2009 Iraqi paper have also ensued capitol dialogue on the factual and legal assessment of the Internal Flight Alternative.

5. The national implementation regimes in the UK, Sweden and Norway

This part of the study describes organizational traits in the UK, Sweden and Norway pertaining to the implementation of UNHCR's recommendations. It explores the importance of whether the Ministry, first level decision-making, or the courts drive the implementation of International Refugee Law (5.3). Which rules or principles on the duty to cooperate are developed in national legislations or by the courts (5.4)?

As UNHCR's guidance is often detailed and specific, the national jurisdictions may differ as to the functions they have given to their different instructions and notes where such detailed guidance may be implemented: are they all binding upon the case workers; do the binding ones combine factual and legal insights; where (the Ministry or the office of first level decision-making) are they issued from; how may the process of assessment and possible implementation be more or less conducive to implementation and what is the role of the governments' own COI-units (5.5)?

5.1 Design

The design for this part of the study provides the basis for comparison between the national implementation regimes. The selection of which organizational traits to focus on is guided by theoretical insights on the function of non-binding human rights recommendations in national jurisdictions. This theory claims that the existence of independent and activist domestic courts, an autonomous civil society and governmental institutions that seek to improve or legitimate their own practices are important or necessary to the development of human rights in national jurisdictions. The existence of activist courts are furthermore believed to be particularly significant and the primary source of implementation of developing human rights norms.⁴⁸

For the purpose of this study, this theory is elaborated on in order to take in aspects where the "soft law" recommendations of UNHCR differ from other non-binding recommendations. The "soft law" emanating from UNHCR is distinct in being highly dynamic and giving detailed guidance on both facts and law.⁴⁹ The reception process at the capitol level (the Ministry or the offices of first level decision-making) may therefore be of greater significance than is the case with other supervisory regimes. In addition, UNHCR's factual guidance raises the question of how the different roles given to the governments' own Country of Origin Information-units may affect implementation. The bench-marks for comparison may therefore be summarized as:

- The place of implementation (the Ministry, first level decision-making or courts/tribunals);
- Traditions for cooperation with UNHCR at the office of first level decision-making;
- Formal recognition of the duty to cooperate (either in provisions or case law);

⁴⁸ JOSÉ E. ALVAREZ *International organizations as law-makers* (2005); ANDREW MORAVCSIK "Explaining International Human rights regimes: Liberal Theory and Western Europe" *European Journal of International Relations* 2 (1995) pages 157-189; and Christian Joppke "The Legal-domestic Sources of Immigrant Rights: The United States, Germany and the European Union" *Comparative Political Studies* 4 (2001) pages 339-336.

⁴⁹ See section 3 above.

- Whether the practice setting documents that are used to implement (such as instructions and notes) are conducive to the intended function of the different guidance of UNHCR;
- How implementation is recognized in terms of reference to UNHCR's recommendations (whether the instructions refer to, transcribe or transform the position papers); and
- The role and function of the COI-units when deciding on whether to implement country specific recommendations.

5.2 The three countries selected for case study

The UK is of interest to any study on the implementation of International Refugee Law in national jurisdiction. The UK is among the European countries with the most extensive and long standing experience of doing Refugee Status Determination. With the peak of receiving over 100,000 new asylum applications in 2003, in 2008 the UK was down to the reception of 30,500 new claims.⁵⁰ In the 1990's, the majority of asylum-seekers arriving in the UK originated from Somalia, the former Yugoslavia, Sri Lanka, Turkey, Pakistan and Nigeria. Since 2000, most claims have tended to originate from Iraq, Afghanistan, Zimbabwe, China, Iran, Eritrea and Somalia.⁵¹

Its extensive experience doing Refugee Status Determination, a long-standing and close cooperation with UNHCR at first level decision-making (the Quality Initiative Project), a living legal community and the significant role given to the courts in implementing refugee rights are all organizational traits that meet the bench-marks indicated above.

In the last decade, *Sweden* has ranked among the five major asylum-claims receiving countries in the EU. In the Nordic region, Sweden is the most important destination for asylum seekers. With a peak of receiving 36,000 applications in 2007, Sweden experienced a decrease, receiving 24,037 new claims in 2008 and 24,194 in 2009. Whereas the number of received applications decreased, comparable figures from 2004 and 2009 show that the recognition rate has increased from 18 % to 38 % and is now at a European average.⁵² At the end of 2009, the Board had a back-log of 10,500 applications that were not being decided upon. This represented a decrease of 3,500 from the previous year.

Traditionally, the Ministry and first level decision-making have driven the implementation of International Refugee Law. A 2005-reform that established independent Migration Courts and instituted a sophisticated legal framework created a shift in direction of the UK-system. The practice setting instructions of the Migration Board and the decisions of the courts do no longer take immigration concerns into account. The Migration Court may however not be activist in the same manner as the UK courts. As of recent Sweden has for the first time also engaged in UNHCR's Quality Initiative Project, which allows for the presence of UNHCR staff at the offices of first level decision-making for purposes of training.

Box: Top 10 received asylum-applications 2009 – Sweden⁵³

⁵⁰ EuroStat "Asylum Decisions in 2008" 92/2009.

⁵¹ The UK does not deliver all statistics as required under Article 4 of the Regulation (EC) 862/2007 of 11 July 2007 on Community statistics on migration and international protection.

⁵² In 2004 and 2009 the number of asylum-applications decided upon was comparable: 23.161 and 24.194. The recognition rate for 2004 was 18 % (4 318 were granted permission to stay, quota refugees excluded), of which 12 % were granted refugee status, 16 % complementary protection and 70 % grant to leave on compassionate grounds. The recognition rate for 2009 was 38 % (9.329 were granted permission to stay) of which 19 % were granted refugee status, 41 % complementary protection and 10 % grant to leave on compassionate grounds.

⁵³ The Swedish Migration Board *Verksamheten i siffror 2009* (March 2010), available on LIFOS' web pages.

	Total	Men	Women
Somalia	5874	3501	2373
Iraq	2297	1506	791
Afghanistan	1694	1455	239
Kosovo	1239	784	455
Iran	1144	722	422
Russia	1058	586	472
Eritrea	1000	491	509
Stateless	912	681	231
Mongolia	753	381	372
Syria	587	409	178

Norway receives a fairly high number of asylum-seekers, a total of 17,226 in 2009. Over the last ten years, it registered an average of about 12,000 asylum-applications a year. It has therefore the least experience in doing Refugee Status Determination.⁵⁴

The courts have left the development of International Refugee Law to the Ministry. The Ministry decides on whether to implement UNHCR's recommendations, and both first level decision-making and the Appellate Board take immigration concerns into account when deciding on protection needs. The place of implementation is therefore different than in the UK and Sweden. In 2008, a new Immigration Act was passed that adapted most of the principles in the EU Qualification Directive. The Immigration Act also codifies its duty to cooperate with UNHCR under Article 35 of the 1951 Convention. No similar provision is found in the other two countries. Norway keeps a bilateral relationship with UNHCR and has not engaged in the Quality Initiative Project.

Box: Top received asylum-applications 2009 - Norway

	Total	Men	Women
Afghanistan	3871	3388	483
Eritrea	2667	1611	1056
Somalia	1901	1348	553
Stateless	1280	1047	233
Iraq	1214	912	302
Russia	867	468	399
Ethiopia	706	394	312
Nigeria	582	402	180
Iran	574	424	150
Kosovo	291	204	87

⁵⁴ <http://www.udi.no/Om-UDI/>. Norway also submits data to Eurostat in compliance with Article 4 of Regulation (EC) 862/2007, see <http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database>.

5.3 The roles of the Ministry, the office of first level decision-making and the courts

In *the UK*, first level decision-making is handled by the UK Border Agency (**Border Agency**) which is an agency of the Home Office.⁵⁵ The Home Office may instruct the decision-makers and the Border Agency reports jointly to the Home Secretary and the Chancellor of the Exchequer. Not including cases regarding national security, first-level rejections of asylum-applications may be appealed to the Immigration Appellate Authority (IAA). There is no automatic right of appeal, and a decision at IAA may be requested to be handled by the Asylum and Immigration Tribunal (AIT).⁵⁶ The Home Office may not instruct IAA or AIT in its decision making and the operative part of the Home Office is expected to adhere to the decisions of AIT.⁵⁷ Rejections from AIT may be tried in the regular court-system. Both the asylum-seeker and the Home Office may bring a case before the courts.

The Ministry's power to instruct the operative part of the Home Office does not subject the question of whether to implement the legal guidance to a matter of political approximation. The UK courts play an important role in delivering particularly sophisticated decisions that drives the implementation of International Refugee Law, and UNHCR has intervened in many of the cases decided (see subsection 4.3 above). Relevant to the administrations' approach to implementation is also the long tradition of close cooperation with UNHCR at first level decision-making. The Border Agency has developed a relationship with UNHCR over a number of years through the Quality Initiative Project and through consultation on subject areas concerning EU Directives, access to protection and resettlement.

Since early 2000's it entered into the Quality Initiative Project allowing for UNHCR's staff observing and recommending improvements in the practice of first level decision-makers.⁵⁸ At the onset of the Quality Initiative Project, there was some skepticism as to the use of such guidance.⁵⁹ The close cooperation is now seen as beneficial to the good offices and efficiency of decision-making. The UK Border Agency has taken forward a number of recommendations made in these reports, including the establishment of an independent Quality Audit team.⁶⁰ In addition, the Border Agency has for long followed the practice of consulting UNHCR in cases of cessation.⁶¹ Capitol dialogue is conducted with UNHCR's Regional Bureau in Brussels.

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⁵⁵ The Border Agency is responsible for securing the UK border and controlling migration in the UK. It manages border control for the UK, enforcing immigration and customs regulations. It also decided on other grounds for leave of entry and on citizenship. The website is accessible at the following URL: <http://www.ukba.homeoffice.gov.uk>.

⁵⁶ The AIT has a screening process. If the appeal is allowed, an oral hearing with three board members will be held.

⁵⁷ The Tribunal produces its own guidelines. The guidelines are not binding upon the first level decision-maker, but some of the APIs refer to them with the purpose of adding legitimacy or reason to practice changes.

⁵⁸ The Quality Improvement Project set out to improve first instance asylum decisions simultaneously in several European countries. Its first phase was concluded in 2004. At present it also involves Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia, Slovenia and Sweden. Evaluators listen in on interviews and analysed files to detect weaknesses in first instance decision making. Their findings were used to prepare recommendations tailor-made for each country. Those include hands-on measures with an immediate effect on the quality of the procedure, such as workshops, tutoring programmes, practical guidelines and checklists for the work of asylum officials.

⁵⁹ Interview with key personell at the Border Agency in Dcember 2010.

⁶⁰ INTERGOVERNMENTAL CONSULTATIONS ON MIGRATION, ASYLUM AND REFUGEES (IGC) *Report on Asylum Procedures Blue Book 2009* Section 7.4.

⁶¹ As a matter of practice, the UNHCR is in such cases consulted for advice on whether it exist significant, fundamental and non-temporary changed circumstances on the basis of objective Country of Origin Information and International Refugee Law.

In *Sweden* the Ministry, according to Chapter 11 § 7 of the Swedish Constitution (“Regeringsreformen”) is forbidden to intervene in individual matters and to give instructions outside the law. **The Immigration Board** (Migrationsverket) that handles first level decision-making is thus guaranteed complete formal independence from political instructions. Amendment of Swedish immigration policy must take place by passing laws in parliament.

Implementation of International Refugee Law has traditionally been driven by the Directorate of Immigration. Appeals were handled by a semi-independent board, and court intervention was not recognized. In 2005, an encompassing reform of the institutional framework and immigration laws brought about a development towards a legalization of case handling. The new 2005 Immigration Act established a fully independent Migration Court.⁶² The 2005-reform also abolished the possibility to receive guidance of the Ministry in particularly difficult individual cases.

Sweden is the only country in this case study that has established a separate Migration Court. The 2005-reform replaced the previous Immigration Appellate Board with three Migration Courts and a Migration Court of Appeals.⁶³ Decisions from any of the Migration Courts may be reviewed by the Migration Court of Appeal (“Migrationsöverdomstolen”) if a decision is incorrect on principal issues (so called “resning”). The Migration Board will adhere to the decisions of the Migration Court of Appeals. Its decision can also be reviewed by the regular court system.

The 2005-reform has resulted in a different approach to decision-making where immigration is concerned, the so-called “push-pull effect” has been taken out of the assessment. The reform entails that implementation is driven by the Migration Courts of Appeals or by the practice of the Migration Board if the courts decide not to seize an issue. Recent reforms of the Civil Rules of Procedure have also allowed for the court intervention of *amicus curae*. UNHCR has so far intervened in two cases before the new Migration Court of Appeals.

Of significance to the reception of UNHCR’s guidance is also that Sweden recently has agreed to engage in the Quality Initiative Project with training both at the office of first level decision-making and of immigration judges with cooperation of the International Association of Refugee Law Judges. The skepticism to whether cooperation with UNHCR would be helpful was also present within the Swedish authorities at the time of establishment of the local office in 1985.⁶⁴

The geographical proximity of the local UNHCR office in Stockholm may enhance cooperation. In addition, capitol talks are conducted with the regional office of UNHCR stationed in Stockholm.

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In *Norway*, first level decision-making is handled by Utlendingsdirektoratet (UDI or **the Directorate of Immigration**). The Directorate of Immigration may be instructed by the Department of Migration in the Ministry of Justice and Police on interpretation of the law and

⁶² Cases regarding national security being excluded.

⁶³ Chapter 16 of the Immigration Act 2005. Sweden kept an intermediate administrative appeal opportunity (Swedish Migration Board) in cases where new information is presented after the decision of the Directorate, cfr Chapter 13 Section 13. In addition, the Migration Board also review the status of protection as it is within its declaratory powers to pronounce an individual who has received residence permit as a refugee, cfr Chapter 4 Section 3 and 4. The declaration may be appealed to the Migration Court, cfr Chapter 14 Section 6. Outside the realm of RSD, Migration Board hears appeals regarding visa, expulsion, refusal of residence permit or long-term residence status and withdrawal of such permits.

⁶⁴ UNHCR Archives 600.SWEDEN 001.Landgren, i.e. the letters ERS/1160/81 and ERS/214/82.

general practice.⁶⁵ The instructions are binding upon first level decision-makers only. Appeals may be brought to the Utlendingsnemnda (UNE or **the Immigration Appellate Board**). Rejections by the Migration Board may be litigated in the regular court system.

Implementation of International Refugee Law is mainly driven by the Ministry and the practice of the Directorate of Immigration and the Immigration Appellate Board. The courts have limited powers of review of the legal and factual assessment of failed asylum-applications, cf the Supreme Court *Abdi* case.⁶⁶ A recent reform of the Civil Procedure Act has opened up for the use of court interventions.⁶⁷ UNHCR has as of yet not made any interventions before Norwegian courts. The role of the tribunal has so far proved less significant as a source of implementation.⁶⁸

The Ministry's approach to implementation takes place in a particularly politicized context. In Norway, adherence to UNHCR's recommendations has been the subject of extensive public debate and competing party politics. This phenomenon is not present in the UK or in Sweden.

Norway is the only of the three countries that has not entered into the Quality Initiative Project. Cooperation with the monitoring of UNHCR is therefore more a matter of negotiations (dialogue) than hands-on observations and training by UNHCR staff. On the capitol level, Norway meets with the local UNHCR office when visiting from Stockholm. In addition, Norway has bilateral meetings with UNHCR at the Headquarters in Geneva twice a year. One of the meetings is reserved for issues regarding protection needs. The meetings are attended by representatives from the Ministry, the Immigration Appellate Board and the Directorate of Immigration.

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Of the basic organizational traits described above, the *most significant difference* is probably in the differences in the roles given to the national courts. Sweden is the only of the three national jurisdictions that has established separate migration courts. Combined with a prohibition of the Ministry to instruct the Directorate of Immigration, decision-making has been placed squarely in the legal realm. However, as will be explained below, this does not necessarily entail greater adherence to UNHCR's recommendations. The significance of independent courts to the implementation-process will also depend on whether they take on an activist role, which in turn will depend on its view of human rights. Even if the UK Ministry

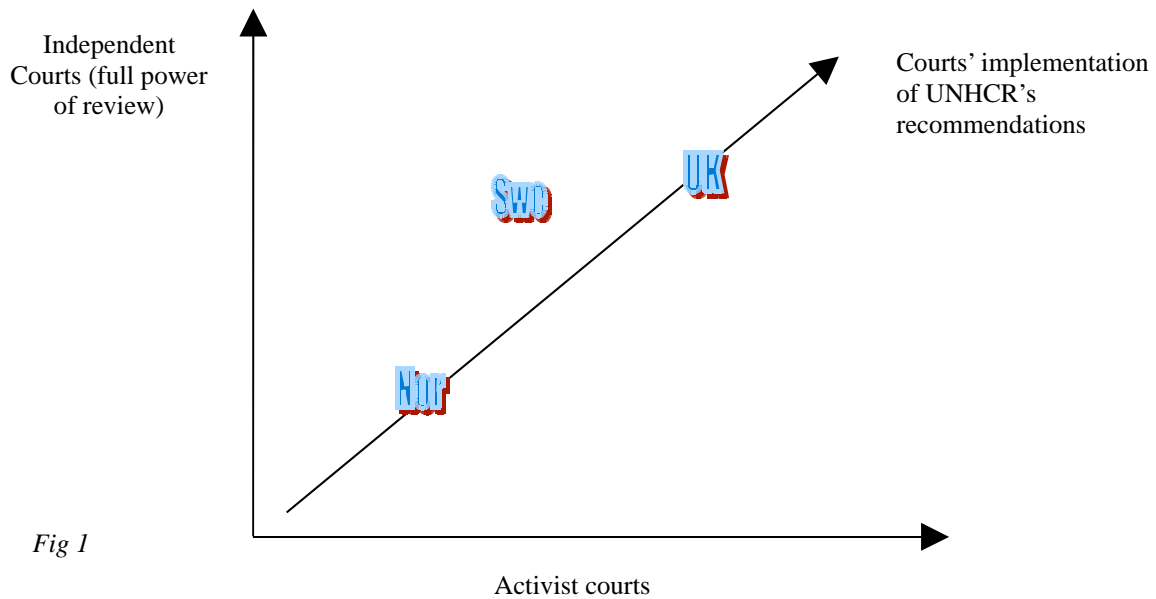
⁶⁵ The Ministry may instruct the Directorate of general practice changes. The Ministry may not instruct to Immigration Appeals Board on law interpretation or exercise of discretion, cfr Section 76 of the Immigration Act.

⁶⁶ *Abdi v Norwegian Ministry of Justice and Police*, Rt-1991-586. According to the Supreme Court, the refugee definition has a core area defined by public international law, while outside this core area States are allowed a margin of interpretation, see also INTER GOVERNMENTAL COOPERATION *Asylum Procedures in IGC Participating States 2009* page 286. Studies on the characteristics of the Norwegian Supreme Court also indicate that it pursues a conventional, legal model of judicial decision-making, GRENSTAND, SHAFFER AND WALTERNBURG "Revealed Preferences of Norwegian Supreme Court Justices" *TjR* (2010) page 82 with further references.

⁶⁷ See above subsection 4.6 on the assessments UNHCR does before they decide to intervene. As of ... a project was started from within the Bar Association working to push potentially successful cases before the courts. As of March 2010 the group pushed ... family reunification which falls outside the mandate of UNHCR, and ... on issues of protection needs. Of the cases on issues of protection needs ... win/loss. THE INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES counts five Norwegian members who all sit on the Appellate Board (Utlendingsnemnda or UNE). None of its members are judges sitting on the bench of the courts, information from the secretariat of March 2010.

⁶⁸ In a recent grand-board decision from the Appellate Tribunal (UNE), which have the function to give principled statements on pertinent issues of International Refugee Law, did not clarify the issue further. The case concerned return of an asylum-seeker to Greece under the Dublin-II ordinance as first country of entry.

may instruct first level decision-making, the activist role of the UK courts' may result in a faster implementation of UNHCR's recommendations (see next subsection 5.4).



The significance of activist courts may be less in the case of UNHCR's country specific recommendations, as implementation may also depend on the role given to the government's Country of Origin-units (see subsection 5.5.4 below).

Another significant difference is also the dissimilar approaches to the concept of "cooperation" with UNHCR. In the UK, cooperation has a long tradition of meaning hands on guidance. It even consults UNHCR in particular cases regarding revocation of refugee status and UNHCR has formal representation in the board monitoring the preferred use of Country of Origin Information. In Sweden, cooperation has traditionally been a matter of bilateral dialogue, but this tradition has as of recent also shifted towards accepting the guidance of UNHCR.⁶⁹ Norway is distinguished in placing emphasis on bilateral dialogue and focus may therefore be on the non-binding characteristic of the guidance instead of its persuasive qualities.

5.4 Provisions and principles relevant to the duty to cooperate

All three national jurisdictions recognize the guidance given in UNHCR's Handbook of 1979 and the editions of 1992 as significant to the development of International Refugee Law in their national jurisdictions. They differ however in whether they give equal weight to the subsequent guidance in the GIPs, Notes and Eligibility Guidelines.⁷⁰ The difference may be due to whether the guidance is regarded as creating new law or as supplements or elaborations on the existing principles in the Handbook.

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⁶⁹ For further details on the historical development in Swedish authorities approach to the concept of cooperation, see box in subsection 5.5.2 below.

⁷⁰ See section 4.2.1 and 4.3 above.

In *the UK*, the appellate board and the courts have long recognized the legal significance of all UNHCR guidance written under the auspices of article 35 of the 1951 Convention. The legal weight or significance of UNHCR guidelines is not regulated in the Immigration and Asylum Act but is developed in the courts.

Several sophisticated decisions from the UK courts show that UNHCR's interpretive guidance is adhered to. The Border Agency also implements the interpretative guidance in a comprehensive set of instructions binding upon the case workers (see next section 5.5.1).

The administrations' general approach to the implementation of the country specific Eligibility Guidelines is less clear.⁷¹ The main approach is probably to consider that the courts would require very good reasons stated for not adhering to a particular guidance in an Eligibility Guideline, or otherwise be charged with "lack of reason."⁷² The existence of institutional safe-guards pertaining to the use of Country of Origin Information is also likely to affect the assessment. In 2003 an independent Advisory Panel on Country Information was established, where UNHCR is given the formal representation, which also has the potential of ensuring a preferred use of the factual guidance of UNHCR. Also, decision-makers have a duty to obtain Country of Origin Information that is "[r]eliable and up-to-date information shall be obtained from various sources..." in section 339JA of the Immigration and Asylum Act.

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In *Sweden* no separate provisions in the 2005 Aliens Act refers to Article 35 of the 1951 Convention.⁷³ The significance of Article 35 is now seized by the migration courts in several of its decisions.⁷⁴

The Migration Court of Appeals has pronounced upon the significance of UNHCR's guidance in several key decisions.⁷⁵ The Court recognizes the guidance of the UNHCR Handbook, but it may interpret the legal concepts differently than the guidance given in the subsequent GIPs and Eligibility Guidelines. For example, the court rejected UNHCR's interpretation of the existence of a category of *prima facie* protection needs for convention reasons, as applied in the 2006 Eligibility Guideline on Iraq.⁷⁶ The Court did not pronounce directly on the relationship between the GIPs and the Eligibility Guidelines and that of the Handbook. However, this case indicates that the court interpreted the recommendation of UNHCR as an expansion of the refugee definition. This may amount to an incorrect use of the guidance as UNHCR's recommendation is intended to stand on the principles of the 1951 Convention. In the case of Iraq, the recommendation in the position paper on a *prima facie* protection need is inter alia based on a very high number of security incidents involving neighbors demonstrating an individual risk. The reasoning of the court does not assess whether the factual situation could amount to such a conclusion.

Most of the rulings pertaining to the significance of UNHCR's guidance regard recommendations given in country specific Eligibility Guidelines. The departing principle is

⁷¹ A more precise analysis would require a study of the archives or a field study.

⁷² A systematic case-study may provide a more exact statement as to how the courts approach implementation of the Eligibility guidelines and whether the UK courts take on an activist role also in this context.

⁷³ In the white paper propositions of the Ministry the legal significance of the UNHCR Handbook is recognized as providing guidance to the interpretation of Article 1 of the 1951 Convention, see White paper to the 2005 Aliens Act *Proposition* 2004/05:170 page 173.

⁷⁴ Previous to the 2005-reform, the courts did not deal with or develop the significance of UNHCR's guidance.

⁷⁵ The precedent-setting cases are MIG 2006:7, MIG 2007:33, MIG 2008:12 and MIG 2008:20.

⁷⁶ The existence of a *prima facie* recognition of refugee status entails that the decision-maker affords protection base on the generalized risk in the country of concern and without an individual assessment.

that of careful assessment. UNHCR's country specific recommendations shall be presented before the court and commented upon.⁷⁷ In a case regarding the application of the Internal Flight Alternative in Kosovo, the lower Migration Court in Gothenburg had given decisive weight to UNHCR's recommendation in the June 2006 Update "Position on the Continued International Protection Needs of Individuals from Kosovo", and by this afforded protection to a family belonging to the ethnic minority in the region. The court conceded to the assessment of UNHCR that no Internal Flight Alternative was relevant or reasonable in Serbia due to the ethnic cleansing that had happened in Kosovo. The Migration Court of Appeal overturned the decision of the Gothenburg Migration Court. It emphasized the role of the Eligibility Guidelines in the national jurisdiction as guidance to the courts. As they are not expressly binding international norms, the courts must assess whether the relevance and reasonableness criteria stipulated are in accordance with the principles laid down in the Handbook. For instance, the application of an Internal Flight Alternative does not depend on whether employment is available but on whether there is a right to gain employment. Based on the Court of Appeals reading of the recommendations in the Eligibility Guidelines, it decided against granting the family protection. The described circumstances in Serbia were acknowledged as difficult, but the situation did not amount to a risk of persecution, degrading or inhuman treatment upon return of any ethnic Serbs.⁷⁸

In a subsequent case concerning a Tamil asylum-seeker from Sri Lanka, the Migration Court of Appeals reiterated the emphasis of the non-binding character of the recommendations given in the Eligibility Guidelines, and stated that the assessments of UNHCR had to weigh against other objective information available. A UK report concluded differently from UNHCR on protection needs both for convention and convention-like reasons. The court decided that there was evidence of possible breach of the principle of non-refoulement,⁷⁹ and returned the case to the Migration Board for a new assessment.⁸⁰

In a decision regarding an asylum-seeker from Afghanistan, the Migration Court of Appeals considered UNHCR's recommendations given in the December 2007 Eligibility Guidelines, the UK Home Office COIS-report on Afghanistan of 2nd April 2008 and UNHCR's Security Update Relating to Complementary Forms of Protection of 25th February 2008. The court did not give decisive weight to the recommendations in the 2007 position paper and decided that internal relocation to Kabul was reasonable even if the refugee lacked social network.⁸¹

The staff within the legal unit of the Migration Board stated that they frequently rely on UNHCR's recommendations in its arguments when preparing notes or cases before the courts.⁸² In an exclusion case presently pending before the courts, the Migration Board relies on UNHCR's interpretation of the exclusion criteria because they are considered as helpful to understand the meaning of the relevant provisions in the 1951 Convention. As few other legal sources exist on the issue of exclusion, UNHCR's interpretation also takes on particular importance.⁸³

⁷⁷ MIG 2006:7.

⁷⁸ MIG 2007:33 II.

⁷⁹ "Verkställighetshinder" cf. Chapter 12 Section 1, 2 or 3 in the Aliens Act ([2005:716](#)).

⁸⁰ MIG 2008:12. The decision was handed down 2. April 2008 and therefore before the decision from ECtHR in the case of the Tamil *NA v the United Kingdom* Judgment ECtHR Appl. No. 25904/07 (17 July 2008).

⁸¹ MIG 2008:20.

⁸² Interviews conducted for the purposes of this report, April 2010.

⁸³ In this case, the Board relies on UNHCR's position concerning how the legal concept must rely on that the inclusion criteria in Article 1A(2) are met in order to assess the exclusion criteria. The contentious issue is the significance of whether the asylum seeker had opportunity to resist the prohibited activities without risking repercussions.

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As the only country in this study, *Norway* has a separate provision pronouncing on the obligation to cooperate with UNHCR under Article 35 of the 1951 Convention. Section 98 of the Immigration Act reads as follows:

“The Norwegian authorities shall cooperate with the UN High Commissioner for Refugees in accordance with Article 35 of the Convention relating to the Status of Refugees, and in so doing shall facilitate the United Nations’ discharge of its duty to supervise compliance with the provisions of the said Convention. Notwithstanding the rules concerning confidentiality, the UN High Commissioner for Refugees may be given access to case documents. To the extent necessary for the purpose of obtaining information, access may also be given to a refugee or human rights organisation.”

According to the preparatory works, this section is meant to underline the importance of UNHCR’s supervisory role when interpreting the 1951 Convention. In their comments to this provision the Ministry of Labor and social inclusion stated:⁸⁴

“... The Ministry finds it desirable to emphasize the importance of cooperation with the UNHCR, and therefore suggests the inclusion of a reference to article 35 of the Refugee Convention in the first paragraph. The provision stipulates that the states are under an obligation to cooperate with the UNHCR under the discharging of its duties and especially facilitate the fulfillment of the UNHCR’s duty to supervise the compliance with the provisions of the Convention.”⁸⁵

The Norwegian administrative Immigration Regulation further stipulate in a procedural provision regarding the appeals process to the Immigration Appellate Board, that a Grand Board of seven shall be set if a case may involve changes in practice that is not in accordance with UNHCR’s recommendations.⁸⁶ The Immigration Regulations section 16-4, second paragraph, reads as follows:

“... If a practice is in breach of a formal country specific recommendation from the UN High Commissioner of Refugees (UNHCR) regarding protection, or establishing a new practice in breach of such recommendations may be considered, at least one representative case shall, as a main rule, be decided by a Grand Board, unless the practice is in accordance with a Ministry order to the UDI.”⁸⁷

During the hearing of the Immigration Regulation, the Directorate of Immigration made comments that the motives of this provision should be seen in light of Norway’s duty to cooperate with UNHCR’s authoritative statement on protection needs given to it under its mandate under the Refugee Definition and under the Extended Refugee Definition.⁸⁸ The

⁸⁴ Ot.prp. 75 (2006-2007) section 6.2.5. The Ministry of Labor and Social Inclusion has been responsible for the administration of matters regarding to asylum seekers and the asylum process since January 1st 2006. This responsibility is now transferred to the Ministry of Justice.

⁸⁵ This is an unofficial translation done for the work of this report.

⁸⁶ Immigration Act section 78, second paragraph

⁸⁷ This is an unofficial translation done for the work of this report. ” (...) Dersom praksis er i strid med formelle landspesifikke anbefalinger fra FNs høykommissær for flyktninger (UNHCR) om beskyttelse, eller det kan være aktuelt å etablere ny praksis i strid med slike anbefalinger, skal som hovedregel minst én representativ sak avgjøres i stornemnd, med mindre praksis er i samsvar med instruks fra departementet til Utlendingsdirektoratet.” In addition the Grand Board may be set in “cases of principle importance, cases of great social or economic importance or cases regarding areas where there are tendencies towards different practices, may be decided by a Grand Board.” According to the Immigration Regulations section 20-12, this provision is not applicable to practices that were already in effect before the new regulations were set into effect.

⁸⁸ Cf the Immigration Act § 28, see UDI_2009-04-24 *Hearing on the new Immigration Regulations* – Chapter 1-3, 5, 7-16.

procedural rule is limited to the instances where the Ministry has not accepted the practice in one of its orders. However, as the Ministry may not instruct the Immigration Appellate Board, it may decide against its orders and practice regardless of this reservation for when a Grand Board may be set. A Grand Board decision may also intercept the Ministry's assessment of whether to adhere to fresh recommendations of UNHCR, for example the recommendations in an Eligibility Guideline. In a comment to the hearing of the Immigration Regulations, the UNHCR criticized the suggested provision for not including recommendations where the Minister had already taken a different position than UNHCR.⁸⁹

Section 98 of the Immigration Act held together with the procedural Grand Board provision in section 16-4 of the Immigration Regulation implies a presumption of adherence to UNHCR's guidance. As the court has left to the administration to develop refugee rights, this presumption will probably not take prominence over any national practice diverging from its recommendations, at least in the case of the country specific guidance. The Immigration Appellate Board has in several Grand Board decisions emphasized the non-binding character of UNHCR's recommendations. The duty to cooperate does not extend beyond giving careful consideration to UNHCR's guidance. Only one decision of the Grand Board gives decisive weight to the added value of UNHCR's Eligibility Guidelines and refers to its extended mandate in Afghanistan in 2007. The Ministry has on several occasions also emphasized the non-binding character of UNHCR's guidance.

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The differences in the national implementation of the duty to cooperate with UNHCR's guidance give further illustration to the significance of independent *and* activist courts (see figure 1 above). The Swedish Migration Court of Appeals' reasoning on the prima facie protection of Iraqis may serve as a case in point: it rejected the guidance of UNHCR as pronouncing on a form of protection that did not exist in the 1951 Convention. The Migration Court of Appeals had previously adhered to the interpretive guidance of UNHCR, but it drew a line for guidance it perceived created new rights or lacked sufficient basis in the 1951 Convention. As explained in section 4 above, UNHCR's rationale for writing its position papers is to fill in gaps and elaborate on some of the sections in the Handbook. The intended function of the guidance is therefore not that it should be regarded as suggestions on how to expand on refugee rights. Whether the guidance is perceived by national jurisdictions to stand on the principles of the 1951 Convention or to create new rights therefore depends on whether the court accepts the dynamic character of International Refugee Law; a view the UK courts have adapted in several precedent setting decisions and which may give them the label of being activist in comparison to the seemingly more restrictive Swedish Migration Court of Appeals.

As the Norwegian courts have left to the immigration authorities to develop refugee rights beyond its core concepts, the significance of the provisions pertaining to the duty to cooperate depends on the reception process, as will be described in the following section.

5.5 Implementation by the immigration authorities

The focus in this subsection is on implementation carried out by the immigration authorities in the instructions and notes directing the practice of first level decision-making. UNHCR's recommendations are often given quite detailed guidance on basic legal concepts already implemented in national laws. The different functions given to the instructions and notes

⁸⁹ In example, UNHCR pointed to the instructions that were issued with regard to Dublin transfers to Greece and the instructions on determination of asylum applications of persons originating from Somalia and Iraq, that all contradicted the position of UNHCR.

where such detailed guidance may be taken in may be more or less conducive to implementation: which instructions are binding and which may the case worker merely consider; do the binding instructions combine factual and legal insights and which techniques of transformation or transcription are employed when deciding to implement UNHCR's guidance?

5.5.1 The different functions of instruction and notes

In *the UK*, first level decision-making is done on the basis of the Nationality, Immigration and Asylum Act 2002 and other laws and regulations implementing the EU Qualification Directive and the European Convention of Human Rights.⁹⁰ The Asylum Policy Instructions (**API**) produced by **the Asylum Advice Team** of the Border Agency are thought to implement the detailed guidance in the GIPs. They give a comprehensive guidance to the inclusion criteria, and also give specific attention to the protracted issues of gender and internal flight.⁹¹ The APIs are binding upon the decision-makers. In addition to producing APIs, the Asylum Advice Team may on occasion give advice to the Minister, engage with issues under the EU and contribute to the writing of the OGNs.

The Country Specific Units within the operative part of the Border Agency produce Operational Guidance Notes (**OGN**) that combines factual and legal insights. The OGNs are produced on an ad hoc basis, and aim to assess the case owners the relevance of the most recent Country of Origin Information produced by COIS. The unit provides about 40 OGNs a year. Like the Eligibility Guidelines, the OGNs are also to a certain extent *sourced*. Unlike the GIPs, the OGN does not adapt the recommendations in the Eligibility Guidelines. The decision-maker may consult but not rely on the OGNs. They may not replace the reports from COIS, but is rather meant to ensure consistent application of policies and information.⁹²

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The Swedish Migration Board does Refugee Status Determination based on the 2005 Aliens Act and accompanied regulations⁹³ and decisions by the migration courts. As in the UK it also looks to international developments; such as EU directives and decisions from regional courts. In addition it also gives due consideration to the practice of UN bodies and UNHCR's recommendations.⁹⁴ Being guaranteed complete formal independence from political instructions, its instructions are entirely the products of the Migration Board.

⁹⁰ The 1951 Convention is given effect in British law by references in the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration Appeals Act 1993, the Refugee and Person in Need of Humanitarian Protection (Qualification) Regulations 2006, and the Immigration Rules. The concept of subsidiary protection as laid down in Council Directive 2004/83/EC is mandated in the Immigration Rules as Humanitarian Protection. The UK has added "unlawful killing" as an explicit category of serious harm when granting Humanitarian Protection. Council Directive 2005/85/EC⁷ has been implemented by the Asylum (Procedures) Regulations 2007 (SI 3187/2007) and changes to the Immigration Rules. The European Convention on Human Rights (ECHR) takes effect in British law under the Human Rights Act 1998.

⁹¹ *API Assessing the Asylum Claim* (October 2006, rebranded December 2008). The API gives a comprehensive guidance on all the inclusion and exclusion criteria in the Refugee Status Determination Process; *API Assessing Credibility in Asylum and Human Rights Claims (...)*; *API Internal Relocation* (February 2007); *API Assessing Gender Issues in the Asylum Claim (...)*; *API European Convention on Human Rights* (October 2006, rebranded December 2008); *API Humanitarian Protection (...)*; *API Discretionary Leave (...)*.

⁹² WILLIAMS, PETTIT, TOWNHEAD AND HUBER *The Use of Country of Origin Information in refugee Status Determination: Critical perspectives; report for the Immigration Advisory Service* (May 2009).

⁹³ In addition to the Aliens Act (2005:716), the Aliens Ordinance (2006:97), the Reception of Asylum-Seekers and Others Act (1994:137), and the Reception of Asylum-Seekers and Others Ordinance (1994:361).

⁹⁴ The 1951 Convention, the UNCAT, the ECHR are included in Chapter 4, Section 1 and Chapter 12, Section 2 of the Aliens Act. Sweden is also state party to the Dublin-II convention, and is as of fall 2009 in the process of transposing the EU Qualification Directive.

Adapting administration of first level decision-making to the new role of the Migration Courts

The 2005-reform was at first believed to end the need for any production of instructions on issues of International Refugee Law. The new Migration Court of Appeals was expected to respond to questions regarding interpretation of legal concepts and the application of these legal concepts on available Country of Origin Information. Consequently, the "practice section" ("praxisenheden") was nearly terminated in 2006 when the reform entered into force. The Migration Board quickly experienced, however, a protracted need for legal staff providing guidance on new or pressing issues. Even if the courts provided guidance, the lower Migration Courts did in some cases deliver conflicting decisions and the Migration Court of Appeals did not pronounce on all issues that the Migration Board needed to have clarified.⁹⁵ The duration of the appeals process could also be too long in responding to the Migration Board's need of prompt guidance to pressing issues arising from the case load, as for instance in the case of Iraq. As a result, the legal unit was re-staffed with personnel giving advice on matters of International Refugee Law. Presently, three to five people in the legal unit staff of a total of 17 ("verksamheden for asylprövning") have as their main function giving advice on issues of International Refugee Law. These staff-members report to the head of the legal unit ("enhetschef"), presently Cecilia Gylling Lindkvist, who reports further to the Legal Director of the Board (**the Legal Director** or "Rättschefen"). This unit also has the function of being involved in litigation by preparing and writing appeals to the Migration Courts.

To meet the need of ensuring a coherent practice of the decision-makers, the revitalized legal unit was initially expected to produce precedent-setting decisions ("vägledande beslut"). Potentially principled cases were picked out and prepared by the staff in the legal unit. However, this mechanism did not prove to be sufficiently expedient. It proved difficult to find cases with the potential of having a precedent-setting effect, and the precedent-setting decision that was decided upon did not prove to give the general guidance sought for. In an interim period, different units within the Board produced a number of different kinds of instructions ("styrsignaler", "vägledande beslut" and "klargörande beslut"). The status of these documents was not entirely clear and it was therefore necessary to clarify the form and function of the instructions. The production of guidance was subsequently reorganized.

Presently the Legal Director produces **Instructions** ("Ställningstakende") that are binding upon first level decision-makers. These Instructions are perceived as yielding the desired flexibility and sufficient general level of guidance in the Refugee Status Determination-process. The Instructions adhere to all clear precedents of the Migration Court of Appeal, but not necessarily to decisions by the lower Migration Courts if the jurisprudence is conflicting. The Instructions also reflect and implement developments in the case law of the European regional courts.

In comparison with the APIs, the Instructions do not provide a comprehensive guidance that covers the whole refugee determination process in detail. The Instructions are produced on an ad hoc basis. The Instructions may be merely interpretive or may combine factual and legal insights. Both types are binding upon first level decision-makers.

The Migration Board follows the Migration Court of Appeal's practice of adhering to UNHCR's interpretive GIPs. The Instructions are also believed to reflect the guidance in the GIPs, but not all of the GIPs are implemented. The Instructions may or may not adhere to the recommendations in the Eligibility Guidelines.

The Instructions of Rättschefen are collected electronically on the webpage of the Migration Board and on the webpage *LIFOS*, which is a database run by unit producing Country of Origin Information. The Migration Board also produces a Handbook that collects the instructions with recommendations. The Handbook is only published internally.

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⁹⁵ See subsection 5.3 above.

In *Norway* the relevant national laws for deciding asylum-applications are the newly passed Immigration Act of 2008, the Human Rights Act and the Administrative Act, in addition to subsequent regulations.⁹⁶ The decision-makers are also bound by **the Orders** produced by the Ministry (“Departementets rundskriv og instruksjer” and “Departementets retningslinjer”). The function of the Orders is to set standards or dictate changes of its practice on general issues of law. The Orders are produced on an ad hoc basis. The most comprehensive Order is the *Guidelines on new refugee criteria* from 1999. It addresses the issues standard of proof, agents of persecution, the Internal Flight Alternative and the different convention grounds.⁹⁷ Two of the Orders address Gender Related Persecution⁹⁸ and three regard the application of legal issues in three of the top five countries of origin.⁹⁹

The Directorate of Immigration also produces **Practice Notes** (“UDI praksis notater” or PNs). The Practice Notes give guidance on the assessment of asylum applications from some of the top countries of origin. In the fall of 2009 guidance was provided for Afghanistan, Eritrea, Iraq and Iran. In addition guidance was also provided for applications originating from Sri Lanka.¹⁰⁰ The PNs are defined as “internal guidance” to first level decision-makers, but are nevertheless in the public domain. The status of being internal relates to the documents not having the status of Orders from the Ministry that dictate practice that in turn may be relied upon in courts. There exists no comprehensive “rule book” for the decision makers’ guidance, as in the UK with the collection of APIs.

Both the Orders and the Practice Notes are in the public domain.¹⁰¹ The legal resources link at the Directorate of Immigration website also provides reference to UNHCR’s GIPs, some of the Notes and a thematic compilation of ExCom conclusions, but not the Eligibility Guidelines.¹⁰²

⁹⁶ Law on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act). The 2008 Immigration Act was set into effect 1st January 2010. The Immigration Act incorporates Norway’s international obligations in general in section 3. The Human Rights Act prescribes that some of the core UN human rights convention and the European Convention on Human Rights shall be given precedence over other Norwegian laws. See for further reference:

<http://www.udiregelverk.no/sitecore/content/Home/Rettskilder/Sentrale%20lover%20og%20forskrifter.aspx>

⁹⁷ *Guidelines on new asylum criteria* from the Ministry of Justice of 28th May 1999 IM 1999-032V (amended 8th March 2005) – regarding inclusion criteria for Refugee Status, agents of persecution, gender-related persecution, standard of proof and complementary protection.

⁹⁸ “Application of refugee law in cases where women flee from gender related persecution” from the Communal and Regional Ministry KR-2001-05-10 of 10th May 2001; “Instructions: Guidelines on Gender-Related Persecution” from the Labor and Inclusion Ministry AI-2008-063 of 1st October 2008 (also in English version);

⁹⁹ “Instructions on practice on asylum cases from Afghanistan and instructions concerning subjective sur place in asylum cases from any country” from Ministry of Work and Inclusion AI-2008-036 of 31st January 2008 Case no: 200705348-/GHI

Instructions on practice in asylum cases from Iraq from Ministry of Work and Inclusion AI-2008-065 of 1st November 2008 Case no: 200803598

Instructions on consideration of stay on compassionate grounds for persons from South Somalia who has applied for asylum from Ministry of Work and Inclusion AI-2008-068 of 3rd December 2008 Case no: 200700116

¹⁰⁰ Asylum practice Sri Lanka of 28th February 2008 PN 2008-002 Case no: 08/1217; Asylum practice – Iran of 28th February 2008 PN 2008-006 Case no: 08/1222; Asylum practice – Eritrea of 28th February 2008 PN 2008-023 Case no: 08/1284; Asylum practice Afghanistan of 6th July 2009 PN 2009-015 Case no: 09/3107; Asylum practice – Russia (Chechnya) of 5th August 2009 PN 2009-018 Case no: 04/5634

¹⁰¹ <http://www.udiregelverk.no/sitecore/content/Home/UDIREgelverk/Main%20menu/All%20documents.aspx?mguid={A5252B3E-CAAF-41DD-9CF6-A50BE7B2BBF5}>. The Website also provides links to the Directorate’s circulars and internal memos, but these raise no relevant issue regarding the implementation of UNHCR’s guidelines.

¹⁰² Available under the link “andre internasjonale rettskilder.” It may not be possible to provide a link to all of the Eligibility Guidelines.

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Of the differences in the function of the instructions and notes, the use of binding instructions in the UK that merely deals with interpretation and covers the whole Refugee Determination Process (the APIs) is likely to be more conducive to implementation. This systematic approach enhances transparency and also signifies how the area of law is thought of as a complete area of international law. The ad hoc approach in Sweden and Norway give emphasis to a perception of International Refugee Law as being more fragmented and the guidance perhaps being a matter of creating new rights.

Of significance is also how the binding instruction in the UK pertain to interpretation only, and that the country specific OGNs are meant as guidance to the case workers only. This may influence the adherence to UNHCR's recommendations in the Eligibility Guidelines by the first level decision-makers.¹⁰³ In comparison, in both Sweden and Norway, the binding instructions combine both legal and factual insights. Further study on the use of Country of Origin Information as case worker level is necessary to explore whether this practice induces an adverse use of Country of Origin Information.

5.5.2 The reception procedure

None of the countries in this case study has adapted written standards for how to receive, assess and eventually implement UNHCR's recommendations. They all describe an organic process.

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In *the UK* the reception of a new interpretive guideline will start a procedure of transforming the guidance into the APIs. Usually, the guidance of UNHCR is not referred to in the API. The text of the position paper could therefore in principle be transcribed, but this is not done for reasons of style. The guidance is transformed into a language believed to be more conducive to the operational use of first level decision-makers, as the position papers from UNHCR are sometimes perceived as being too technical or difficult to access.

Upon reception of an Eligibility Guideline, the relevant Country Specific Unit will assess the need for amendments of practice to be implemented in the upcoming publishing of an OGN. It is within the functions of the Country Specific Unit to give reason as to whether to adhere to or divert from UNHCR's country specific guidance. The unit also issues country policy bulletins on an ad hoc basis to provide guidance on how to deal with particular country-specific issues arising in asylum applications. It also has the function of being involved in litigation, providing the court with policy statements relevant to a particular case. The unit consists of one team manager, two senior policy advisors and three policy advisors.

The process starts with the production of a draft OGN that is prepared by one of the senior staff advisors. The draft is sent to COIS to check the facts and for legal advice to the Home Office. The draft will also go to the foreign office desk officer for fact checking and policy, which may send the draft to a local presence which is familiar with the situation in the country of concern. The final draft will be handed to the head of the unit and reviewed by the chief executive who is responsible to the Minister. The review by the chief executive will usually result in comments. If the OGN deals with an issue that is likely to be controversial, it will probably be given to the Minister for approval. The Minister may also instruct the unit in the writing of the OGN.

¹⁰³ Studies done on UK decision-making at first level indicate that this difference is of significance to the preferred use of Country of Origin Information, see NATASHA TSANDGARIDES "The Refugee Roulette: The Role of Country Information in Refugee Status Determination" *Immigration Advocacy Service* (January 2010).

The OGN may make reference to UNHCR's position papers, but usually for reasons to support a factual assessment and not the legal conclusion.

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In *Sweden*, the staff at the Migration Board's legal unit's section for Refugee Status Determination (**Asylprövningsenheten**) has within their functions to report discrepancies between the practice of the Migration Board and UNHCR's recommendations to the Head of the Section which in turn reports to the Migration Boards head of legal issues (**Rättschefen**). These staff members also have within their functions to be updated on new position papers from UNHCR. Within the legal unit, they have the exclusive responsibility to be updated on position papers that interpret issues of International Refugee Law (new GIPs and Notes). Within the Migration Board, they share the responsibility and are frequently aided by the COI-unit LIFOS in being updated on UNHCR's Eligibility Guidelines and letters.

The function of being updated on new position papers from UNHCR includes the assessment of whether Swedish practice diverges from the recommendations given, the production of a note explaining the discrepancy that is reported to the head of the unit.

The reporting of discrepancies is not systematic and is dependent on the priority given to UNHCR's recommendations by the individual staff-member. Whereas the staff views the recommendations as important, none of the staff has UNHCR as their main priority. For instance, the person who has European legal developments as her main function, has given the ECtHR, the EC and UNCAT her first priority, the Swedish Migration Court of Appeals her second priority and UNHCR her third priority.¹⁰⁴

When a report on discrepancy between national practice and UNHCR's guidance is given to the head of the legal unit, he or she will transmit the report to Rättschefen. Usually, Rättschefen will collect additional information and an internal discussion will follow. This process aims to clarify the extent and the significance of the discrepancy.

The decision of whether to amend practice that diverges from UNHCR's recommendation rests with Rättschefen. The decision will depend on whether the recommendation is given in a GIP or in an Eligibility Guideline. The Migration Court of Appeals has in its guiding judgments concluded that UNHCR's recommendations are not Swedish law but should be interpreted in each situation. Such interpretations are left to the Migration Board and the Migration Courts. When the Migration Board decides not to follow a specific guidance or recommendation this must be explained in an instruction (Rättsligt ställningstagande).

When assessing the recommendations in an Eligibility Guideline, Rättschefen's decision may also rely on the reports given by the COI-unit or on other publicly available Country of Origin Information. In the assessment of which objective information to rely on, the factual assessments of UNHCR are regarded as important, but only one of several reports that are consulted.

A shift in Sweden's perception on why UNHCR matter: from factual insights to also legal insights

In the early 1980's, when UNHCR negotiated on the opening up of a local office in Stockholm covering Scandinavia and the Baltic states, Swedish authorities touched upon the value of UNHCR's presence to national decision-making. Letters provided from the archives at UNHCR Headquarters indicate a shift in

¹⁰⁴ The reason for placing UNCAT as a first priority is the perception of their decision being of particular importance to the field of International Refugee Law, that Sweden on several occasions have had individual complaints decided by UNCAT and that requests for interim measures given by its Special Rapporteur shall be followed according to Chapter 12 § 12 of the 2005 Aliens Act.

perception. The context of the discussion was UNHCR's assistance to Swedish authorities in a particular case (TT). At this point in time, Swedish authorities were reported to be unsure of how UNHCR may be of assistance to their decision-making as they found its comments as being too vague to be useful and "tell us nothing we don't already know." The interest of the Swedish Immigration authorities was that of information sharing and that UNHCR could assist by providing Country of Origin Information on a general basis, a function that UNHCR declined to fulfill. Little attention was given to how UNHCR could provide guidance on legal assessments when determining eligibility. The development in the cooperation with UNHCR from the early 1980's up to the present establishment of the independent Migration Courts shows a clear shift in attitude where the emphasis is now on how UNHCR may offer guidance in the interpretation of legal concepts. The immigration authorities have established its own COI-unit, and the acceptance of UNHCR's factual insights pertaining to eligibility determination is still given less emphasis.

See also above subsection 5.3 on differences in the traditional cooperation with UNHCR in the UK, Sweden and Norway.

If a recommendation leads to the decision to write a new Instruction, a discussion usually follows on whether and how to refer to UNHCR's recommendations. As the new instructions will usually be about amending a part of Sweden's existing interpretation of International Refugee Law that is incorrect or questionable, reference to UNHCR has been considered a way to add legitimacy to the amendments of practice. Subsequent to the 2005-reform, the legalization of the decision-making process following the 2005-reform there is no reason to avoid explicit reference to UNHCR's recommendation. Because the Migration Court of Appeal follows a practice where the GIPs generally are adhered to and that the Eligibility Guidelines are regarded as important guidance, explicit references to UNHCR is not deemed as problematic. Before the 2005-reform, the previous Board of Appeals arrived at decisions that were in line with UNHCR, but a direct reference to its position papers was usually not given.

Two recent instructions regarding minorities and homosexuals in Iraq represent an amendment of Swedish practice prompted by the information and recommendations given by UNHCR in its Eligibility Guidelines.¹⁰⁵ Implementation may also be partial, as was the case with UNHCR's recommendation pertaining to the use of the Dublin II Ordinance for the taking back of asylum-applications to Greece. The Migration Board decided to adhere to the recommendation in cases of lone children, but decided on a practice to return all other groups.¹⁰⁶

If Rättschefen decides not to follow a recommendation given in an Eligibility Guideline, the Migration Board will probably attempt to bring a test case before the Migration Court of Appeals. This decision and process is not manifested into a written statement, and will not be evident for the public in other ways than the Migration Board being successful in having the Court of Appeals seize the issue on a leave to appeal.

The Migration Board will amend their practice according to the rulings of the Migration Court of Appeals by Rättschefen producing new instructions. In 2007 the Migration Board had taken the position that failed asylum-seekers from Iraq could not be forcibly returned as Sweden did not have an agreement with the national authorities. Later the same year, the Court of Appeals held that the order of return to failed asylum-seekers is an individual responsibility that does not place any specific requirements upon the host country or the country of origin.¹⁰⁷ The Migration Board amended their instructions accordingly.¹⁰⁸

¹⁰⁵ LIFOS 21656 and LIFOS 21957.

¹⁰⁶ The decision also gave due consideration to the ECJ judgement *KRS v The United Kingdom* Application no: 32733/08; and Migration Court of Appeals judgment of 30th September 2009 (Lifos nr: 21580)

¹⁰⁷ MIGOV 2007:15.

¹⁰⁸ LIFOS nr: 16852

The Migration Board also has within its powers to decide to amend existing practice on the basis of decisions from the lower Migration Courts, but has so far refrained from doing so if the practice lacks consistency.

In cases where the Migration Board decided not to implement and subsequently received a decision from the Migration Court of Appeals in their favor of its decision, a bilateral discussion between UNHCR and the Migration Board's Rättschefen and the General Director may ensue. The staff at the legal unit and the head of LIFOS will usually be given an informal report of the topics that were discussed at the outcome of the meeting.

Recently the Rättschefen discussed with UNHCR the issue of whether lack of access to water hindered internal movement within Iraq. The Migration Board's position was that water shortage does not hinder internal movement. Previously, Rättschefen has also brought to UNHCR's attention that the Migration Board did not find the existence of social network necessary for a reasonable application of the IFA in Afghanistan.

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In *Norway* both the legal unit of the Department of Migration and country specific units within the Directorate of Immigration have within their functions to keep track of new position papers and to assess whether national practice is in line with the recommendations given. It is for the Department to take the lead in the processing of a new position paper. If the Directorate of Immigration has assessed that new recommendations may impact existing asylum policy, it may request the Directorate of Immigration to produce a background note giving recommendations about whether to amend existing practice. The Directorate of Immigration in addition has a duty to bring to the Department's attention ("rapporterings- og foreleggelsesplikt") the existence of a recommendation which is in conflict with national practice.

The duty of the Directorate of Immigration is based on the steering document of the coalition government, which after the 2009 election set out that UNHCR's recommendations should be a significant authority when assessing asylum-claims, but the immigration authorities may also rely on their own assessment.¹⁰⁹ The duty for the Directorate of Immigration to inform the Department of diverging practice is a result of the immigration policy of the coalition government currently in office, and may therefore be subject to change if a new administration should replace the existing one. An internal memorandum of February 29th 2008 from the Department to the Directorate of Immigration gives instructions to ensure that their duty to report practice changes to the Ministry is followed through.¹¹⁰ The memorandum has recently been suggested changed to also include practice not in line with new UNHCR's recommendations.

The reception and assessment of new recommendations lie within the function of the legal unit of the Department. The procedure does not follow any written internal instructions. A

¹⁰⁹ The 2009-2013 Political platform as basis for the Government's work formed by the Labour Party, Socialists Left Party and Centre Party Chapter 17: "UNHCR's recommendations shall be taken seriously by Norwegian authorities in our assessments, but Norwegian authorities shall also make an independent assessment of the situation. Establishing practices that conflict with UNHCR's recommendations about protection shall as a primary rule be assessed by the an open tribunal, unless these practices are done according to instruction from the Ministry of Labour and Social Inclusion, sent to the Norwegian Directorate of Immigration." The previous steering document of the same parties for 2005-2009 stated that the government will have a refugee policy that to a greater extent adheres to the recommendation of UNHCR ("Regjeringen vil føre en flyktningpolitikk som i større grad tar hensyn til anbefalingene fra FN's høykommissær for flyktnings (UNHCR) anbefalinger...").

¹¹⁰ IM2008-003.

staff member in the legal section has within her or his functions to be a liaison with UNHCR and is put on the distribution list for new position papers.

Upon reception of a new position paper, it is given to the coordinator of the unit to lead the work with assessing whether it is necessary to give instructions for a practice change. The coordinator selects a case worker within the unit with legal education to assess whether existing practice is not in line with the new recommendations in the position paper. The case worker also consults the COI-unit (Landinfo). Of particular importance is also to conduct a comparison of the practice of other European states. The liaison is also engaged and expected to be in close dialogue with the field office located in Stockholm on any further instructions on the intended use of the guidance.

The coordinator also sends a request to the Directorate of Immigration for a Note with comments. The comments of the Directorate of Immigration will include a description of its practice on the issues at hand, and usually also includes its views on whether practice should be amended. The views of the Directorate of Immigration are not based on a particular perception of the legal significance of UNHCR's recommendations but on a case by case assessment of the recommendations given. The unit has not incorporated a specific understanding of the new Section 98 (on the duty to cooperate under Article 35 of the 1951 Convention).

The note with the Directorate of Immigration's position is handed to the coordinator who sends it to the Department for further assessments. The decision of whether or not to amend existing practice rests with the Department. The assessment follows the same procedure as other cases where the need for amendment of practice is considered. The guidance of UNHCR is regarded as significant and is given careful consideration. If a new Instruction is produced, it may refer to UNHCR's position if such a reference is deemed to "belong" in the text.

The Practice Notes produced by the Directorate of Immigration all refer to UNHCR as a source of factual information. However, apart from the Practice Note on Afghanistan, none of them make reference to UNHCR's recommendations on protection needs. To assess the security and human rights situation in the country, the Practice Note refers the decision makers to information presented by the immigration authority's own production of Country of Origin Information (**Landinfo**).

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In summary, the UK's structure of providing *binding instructions limited to the interpretation of legal concepts* (the APIs), and guidance on country specific issues (OGNs) is a significant difference to the function of the Swedish Instructions and the Norwegian Orders and Practice Notes. Its production of a comprehensive set of detailed instructions covering the whole Refugee Determination Process may also better mirror the intended function of the interpretative guidance,¹¹¹ and that case workers are not meant to rely on its country specific guidance (the OGNs) may be favorable to ensure a preferred use of Country of Origin Information. On the other hand, the severance of the Swedish first level decision-making from the influence of the Ministry has created a reception process that is particularly conducive to the significance of producing clearly stated reasons if deciding not to implement a recommendation because this will most likely result in the launching of court litigation. However, as the Swedish Migration Court of Appeals is possibly more restrictive than the UK courts, as this difference greatly enhances transparency, it may not result in increased implementation in the end.

¹¹¹ See subsection 4.2 above.

Another difference that may be of some significance is the method or technique used when deciding to implement. The practice in the UK of *simplifying the interpretive guidance when deciding to implement* in order to achieve a more readily available style, indicates a need for national administrations to simplify the guidance from UNHCR. The value of the legal sophistication of the position papers reaches a limit where it is no longer helpful to the operative parts of first level decision-making (or possibly the courts).

The reception process in Norway seems to be affected by taking place in *the political realm of the Ministry*. The provision on the duty to cooperate in the Immigration Act and the stated policy in the steering document of the administration in office to give considerable weight to the guidance of UNHCR does not seem to have any particular or even positive effect on the reception process, as no particular procedure is instigated. In addition, this reception process seems to result in an emphasis of the non-binding character of its guidance, and not on producing transparent well stated reasons that respond to the added value that may be attached to UNHCR's position.

5.5.3 The role of the governments' COI-unit – how may their reports compare to the factual assessments in the Eligibility Guidelines?

The organization and rationale for national production of Country of Origin Information may be of significance to how states approach implementation of the country specific recommendations in the Eligibility Guidelines: how may the governments' own production of Country of Origin Information compare with that of UNHCR's factual insights; and how may the different roles that the governments may give to their COI-units affect implementation?

The three COI-units are all presumed to have an independent role. Their functions are also focused on collecting and assessing the reliability of factual information. None of the COI-units produce reports that engage in an analysis of the significance of the facts to protection needs.

Independence of the unit

In *the UK* the purpose for producing own Country of Origin Information is to direct national decision makers to these reports as their primary guidance.¹¹² The Country of Origin Information Service (COIS) is located within the Research, Development and Statistics branch within the Border Agency. It was established in June 2005 as a discrete unit, replacing the first COI-unit established in 1997.¹¹³ COIS concentrates solely on providing objective country information to asylum decision-makers.

The function of COIS is to compile and produce Country of Origin Information for use of decision makers doing Refugee Status Determination. COIS publishes Country Reports focusing on the main asylum and human rights issues in the 20 countries that generate the greatest number of asylum-seekers to the UK. The reports are posted on the public website of the Home Office. The COIS also publishes Key Documents which summarize the main source documents on countries that generate fewer asylum claims. It also produces Country of Origin Information Bulletins, which respond to emerging events and operates a rapid request service to research information not available in existing products. COIS also provide a Request

¹¹² WILLIAMS, PETTIT, TOWNHEAD AND HUBER *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives* (May 2009) page 16 with further reference to *The Home Office Asylum Process Manual APN052000* (January 2005 2nd edition).

¹¹³ Until 1997, there was no dedicated COI resource in the Home Office. In 1997, the Country Information and Policy Unit (CIPU) was set up to provide COI and country-specific policy advice to Home Office asylum decision-makers on conditions in countries of origin.

Service for internal users have been developed to better meet the information needs of decision-makers.

To ensure objective application of Country of Origin Information, the independent Advisory Panel on Country Information (**APIC**) was established in 2003. The panel was in 2008 renamed under the function of the Chief Inspector of the UK Border Agency, but retains its previous purpose. The function of the panel is to provide expert, external scrutiny of the Home Office's Country of Origin Information material, to help ensure that it meets the highest standards.¹¹⁴ The Border Agency allows for the presence of a UNHCR representative on the panel.

The COIS presently employ 13 researchers and 7 senior researchers or team managers. Each researcher has the task of keeping updates on one of the top 20 refugee producing countries, in addition to some less important countries. Within every two or three years the researchers may be asked to revolve and have the responsibility of another top 20 country, but upon request the researchers will normally be able to stick with the same top 20 country for many more years.

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The *Swedish Landinformatjonsenheten* was established by internal decisions of the Migration Board in 2006. The database Lifos has however existed for more than ten years. The head of the COI-unit (enhetschef) reports to the legal director (**Rättschefen**) of the Migration Board, which reports to the General Director of the Migration Board.

The COI-unit has the task of administering the database where all legal and factual information produced by the Migration Board and the Migration Courts is posted. LIFOS is furthermore expected to produce Country of Origin Information that meets the needs of the operative part of the Migration Board doing Refugee Status Determination.

The creation of the unit came about as a result of the 2005-reform. The main concern of the reform regarding the COI-unit was the need for public access and notoriety of the production of its reports.¹¹⁵ The reform resulted in the internal decision that the COI-unit shall be in charge of and administer the database covering all of the Migration Board's activities in deciding claims.

Sweden is the only country in this case study where the legal unit and the COI-unit are under the instruction of the same executive. The Migration Board's legal director (Rättschefen) has the final say regarding which countries or issues the COI-unit should write reports on and which fact finding missions to conduct. It is presumed as evident however, that Rättschefen cannot instruct the unit regarding the design and content of the reports. The 2005-reform prompted no principal discussion of the independence of the COI-unit within the Migration Board. It was believed that as it is the function of the unit only to collect facts, not to administer the Migration Board's policy, the instructions regarding which reports to write were not thought to detract from the independence and the neutrality of the reports.

The COI-unit produces different types of documents. The most important ones are the Country Profiles ("landprofil") which among other things give facts regarding the security situation and human rights practices in particular countries. The COI-unit also produces

¹¹⁴ See <http://www.apci.org.uk>. The present UNHCR representative on APCI is the head of SDPIS.

¹¹⁵ Regjeringens proposisjon 2004-2005:170 *Ny instans och prosessordning i utlendings- og asyl* (NYPU) side 156.

thematic reports that may cover a region, such as the one on honor related killings in the Middle East.

The COI-unit presently staffs 13 people that include the head of the unit, one librarian, one administrative coordinator, five COI researchers (**informationspecialister**) and five COI-analysts (**landanalytikere**).

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In *Norway* the Country of Origin Information Centre (**Landinfo**) is the responsible unit for fact finding on relevant issues related to the administration of the immigration act. Landinfo was established by adaption by the parliament on 1st January 2005.¹¹⁶ Landinfo is under the administration of the Directorate of Immigration, but is professionally independent of both UDI and of the Ministry Cabinet as they cannot be instructed as to the content of the documents produced.

Landinfo has the task of describing the humanitarian and security situation in a particular country of concern by collecting the information available to them. Landinfo has no formal task for the formulation of policy or administrative practice concerning a particular country. As is the case in the UK and Sweden, Landinfo does not assess whether return to a particular country is advisable or not.

Landinfo staff “land advisors” to author the different COI-reports. The land advisors specialize themselves on the human rights and security situation of a region. It is the policy of Landinfo to endeavor continuity instead of rotating their consultants over to new regions, as it is believed that long standing experience and visits to a country provide a better qualification to describe a country.

Role and tasks given to the staff – types of reports produced

In *the UK* the researchers are generalists and not required to hold an academic degree. They may be recruited from other parts of the UK Border Agency. The qualification to perform the tasks as researchers comes from training within COIS. The reason given for the researchers to be generalists is that their specialization is to collect and collate information, not to give academic analyses and examinations. In the UK, the difference between a researcher and an expert witness may be formulated as a matter of degree or abstraction of knowledge. While the researchers of COIS will base their written reports strictly on the facts they have collated, an expert witness may venture into more generalized or synthesized statements regarding the conditions in the country of concern, indicating a perception of the expert role as more closely related to that of the Country Specific Unit assessing and shaping policy in the OGNs.

In addition to country reports, COIS also produce COI Bulletins to provide information at short notice in response to emerging events, and Fact Finding Mission Reports when conducted. For the case owner, COIS also has a Request Service responding to specific inquiries and which are posted on their webpage. COIS can also provide feedback on the reports of expert witnesses, usually provided by asylum seekers.

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In *Sweden*, the COI-researchers have within their functions to do research on Internet. The COI-researchers tend to have educational background from or hold a college degree in “Library and Information science.”¹¹⁷

¹¹⁶ St.meld. nr. 21 (2003–2004) *Styringsforhold på utlendingsfeltet*.

¹¹⁷ A college degree in information science is usually taken to qualify for positions within libraries and archives.

One of the main functions of the COI-analysts is to produce general reports on the security and human rights situation in refugee-producing countries, or more specific reports on issues raised in refugee claims (such as the report on honor-related killings in the middle-east region). The country analysts usually have an educational background from the field of political sciences or law. In addition it is a requirement that they also have experience in decision-making, or from other operative parts of the Migration Board.

Each COI-analyst has the responsibility to be updated on Country of Origin Information from an assigned region. They are expected to be updated on protracting issues in doing Refugee Status Determination from the countries within their region, including the reports from UNHCR. The COI-analysts partake in meetings in Brussels (EURASIL) and conduct fact finding missions in order to be updated on news regarding the countries within their assigned region.

The responsibility for a geographic region assigned to a COI analyst does not change so much over the years. However, each analyst has a back up function for one of his colleagues.

The COI-analysts may be regarded as “experts” in collecting and presenting information relevant to the task of deciding on asylum-applications originating from their region. In this regard they are given the role of partaking in meetings with the decision-makers and give advice regarding relevant information. It is also within their functions to produce preparatory notes that may form the basis of instructions from the legal director. A recent example is the report from a fact finding mission to Afghanistan which gave an update on the security situation in the provinces of Afghanistan. The report collected information relevant to the criteria for establishing “armed conflict”, such as number of armed incidents, number of reported dead, number of civilian casualties, and intensity of the conflict. The unit very seldom makes witness statements in the Migration Courts. The basis for defining “inner armed conflict” comes from a decision from the Migration Court of Appeal.¹¹⁸

The unit has, however, not been requested to produce statements in relation to cases pending before the Migration Courts or to make witness statements during the hearing of cases. █

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In *Norway* the land advisors are expected to produce topical or country reports to aid decision-makers doing Refugee Status Determination. Landinfo produces five different types of documents. Two of them (Webnotes and Responses) are in the public domain on their website. The Travel Reports and Topical Notes produced in relation to fact finding missions are in some instances posted on the webpage. However, with the exception of Eritrea, none of the fact finding missions from the “top 10” countries are distributed publicly.

The land advisors usually have a university degree in social science or humanities. They may have experience with decision-making or other operative parts of the Directorate of Immigration. It is the policy of Landinfo that the land advisors have in-depth knowledge and long-standing experience of his or her region. They are characterized as experts, both in terms of partaking in meeting with the Directorate of Immigration and the Immigration Appellate Board, and in terms of giving expert testimony in court.

Decision to write country reports

In *the UK* there is no separate process on the decision to write country reports. COIS is expected to deliver three updates (COI-reports) a year on the top 20 asylum-seeker producing

¹¹⁸ Lifos document 21598.

countries. COIS also produces Country of Origin Information Key Documents on countries that generate fewer asylum applications, which are updated annually.

In *Sweden*, both general and issue specific reports are often generated upon instruction from Rättschefen. The decision to write is usually based on a dialogue with COI-unit, but the final say rests with Rättschefen. As opposed to the UK system, the COI-unit does not routinely publish updated reports on the top 20 asylum producing countries.

Upon request, the COI-unit also produces responses/notes regarding particular questions. Requests to write on specific issues may in principle be placed by anyone, but in practice most of the requests come from a decision-maker or case workers in relation to a particular case. Responses to requests are published in Lifos when they are of general interest. The COI-unit is expected to respond to such requests within five working-days. The Legal Director does not pose questions. The Migration Courts do not put questions directly to the COI-unit if they want more COI they refer the case back to first level decision-making.

In *Norway* Landinfo cooperates with the Directorate of Immigration and the Immigration Appellate Board both in the selection of topics that they decide to write Notes or Webnotes on, and where to go on fact finding missions. The reason for producing own Country of Origin Information is somewhat less clear than in the UK or Sweden, as the production is not merely linked to the “top 20” countries in the case load but also based on assessment of need for up-to-date information.

Landinfo also produces a number of emails on request from case workers on particular or isolated questions, for instance whether there is a prison for women in a particular city. This information is not publicized.

Production of a report/response

In *the UK*, COIS base their reports on objective information and only information that is publicly available and able to be disclosed. As is the case of UNHCR, the COIS applies the same methodology of collecting all available public information and collating it according to reliability. The researcher regards the factual part of UNHCR’s Eligibility Guidelines as an important source of information which they hold together with other important publicly available information, such as some other state reports and reports from Amnesty International and Human Rights Watch.

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In *Sweden*, the task of writing reports is given to the COI analyst covering the country or region. The COI analyst has the responsibility to conduct the research but may receive support from one of the COI researchers.

The final report is usually read by the head of LIFOS, but he or she comments on language only. There is no review of clearance process of the general professional standard or information collated on the specific issue or country.

The COI-unit is the only one in this case study that explicitly states that it follows the standards given in the EU Directive on Country of Origin Information when compiling their reports. One of the principles of this EU directive is the transparency of the sources that the COI is based upon. The Swedish reports have adapted the principle of transparency by only using identifiable sources. The COI-unit cooperates with representatives from other countries and on one occasion with NGOs in collating information on fact finding missions. The COI-unit seldom questions the facts in the UNHCR reports. On the contrary they are considered an important and reliable source. However, the reports are only one of several reliable sources.

Recently, the Swedish Migration Board has adapted a design where the country profiles are divided into a section compiling facts and a section assessing the facts and also relevant case law. So far the country reports of Kosovo, Palestine and Somalia follow this design. The reports on Iraq, Russia and Afghanistan which are in the making also follow this design. The country profiles also contain information about civil registration, civil law, citizenship and the question of return.

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In *Norway Landinfo* in general bases its reports on publicly available information, but as they also rely on country visits some of the sources are classified and therefore not tracable as to the content given.¹¹⁹

The Webnote¹²⁰ is a document written by using a standard formula on which topics to address. The larger part of the document concerns an overview of the history, the human rights and security situation in the country. The information is based on publicly available sources. The last part of the document consist of a section on the dominant asylum claims of nationals from this country (“who seeks asylum and why?”). The source for this sub-section is publicly available information and the regular dialogue between Landinfo and the Directorate of Immigration concerning individual cases. The Webnote gives very broad information on the country of concern, and the intended purpose is to give less experienced case workers a general introduction to the main issues that may arise in relation to an asylum application. At the end of the Webnote a statement on sources is given, as well as a statement concerning with which regularity Landinfo go on their own fact finding missions.

The Travel Report¹²¹ is a comprehensive report of the general findings from a fact finding mission. These reports are related to a specific journey and cannot so easily be updated. As of recent, the Topical Notes¹²² has been more in use. The Topical Notes focus on select issues relevant to case workers doing Refugee Status Determination, for instance prison conditions, the conditions for homosexuals or the prevalence of gender mutilation in a country of concern. In addition to focusing on relevant issues, the topical notes have the advantage of being able to be updated.

The writing of notes and reports is the sole responsibility of the land advisor. The land advisor writes a first draft. If it is a travel report, it is handed over to the others partaking in the travel to have the information checked. Upon return of the draft, it is then read by a colleague on the same regional desk for comments. The editorial committee of Landinfo will then read the reports for comments on language and style, in terms of the report being understandable and accessible for case workers. The head of Landinfo has the editorial responsibility and will usually read the report before it is posted on the webpage and may comment on language and style.

Significance of fact-finding missions

In *the UK*, COIS may undertake fact-finding missions (or: information gathering visits) to collect information directly from sources in the country of origin, but this is rarely done. Fact-finding missions are therefore not part of the routine of writing a top 20 reports. When conducted, the purpose of the fact-finding missions is to gather information not available from

¹¹⁹ Tracability is considered necessary to meet the basic standards for processing Country of Origin Information, cf Section 4.1.2 in the ARGO-PROJECT *Common EU Guidelines for processing Country of Origin Information* (COI) (April 2008). Sometimes information may be classified, section 5.

¹²⁰ Webnotat – under the link “Information”

¹²¹ Travel rapport (Reiserapport) – under the link “Rapporter”

¹²² Topical Notes (Temanotater) – under the link “Rapporter”

existing sources. Such missions have the benefit of being more recent and on the ground. UNHCR may be perceived to have given an over cautious statement due to generalized protection need, and the fact-finding mission may give a more individual assessment fitting the case at hand. Fact finding missions are rarely used, however, in part due to expenses but also because the information seldom yields entirely accurate and reliable information and may therefore be difficult to use. In addition the information gathering represents a problem as the sources are often not citable.

In *Sweden*, as a part of collecting information, a fact-finding mission is sometimes conducted when the need arises and information cannot be obtained otherwise. Usually the COI-analyst travels on the fact finding missions together with representatives from the operative part of the Migration Board. Sometimes the fact finding mission is conducted in cooperation with another country, usually a Nordic country. It otherwise shares the concerns of the UK regarding the methodological difficulties that may be attached to this form of fact gathering.

In *Norway* several fact-finding missions are conducted each year. The decision of where to go on a fact finding mission involves an assessment starting with Landinfo requesting a list of priorities (countries and issues) from the Directorate of Immigration. Landinfo receives a list from the Directorate of Immigration which is extensive and requires a selection. Landinfo assesses the requests on the basis of need and what is practically feasible. Landinfo and the Directorate of Immigration will then enter into a dialogue resulting in a smaller select list of countries and issues for next year's fact finding missions. This process is transparent to the Ministry Cabinet.

The land advisor will often travel with a representative from the Directorate of Immigration and one representative from the Immigration Appellate Board, who all partake in the collection of facts. The report from the travel is written by the land advisor, who may have the other two representatives read through the reports.

How to interpret information gaps

In *the UK*, if an information gap on a general issue or a specific claim exists, the decision-maker may place a request for a search on a particular issue. Requests that are dealt with usually entail search on internet. COIS will also conduct research on the ground by contacting a relevant organization. They may also conduct a fact-finding mission but this is rarely done due to the difficulty in citing sources. However, if this type of information is all that is possible to retain, the COIS will mention the information in their reports but with the necessary comments as to the lack of certainty of the information.

In *Sweden*, the COI-unit sometimes uses the possibility to pose questions through existing networks such as Eurasil or IGC, if there is reason to believe that information can be found.

In *Norway*, the annual prioritization of where to conduct fact-finding mission is used as an operative tool in how to deal with information gaps.

Significance of "current information"

In *the UK*, the reason for the routine of writing three updates a year on the top 20 countries is to retain currency, particularly in regards to conflict situations. It is the perception of the Border Agency that six months old information should be regarded as out of date and in the need of updating. Exceptions to this routine may be made if conditions are static. Upon question of whether security assessment should not be dependent on the most recent assessment but be conducted in a long term perspective, the Border Agency is of the opinion that governments doing Refugee Status Determination with an actual asylum-seeker in front of them are in need of current Country of Origin Information pertaining to the issues at hand.

If the reports are not updated the decision-maker risks missing information. In this regard, UNHCR's Eligibility Guidelines are perceived as fact collation being focused on the general situation in the country and at particularly vulnerable groups, whereas their national COI-unit is more focused on particular situations and to a greater extent based on individualized information.

For example, as of recent case workers had to deal with many asylum applications from Congolese citizens where many claimed that to return as a failed asylum seeker in itself represented a risk. The information from UNHCR supported this claim but it was dated and the UK had different and more recent information stating that there was no such generalized risk upon return in all areas. In this case, the UK contacted Human Rights Watch, who had researchers on the ground in the relevant area, and they reported back with recent information that was more specific than that of the UNHCR.

In *Sweden*, the COI-unit has the aim that information in the database Lifos should be correct, relevant and current. Country of Origin Information can however be "old" but still correct. The COI-unit does not update just to update. On questions pertaining to updates, the COI-unit may also respond that it presents the facts, and that it is up to the policy makers to assess them in relationship to the legal regulations, i.e. whether a sufficiently sustainable change has occurred that may affect protection needs.

Standard of accuracy – facts as they “are” or as they “could be”

In *the UK*, COIS operate with a standard for reporting facts as they “are” and not as they “could be.” This standard requires that COIS must be able to say and demonstrate the status of the human rights and security situation in the country of concern. A description of the facts coined in terms of how the situation “could be” will fall short of this standard. There is a perception that UNHCR may write the facts as the “could be” to be on the safe side of their mandate of protection refugees.

In *Norway*, Landinfo aims to produce reports with correct and relevant Country of Origin Information. This is perceived being possible by the skill of the land advisor and by Landinfo being independent. In comparison, UNHCR is perceived as a big organization where policy considerations may have to be taken into account. As an example, the long time it took to write a paper on Chechnya may have involved policy considerations unrelated to the actual assessment of protection needs. If there is disagreement on Country of Origin Information, i.e. with that presented by UNHCR, it is the sole responsibility of the land advisor in her or his professional capacity to assess which information to write down in the report.

Perceived added value of own COI-reports versus that of UNHCR:

In *the UK* one of the rationales for writing own reports is that the currency of the information coming from COIS adds to the information in UNHCR's Eligibility Guidelines, as the example of Congo illustrates. In addition, there may be a tendency to perceive the reports from COIS as stating the facts as they “are”, whereas UNHCR's Eligibility Guidelines state the facts as they “could be.”

In *Sweden* the COI-unit regards that its country profiles cover more areas of information than the position papers of UNHCR.

In *Norway* Landinfo perceive that their reports have distinguished characteristics of being more pointed on particular issues relevant to the case load of the Directorate of Immigration, whereas the Eligibility Guidelines are more general. Each country report is specifically tailored to the need of the case load of the Directorate of Immigration.

Landinfo claims to have other and in some instances possibly better sources than UNHCR. For instance, on a travel to Afghanistan or Sri Lanka, the land advisor will conduct interviews with UNHCR and also speak with the same organizations and people as UNHCR, but also others. Landinfo also perceives that their reports may give a more nuanced picture of the security and human rights situation in a country due to a different working method. In the example of Iran, even if the same sources are interviewed on a fact finding mission, UNHCR may be more concerned with the refugees in the northern part of the country, whereas Landinfo may be asking particular questions on homosexuals.

The reports from Landinfo are also thought to have an added value in comparison to i.e. the COIS-reports of i.e. the UK, as Landinfo's staff stay on longer and have years of experience analyzing a particular region. One land advisor has worked with Country of Origin Information for 20 years.

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To summarize, the structure of the COI-units have notable organizational differences in both the role given to the authors of the reports and to the methodology adapted. The UK COIS is given a more subdued role with a narrower and clearly defined task of collecting and assessing the reliability and value of all publicly available information. The production of new reports is also not subjected to discussions of needs and resources. In comparison, in Sweden and particularly in Norway, a greater emphasis is placed on the COI-reports providing expert advice, both by the more prominent advisory functions given to the staff at LIFOS and Landinfo and (in particular in Norway) by devoting resources to conducting fact-finding missions. Decisions on which reports to write and possibly where to travel, involve dialogue or initiative with the operative part of the Swedish Migration Board or the Norwegian Directorate of Immigration.

In the UK, and possibly in Sweden, the approach to the significance of fact-finding missions is closer to that of UNHCR. In the UK, such information gatherings raise difficult issues regarding reliability and corroboration, and pose challenges in terms of transparency. In Sweden the COI-unit does make use of fact finding missions, but shares the basic concerns of the UK. In Norway the greater tendency to place value and emphasis on the expert role of the staff of Landinfo may be interlinked with a reliance on fact-finding missions as a useful methodology in finding and assessing Country of Origin Information.

The UK and Sweden also show some differences in their emphasis on Country of Origin Information having to be recent. In particularly in the UK, the up-to date quality of its reports is regarded as characteristic, distinguishing them from UNHCR's Eligibility Guidelines. This emphasis may be at odds with UNHCR's in-house policy that their country specific recommendations stand until new Eligibility Guidelines or Interim Guidance is produced. This difference may be of significance when doing risk assessments, as UNHCR tends to assess risk in a more long term perspective. The Swedish COI-unit and Landinfo may place less emphasis on this value, perhaps because it is not perceived as being one of their tasks or perhaps because the more academic profile of their COI-units may contribute to giving the issue of up-to-date information a more subdued significance.

All countries point to their own COI-products as capable of being more on target (more detailed or more accurate) for the process of doing Refugee Status Determination, whereas UNHCR's Eligibility Guidelines were described as sometimes too general to be entirely useful. This perception may be due to a different perspective in the use or function of Country of Origin Information that has more to do with its use in the operative parts of first level decision-making than actual differences in the fact finding. The perception of its own Country

of Origin Information as being more valuable by allegedly being more correct may rest on a different view of human rights, where the governments may interpret legal concepts such as “risk of persecution” as requiring a higher threshold of hardship than UNHCR.

The three COI-units all play a significant role in aiding first level decision-making. The UK system has done most to sever the COI-unit from the operative part of first level decision-making. The case workers are instructed to consult objective Country of Origin Information for information and not support their decisions. They shall also not rely on the country specific guidance given by the Border Agency in the OGNs. Moreover, the UK has established a board overseeing the use of Country of Origin Information.

6. Case study: time and place of implementation of the 2002 guidance on the Internal Flight Alternative (IFA) and Gender Related Persecution (GRP)

This section provides a small case study on the speed and place (the administrations or the courts) of implementation of UNHCR's 2002 guidance on the Internal Flight Alternative and Gender Related Persecution up to the adaption of the EU Qualification Directive which now embodies most of the principles in UNHCR's guidance.

The focus is on the historical development of the implementation. The three states may vary greatly as to the speed and degree of implementation of the principles in these two position papers, ranging from recognizing the concepts before or at the issuance of the 2002 GIPs, to not implementing all of the core concepts in 2009 in the context of having to adapt the principles also laid down in the binding EU Qualification Directive.

The design follows the same theory on what may influence national development of non-binding human rights law as relied on in the previous section (see 5.1 above).

6.1 Implementation of the two categories of international protection

All three countries have implemented the two forms for (convention and convention-like) protection, but the dates for implementation of even these basic concepts vary greatly.

The UK was the first to recognize both forms of protection. Norway ensured a complete implementation with the passing of the 2008 Immigration Act, and Sweden in 2005 and 2009 with the adaptation of the EU Directive.¹²³

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In *the UK*, the passing of the present 2002 Nationality, Immigration and Asylum Act (**2002 NIA Act**) provided protection to refugees with reference to the definition in the 1951 Convention grounds, cf. the Immigration Rules Section 327 and 344. Later on the sections were amended to include a reference to the EU Directive. Complementary protection is presently referred to as "Humanitarian Protection" in Section 339C of the 2002 NIA Act.¹²⁴ The section now has a reference to the EU Qualification Directive Article 15 and a stipulation of "serious harm."¹²⁵

The Border Agency's Asylum Policy Instruction (API) gives a comprehensive and detailed interpretation of the inclusion criteria for convention and convention-like protection, as well

¹²³ Article 15 nevertheless represent an important harmonization of national law in the EU-27, by ensuring the implementation of the criteria of "persecution" due to "armed conflict or civil unrest" based on a broad assessment of the human rights catalogue beyond that of threat to life or inhumane or degrading treatment.

¹²⁴ Humanitarian Protection (HP) is granted in cases where the asylum-seeker runs a real risk of serious harm, that is: the death penalty or execution; unlawful killing; torture or inhuman or degrading treatment or punishment; serious and individual threat to life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

¹²⁵ With the passing of the EU Directive the refugee definition in the 1951 Convention and "subsidiary protection" is ensured. Article 15 of the EU Qualification Directive raise particular issues under the possibly extended definition of "harm" in Article 15 c. According to national UK case law, the protection granted under Article 15 c) is no wider than that granted by Article 3 of the ECHR, which is identical to Article 15 a) and b). However, the Advocate General's opinion in the case of *Elgafaji v Staatssecretaris van Justitie of the Netherlands* before the European Court of Justice indicated that the level of protection is in fact wider. The judgment handed down on 17th February 2009 also states that the harm outlined in Article 15 c) covers a more general risk of harm than Article 3 of the ECHR, cf Case C-465/07.

as a guide to procedural issues doing Refugee Status Determination, the ECHR and basic principles of Humanitarian Protection.¹²⁶ For sake of providing a comprehensive picture of the national protection regime, it may also be mentioned that UK national laws have a different standard for when to grant discretionary leave than the other three countries in this case study. Despite its terminology, the decisions are predominantly meant to be based on careful human rights assessments.¹²⁷

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In *Sweden* national law did not distinguish between the two forms of international protection until passing of the 2005 Aliens Act. The previous Act from 1998 had no reference either to the refugee definition or the extended refugee definition. The 2005 Aliens Act explicitly refers to the 1951 Convention criteria and to others in need of protection for similar reasons. It also has a separate section acknowledging persecution by non-state actors, cf. Chapter 4 Section 1 of the 2005 Aliens Act.

Initially, the 2005 Aliens Act recognized that protection may be given for “complementary reasons” if risk of death or torture regardless of cause, or to “serious abuses” due to “armed” or “severe conflicts.” In addition, it kept the previous act’s novel acceptance of granting protection to asylum-seekers unable to return due to environmental disaster, cf. Chapter 4 Section 2 of the 2005 Aliens Act. The Swedish complementary protection regime in the 2005 Aliens Act was therefore both narrower and broader than the standard set in the EU Qualification Directive. As of 1st January 2010, the Complementary Protection-regime will be aligned with that of the EU Qualification Directive.¹²⁸ The 2005 Aliens Act did not transfer the previous standard for granting discretionary leave on “humanitarian grounds.” Instead such permit may now only be granted on the basis of “exceptionally distressing circumstances”, cf. Chapter 5, Section 6 of the 2005 Aliens Act. Compared to the UK system, the possibility of achieving this form of permission is particularly vague and meant to be applied in only exceptional circumstances.

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In *Norway*, Section 28 of the new 2008 Immigration Act recognizes the right to protection either on the grounds of the 1951 Convention Refugee Definition or on the grounds of Complementary Protection. Before the passing of the new Immigration Act, there was no clear recognition of a complementary protection regime. The previous Section 15 referred to the prohibition similar to that of non-refoulement, erroneously understood as an additional form of protection granted by Article 33 of the 1951 Convention. Section 28 in the new Immigration Act recognizes that complementary protection may be granted for convention-like reasons. The reference to persecution grounds and the definition of persecution is in line with UNHCR’s definition of complementary protection.

¹²⁶ API Assessing the Asylum Claim (October 2006, rebranded December 2008); API Assessing Credibility in Asylum and Human Rights Claims (...); API European Convention on Human Rights (October 2006, rebranded December 2008); API Humanitarian Protection (...); API Discretionary Leave (...).

¹²⁷ It includes applicants that 1) are excluded under the 1951 Convention from receiving refugee status under Article 1F and Article 33(2) but return will violate Article 3 of ECHR; 2) applicants who do not meet the inclusion criteria under the Refugee definition or the Extended Refugee Definition but return would be an inappropriate breach the obligations of Article 3 or Article 8 of ECHR or flagrant breaches of other rights contained in ECHR; 3) any other exceptionally compelling case falling outside the rules.

¹²⁸ Proposition to transpose and align was presented in 2004, cf. *Skyddsgrundsdirektivet och svensk rätt: En anpassning av svensk lagstiftning til EG-direktiv 2004/83/EG angående flyktingar och andra skyddsbehövande* at: <http://www.regjeringen.se/sb/d/5805/a/66122;jsessionid=axnOnhDLLWS>

Section 38 of the 2008 Immigration Act allows for the grant of discretionary leave on compassionate grounds or due to strong ties to the state. Relevant to the assessment is under age, serious medical conditions, social or humanitarian conditions upon return or history of trafficking. In comparison the UK provision allowing for discretionary leave may only be given by reasons of breach of core human rights.

6.2 Time and place of implementation of IFA-recommendations

IFA is to be regarded as *a sub-issue when assessing protection needs* and arising only after having identified an international protection need, either for convention or convention-like reasons. This entails that if an assessment of IFA does not lead to a rejection of the asylum-application, the asylum-seeker should not be granted leave on discretionary grounds.

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In *the UK* the Internal Flight Alternative was recognized in national law and instructions before the 2001 Round Table.¹²⁹ The Canjai-case from 2001 recognizes the principle that relocation was not applicable if living conditions were “unduly harsh.”¹³⁰ Stipulation of the reasonable-test was further developed in several cases pertaining to Sudan and Somalia from 2003 and 2004 and to Kosovo in the Januzi-case of 2006.¹³¹ IFA is implemented in Section 339O of the Aliens Act as sub-issue of the “persecution” assessment.¹³² In the recent case of Somali AM and AM armed conflict, the courts adhered to the guidance on UNHCR when regarding the method of return to an internal relocation as far too uncertain.¹³³

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In *Sweden* the new 2005 Aliens Act has not included a separate provisions regarding IFA,¹³⁴ and the Migration Board has not produced a general instruction pertaining to the interpretation of IFA. Implementation of IFA as a sub-issue has instead taken place within the Migration Court of Appeals. Subsequent to the 2005-reform establishing the Migration Court of Appeals, several decisions are handed down pronouncing on the significance of UNHCR’s recommendations concerning IFA clearly describing it as an issue pertaining to the protection need of asylum-seekers that come under the refugee definition or the extended definition.¹³⁵ The judgments concern cases originating in Iraq, Afghanistan and Sri Lanka. Partly in response to these cases and partly in response to the need for instructing first level decision-

¹²⁹ *R v Home Secretary ex parte Robinson* [1998] QB 929.

¹³⁰ *Canaj v Secretary of State for the Home Department* [2001] EWCA Civ 782; [2001] INLR 342 at p.349, concerning the return of Kosovo Albanians. Further principles were developed, i.e. in *E and another v Secretary of State for the Home Department* [2004] QB 531, para 67, stating that “[t]he comparison between the asylum-seeker's situation in the host country and what it will be in the place of relocation is not relevant for this purpose, though it may be very relevant when considering the impact of the European Convention on Human Rights or the requirements of humanity.”

¹³¹ *Januzi* [2006] UKHL 5) paras 46.

¹³² Section 339O refers to the IFA as becoming relevant if the state has determined that the individual qualify as refugees under the 1951 Convention or under the extended refugee definition. The Border Agency’s Asylum Policy Instruction (API) series give separate and specific attention to issues internal flight in API *Internal Relocation* (February 2007).

¹³³ *AM & AM (armed conflict: risk categories) Somalia CG* [2008] UKAIT 00091 (1 December 2008). It also rejected the Opinion of the Advocate General in Elgafaji, 9 September 2008 in Case C-465/07, as not affording an adequately reasoned basis for departing from the guidance given on the law in the so-called “AIT country guidance case” on Article 15(c) – HH and others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 and KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023.

¹³⁴ There are however a potentially relevant provision regarding the definition of “internal armed conflict,” cf Section 2(1) in Chapter 4 of the 2005 Aliens Act.

¹³⁵ MIG 2006:1; and MIG 2007:12

makers, the Migration Board has produced precedent-setting decisions or the Legal Chief of the Migration Board has produced instructions pertaining to the application of IFA in Iraq and Afghanistan. No court decision has been handed down regarding IFA in asylum-applications originating from Russian Chechnya, but the Migration Board has produced precedent-setting decisions and instructions based on the courts' general interpretation of the concept.¹³⁶

A decision from the lower Migration Court in Stockholm holding that an existing social network was a requirement for relocation to Kabul did not present sufficient grounds for the Migration Board to amend its practice. In a comment from Rättschefen this one decision did not warrant a redirection of practice as several other decisions from the Migration Courts prohibited that social network was a requirement in the reasonable assessment of the IFA. In a comment from the legal director this one decision did not warrant a redirection of practice as several other decisions from the Migration Courts and the Migration Court of Appeal (MIG 2008:20) have not found that social network was a requirement in the reasonable assessment of the IFA. On issues regarding assessment of Country of Origin Information and application of legal concepts on facts, the Migration Court of Appeal has so far held in favor of the Migration Board position in all but one case.¹³⁷

A recent decision from the Migration Court of Appeals may serve as an example that it may also take on an activist role. In a decision concerning the reasonableness of an Internal Flight Alternative of an Iraqi family of mixed marriage of Shia and Sunni Muslims from Bagdad to some parts of Bagdad. The court *may* apply a higher threshold for the reasonableness test than the UK "not unduly harsh" as it applies UNHCR's "undue hardship" criteria ("onödigt lidande eller umbäranden").¹³⁸

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In *Norway* the new section 28 of the 2008 Immigration Act made an important amendment bringing the extended refugee definition in line with that of international refugee law.¹³⁹ Apart from this change, the new law codifies existing practice in a number of ways that are relevant to the implementation of GRP and IFA.

To decide whether an IFA may be applied UNHCR requires two steps, first the assessment of whether there are other regions in the country of region that are *relevant* to consider as an alternative area of relocation, and secondly an assessment of whether it is reasonable to refer the asylum-seeker to seek protection in this area. UNHCR's GIP on IFA stipulates a detailed relevance-test that includes an assessment of persecution for convention and convention-like reasons and also refers to the whole catalogue of human rights.

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¹³⁶ The Migration Board *Instruction* "Iraq: Internal Flight Alternative" ("Styrsignal: Irak: Internt flyktalternativ") No 2 (11th November 2008); The Migration Board *Comment* "Head of legal affairs' comments regarding relocation of Afghan asylum-seekers" ("Rättschefens kommentar med anledning av ändrade/återförvisade ärenden rörande sökande från Afghanistan") (22nd May 2008); and The Migration Board *Instruction* "Russia: Internal Flight Alternative" ("Styrsignal: Ryssland: Internt flyktalternativ") (17th October 2008).

¹³⁷ MIGOV – 2007:33 Regarding the IFA of a Serb from Kosovo. The Migration Board was of the opinion that Serbs from Kosovo could be relocated to Serbia, contrary to UNHCR's position. The Migration Court of Appeal held in favor of the Migration Board. MIGOV – 2008:20 Regarding the IFA of Afghans to Kabul. The Migration Board was of the opinion that there was no requirement of a "social network," contrary to UNHCR's position. Otherwise: The Migration Court of Appeal held in favor of the Migration Board. MIGOV – 2006:7; MIGOV – 2008:12 Sri Lanka; and MIGOV – 2009:4

¹³⁸ MIG UM-6397-09 of 11th May 2010.

¹³⁹ In section 15 of the previous law Article 33(1) of the 1951 Convention was understood as giving the basis for complementary protection, and that an alternative basis was the obligations derived from Article 3 in ECHR. In the new section 28 the inclusion criteria for complementary protections is based on the definition given in ...

In *the UK*, the Border Agency’s API briefly mentions that the suggested area must be “relevant” to consider. It merely states that an assessment must be made “whether the applicant would be at risk of persecution or serious harm in the place of relocation.” In *Sweden*, the 2005 Aliens Act has no separate provision regarding IFA. Development of the concept has been driven by case law since the establishment of the Migration Courts of Appeals. It has stipulated that the relevance-test requires that the IFA must be an accessible and a practical option for the refugee.¹⁴⁰ The courts’ assessment of the relevance criteria seem also to be limited to instances where the applicant is in need of protection for convention reasons also in the suggested area of relocation, and not based on broader human rights assessments.¹⁴¹ With the adaption of the EU Directive, it is suggested that the 2005 aliens Act includes an express provision of existing practice.¹⁴² In *Norway* Section 28 explicitly refers to the IFA as an exception to the right of protection, if it is relevant and reasonable to request of the asylum seeker to relocate to another area of the country of origin. Previously, it was the practice of Norway to grant stay on compassionate grounds in IFA-cases where it is deemed unreasonable for the asylum applicant to relocate. As a result of dialogue with UNHCR, their practice is now to give asylum status. In section 29 the concept of persecution now requires an assessment of the whole human rights catalogue.

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The disagreement regarding the application of IFA often turns on the assessment of whether it is *reasonable* to request the asylum-seeker to seek protection in another area of the country of origin. UNHCR’s GIP calls for a broad human rights assessment, including an assessment of the likely social and economic consequences the asylum-seeker will meet upon return. The GIP refers that the conditions upon return must not fall below a standard of “undue hardship.” Most significantly, the GIP recommends an assessment of whether a return to the suggested area is likely to have the consequence of the applicant being forced back to his or her area of origin. For instance, if a single woman is not able to acquire accommodations or sustain a livelihood, it may be “unreasonable” to expect relocation.

In *the UK*, the Border Agency’s API has detailed instructions for how to conduct the reasonableness test. Structurally it is different than the approach recommended by UNHCR for reasons of making the legal operations more accessible to the decision-maker. The concept is developed by the courts, as referred to in the cited cases above. In *Sweden* this part of IFA is also developed by the courts. The Migration Court of Appeals provides a detailed analysis of the reasonable test and refers to the concept of “undue hardship.”¹⁴³ The Migration Board accepts the Migration Court of Appeals’ interpretation of the relevance test in general.

¹⁴⁰ MIG 2008:20 and MIG 2009:4

¹⁴¹ In a case concerning a Tamil requested to return to Colombo, the court held that the suggested area of relocation was a relevant alternative as there was no risk of individual persecution. The court did not address UNHCR’s recommendation of not regarding Colombo as a relevant IFA for Tamils, see MIG Mål nr UM 1436-07 page 8. In a decision assessing whether Kabul was a relevant IFA for a refugee in need of protection from actors located only 20 miles from the province, the court did not regard Kabul as a relevant alternative for relocation. It stated that due to the geographical proximity of his persecutors they might be able to reach him in the Kabul district and he therefore had an individual protection need that could not be ensured due to the poor general security situation. The presence of ISAF-forces did not represent sufficient protection, as they did not have a policing mandate, see MIG Mål nr UM 4118-07 Judgment (14th January 2009).

¹⁴² The Swedish Ministry of Justice *Proposition 2009/10:31*, draft article 8.

¹⁴³ In a case concerning an afghan Hazara relocating to Kabul the court stated that the reasonable test must be based on a broad assessment of the individual circumstances, inter alia of the asylum-seeker’s gender, age, health. The assessment shall be carried out within the framework of “skyddprövningen,” and the reasonability test is not met if return would expose the individual to undue hardship (“otillbörliga umbäranden ur humanitär synvinkel”, see MIG 2008:20; and MIG 2007:33 II.

The Swedish Migration Court of Appeals has also stated that UNHCR's Eligibility Guidelines are reports that constitute an important source of guidance in the decision of asylum applications.¹⁴⁴ In a subsequent decision from 2007 the Court of Appeal stated that UNHCR's Eligibility Guidelines are reports that must be assessed in light of other available information.¹⁴⁵ On such assessments of all available Country of Origin Information, the court has rejected the recommendation of UNHCR on the existence of social network in several but not all instances:

- In the case of Afghanistan, it has explicitly rejected UNHCR's recommendation of the existence of social network as a requirement for relocation.¹⁴⁶
- The court does not give clear stipulation as to how it assessed Country of Origin Information, however the court pleadings of the Migration Board point to alleged contradictions between UNHCR's recommendations and its own reported COI (i.e. that the requirement of social ties contradicts the reporting of large migration and multi-ethnic mix in greater cities), and to recent news reports of improved security situation allegedly must lead to a different position regarding the requirements of applying IFA.¹⁴⁷
- In a case from 2008, the Migration Court of Appeals did not adhere to the recommendation of UNHCR regarding the requirement of social network or ties for the return of Afghan asylum-seekers to Kabul. The case concerned an Afghan Hazara from Ghazni with no ties to other regions of the country. The court held that the personal circumstances of the asylum-seeker did not make relocation unreasonable (he had 10 years of education).¹⁴⁸
- So far only one decision has been given by the lower Migration Court accepting "social network" under the assessment of whether it is reasonable to relocate to Kabul (Stockholm 2008). As the case law is not consistent, the Migration Board has so far chosen not to alter its policy.¹⁴⁹
- Decisive weight was given to the Eligibility Guidelines in a case handed down 6th October 2009, where the Migration Court of Appeals considered the significance of social network upon return and found that no IFA existed in Mogadishu.¹⁵⁰
- But in another case handed down on the same day, the Court of Appeals assessed the significance of basic and sufficient needs ("materiella behov och tillfredsställande omvårdnad vid ett återvändande").¹⁵¹
- Following these decisions, the Migration Board issued two practice setting decisions on 21st December 2009 regarding single underage asylum-seekers. One of the cases

¹⁴⁴ "... UNHCR:s rapporter är en viktig källa som vägledning för asylprövande stater men dess rekommendationer utgör inte svensk lag." MIG 2007:33 II

¹⁴⁵ "UNHCR's rekommendationer måste givetvis vägas mot annan information som finns om situationen i ett land." MIG Mål nr UM 1436-07.

¹⁴⁶ The Board's pleadings in the case MIG Mål nr UM4118-07 page 5-6, in which the Court of Appeal decided the case on the relevance criteria in favor of the asylum-seeker; and MIG Mål nr UM 3854-07 page 8-9, in which the Court of Appeal held in favor of the Board's position that social network is not a requirement for relocation to Kabul.

¹⁴⁷ MIG Mål nr UM 1436-07 page 5, regarding whether UNHCR's Eligibility Guidelines entail new information and the requirement that the Board reassesses the relevance and reasonableness of relocating a Tamil to Colombo.

¹⁴⁸ MIG Mål nr UM 3854-07 (1st July 2008) page 15.

¹⁴⁹ The Board *Comments* "Rättschefens kommentar med anledning av ändrade/återförvisade ärenden rörande sökande från Afghanistan" (22nd May 2008)

¹⁵⁰ The court assessed the security situation in Somalia and held that an internal armed conflict did not exist in Mogadishu, however the security situation is liken to that of Section 2 (1) Chapter 4 in the 2005 Aliens Act. MIG 2009:9, Lifos 21598

¹⁵¹ MIG 2009:8.

the Migration Board found that a child, who was not trustworthy concerning his domicile in Mogadishu, could be relocated to Northern Somalia.¹⁵² The court did find that the security situation in Mogadishu was an internal armed conflict.

- In a case regarding internal flight of a Tamil to the capital Colombo of Sri Lanka UNHCR's recommendations are regarded as significant to the interpretation of the IFA. The court decided to return the case to the Migration Board for a new assessment on the basis of new information. The court did not accept the arguments of the Migration Board that UNHCR's risk assessment holds a higher standard than what is required of the 1951 Convention when it recommended that no IFA exists for those persecuted by LTTE, or that IFA shall be assessed in regards of the individual circumstances not on the basis of (new information on) the general conditions in the country.¹⁵³

In the case of Iraq and Sri Lanka the Swedish Migration Board has not implemented all of UNHCR's recommendations. No Appellate Court decisions have been handed down and instead the Migration Board has produced practice setting decision.

- In the case of Iraq, the Migration Board disagreed with the 2003 Eligibility Guideline recommending prima facie refugee protection, in part on basis of new Country of Origin Information. Sweden started a practice of requiring an individual assessment of asylum seekers from central Iraq (including Bagdad) and Christians from Mosul.
- In the case of a Kurdish male of Feyli ethnicity from Bagdad,¹⁵⁴ the Migration Board upheld the policy that links or social network is not a requirement for the use of IFA.¹⁵⁵ The decision provides an unusual level of transparency as to the sources relied upon. It substantiates the security assessment with footnote references to objective sources of COI collated by LIFOS, however no reference is made to the risk assessments in the recommendations of UNHCR.¹⁵⁶
- In a practice setting decision of 19th March 2008, the Migration Board held that the situation had improved and an individual assessment of each case was required.¹⁵⁷ The

¹⁵² The Board Decision 22nd December 2009

¹⁵³ MIG Mål nr UM 1436-07 page 6-7.

¹⁵⁴ The Swedish Migration Board precedent setting decision on Iraq IFA of 11th November 2008. The Migration Board issued a clarifying decision as no legal provision was found at that point in time.

¹⁵⁵ The asylum-seeker who was found to have a protection need in Bagdad could return to several of the other provinces. The Board found that it was reasonable to relocate the asylum-seeker to provinces dominated by his own sect or ethnicity. The Board found that the security situation had improved significantly in large parts of southern and central Iraq. It was on this basis it was reasonable to return the individual to provinces in Southern Iraq, to any of the ethnic-mixed provinces in Central Iraq, even if a social network was absent, or to the Kurdish region in Northern Iraq. It was not found to be reasonable to return the applicant to Anbar in Central Iraq due to its Sunni-dominance, or to Babil or Kerbala due to lack of legal access.

¹⁵⁶ The security situation in Southern and Central Iraq is primarily substantiated with reference to newspaper articles (BBC, Deutshce Presse Agentur and New York Times), and to Sweden's own production of COI by LIFOS. Reference to UNHCR is limited to its repatriation work, documenting that return mainly takes place to ethnic and religious homogeneous regions and that a substantial number has returned from Syria to Iraq due to lack of means to sustenance. The assessment of the security situation in Northern Iraq is substantiated by LIFOS-reports, and in addition one reference to UNHCR acknowledging the existence of a semi-functioning legal system which is interpreted as showing a sufficient ability and willingness of the local authorities to protect its citizens, see LIFOS nr 17584 Governate Assessment Report Dahuk Governate sept 2007 Chapter II Legal issues A Justice system. The assessment of Feyli-Kurdish rights refers to sources that inter alia is found on RefWorld, indicating that UNHCR is also considering these sources, but the conclusion that the authorities provide sufficient protection by pronouncing the importance that this group also should be given constitutional rights sharply differ from that of the UNHCR.

¹⁵⁷ The Board Decision (17th October 2008); The Board *Instruction* (Styrsignal) "Klargörande beslut beträffande internt flyktalternativ och person med sannolikt samröre med rebellrörelse i Tjetjenien" (20th October 2008)

security assessment and the question of the existence of IFA were based on available COI and a fact finding mission conducted by LIFOS. In this case, the Migration Board found that an IFA does exist in Russia, but in the particular case it was not found to be relevant as the persecutor may be the central authorities.¹⁵⁸

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In *Norway*, instructions make reference to the reasonable-test in the context of a particular country of concern. The assessment of risk is not stipulated in the terms of conducting a broad human rights assessment and there is no reference to “undue hardship”. Furthermore, contrary to UNHCR’s recommendations, asylum status will not be given if the IFA is not relevant because it is not possible to relocate due to practical hindrances.¹⁵⁹ The order of 2008 on GRP does not clarify Norway’s practice regarding IFA.¹⁶⁰

Implementation of recommendations in Eligibility Guidelines is mainly driven by the Ministry and not the courts. Until the winter of 2009, the provision pertaining to the setting of a Grand Board at the Appellate Tribunal (Utlendingsnemnda) had only handed down two decisions of May 2007 pertaining to the Internal Flight Alternative:

- In two cases concerning Afghan asylum-seekers relocating to Kabul. The decisions considered the recommendation of UNHCR as important due to its extended mandate in the region. The decisions addressed the need for social network, deciding that it was unreasonable to relocate due to individual circumstances in one of the cases but not in the other.

In the orders from the Ministry and the Practice Notes (PNs) from the Directorate of Immigration, assessment of UNHCR’s recommendations on IFA has not led to implementation in cases other than Afghanistan:

- An instruction on Afghanistan subsequent to the decision of the Immigration Appellate Board explicitly refers to UNHCR’s recommendations regarding IFA in their Eligibility Guidelines. The Ministry accepts a practice where relocation may take place if the asylum seeker has a link to a safe area. The Ministry also concurred to a practice where UNHCR’s recommendations on the security situation in an area shall be adhered to as a main rule, as long as UNHCR has a dominant role as a source of COI compared to other sources.¹⁶¹

¹⁵⁸ The Board Decision (17th October 2008) page 10.

¹⁵⁹ The Guidelines interpret the unreasonable criteria in a way that mirrors the then current practice for giving stay on compassionate grounds due to under age, health conditions and links to Norway. If such compassionate grounds are present the asylum seeker shall be given asylum status even if there is no assumed protection need in that area. Also the reservation of asylum status to the cases where practical restraints is not the main reason for why IFA is not relevant but would be presumed to be reasonable, refers to that the issue of asylum status must be assessed from the situation in the country as a whole. However, according to UNCHR, the assessment of the situation in the country as a whole should be the focus of any case involving IFA. Even if these interpretations are not entirely in line with UNHCR’s recommendations, the wording may suggest that they intend to be, if compared to the wording when interpreting GRP (section 4 of the Guidelines).

¹⁶⁰ The order is also available and posted on the Internet in an English translation.

¹⁶¹ The instruction also considers conversion-cases. Without referring to UNHCR’s recommendations on conversion in general, the Ministry states that it does not accept a practice change where conversion that has occurred *sur place* shall be given protection, and where the conversion emanate from activities in the country of origin only complementary protection shall be given. The Ministry’s position was taken after bilateral dialogue with UNHCR at the Headquarters and deviate from their recommendations. The instruction illustrates how reference to UNHCR is given when the Ministry chooses to adhere to their recommendations, and is omitted when its advice is considered but discarded.

- The Directorate of Immigration’s PN reiterates that “UNHCR is given great weight as a source when assessing asylum applications from Afghanistan”.¹⁶² In line with the decision of the Appellate Tribunal, the PN’s state that young males may be returned to Kabul even if they have no link to the capital if personal circumstances make such return reasonable.
- The Ministry’s order on Iraq given at a time when the 2003 Eligibility Guideline recommended that states gave Iraqis fleeing prima facie asylum status, does not refer to UNHCR. In the order, the Ministry decides that the Norwegian practice should be aligned with that of the other Nordic countries that had protested against the prima facie recommendation of UNHCR.
- The Directorate of Immigration’s PN on Sri Lanka has a separate section on IFA which guides the decision makers to regard Colombo as a relevant alternative, unless the state is the persecutor. It also states that the incident reports of arbitrary arrests and illegal killings does not amount to a situation where all Tamils from the North or the East risk persecution if returned to Colombo.
- The PN on Russian Chechnya states that the many claims of persecution due to the asylum seekers’ limited assistance (providing food, transport or medicine) to the guerilla will usually not amount to a protection need. This assessment runs counter to UNHCR’s position regarding the general perception of risk in the Eligibility Guideline and the Note from spring 2009.

The above examples show how implementation of UNHCR’s recommendations on IFA is gradual in all three states. However, when implementation of the interpretative guidance takes place within the interplay of the offices of first level decision making and the courts (as is the case in the UK and Sweden), clear reference is made to the relevance, reasonableness and undue hardship test. In the case of Norway, where the courts do not drive the development of International Refugee Law, the implementation is less specific as to the nuances in the legal concept “internal flight.”

The three states differ most in the speed of implementation, where both Sweden and Norway eventually end up with implementing the guidance that the UK adhered to at or before the time of the 2001 Round Table. The timely implementation in the UK must also be attributed to the independent role of the courts.

The time and place of the country specific guidance in the Eligibility Guidelines is influenced by the government’s own assessment of the facts. The independence and activism of the courts play a somewhat lesser role, but the UK, and possibly the Swedish courts have played a role in implementing UNHCR’s guidance on internal flight in Somalia. The different approach to the recommendations in the Eligibility Guidelines may be due to the role of the governments’ COI-units. A more precise analysis of the interplay between independent courts and independent COI-units requires further studies, either in archives or field.

Implementation of the Eligibility Guidelines also raises questions of whether the guidance is understood correctly; or alternatively whether the governments apply a different interpretation of the legal concepts such as “risk” and “persecution”, or even employ a different approach to the methodology of theory of Country of Origin Information. Illustrative examples are when the governments “add” criteria such as when requiring individual risk to exposed groups in

¹⁶² Section 2.1.

Iraq and Sri Lanka, or when emphasizing the alleged contradictions in the facts of UNHCR's reports on Kabul.

6.3 Time and place of implementation of GRP-recommendations

UNHCR's 2002 Guidelines on International Protection on GRP delineates the issue of gender first and foremost as a matter of maintaining focus and not in itself creating a new issue of law.¹⁶³ The gender perspective includes the entitlement of a gender-sensitive interpretation of "persecution" for any of the convention grounds. The potential size of the group has not been a concern for UNHCR. The convention ground "particular social group" may be interpreted either as inherent characteristics or one of social perception, persecution can take place by non-stated actors,¹⁶⁴ due to imputed opinion and sexual violence or exploitation may constitute persecution.

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The UK preceded the guidelines focus and gender and its recognition of gender forming a basis for "particular social group" in its early recognition of the need for a gender-sensitive approach to interpretation of the Refugee Definition with the UK House of Lords of 1999 on the widely read precedent *Shah and Islam*.¹⁶⁵ Also the recognition of persecution by non-state actors was driven by the courts in the precedence of the *Horwarth* case, where UNHCR intervened, and the *Harakel* case.¹⁶⁶ Following the court cases the 2002 NIA Act adapted a provision recognizing persecution at the hands of non-state agents. The subsequent API recognized non-state agents.¹⁶⁷ It also recognized that gendered political actions, transgression

¹⁶³ "Gender-related persecution" is a term that has no legal meaning *per se*. Rather, it is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status., UNHCR "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" HCR/GIP/02/01 (7th May 2002) section 1, see also section 5 for the historical context. In section 2 UNHCR refer to that gender focus or awareness is a well established principle of International Refugee Law, endorsed by the General Assembly and the Executive Committee of UNHCR's Programme, i.e. ExCom conclusion No. 87 October 1999.

¹⁶⁴ The present interpretation is somewhat broader than that of Article 9 of the EU Qualification Directive. The EU Directive has limited the application of non-State agents by broadening the definition of the actors as "parties or organizations controlling the state or a substantial part of the territory or State," and by requiring merely that security is "generally provided" which is less than effective control. The UNHCR's position is based on a stricter requirement of "effective control" that is only relevant to assess if the actor have the "attributes of a State," including the ability to enforce the rule of law, that are *de jure* recognized and can be held accountable for its actions both internationally and nationally, see UNHCR's GIP on GRP.

¹⁶⁵ The House of Lords judgment *Shah and Islam* [1999] INLR 144, and as later interpreted in the lower UK Courts. As a result it is established that the independent defining characteristic of a "particular social group" must be an innate, immutable or unchangeable characteristic of some kind, and a characteristic or association that members of the group should not be forced to forsake because it is so fundamental to their human dignity.

¹⁶⁶ In *Horwarth* the court stated that the protection test was "a practical standard, which takes proper account of the duty which the State owes to all its nationals," and the sufficiency of protection is not measured by the existence of a real risk but "by the availability of a system for the protection of the citizen and a reasonable willingness by the State to operate it," cf *Horwarth v Secretary of SSHD* (2000) INLR 15. In *Harakel* the court stated that sufficiency of state protection must be assessed "in its proper historical context," including the experiences of people sharing the appellant relevant characteristic ... and the appellant's own experience of police failures and abuses," cf *Harakel v SSHD* (2001) EWCA civ 884.

¹⁶⁷ The API elaborates the concept of non-State agents by clearly acknowledging that seriously discriminatory or other offensive acts by non-State agents that are "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection, it may amount to persecution, cf para 8.5 of the 2006 API. The paragraph offers a reference to paragraph 65 of UNHCR's Handbook. A perspective must be included of whether protection is offered equally to gender-related claims. However, a study from 2003 indicate that these principles are difficult to apply, as the most common reason to refuse an application is that the abuser was a non-State agent, see REFUGEE WOMEN'S RESOURCE PROJECT *Women Asylum Seekers in the UK – A Gender Perspective: Some Facts and Figures* (2003) at: <http://www.asylumaid.org.uk>.

of religious and social mores and imputed opinion may form the basis for protection under the 1951 Convention. The regulation of “particular social group” now makes up reference Regulation 6(1) d in the EU Qualification Directive.

The UK practice of affording protection in Female Genital Mutilation (FGM) cases has undertaken a development since the 1990s where refugee status was rarely given. In the practice of the Appeals Tribunal, many cases were dismissed failing to prove that the woman belonged to a “particular social group” or that the persecution formed a nexus with one of the other Convention grounds.¹⁶⁸ Although complementary protection could be given, the practice indicated a protection gap.¹⁶⁹ The present version of API includes additional focus on the protracted issues of assessing past prosecution and failure of state protection. It is also explicit in detailing different types of persecution, including sexual violence and exploitation.¹⁷⁰ The development anticipated the UNHCR Guidance Note on FGM of 2009 clearly states that all forms of FGM is a form of gender-based violence that inflicts severe harm, both mentally and physically, and amounts to persecution.¹⁷¹

In the UK, the AIP recognizes rape as a possible form of persecution, however practice indicates that even if the seriousness of the act is not questioned there is an issue of whether there exists a nexus between the motive of the act and one of the convention reasons. Several court cases state that rape is a licentious act and is unlikely to occur without some sexual interest, which cannot form a nexus with one of the convention reasons.¹⁷²

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In *Sweden*, the history of implementation of UNHCR’s recommendations on GRP has been greatly affected by the shift away from the politically driven instructions and the interplay between the Migration Board and the Migration Court of Appeal after the 2005-reform.

Swedish national law has since 1997 explicitly acknowledged persecution by non-State agents.¹⁷³ The white papers to the 1997 Aliens Act suggested, however, that persecution by non-State agents could not form the basis of refugee status in gender-related claims, but that complementary protection may be afforded. Sweden produced its first gender guidelines in

¹⁶⁸ HEAVEN CRAWLEY and TRINE LESTER *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe* UNHCR Evaluation and Policy Analysis Unit Series EPAU/2004/05 (May 2004) page 40 with further reference to page 61 in KATJA LUPOAJÄRVI *Gender-Related Persecution as a Basis for Refugee Status: Comparative Perspectives* Institute for Human Rights Åbo Akademi University at: http://www.abo.fi/instut/imr/norfa/Katja_Genderrelated_persecution.pdf

¹⁶⁹ The House of Lord has stated that the procedure almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment. *Fornah (FC) (Appellant) v SSHD (Respondent)* UK House of Lords (UKHL 46) 18th October 2006; *Yake* Immigration and Appeals Tribunal, Appeal No 00TH00493 19th January 2000.

¹⁷⁰ Protest, activism and resistance may manifest itself as less direct action such as hiding people, passing messages or providing community services, food clothing and medical care. It exemplifies possible characteristics of a PSG, such as sex, age, marital status, religion, family, economic status, class, occupational history, disability, sexual history or ethnic or tribal affiliation.

¹⁷¹ UNHCR “Guidance Note on Refugee Claims Relating to Female Genital Mutilation” (May 2009) section 7, with further reference to HRC *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment* of 15th January 2008 A/HRC/7/3 para 51; Committee on the Elimination of Discrimination Against Women *General Recommendation No. 14: Female circumcision* 1990 A/45/38 and *General Recommendation No. 19: Violence against women* 1992 A/47/38; Article 2 and 5 of the Convention on the Elimination of Discrimination Against Women (CEDAW); Article 6, 19, 24 and 37 of the Convention on the Rights of the Child (CRC); Article 3, 6 and 7 of ICCPR; Article 12 of ICESCR; and Article 3 of CAT. In addition reference is made to ECtHR *Emily Collind and Ashley Akaziebe v Sweden* Appl No 23944/05 8th March 2007

¹⁷² *High Court R v Secretary of State ex parte Muiriu* CO/1533/99 21st May 1999; *R v Secretary of State for Home Department ex parte Roomy* CO/4454/98 10th May 1999; Court of Appeal *ex parte Rose Njemba* July 2002.

¹⁷³ Section 2 of the 1997 Aliens Act.

2001 and 2002.¹⁷⁴ It accepted that GRP may take place in both the public and private sphere, cf reference to Article 1 and 2 of the UN Declaration on the Elimination of Violence against Women. It also accepted that women’s opportunity to seek protection from the authorities varies greatly due to society’s perception of gender related claims. However, gender alone could not form a nexus to a convention ground and it prohibited any application of “particular social group.”¹⁷⁵ Case studies indicated that complementary protection had been limited to gender-specific threats such as FGM and abortion,¹⁷⁶ and that a significant protection gap existed.

The process of making the 2001 Gender Guidelines included dialogue with UNHCR and several NGOs, such as the Red Cross and Amnesty International. However, specific references to UNHCR’s recommendations were limited and not related to the interpretation of the Refugee Definition. The Guidelines also stated that cumulative and discriminatory acts may only form the basis of refugee status on other convention grounds than “particular social group.” This position had the prospect of excluding gender-related cases from protection under the 1951 Convention completely, forcing the asylum-seeker to rely on the more limited criteria for obtaining complementary or humanitarian protection.

In a report from 2004 a government-appointed expert committee proposed amendments where Sweden should recognize the possibility that GRP may form the basis for protection due to membership of a “particular social group.” It also suggested that the decision-makers should be guided in their interpretation by UNHCR’s Gender Guidelines and the EU Qualification Directive.¹⁷⁷ The proposal referred to UNHCR Gender Guidelines, as well as to practice in the UK, New Zealand, Canada, the United States and Australia, to acknowledge that women and homosexuals may constitute particular social groups under the 1951 Convention. With the passing of the 2005 Aliens Act, gender constituting a criteria for “a particular social group” was recognized, cf Chapter 4 Section 1.

It also recognized persecution by non-State agents in gender-related claims, but the provision fell short of meeting the criteria of effective control and who may constitute non-state agents as it for example excludes clans. A non-exhaustive list of non-state agents was not implemented until the passing of the EU Qualification Directive.¹⁷⁸ In 2009 new instructions were published on particularly vulnerable groups, referring to the general importance and weight of the UNHCR Handbook.¹⁷⁹

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In *Norway* the present Section 29 of the 2008 Immigration Act refers to the concept of persecution requiring an assessment of the whole human rights catalogue. The section ensures

¹⁷⁴ The Migration Board Instruction “Guidelines for the Investigation and Evaluation of the Needs of Women for Protection” 2001,13 (28th March 2001); and Migration Board’s “Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is cited as a Ground” January 2002 (2002, 13).

¹⁷⁵ The 2002 guideline does however refer to a clear international trend towards including GRP as a “particular social group.”

¹⁷⁶ HEAVEN CRAWLEY and TRINE LESTER *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe* UNHCR Evaluation and Policy Unit series (2004) page 38, with further reference to the 2001 case-study report of M Bexelius.

¹⁷⁷ Committee Report to the Ministry of foreign Affairs (8th March 2004).

¹⁷⁸ The Swedish Migration Board *Letter* “Yttrande över kommissionens förslag till omarbetat skyddsgrundsdirektiv och asylprocedurdirektiv” (8th December 2009) page 4.

¹⁷⁹ The Migration Board *Instruction* “Guidelines on assessing refugee and protection need of asylum seekers belonging to particularly vulnerable groups” (“Rättschefens rättsliga ställningstagande angående Flyktning- och skyddsbedömningar rörande sökande som tillhör särskilt utsatta grupper”) RCI 11/2009 (22nd December 2009).

a gender sensitive analysis by listing “sexualized violence” and acts particularly aimed at women or children as possible acts of persecution. This represents a development due to the adaption of the EU Qualification Directive. However, compared to the legal history in Sweden, the previous 2001 Order on gender did recognize the application of “particular social group”.

The order of 2001 that gives instruction on practice changes regarding GRP makes several explicit references to UNHCR’s recommendations on a gender sensitive approach, in particular to the GIP on GRP. The order does not amend the interpretation in the Guideline of 1999 that GRP may only be referred to the convention ground “particular social group.” It emphasizes the gender sensitive perspective and the importance of interviewing women separately when applying for asylum together with their husband.

The order of 2008 on GRP is also geared towards the need for a gender sensitive approach to asylum applications. The procedural practice changes concerned making a female interviewer and interpreter available if practically possible, and recognizing the difficulty of speaking of personal and sensitive issues during the interview. On the determination of refugee status, the order call for practice changes are in line with UNHCR’s recommendations regarding all the inclusion criteria under Article 1 of the 1951 convention, including the possibility of giving protection for any of the convention grounds.

The new Section 30 defines the persecution grounds. The inclusion criteria of a particular social group are defined as the presence of innate characteristic and social perception. The section explicitly mentions that victims of trafficking “shall” be regarded as members of a particular social group. For all the convention grounds, the section clearly states that imputed characteristics may lead to protection needs. Discrimination – new Aliens Act section 58 b) – violations which might not in themselves amount to persecution may cumulatively amount to persecution.

Before the enactment of the new Aliens Act, Norway did not expressly recognize that women’s political activities may take on a different form than that of men, in the manner that was stated in the UK’s APIs, and which has been explicit in the laws of Sweden since 2000.¹⁸⁰ The previous 2001 Guideline only makes explicit how GRP may be a reason for women belonging to “a particular social group.” Section 58c of the new Immigration Act now makes an explicit reference to the possibility of being imputed political or religious opinion or a social group.¹⁸¹

As of 2009, the PN on Iran sorts Gender Related Persecution as a topic under the assessment of membership of a “particular social group.” The PN on Iran refuses the existence of imputed political opinion due to the activity of a family member. The PN on Eritrea takes the position that complementary protection should usually be given when there is a protection need, as it as a main rule will not exist a nexus between any of the convention grounds and persecution on grounds of deserting. It has a section on women in the military calling for a gender sensitive approach. It does delineate the general risk to unmarried childless women. Also in

¹⁸⁰ In 2004, the survey completed by Crawley and Lester found that only one quarter of the 42 countries of the European Bureau Region acknowledged recognition of gendered political activities, HEAVEN CRAWLEY and TRINE LESTER *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe* UNHCR Evaluation and Policy Unit series (2004) page 69.

¹⁸¹ This amendment seems to be a result of the passing of the EU Qualification Directive Article 12.1 d), and not the monitoring of UNHCR. The previous 2001 guidelines stated that it may give rise to protection due to persecution for reasons of belonging to a “particular social group.” The meeting with UNHCR did result in Norway amending their practice, but only in relation to it recognizing that GRP could give rise to protection due to persecution for reasons of belonging to “a particular social group.”

this PN, the emphasis is on “particular social group” as the “relevant convention ground”.¹⁸² In the PN on Afghanistan it is presumed that most GRP-claims will have a nexus to “particular social group”. The PN does not recognize land conflicts as ground for protection. Finally, the PN on Russian Chechnya does not reflect the gender sensitive approach that UNHCR calls for in their Eligibility Guideline from 2003, as it states that the hardship of women will seldom amount to recognition of refugee status or complementary protection. Such claims may give rise to leave on humanitarian grounds.

As of 2009 Norway did not completely adhere to UNHCR’s recommendations that asylum claims raising gender related issues should be assessed in relation to all the convention grounds, not only that of “social group” in the case of Iran, Eritrea and Afghanistan. Even if the PN does emphasize that other convention grounds may be relevant, the focus on “social group” seems to diminish the gender sensitive approach to all the different convention grounds recommended by UNHCR. The PN assesses the exposure of different groups based on available Country of Origin Information that is gathered from Landinfo. The PN makes a separate note of UNHCR not having produced an Eligibility Guideline on Iran.

As of January 1st 2010, Norway issued a new Order on Gender Related Persecution that may complete the implementation of UNHCR’s guidance.¹⁸³

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The case of Sweden’s approach to whether gender related claims can form the basis of persecution for reasons of belonging to a “particular social group” provides a particularly lucid example of how governments change their minds. The shift from 2002, when case workers were clearly prohibited to interpret the 1951 Convention in this manner, to full adherence to UNHCR’s guidance after the 2005-reform raises several questions regarding its reception process. Was the initial position due to reception having to consider immigration concerns where the legal reasoning was given less emphasis, and could the initial position have been avoided if a decision not to adhere required that clearly stated legal arguments were convincing in showing that Sweden’s initial position were firmly based on sound principles?

The slow and gradual implementation in both Sweden and Norway also raises questions regarding the use of a general reference to UNHCR’s guidance for reasons of legitimizing practice change. In both countries, the initial instructions have general references that do not indicate whether the intention was to implement all of its guidance (in the case of Sweden: with the exception of not accepting the interpretation of “a particular social group”) or whether implementation was incorrectly carried out. The subsequent practice change moving in direction of full implementation in either way identifies a need for a more tailored reception process.

6.4 Commonalities pertaining to IFA, Gender and evidentiary issues

Implementation of the Internal Flight Alternative may also be seen in the perspective of gender and evidential issues. UNHCR’s Gender Guidelines call for Country of Origin Information with relevance in women’s claims. Appropriate information can be particularly important where substantiation of GRP is more difficult to obtain than in other claims.¹⁸⁴

¹⁸² Section 3.1.4.

¹⁸³ AI-2009-105 “Retningslinjer om kjønnsrelatert forfølgelse” 200701566-/UMV.

¹⁸⁴ Cfr para 36 (x), and in cf para 37: “... Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.”

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In *the UK*, case law has adapted a gender-sensitive approach to the assessment of the reasonableness criteria, indicating the application of a standard of “undue hardship”. In the case of lone women in Uganda the Appeals Tribunal stated that “if survival comes at a cost of destitution, beggary, crime or prostitution, then that is a price too high”.¹⁸⁵

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In *Sweden*, the 2001/2002 Gender Guidelines recognized that women’s political activities may be more difficult to substantiate than that of a man, since their activities may have been of a different nature. It is unclear however how this would be applied in a case where an Internal Flight Alternative has been suggested and whether the Migration Court of Appeal would uphold that there is no requirement for social network also in the case of women.

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In *Norway* the instruction on South Somalia regards the security situation in the area and single female asylum seekers. It makes no reference to UNHCR. The Ministry orders the Directorate of Immigration to bring its practice in line with that of Denmark and Sweden, where protection needs must be based on individual grounds. The Ministry further instructs the Directorate of Immigration not to give protection merely because the asylum seeker is a single woman from a dominant clan, without assessing whether she has close male relatives or links to her region of origin.

Section 54(4) of the new Aliens Act prescribes separate interviews for husbands and wives. The provision is meant to ensure the systematic application of existing practice.

The PN on Iran regards homosexuals as not being under a general risk of persecution as the regimes severe punishment is rarely enforced. There is no general risk of persecution as homosexuals may, according to the Directorate of Immigration, function safely if they do not transgress the social mores of society. Even if UNHCR has not produced an Eligibility Guideline on Iran in particular, this assessment runs counter to UNHCR’s position regarding the general perception of risk. The PN state that it is not known that anyone has been convicted to death penalty on grounds of homosexuality alone and that the regime will only persecute if the sexual orientation is visible in public. This perception of the Country of Origin Information runs counter to that of Human Rights Watch and the Committee of Human Rights Reporters who report of several excommunications after closed trials, where the judgment may be based on “the knowledge of the judge” and that some judgments may be handed down on the basis of alternative motives of the accuser.

The PN on Iran regards women as a vulnerable group, but where women from the districts and women who lack resources are more likely of being at risk of persecution than resourceful women and women from urban areas. The PN places great emphasis on the formal availability of divorce and the prohibition of mistreatment, forced marriage and honor killings. The PN on Iran suggests that even if the regime may impose severe punishment as a result of infidelity or other inappropriate relations between man and woman, the punishment will normally be converted to fines. Even if women may be particularly vulnerable to such accusations due to rules of witnesses, the PN offers no gender sensitive approach on these issues.

Although Eritrea is not one of the countries of origin that is part of the case study, the Directorate of Immigration’s PN may be of particular interest to this report as it discusses the

¹⁸⁵ The UK Asylum and Immigration Tribunal *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone v SSHD*.

relevance of UNHCR as a source of information. Regarding the risk of persecution of deserters, UNHCR is referred to as concluding that they were all at risk. The PN then compares this to other sources that Landinfo has been in contact with informing that ill-treatment of deserters is far more random. The source is anonymous but is regarded by Landinfo as “well renowned, well informed and reliable”.¹⁸⁶ It also refers to *Said vs Netherlands* where an Eritrean deserter was protected from refoulement under Article 3 of the ECHR. The PN ends up on a middle position, falling short of UNHCR’s recommendation that all are at risk, regarding it as “highly likely” that asylum seekers belonging to this group are at risk of persecution. The decision maker is called upon to make individual assessments. Further, the PN states that women who have married and have children are usually not at risk of being drafted.

The PN on Afghanistan is the only one that makes reference to UNHCR’s recommendation on protection and return. It states that the decision maker’s assessment shall look to whether UNHCR defines the applicant’s area of origin safe, both in relation to deciding on his or her status and in relation to IFA. The PN then reiterates that “UNHCR is given great weight as a source when assessing asylum applications from Afghanistan”.¹⁸⁷ As with the case of Iran, the PN guides that there is no general risk of persecution of homosexuals as they may function safely if they do not transgress the social mores of society. When it comes to women, however, the PN follows UNHCR’s recommendations regarding their vulnerabilities.

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The Practice Note of the Norwegian Directorate of Immigration on protection needs of female deserters from Eritrea provides an example where it is possible to discuss whether lack of adherence to UNHCR’s is based on facts or law, and in addition how the role given to the COI-unit may affect implementation. The Practice Note gives a rare example of the government discussing UNHCR’s factual assessments and explaining why it gives preference to its own fact finding.

The government’s assessment raises several questions pertaining to the perceived distinguished characteristics of UNHCR’s factual assessments. The use of an anonymous source during a country visit giving contrary information to the sources that has corroborated UNHCR’s finding raises important issues pertaining to COI-method. Probably, the approach of UNHCR would be not to deem the information reliable because it is not corroborated, even if the source presents his- or herself as “particularly reliable”. Depending on whether the information was also gathered from inside Eritrea, security issues may also apply where the source is under pressure to make apologies for the regime. The difference in assessment may also be due to a different perception of possibly the same or similar facts. The Norwegian COI-unit may have collected the same or similar information, but as the information is presented as being different by giving emphasis to the harassment being more “random” than widespread, it is the interpretation of the information collected that differs, not the facts themselves. Whether the differences rest with having different sources or having a different assessment of the same or similar facts, the case of Eritrea nevertheless gives a clear example of how the role of the government’s own COI-unit takes prominence over the presumed distinguished role and competence of UNHCR on Eritrea. Whereas the COI-unit has relied on a temporary country visit, UNHCR may rely on a permanent on-ground presence on the borders of the country of concern. The Practice Note does not consider the possible significance of the particular position of UNHCR to collect and provide COI-analysis, and

¹⁸⁶ Section 3.1.1 of the Practice Note of the Directorate of Immigration and note 2.

¹⁸⁷ Section 2.1.

may serve as an example of how the duty to “carefully consider” UNHCR’s guidance should also provide reasons that deal with the distinguished position of UNHCR.

7. Concluding remarks

7.1 *The perception of UNHCR's guidance in the national jurisdictions of the UK, Sweden and Norway*

The general understanding of the different functions of UNHCR's position papers in the national jurisdictions varies. The above findings show that whereas the standing of the Handbook causes little dispute or misunderstandings, the other position papers have a different reputation and may not even be correctly understood.

A decision on whether to implement a recommendation depends on a correct understanding of *the legal character* of the position papers. The reference to the non-binding character of the position papers as a "reason" for not adhering to its guidance by some of the administrations and in some of the court cases indicate that the position papers are not understood entirely as intended. Such references imply that the guidance is compared to the formal functions of sources of international law, whereas the function of the guidance is to improve the quality of the legal reasoning of states when determining protection needs.

The different value given to the position papers may also be due to a *different view of International Refugee Law* in national jurisdictions. When writing under the auspices of Article 35 of the 1951 Convention, UNHCR intends to fill in the gaps or elaborate on some of the principles in the Handbook. This function of the position papers seems to be accepted by the UK courts and administration where UNHCR's elaboration on existing principles does not amount to creating new obligations. The question of implementation also becomes a matter of *how to arrive at the correct interpretation* of a convention right and the guidance of UNHCR is perceived as *helpful*. The Swedish, and in particular the Norwegian jurisdictions, seem to have adapted a view of *International Refugee Law as being more fragmented*. In a decision by the Swedish Migration Court of Appeal referred to above, the recommendation of prima facie protection in the 2006 Eligibility Guideline on Iraq was perceived as *developing or creating new obligations*.

The above findings clearly point to a *more unsure status of the UNHCR's Eligibility Guidelines* in national jurisdictions. This may be for reasons of wishing to gain political control over recommendations that may affect recognition rates, for reasons pertaining to differences in how to collect and assess Country of Origin Information, or due to a different view of human rights. One striking finding is how the three governments usually refer to differences of facts, even if the disagreement may better be understood as a different take on the legal principles in play. References to having "other", better or newer sources may be bewildering as the collection and assessment of Country of Origin Information rests on principles of international cooperation. Also, the particular position of UNHCR and the rigor that goes into the research and writing of the position papers makes it unlikely that governments' COI-units should be in a better position to collect and assess facts. As UNHCR also claims to monitor ongoing conflicts, it may also be presumed that even newer information will not result in a different recommendation on protection needs. National courts' or administrations' reference to the living conditions being hard but not so difficult that return is not advisable, also indicates a divergent view of the function of Country of Origin Information when interpreting and applying the legal concepts. These findings identify *a need to clarify the policy on the preferred use of Country of Origin Information*. Further

research is needed in order to arrive at a more precise statement as to why governments may take a different view on protection needs in specific circumstances.¹⁸⁸

Findings also indicate that even if the GIPs are more readily accepted, *the persuasiveness of the interpretive guidance becomes most apparent in the long-term perspective*; whereas the recommendations on the Internal Flight Alternative and Gender Related Persecution initially raised concerns in some jurisdictions, most or all of the basic principles are now implemented. The above study has a narrow focus on certain important and protracted issues in national immigration policy. Other topics may illustrate a different development. All decisions on whether to implement may still benefit from taking the long-term perspective into account, as it has the potential of *ensuring stability and efficiency to first level decision-making*.

7.2 On implementation techniques

A decision to implement usually appears by the production of a new instruction or note that makes reference to UNHCR's guidance, for example for the purpose of legitimizing practice change. Implementation rarely results in the *transcription or transformation of the guidance into national practice*. This technique may lead to an incorrect implementation of its recommendations if the government intends to adhere to all of its guidance, or it leaves unclear whether partial implementation was intended. As illustrated in the case study on both Internal Flight Alternative and Gender Related Persecution, this may in turn lead to several practice changes as the governments in the long run end up adhering to all of its interpretive guidance.

The use of another implementation technique is likely to enhance the general understanding and reputation of UNHCR's different position papers in the national jurisdiction. By merely implying that UNHCR's guidance has had some kind of influence on the practice change, the relevance of the position paper becomes unclear and case workers and decision-makers will probably have difficulty with any direct use of the guidance as its relation to the instruction or note is unclear. A general reference to UNHCR's guidance may also give cause to more work in monitoring practice, as the more detailed reasoning of UNHCR may be lost on the decision-makers.

However, the national jurisdictions also point to a need for simplifying UNHCR's guidance and transforming it into a style and language more conducive to the day-to-day needs of the case workers. This indicates that the sophistication of the research and writing as an added value of the position papers has its limitations; if the guidance gets *too* sophisticated and complicated it is no longer useful or helpful to national decision-making.

7.3 Why do national jurisdictions differ in their speed of implementation?

Measured by the *speed* and *degree* of implementation, the above study on the implementation of the two categories of international protection, the legal concept Internal Flight Alternative and the mainstreaming of Gender Related Persecution examples, illustrates how organizational differences and changes affect implementation.

¹⁸⁸ In the UK, the principles guiding the application of Country of Origin Information seem to be more settled, or at least more clearly stated. Research on the use of Country of Origin Information at first level decision-making may be of value when identifying topics for further research, see i.e. WILLIAMS, PETTIT TOWNHEAD AND HUBER *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives (May 2009)*; and NATHASHA TSANGARIDES *The Refugee Roulette: The Role of Country Information in Refugee Status Determination* UKBA Immigration Advisory Service (2009).

In the UK and Sweden, where the position papers are received and assessed at the agency of first level decision-making, the focus is on the recommendations being helpful to doing Refugee Status Determination, that specific reasons should be stated for non-implementation and there is by different mechanisms an overall greater transparency of the agency's position. In Sweden, where the 2005-reform left for the courts and the agency to drive the implementation of International Refugee Law, stated reasons for non-implementation are also used proactively by attempting to launch cases before the courts. In Norway, where reception takes place within the political realm of the Ministry and where the courts are not activists and have a limited power of review, implementation has a slower pace and may depend on legislation by the Parliament or the EU.

The UK's fast implementation of the Internal Flight Alternative and the gender-sensitive approach preceded or coincided with the passing of the UNHCR GIPs. The passing of the EU Qualification Directive that adapted most of UNHCR's recommendations did not require many changes in the UK national legislation. In comparison, Sweden's express prohibition of attributing GRP for reasons of belonging to a "particular social group" until the legislation given in the 2005-reform, illustrates how the previous influence of policy considerations postpone the "correct" implementation of legal principles. Likewise, the slow recognition of the two forms of international protection in both Norway and Sweden were dependent on being pushed by the legislators or the EU.

The different functions of the position papers may not be readily understandable to decision-makers or stakeholders not entirely familiar with the mandate and position of UNHCR. The legal analysis of decision-makers may also depend on whether it is possible to overview all the different legal material. The public character of the position papers have improved greatly with the onset of Internet, and more so with *Refworld*. However, no ready-made way exists allowing the decision-maker to trace the total line of publication, as only the GIPs are given a serial number. The relationship between the GIPs and the Eligibility Guidelines may therefore not be apparent, or the existence of a position paper may even be lost on a decision-makers.

Reception in accordance with its intended functions will also depend on variances in the *degree of cooperation on capitol level*. The UK may display a particularly close cooperation with UNHCR on both the capitol level and first level decision-making. In Sweden cooperation had become closer as the 2005-reform allows for a better monitoring of practice with full text decision of the Migration Courts, the production of corresponding instructions by the Migration Board and the recent engagement in the Quality Initiative Program. In Norway, cooperation with UNHCR has not taken on the same intensity.

To the extent that the organizational characteristics of the UK (and now Sweden) lends force to an environment more conducive to implementation of UNHCR's recommendations: Administrations with a focus on the recommendations being helpful to doing RSD engage in close cooperation with UNHCR, with independent and activist courts and with some level of transparency as to its position of non-implementation allows for faster and more complete implementation. The recommendations are recognized and read for the persuasion of the legal reasoning. Administrations with a focus on the political element of the position papers, on their non-binding character, that engage in bilateral dialogue instead and that also have a protectionist court, create a more difficult environment for implementation. Implementation may take place, but in the political realm of the Ministry.

In addition, in Norway UNHCR's recommendations play a significant role in the public debate and in party politics. This phenomenon is not present in any of the other two countries. The political element may therefore be particularly strong when assessing implementation. However, the political will of the administration in office to adhere to UNHCR's

recommendations seem not to create a particularly conducive environment for implementation, as the appreciation for the legal persuasion may be lost when reception takes place in the political realm.

Implementation of the non-binding “soft law” recommendations of UNHCR will on this basis necessarily be subject to the dynamics of the national systems changing over time. Systems that allow for the guidelines to be assessed in a legal context seem more likely to be received as intended as it improves the likelihood of a response to the legal logic of the recommendations. It is the interplay of different organizational trait and not one singular element that matters.

The Migration Court of Appeals’ different approach to UNHCR factual and legal guidance

The reasoning of the court in the *Kosovo-Serb family* case indicates that it interpreted the recommendation on Internal Flight in the Eligibility Guideline as an expansion of the legal concept as stated in the Handbook. If so, the court does not recognize the position of UNHCR that the subsequent GIPs and Eligibility Guideline is not meant to give expression to an expansion of the principles spelled out in the Handbook, but rather as clarifications or more precise statements of the legal concepts.

MIG 2007:33 II also illustrates how the legal practitioners’ emphasis on the *non-binding characteristic* of the guidance may take focus away from an assessment of the persuasive qualities of the guidance:

For one, the reasoning of the court raises the question of whether UNHCR recommends that Kosovo-Serbs should not be returned because work is not available, or whether it expects states to make an assessment of the consequences to the refugee if returned to an alternative location where she or he will probably not find employment.

The court also seems to interpret the relevance or reasonableness criteria as an assessment of whether the refugee will be at risk of persecution in the suggested area of relocation, whereas UNHCR’s guidance in the GIP on Internal Flight Alternative call for a broad assessment of possible violations of the whole human rights catalogue and whether conditions upon return would amount to an “undue hardship.”

It is also not evident from the reasoning of the court whether it has assessed the reasonableness to this particular refugee-family, as it seems to make a general statement pertaining to the living conditions for ethnic Serbs. However, the GIP on Internal Flight Alternative guides the decision-maker to assess, on the basis of the asylum applications story and existing COI, what will happen upon return.

This furthermore emphasizes the point that the aim of soft law recommendations will not necessarily be “widespread acceptance” (or any other formal criteria signifying binding international law). The non-binding soft law recommendations of UNHCR lend its force to persuasion by way of legal reason and sophistication and not general recognition. Unanimous agreement that comes about in joint binding statements is “another business”, for other actors in other fora (i.e. the EU, or possibly ExCom or the General Assembly).

7.4 Are some of the distinguishing characteristics of UNHCR debatable?

The significance or added value of UNHCR’s guidance is closely linked to its functions under Article 35 of the 1951 Convention: The position papers are significant as they are carefully coached in terms of refugees’ protection needs. UNHCR is the only organization with the mandate of monitoring refugee flows. In comparison, other reputable organizations, such as Red Cross and Amnesty International, have a possibly different focus on the selection and assessment of facts. Government’s COI-units also coach their reports on facts in the context of protection needs, but UNHCR’s position papers are nevertheless distinct in combining expert legal and factual insights. Reports produced by government units on Country of Origin Information (COI-units) have no legal component and the facts are therefore not put in the

perspective of the inclusion criteria. Some of the distinguishing characteristics may nevertheless be subject to debate.

Findings indicate that this difference may lead to a perception of UNHCR, while being regarded as giving objective information, nevertheless not being entirely neutral. National jurisdictions may therefore be less inclined to recognize the added value of UNHCR's recommendations as being as neutral because the organization is able to give general guidance without being party to an adversarial process.

Findings also indicate that governments sometimes challenge the particular competence of UNHCR. UNHCR's combined factual and legal analysis draws on the organization's global network and over 50 years of experience monitoring refugee flows. Even if UNHCR has on-ground presence in or around countries of concern that focus solely on protection needs and even an extended mandate of presence, governments may give more weight to own findings. The particular competence and focus of UNHCR may in these instances be equated with governments' diplomatic presence or with fact findings missions. Findings also indicate a difference in opinion as to collecting and assessing Country of Origin Information in the case of oppressive regimes. Governments differ in what value they place on own country visits and on direct contact with sources, and also on when a change in the security and human rights situation may lead to other protection needs.

The added value of the Eligibility Guideline combining factual and legal insights may therefore be in need of a more precise explanation, and even a more transparent process. Some of the responses of states indicate that the factual assessments of UNHCR are difficult to consolidate with newer information, or that the recommendations present themselves as too general to determine the outcome of particular cases. This indicates that the function of the Eligibility Guidelines foreshadowing the whole decision-making process leaving the credibility assessment out of it does not always work as intended.

The manner in which UNHCR may solve sourcing problems in cases where the local government is likely to harass sources that are identified is not readily apparent to national decision-makers. In some of the cases where the government initiates dialogue, UNHCR is given the opportunity to explain its strategies. However, as such initiatives may vary, national decision-makers and stakeholders may benefit from having some general information on possible challenges pertaining to sourcing.

The rigor and principles applied in the research process is not always readily apparent. The position papers may also be regarded as *neutral*, in terms of giving *general statements on protection needs* not being party to an adversarial process, and by having employed *a rigorous process of clearance and review*. Government reports may in comparison be influenced by policy considerations as the recommendation may have the potential of affecting migration flows, and a comparable clearance and review process may not be attached. This enhances a need for a rigorous clearance and review process, as is also the advice in the EU Guidelines on processing of Country of Origin Information.¹⁸⁹

UNHCR's in-house policy that recommendations in Eligibility Guidelines stands until a sufficiently sustainable change in the situation warrants an update, is either not very well known or not recognized among some European states. The many requests from several different states on updates on the situation in countries such as Russian Chechnya, Somalia, Iraq and Afghanistan indicate a potentially contentious issue pertaining to the significance of new information to the interpretation of risk of persecution.

¹⁸⁹ Section 4.5 on Quality Control in the *Common EU guidelines for processing COI* which refers in example to the 2002 independent Advirosry Panel established in the UK.

Regardless of whether the position papers are received in the political or legal realm, it has *less* effect on the implementation of the Eligibility Guidelines. All three countries rely in some way on their own COI-units when deciding whether to implement recommendations in an Eligibility Guideline, but the way in which this is done and the role and relationship to the COI-unit differs. First of all, in the UK decision-makers are instructed to base their decisions on all available objective information and may deviate from the policy statements in the OGNs of the Border Agency upon such assessments. Furthermore, the decision-makers have instruction that the facts should *inform* their decisions, whereas an adverse use of Country of Origin Information would be to have reports *support* their decision. Such principles may induce the authority of UNHCR's guidelines, and delineates in addition a role of its own COI-unit as not being a "national authority" on land information. Furthermore, as the staff at COIS is described as researchers that rotate to different regional desks and do not engage with the operative part of the Border Agency regarding which reports to write, its "independence" becomes a matter of being one-step removed from the decision-making. In comparison, in Sweden and in particular in Norway, the organization and role given to the staff makes LIFOS and Landinfo take on an expert profile. Instead of having "researchers" that rotate from one regional desk to the next, the staff is called "land advisors" and are encouraged to gain experience and expertise within one region and may appear in court to provide expert witness statements. In Sweden and Norway there is also greater interaction between the staff of the COI-units and the operative part of the agency in terms of deciding when and which reports should be produced and in terms of traveling together on country visits. The proclaimed or presumed "independence" of the COI-units therefore becomes more a matter of having standing to give opinions on the security and human rights situation in a country.

States experiencing UNHCR as "on the safe side of protection needs", or as more "liberal" in its interpretation of rights or even as not entirely "neutral" may display a fundamental disagreement on the function of Country of Origin Information in the context of protection needs. The case of the Iranian asylum-seeker that was afforded protection under Article 3 by the ECtHR indicates that the Swedish approach to the function of Country of Origin Information is too exacting. The question of whether Mogadishu represents an Internal Flight Alternative in Somalia may be another case in point: whereas the UK adheres to UNHCR's factual assessments, Sweden and Norway do not and they base their decision on "better" sources that begs the question of whether there is a perspective of what Country of Origin Information is able to tell us in the context of determining "risk of persecution."

Probably, this different perspective belongs to the methodological debate of whether social sciences may be guided by the ideals of natural science. States' reasoning seems to demand, or being close to demanding, that it is possible to determine a threshold for "risk." Arguments pertaining to having "better" or more precise sources in the face of UNHCR's guidelines being too "general" requiring an additional requirement of individual risk for those belonging to an exposed group, indicate a demand that all such claims must be falsified before accepted. Also, how states have all separated the unit that collects facts from the unit in charge of applying these facts on legal theory, may induce a possibly outdated perspective on Country of Origin-theory (or any social science theory) where the most precise statement of facts arrives when disengaging facts and norms and where claims pertaining to "risk" should be falsified before relied on. In comparison, UNHCR clearly holds the perspective that it is not possible or even desirable to separate normative and factual insights, as the combination of the two is described as one of the distinguishing characteristics of the Eligibility Guidelines:

Whether there exists a different understanding of the concept of "risk of persecution" is in need of further research. Some remarks may still be warranted. UNHCR takes on the perspective that "risk" is an on-going assessment that should be done in a long-term

perspective and subject to cultural variation. Subsequently, another perceived added value of the Eligibility Guidelines lies in the organization's ability for global on-going monitoring of protection needs. Also, UNHCR probably interprets "risk" in more liberal terms as a right to avoid or be free from risk. The reasons given by the three states when not implementing a recommendation pertaining to Internal Flight Alternatives indicate that "risk" is perhaps interpreted in a more narrow sense of only being endangered if there exists some kind of positive action encroaching the security of the person. It is also difficult to apply the "reasonableness" and "undue hardship" test without engaging in an adverse application of Country of Origin Information. Recommendations regarding Gender Related Persecution also indicate the same possible difference in interpreting risk in a positive or negative manner.

DIFFERENCES IN NATIONAL IMPLEMENTATION REGIMES THAT MAY INFLUENCE ADHERENCE:

	Conducive to implementation	Non-conducive to implementation
	Different views on refugee rights?	
<i>Application of legal concepts</i>	Generalized violence may cause different types of risk Risk-assessment in long term perspective	Generalized violence must be the direct cause of risk Risk-assessment based on recent changes
<i>Country of Origin Information</i>	Control of adversarial use of COI COI informs decisions COI-staff are researchers	COI supports decisions COI-staff are experts or advisors
<i>Legal processes</i>	Transparency Comprehensive set of instructions for the whole RSD-process Non-implementation based on carefully stated reasons in response to UNHCR's position Activist courts Independent courts	Internal/not written Ad-hoc instructions Non-implementation based on careful considerations Restrictive courts Courts with limited power of review
<i>Political processes</i>	Helpful Adherence for reasons of efficiency	Significant Adherence a matter of political will of parties

8. Hovedfunn – norsk sammendrag og leserveiledning:

Basert på av intervjuene med nøkkelpersoner ved UNHCRs hovedkvarter i Genève og ved de tre nasjonale administrasjoner, sammenholdt med offentlig tilgjengelig informasjon og en begrenset arkivundersøkelse kan følgende hovedfunn pekes på:

Det kan knyttes flere tilleggsverdier til UNHCRs posisjonspapirer som bør trekkes inn i vurderingen av om anbefalingene skal følges. Det bør finnes rutiner som sikrer at anbefalingene mottas og vurderes på de forutsetningene de er skrevet. En presis begrunnelse bør gis også når det besluttes å implementere, dels for å klargjøre at praksisendringen skal omfatte hele anbefalingen og dels for å sørge for at det gis en mer presis henvisning (enten ved transformering eller transkripsjon) til posisjonsdokumentet. De ulike anbefalingene UNHCR lager har ulike funksjoner og egenskaper, som ikke alle kan forutsettes kjent. Det kan derfor være behov for opplæring der de ulike anbefalingene settes i sin rette rettslige kontekst. Dette gjelder særlig for de landspesifikke anbefalingene, som byr på særskilte utfordringer siden de kombinerer rettslige og faktiske innsikter. De ulike kvaliteter og funksjoner til egen landinfoenhet bør defineres i forhold til de faktiske innsikter som UNHCR formidler. Funnene indikerer også et videre forskningsbehov på hvordan anbefalingene og landinformasjon ses i forhold til hverandre.

Leserguide for saksbehandlere:

UNHCR lager ulike anbefalinger (posisjonspapirer). Hvor mange er de og hvilke funksjoner har de? Punkt 3.3 gir en kortfattet oversikt over de ulike anbefalingene som UNHCR skriver i medhold av sine "funksjoner" under Artikkel 35 i Flyktningkonvensjonen – s 15-17.

UNHCRs landspesifikke anbefalinger kan være vanskelige å håndtere. Hvorfor skrives de, hva slags undersøkelser gjøres og hvordan skal vi veie kildebruken opp mot andre rapporter? Punkt 4.5 går igjennom hvordan de landspesifikke anbefalingene (Eligibility Guidelines) blir til. En oppsummering av hva de "er" er gitt på side 33-34. Hovedprinsippene for innsamling og vurdering av landinformasjon og hvordan disse kommer til uttrykk i anbefalingene er beskrevet på sidene 39-41. En forklaring på hvordan de ulike anbefalingene utformes (beskyttelse og anmodninger om retur) er gitt på side 44-45. En kommentar om betydningen av oppdateringer følger på side 48. Dette avsnittet inneholder også bokser som beskriver noen av særtrekkene ved de landspesifikke anbefalingene om Irak, Afghanistan, Sri Lanka og Russland, samt litt om hvordan kildeinnsamling om Iran kan forventes å gå til.

Hvilken betydning har anbefalingene i nasjonal rett? Punkt 5 beskriver trekk ved den generelle organiseringen i England, Sverige og Norge. Dette avsnittet kan gi bedre forståelse av *hvorfor* de tre landene vurderer anbefalingene ulikt, noe som kan være til hjelp for å vurdere ulik praksisutvikling i landene. Hvert kapittel har en oppsummering som innledes med to asterisker (**): om domstolenes ulike roller – s 56-57; samarbeidsplikten – s 61; om forskjellig bruk av instruksjoner og noter – s 65; om hvordan implementeringen kommer til uttrykk – s 69-70; og om landinformasjonens ulike rolle – s 78-79.

En powerpoint-presentasjon rettet mot saksbehandlere er også tilgjengelig på Intranett.

Om plikten til å samarbeide: Statene forventes å følge alle UNHCRs anbefalinger skrevet i medhold av dets kompetanse i artikkel 35 i Flyktningkonvensjonen. Samarbeidsplikten omfatter de landspesifikke anbefalingene som kombinerer rettslige og faktiske innsikter. Med henvisning til Artikkel 35 forventes derfor også at det UNHCR har kommet frem til i den faktiske delen av de landspesifikke anbefalingene legges til grunn.

Om hensikten med og betydningen av UNHCRs anbefalinger: UNHCRs rolle i overvåkningen av flyktningers beskyttelsesbehov er svært dynamisk. For å oppfylle sitt

mandat, produserer UNHCR posisjonsdokumenter ("position papers") på grunnlag av behov og ressurser.

- Et sentralt formål med posisjonspapirene er å gi et helhetlig sett av anbefalinger om vanskelige spørsmål som angår beskyttelsesbehov. Behovet kan identifiseres som et ledd av UNHCRs overvåking av nasjonale myndigheters vedtakspraksis. Behov kan også utløses dersom det kommer frem motstridende nasjonal rettspraksis eller avvik i anerkjennelsesratene kan påvise et behov.

De landspesifikke anbefalingene har den tilleggsfunksjon at de forutsier hele beslutningsprosessen etter at troverdigheten til asylsøkeren er etablert. Landspesifikke anbefalinger skrives vanligvis som følge av opptrapping av en væpnet konflikt, ved grove brudd på menneskerettighetene eller som reaksjon på at et undertrykkende regime produserer asylsøkere av et visst omfang, eller at det over tid har vist seg å by på problemer å anvende flyktningkriteriene på søknader fra et område. Oppdateringer produseres som følge av at nye utsatte grupper med beskyttelsesbehov er identifisert, eller dersom endringer i landet tilsier at en ny posisjon kan inntas (det kan derfor finne sted markante endringer uten at UNHCR mener at det tilsier nye anbefalinger om beskyttelsesbehov).

- En annen viktig funksjon for anbefalingene er å veilede saksbehandlerne i hvordan man kommer frem til korrekt tolkning og forståelse av de juridiske begrepene. Nasjonale myndigheter må forholde seg til folkeretten, og man kan ikke legge enhver mulig tolkning av denne til grunn. Det kan være dårlig med rettskilder, eller rettstilstanden kan være uklar.

Anbefalingene er i seg selv ikke en rettskilde, da bare rettskilder kan gi uttrykk for bindende normer. De er snarere forsøk på å sammenfatte ulike syn og teorier fra nasjonale jurisdiksjoner. Anbefalingene er ikke ment å skulle leses som en tilslutning til en spesiell (nasjonal) juridisk teori, eller en utvidelse av eksisterende prinsipper, eller at de skaper ny rett. Posisjonspapirene er således ment å gi veiledning fra en nøytral instans, som ikke er part i en vedtaksprosess, som en særskilt godt utredet prinsipiell uttalelse om beskyttelsesbehov.

- Posisjonsdokumentene har videre visse særskilte kvaliteter som er nært knyttet til UNHCRs "funksjoner" under artikkel 35 i 1951-konvensjonen: UNHCR har et eksklusivt mandat til å samle fakta om beskyttelsesbehov, over 50-års erfaring og et globalt nettverk av kontorer som overvåker flyktningstrømmer, tilstedeværelse i feltet eller rundt de flyktningproduserende landene, og flere steder et utvidet mandat til også å registre menneskerettighetsbrudd, en muligens unik kompetanse til å se de faktiske og rettslige forhold i sammenheng; en grundig og omfattende prosedyre for kvalitetssikring, og de gir nøytrale uttalelser ettersom de ikke er del i konkret saksbehandling.

Om nasjonal implementering: Saksstudiet om implementering i tre nasjonale jurisdiksjoner viser at de alle ser på UNHCRs anbefalinger som "viktige" og at de generelt følges.

- Implementering skjer vanligvis ved at nye instruksjoner eller notater produseres. Dersom instruksjonen eller notatet viser til UNHCR gjøres dette gjerne for å legitimere praksisendring. Det opplyses sjelden om hvorvidt alle anbefalingene implementeres, og det gis ikke noen direkte henvisning til selve posisjonsdokumentet. Nasjonale saksbehandlere kan derfor ikke forventes å være kjent med eller ha forkunnskaper til direkte å anvende eller gjøre seg nytte av anbefalingene. I utgangspunktet kan det derfor legges til grunn at implementering skjer med en generell og noe upresis henvisning på overordnet administrativt nivå. Det kan derfor være vanskelig å vite hva som menes med at en anbefaling skal følges. Dette identifiserer et behov for bruk av andre

implementeringsteknikker, samt et behov for opplæring og videre forskning på hvordan og saksbehandlerne refererer til og anvender UNHCRs posisjonsdokumenter.

- De tre immigrasjonsmyndighetene i dette studiet foretar en grundig overveielse også der beslutningen blir ikke å følge en anbefaling. UNHCRs anbefalinger kan derfor sies å være prioritert, men på ulikt grunnlag. I England og Sverige, der asylforvaltningen i stor grad er rettsliggjort, er det anbefalingenes juridiske kvaliteter som står i fokus, ved at den grundige overveielser sterkt ser hen til hvordan domstolene vil vurdere betydningen av ikke å følge. I den sammenheng formuleres også klare begrunnelser for ikke å følge. I disse landene vil en begrunnelse for ikke å følge være saklig begrunnet, f eks med henvisning til at annen dokumentasjon begrunner et svakere beskyttelsesbehov. I Norge (og til en viss grad i Sverige) vil det at anbefalingene ikke er bindende i en del tilfeller være den begrunnelsen som gis. Et særtrekk med Norge er at spørsmålet om å følge er politisert, noe som kan ha sammenheng med at det ofte pekes på at anbefalingene ikke er bindende, i stedet for å vurdere om de er korrekte og kan avhjelpe effektivitet og presisjon i saksbehandlingen i førsteinstans.
- Når konkrete begrunnelser gis for ikke å følge en landspesifikk anbefaling, så mangler det ofte en forklaring som tar opp den særlige kompetanse og den tilleggsverdi som kan knyttes til UNHCRs posisjon. For eksempel tas det ikke opp hvordan landene kan ha ”bedre” kilder om interne fluktmuligheter i Irak i lys av det utstrakte mandatet og tilstedeværelsen i feltet, som UNHCR har. Dette indikerer et behov for en mer spisset og spesialisert prosess for mottakelsen og vurderingen av de landspesifikke anbefalingene.
- Institusjonell teori har pekt på at uavhengige og rettsskapende domstoler er en forutsetning for implementering av ikke-bindende ”soft law” menneskerettighetsanbefalinger. Eksempelene i dette studiet bekrefter denne teorien. I England, der domstolen har en særlig uavhengig og aktivistisk rolle, skjer implementeringen av UNHCRs anbefalinger raskt. Den samme teorien viser også at i de nasjonale jurisdiksjonene der slike anbefalinger mottas i en rettslig sfære også i administrasjonen, vil de sannsynligvis oppfattes som nyttige for å fremme effektivitet i saksbehandlingen. Saksstudiet, som er foretatt på implementeringen av anbefalingene om internflukt og kjønns sensitiv saksbehandling, viser at den raske implementeringen i England har ført til få praksisomlegginger, mens delvis implementering og åpen motstand mot noen av anbefalingene i Norge og Sverige har ført til flere praksisomlegginger. Dette gir en indikasjon på at forvaltningen kan bli mer effektiv dersom mottaksprosessen finner sted i en rettslig sfære styrt av rettslig logikk. Et overfladisk studie av statistikken over mottatte asylsøknader indikerer at rettsliggjøring ikke har ført til økt asyltilstrømning. Et videre studie vil være nødvendig for å klargjøre om rettsliggjøring vil medføre at anerkjennelsesraten går opp (statistikken i England tyder ikke på det, enkelte tall i Sverige peker på at raten går klart ned, mens andre tall at raten har gått klart opp).
- Eksistensen av uavhengige domstoler fører imidlertid ikke til rask implementering om ikke domstolene også er rettsskapende. Restriktive domstoler kjennetegnes ved at de har et syn på flyktningretten der UNHCRs anbefalinger oppfattes å utvide rettsbegrepene eller skape nye rettigheter. Til sammenlikning vil en aktivistisk domstol akseptere at flyktningsretten har en dynamisk karakter der rettsbegrepene må fylles ut, uten at dette innebærer at det skapes nye rettigheter.
- Avgjørelser om ikke å følge landspesifikke anbefalinger tenderer til å begrunnes med uenigheter om faktum. Det er også en klar forskjell i den rolle og betydning som er gitt til landinformasjonsenhetene når en skal ta stilling til UNHCRs og egen vurdering av sikkerhets- og menneskerettighetssituasjonen i et land. En sammenlikning av de

grunnleggende trekkene ved skriveprosessen i UNHCR og ved landinformasjonsenhetene viser imidlertid at dette er rapporter av såpass ulik karakter at de er vanskelige å sammenligne. Mange faktorer spiller inn, men noen trekk viser forskjeller som kan ha betydning for statenes vurdering av om de skal følge eller ikke:

- Rapportene fra landinformasjonsenhetene inkluderer ingen analyse av hvilken betydning fakta har for beskyttelsesbehovet. Fakta kan derfor ha et noe annet fokus. Myndighetenes landinformasjonsrapporter har også en noe annerledes utrednings- og redigeringsprosess, i og med at de er mer et produkt av én eller noen få erfarne utredere ved enheten. I Sverige, og særlig i Norge, er de ansatte landrådgivere videre gitt en profil og funksjon som ligger nær det eksperter ellers har i forvaltnings- og rettssystemet. Der UNHCRs posisjonspapirer gir uttrykk for en global organisasjons erfaringer med tilstedeværelse i feltet, er myndighetenes landrapporter mer basert på erfaringen til den ekspert eller erfarne rådgiver som har forfattet rapporten. Landrådgiverrapportene har derfor heller ikke noen sammenlignbar kvalitetssikringsmekanisme. På grunn av de ulike utgangspunktene for å samle inn og vurdere landinformasjon kan de muligens også ha en annen tilnærming til metode, særlig dersom rapportenes tilleggsverdi ligger i at de også baserer seg på egne faktareiser. Dette identifiserer et klart behov for opplæring og videre forskning for å avklare hvilke prinsipper som bør følges når flyktningkriteriene skal anvendes på landinformasjonen.
- I England er det fokus på bruken av landinformasjon. De har også iverksatt noen institusjonelle garantier for riktig bruk av slik fakta. Bruken av landspesifikke notater er ikke bindende på saksbehandlerne (de britiske OGNs). Landinformasjonsenheten har ikke en ekspertprofil.
- Til sist indikerer funnene at statene kan gi et uproporsjonalt stort fokus på en anført uenighet om fakta. Både UNHCR og landinformasjonsenhetene forholder seg stort sett til den samme informasjonen og det er vurderingen av denne som ofte kan være ulik. Det som anføres handler om uenighet om fakta, kan derfor like gjerne forstås som uenighet om jussen. Nasjonale myndigheter kan for eksempel ha en annen oppfatning av hvordan man anvender begrep som ”risiko for forfølgelse” for en person som kan tilhøre en utsatt gruppe, eller når den avgjør om et internt fluktalternativ er relevant og rimelig. Dette identifiserer et videre forskningsbehov om risikobegrepene, slik som forestillinger om at det finnes en ”terskel” eller hva som kreves av positiv landkunnskap for å kunne konstantere risiko.

Anbefalinger:

- Vurdere om rask implementering av UNHCRs anbefalinger kan bidra til helhetlig, effektiv forvaltning for saksbehandlere i første instans. Det foreligger ingen klare indikasjoner på at det å følge UNHCRs anbefalinger vil øke anerkjennelsesraten, men videre forskning er nødvendig.
- Bindende instruksjoner bør begrenses til lovtolkning og ikke omfatte retningslinjer om praksis for avgjørelsen av søknader fra spesifikke land (UDIs praksisnotater).

Organisatoriske rutiner:

- I vurderingen av om Norge skal følge UNHCRs retningslinjer bør det vurderes om rask implementering vil gi økt forutsigbarhet og effektivitet i saksbehandling i første instans.

- Når man beslutter å slutte seg til UNHCRs anbefalinger eller instruksjoner bør det gis en klar referanse til posisjonsdokumentet og at alle anbefalingene skal følges. Det kan også vurderes om viktige deler av teksten bør skrives av eller innarbeides.
- Når UNHCRs landspesifikke anbefalinger vurderes opp mot egen landinformasjon bør det tas med i vurderingen hvilke tilleggsverdier og særlig kompetanse som kan knyttes til de ulike dokumentene, og se dette i lys av de internasjonale prinsippene for innhenting og vurdering av landinformasjon.
- Hvis det besluttes å ikke implementere en anbefaling bør det skrives klare grunner som relateres til den tilleggsverdien og særlige kompetanse som ligger til grunn for UNHCRs posisjon. Disse grunnene bør være transparente.
- Vurdere opplæring om funksjonen og tilleggsverdien av de forskjellige anbefalingene fra UNHCR (se understrekningene ovenfor).
- Vurdere hvordan videre forskning på hvordan saksbehandlere bruker og henviser til UNHCRs anbefalinger kan føre til retningslinjer på hvordan man kan effektivisere saksbehandling, spesielt i forhold til landspesifikke retningslinjer (se understrekningene ovenfor).

Annex

UNHCR's legal basis for pronouncing on protection needs

MANDATE of UNHCR:

Identify the protection need of Refugees:

- *on convention grounds* (RSD under the Refugee Definition of Art 1)
- *convention-like ground* (CP under the Extended Refugee Definition)

Art 35:

- states have undertaken an obligation to cooperate with the function of UNHCR supervising protection needs

Convention Grounds (1951 Refugee Convention)

Article 1(A) 2: *Refugees* in need of *individual protection* due to convention grounds (may raise issues of GRP and IFA)

Complementary Protection (Non-convention grounds)

(national terminology i.e.: 'subsidiary protection,' 'humanitarian protection,' or 'temporary asylum')

Definition in *ExCom* Agenda of Protection Obj. 3 Goal 1

- protection on convention-like grounds
- considered in one single procedure

Definition in *UNHCR* statements

- persons facing a serious threat to life, liberty and security
- due to persecution, armed conflict or serious public disorder

Regional instruments bringing complementary protection under the refugee definition

- African 1969 OAU Convention
- South American 1984 Cartagena Declaration
- EU Directive Art 2(e), cf Art 15:
 - o threat to life,
 - o torture or inhumane or degrading treatment, or
 - o serious and individual threat to civilian's life or person due to indiscriminate violence in situations of armed conflict

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