rights law.[3] This annual review exercise lends itself to include themes on which the Joint Position is silent or obviously incomplete. Notably, two kinds of action deserve due consideration. Firstly, paragraphs 3 and 10 of the Joint Position should be brought in conformity with Rules V and II of the Standing Committee's proposal. Secondly, Rules I, III, and IV of the Standing Committee's proposal could be incorporated into the Joint Position. Alternatively, these rules could be considered for inclusion in one or more supplemental Joint Positions concerning the harmonized application of the term "refugee" in Article 1 of the 1951 Convention or a Joint Position concerning a particular subject related to the harmonized application of the term "refugee" in Article 1 of the 1951 Convention.

Who is a "refugee"?*

H. Meijers, R. Fernhout and T. Spijkerboer

5.1 Introduction

The "Presidency" of the Council of the European Union, acting on the basis of Title VI of the Treaty on European Union ("TEU"), is preparing the "harmonisation" of asylum law. Before the EU existed, the said harmonisation was being prepared by the "Presidency" of the so-called "Ad Hoc Group Immigration". For that purpose the Presidency has, among other things, raised the question: how can the various, often widely divergent interpretations of Article 1, paragraph A, *sub* 2, of the 1951 Refugee Convention, that are in vogue within the various Member States, be equated? A treaty has only *one* right interpretation and the same holds true for any term occurring in a treaty. Nevertheless, great differences in opinion arise, among the twelve EU Member States, as to the interpretation of the term "refugee" used in Article 1, paragraph A, *sub* 2, of the 1951 Refugee Convention.

In addition to the right interpretation of Article 1, paragraph A, *sub* 2, there is the question resulting in the establishment of refugee status: who is charged with the burden of proving the facts, that the fear to return to the country of origin of the asylum seeker is characterised as "well-founded"? The state where refuge is sought, or the asylum seeker? Conflicts also arise in the establishment of facts, *inter alia*, among the twelve Member States of the EU.[1]

When comparing the relevant data of six of the twelve Member States, Spijkerboer draws, *inter alia*, the following numerical conclusions.[2] In 1991, the percentage of all asy-

3 The last preambular paragraph of the Joint Position states that "The Council shall review the application of these guidelines once a year and, if appropriate, adapt them to developments in asylum applications."

* In 1994, this chapter was published as a separate document. Some editorial revisions have been made.

1 This matter will not be elaborated here. The widely diverging percentage of asylum seekers who were considered "refugees", to be mentioned below, in all probability cannot only be explained by the various interpretations of the concept "refugee", but also by a difference in establishing the relevant facts.

2 T. Spijkerboer, A Bird's Eye View of Asylum Law in Eight European Countries, Amsterdam, 1993, *passim*, especially pp. 28-29.

lum seekers who had reported themselves as such in one of the states, that were recognised as "refugees" by that state, was about 5 in Belgium, Germany, Italy, The Netherlands, and the United Kingdom; in France that percentage was about 20.[3]

The percentage of all asylum seekers of a certain nationality that qualified as "refugee" in the states in question, also differed greatly in a number of EU states. For instance, France concluded in 1991 that 91,9% of the Vietnamese asylum seekers were "refugees" in the sense of Article 1, paragraph A, *sub* 2, of the 1951 Refugee Convention. In Germany that percentage was 0,6%. France and Germany also differed considerably in their determination of the claims by Romanian asylum seekers in 1991: in France 16% proved to be "refugees", in Germany 0,6%. In that same year France considered 67,6% of the asylum seekers from Sri Lanka as "refugees", in The Netherlands it was about 2%.[4]

Such disparities in the manner in which a treaty is applied result in great legal inequality. Vast differences also existed prior to 1991. For that reason, the High Commissioner for Refugees of the United Nations in 1979 published the *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook").[5] In the preface of this Handbook, the Office of the High Commissioner states:

> "The "criteria for determining refugee status" set out in this Handbook are essentially an explanation of the term "refugee" given by the 1951 Convention and the 1967 Protocol. The explanations are based on knowledge accumulated by the High Commissioner's Office over a period of 25 years, (...) including the practice of States in the determination of refugee status...". In addition, the Handbook also contains a part entitled "Establishing the facts."

The UNHCR Handbook is accepted by all EU Member States as an important guideline in the interpretation and application of the definition of refugees in question. Whenever possible, the text of this United Nations book will be used as a guide in the interpretation of Article 1, paragraph A, *sub* 2. However, after the publication date, social developments have taken place that are not considered in the UNHCR Handbook. In addition, the text proved to contain some gaps or uncertainties that required to be supplemented.

The Standing Committee of experts in international immigration, refugee and criminal law formulates five proposals in the form of (legal) rules in the latter part of this chapter (section 3), to fill the gaps mentioned. Those five rules could be adopted as principles by the fora of the European Union or by other international fora. The Standing Committee does not deem it expedient to make proposals concerning the legal nature of the instrument enshrining the five rules.

Before presenting the five rules accompanied by a short comment, in accordance with the way in which the United Nations International Law Commission used to work, the ten subjects of refugee law that have resulted in important differences in application or interpretation will be recalled. The subjects covered in section 2.A are sufficiently

3 It should be noted that in 1991 the consequences of refusal of the refugee status were very divergent in the states examined, chiefly because residence titles were granted on other reasons than refugee status, this being the case - by way of example - in Belgium where it was granted to hardly anyone and to 45% of all asylum seekers in Germany.

4 Spijkerboer, *supra* note 2: However, the impression that France always applies a more liberal interpretation of the concept "refugee" would be wrong. Looking at other groups of asylum seekers and at other years, a more balanced picture arises.

5 The UNHCR Handbook (U.N. Doc. HCR/IP/4/Eng/Rev.1) was reprinted nearly unaltered in 1988.

dealt with in the UNHCR Handbook. The subjects addressed in section 2.B prove to be of great practical importance but have not or insufficiently been dealt with in the UNHCR Handbook. Therefore, specifications of those subjects are offered in the form of rules.

Of course, the five suggested rules, together with the UNHCR Handbook, do not pretend to effectively deal with all problems and developments that may occur in the future with regard to Article 1, paragraph A, *sub* 2. Yet, the UNHCR Handbook plus the five rules can help to remove the most important current problems of unequal interpretation and establishment of facts as to the relevant notion of "refugee" – at least with regard to the theoretical aspects.

5.2 The most important differences in the interpretation and application of the concept "refugee" in the EU states

A Subjects sufficiently dealt with in the UNHCR Handbook

1 *Agents of persecution*

Where it concerns persecution by non-state entities (for instance, resistance movements that exercise actual power in a part of the country, or fringe groups such as death squads), three stances can be discerned. In France, persecution by such third parties is only relevant if the authorities are unwilling to offer protection against it. If the authorities are willing but unable to offer protection, then according to French law there is no persecution for precisely that reason. In contrast, no distinction is made between being unwilling or being unable in Denmark and in The Netherlands: if the authorities are either unwilling or unable to give protection against persecution, that persecution by third parties is taken into account just like that in the determination of refugee status. In between these two positions are Belgium, Germany and the United Kingdom. If the authorities in those countries are willing but unable to offer protection, it is examined whether that is a permanent situation and what the nature is of the interests of the victim that is afflicted. Uniform interpretation and application in this field can be achieved at the level of the UNHCR Handbook, which in paragraph 65 finds a lack of willingness as well as the impossibility to offer protection relevant and does not make the demand that the lack of protection is permanent.

2 *Domestic flight alternatives*

With regard to domestic flight alternatives (connected with the previous matter), EU states also take different positions. The four relevant criteria (who is the persecutor, what is the size of the country, what is the safety situation of the possible flight alternative, as well as subjective considerations of the person concerning the asylum seeker and previous experiences of the asylum seeker) are applied in different combinations and in different ways in every country.

In this matter the UNHCR Handbook can also be referred to, which in paragraph 91 states that an asylum seeker is not excluded from the refugee status solely because he could have sought refuge in another part of his country of origin, if this could not in fairness have been expected of him under the circumstances. Circumstances that may be relevant in answering the question whether the domestic flight alternative actually was an option – as it appears from practice in various European countries – including but not limited to previous experiences of the asylum seeker or of persons in a similar position to the asylum seeker, the size of the country of origin and the safety situation in the putative domestic flight alternative. A domestic flight alternative can of course

never be deemed present when the persecution emanates from the authorities. This includes situations in which the authorities locally encourage or tolerate acts of persecution of citizens.

3 *Republikflucht*

With regard to *Republikflucht*, which at the level of legal dogma is closely connected to the problem of conscientious objection because of the identical question of the refugee-legal relevance of normal prosecution, a similar spectrum can be discerned as with regard to conscientious objection. However, this matter has lost much of its practical importance since 1989. As far as necessary, paragraph 61 of the UNHCR Handbook offers sufficient clarity.

4 *Persecution/prosecution*

The distinction between persecution and prosecution is being applied uniformly at present already, although there are differences as to the question how disproportional punishment and the legal system in the country of origin should be dealt with. Paragraphs 56 through 60 of the UNHCR Handbook on this issue state that international human rights standards, and more particularly the ICCPR, are criteria to distinguish normal prosecution from persecution relevant to refugee law. This offers sufficient starting-points so that in general further rules are not needed. A gap has only emerged in the specific matter of draft-evasion (see section 2.B.2).

5 *Refugees sur place*

When refugees *sur place* are concerned, two approaches can roughly be distinguished. In The Netherlands and in Italy, the prerequisite of continuity is relentlessly applied: activities outside the country of origin count when they are a continuation of activities already started in the country of origin. In the other countries, although in mutually slightly differing ways, it is examined whether the activities abroad are not exclusively undertaken with the intent of being qualified as a refugee. This is regarded as the good faith criterion. The burden [onus] of proof rests with the state.

Paragraphs 94 through 96 of the UNHCR Handbook do not apply the prerequisites of continuity but do leave, by the words "careful examination of the circumstances", room for the criterion of good faith. On this subject no further specification is required.

B Subjects needing specification

1 *Objective doctrine and singled-out criterion*

Contrary to what is the case in the determination of refugee status in most of the European Union, two of those states do not primarily deal with the question whether the asylum seeker involved rightly fears to be affected by a persecution measure, which is apparently based on one of the reasons of persecution (race, religion, nationality, membership of a particular social group or political opinion). In these two states, the leading role in determining refugee status is not played by asylum seekers threatened by persecution, but by the motives of the persecutor. However, it happens that in both countries nearly all persons who are not granted refugee status on the basis of this very restrictive interpretation, qualify for a different residence status.

In Germany, this emphasis on the motives of the persecutors has taken the form of what is sometimes called the "objective doctrine".[6] The "objective doctrine" applies the primary criterion that measures which in themselves should be qualified as measures of persecution, have to be taken (by the state) with the intent of affecting the asylum seeker, on the basis of *one* of the reasons of persecution. If a state commits excesses that objectively in fact affect particular persons but of which can be said that these excesses are in themselves based on a legitimate purpose, the victim of such excesses is not regarded as a refugee, even when they are in conflict with human rights. Two examples may illustrate this doctrine. If a state persecutes a particular population group, while parts of that population group fight for independence of a particular part of that state, the victims of that persecution are not regarded as refugees, because the basis of the persecution is to maintain the unity of the state, which is in itself a legitimate aim. That the measures taken by the state are possibly excessive and entail serious infringements of human rights, which afflict particular population groups, does not alter this. Another example is persecution due to draft-evasion. In the "objective doctrine" this can hardly ever result in the grant of refugee status, because this persecution can be based on a legitimate aim, namely that of maintenance of military legislation. This reasoning prevails even when the persecution assumes excessive forms and causes infringement of human rights.

Therefore, the qualification of this doctrine as "objective" is not entirely accurate. It is not the objective pattern of violations of human rights which is decisive, but the aims the persecutors have or that are attributed to them by the state that has to determine refugee status. Rather, the doctrine should be named the "legitimising doctrine", for in this approach it is decisive whether a state that violates human rights can legitimatise these violations which are in themselves illegitimate.

In Germany, the "objective doctrine" was based on the old version of Article 16 of the German Constitution. To what extent the "objective doctrine" will be abandoned after the recent amendment of Article 16 remains to be seen.

In The Netherlands, an extreme version of the so-called "singled-out criterion" is used. According to that version it is decisive in granting refugee status whether violations of human rights have been committed with the aim (the intent) to harm the specific victim. A positive answer to that question is not provided by the fact that the violations were extremely serious and occurred more than once in a limited period of time. Especially in situations of civil war, Dutch jurisprudence esteems it possible that (repeated and serious) violations of human rights take place that repeatedly affect a particular person – belonging to a particular population group – without that person being a refugee after fleeing. According to Dutch reasoning, persecution is not aimed at the man or woman involved personally, namely because of his or her features as a member of the population group against whom the violations of human rights take place, but the violations occur because it happens to be war.

The clearest example of the application of this doctrine is a Tamil woman who was arrested six times by Sri Lankian soldiers and raped three times in the process. This was insufficient for granting refugee status because the Sri Lankian soldiers did not have her in particular in mind but were looking for her friend.[7] In the Dutch implementation the emphasis is thus on the question whether there was an "objective" reason for authorities

6 See extensively R. Marx, The Criteria for Determination of Refugee Status in the Federal Republic of Germany, in 4 I.J.R.L. (1992), pp. 151-170.

7 Litigation Department of the Council of State of The Netherlands, 8 December 1989, Rechtspraak Vreemdelingenrecht 1989, 8.

to persecute this person, and nobody else. In situations of large-scale violence, of which specific population groups in particular become victim, it is mostly judged that there was no "objective" reason to choose this particular person as a victim and therefore warrants no persecution. Persecution of a population group (for instance, because of race, or the predominant religion within the group) only results in refugee status when the person asking protection personally and particularly "ait attiré l'attention des autorités",[8] despite the "serious violation of human rights" – see the UNHCR Handbook, paragraph 51. If that person succeeds in escaping *before* he has drawn the special attention of the authorities, he is therefore *no* refugee, since this would be in conflict with the historical aim of the drafters of the 1951 Refugee Convention. This Dutch singled-out criterion is nonetheless based on the 1951 Refugee Convention.

In other EC countries these doctrines are not accepted. In many countries the intent of the persecutors, whether it concerns the "objective doctrine" or the singled-out criterion, only plays a part in the determination of the risk of repetition of persecution measures. If an asylum seeker has been the victim of violation of human rights on a limited scale, while it also happened to others, it is deemed doubtful that there is a risk of repetition. However, if an asylum seeker is the victim of serious violations of human rights while there are indications that those violations took place because of characteristics of the person involved (political opinion, ethnicity), it is assumed that the authorities apparently found reason to (also) affect this person, so that there is a risk of repetition.

The gap between Germany and The Netherlands on the one hand, and the other EC countries on the other, is by far the most important one, from the perspective of legal dogma as well as with a view to the recognition percentages. Since both doctrines date from after the publication of the UNHCR Handbook, the Handbook cannot be referred to sufficiently and a supplemental rule is required on this subject.

It was decided to create this rule by repeating the definition of refugee status from the 1951 Refugee Convention. It is clear that this definition excludes the "objective doctrine" and the "singled-out criterion".

2 *Draft-evasion*

In the area of the relevance of (threatening) punishment because of draft-evasion, the EU states take varying positions. The most liberal is France, where threatening punishment for draft-evasion results in recognition if the evasion is dictated by one of the reasons for persecution mentioned in the 1951 Refugee Convention. On the other side of the spectrum is Germany, where draft-evasion may only just result in recognition in theory, but not in practice. Since the "objective doctrine" found acceptance in 1981, only *one* draft-evader has been recognised.

On this issue, paragraphs 167 through 174 of the UNHCR Handbook offer points of departure. This text has, however, given cause for different interpretations; especially when it concerns the question of when a "type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct" (paragraph 171), and how paragraph 173 should be dealt with, which concerns objection on the basis of general conscience. Therefore, an explicit text is proposed on this subject. The concept "fundamental norms that apply during an armed conflict" used in paragraph c of Rule II, refers to multiple sources. The most weighty rules of humanitarian rights are *ius cogens*, such as the ban

8 The Dutch delegation in a 'Note', addressed to the Ad Hoc Group Immigration, of 27 September 1993.

on crimes against humanity and on war crimes. However, the Red Cross treaties and other basic rules of human conduct should also be considered. The international developments mentioned in paragraph 173 of the UNHCR Handbook, as they appear, *inter alia*, from Resolution 1989/59 of the UN Commission on Human Rights of 8 March 1989,[9] are elaborated in paragraph d of Rule II. This resolution "Recognises the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion as laid down in Article 18 of the Universal Declaration of Human Rights as well as in Article 18 of the International Covenant on Civil and Political Rights".

The formulation chosen in paragraph 173 of the UNHCR Handbook that "it would be open" to offer protection in these cases is not adopted because such a formulation not only is not in accordance with Resolution 1989/59 but, moreover, encourages diverging interpretations. No difference is made between draft-evasion and desertion because the same reasons may underlie desertion (during military service or during a valid labour contract) as draft-evasion. In the context at issue, the distinction is not relevant in principle.

3 *Sexual orientation*

In the field of homosexuality, silence reigns in Latin countries; the matter has not yet been introduced in asylum procedures. In Denmark and The Netherlands, homosexuality is recognised as a category of persecution; in Germany and the United Kingdom also, in principle, although the issue apparently is so sensitive there that more stringent requirements apply where this is the reason for persecution than in the case of other ones.

This matter is not dealt with in the UNHCR Handbook. Rule III adopts the view that homosexuality should be regarded as a relevant persecution category. It appears from the adoption of the word "orientation" that the asylum seeker need not have openly expressed his orientation in his country of origin. If expressing this would result in a well-founded fear of persecution, refugee status should be granted, analogous to paragraph 82 of the UNHCR Handbook.

4 *Gender-related rules*

With regard to the question whether women or men who violate social rules related to their gender of their country of origin may be regarded as a social group in the sense of the 1951 Refugee Convention:[10] it is assumed that Belgium, France and The Netherlands answer this question in the positive; in Denmark, those involved are not regarded as members of a social group but persecution on this ground results in the grant of a B-status. In Germany and the United Kingdom, this category is not recognised as being "per-

9 C.H.R. Res. 1989/59, U.N. Doc. E/CN.4/1989/L.11/Add. 8, p. 5, was adopted by consensus and without voting. See Commission on Human Rights, Report on the 45th session (30 January-10 March 1989), Official Records of the Economic and Social Council 1989, supplement No. 2, U.N. Docs. E/1989/20; E/CN.4/1989/86, p. 139 *et seq.* and p. 254 *et seq.*

10 See UNHCR EXCOM Conclusion 39 (XXXVI). The Executive Committee of the U.N. Programme of the High Commissioner (EXCOM) was established in 1958 on the basis of Art. 4 of the Statute of the Office of the High Commissioner (see G.A. Res. 1166 (XII) of 26 November 1957 and ECOSOC Res. 672 (XXV) of 30 April 1958). The EXCOM, consisting of government representatives, has among its task's to advise the High Commissioner at his/her request on the execution of his/her tasks on the basis of the Statute. Within this framework, conclusions, such as the one just mentioned, of the government representatives are adopted.

secuted". As to this issue, a text is adopted in Rule IV which is inspired by EXCOM Conclusion 39 (XXXVI).

5 *Establishing the facts*

In its "Draft for discussion concerning harmonised use of the definition of a refugee, as defined in Article 1, letter A, of the Geneva Convention" (File No. 91-3071/21-96), the Danish Presidency of the Ad Hoc Group Immigration considers the primary sub-aim of the ongoing harmonisation process: "an analysis of what is required, according to the practice in member states for a fear of the type of persecution described in the Convention to be characterised as well-founded". It should be examined whether "the individual countries impose similar burdens on an asylum applicant, from the standpoint of proving that he or she harbours justified fear of persecution in the event of his or her return, and whether consideration is given to the extent to which the general conditions in the applicant's home country affect this situation. A document should be drafted on joint principles...".

The determination of refugee status is a responsibility of the individual contracting parties. But the distribution of the burden of proof is in principle determined by international law; it concerns, after all, the application of *one* treaty. It is, however, quite conceivable that the analysis suggested by the Presidency will show that the distribution of the burden of proof in the twelve EU Member States varies considerably from state to state.

It will have to be examined first if international law provides a framework for "joint principles" in this matter. The 1951 Refugee Convention itself offers few clues here. International rules of proof that apply generally are mainly concerned with procedures between states and not (at least not with general validity) between states and individuals.

Comparable with the burden of proof in refugee cases is the burden of proof resting with someone who claims protection against the violation of a human right (for instance, to family reunification). It is not required for the admissibility of that claim that the applicant proves the alleged violation. It must only concern an applicant "claiming to be the victim". That does not mean that the mere statement on that subject is sufficient. His claim will be examined on the basis of the facts stated by him and possible facts against it furnished by the state.[11]

The distinguishing character of refugee determination procedures is that the proof of *all* underlying facts is often impossible. This is also the principle of paragraph 196 of the UNHCR Handbook, which offers useful starting-points but no real clues for the distribution of the burden of proof. According to paragraph 196 of the UNHCR Handbook, it is "a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. (...) Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner. (...)".

In light of the above, the burden of proof entails that the authorities charged with the determination of refugee status – by means of the facts advanced by the asylum seeker, but pursuant to their own research and to what is already known about the actual situation in the country of origin – independently express an opinion on the question to which extent these facts result in refugee status in a legal sense. Pursuant to Article 1 of

11 Compare P. van Dijk and G.J.H. van Hoof, De Europese conventie in theorie en praktijk [The European convention in theory and practice], Nijmegen, Ars Aequi Libri, 1990, p. 54.

the 1951 Refugee Convention, the obligation to determine refugee status rests on the Contracting States. It follows that neither the "burden of proof" of refugee status nor the establishment of the equally legal concept of "well-founded fear for persecution" is imposed on the asylum seeker. He or she only has the burden of proof with regard to the stated facts, in so far as these are reasonably susceptible of proof, giving the benefit of the doubt (according to paragraphs 203 and 204 of the UNHCR Handbook) and given the special nature of the refugee situation.

Even though the 1951 Refugee Convention does not provide concrete starting-points for the evaluation of the stated facts, it does give a certain clue in the element of fear. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[12]

"Object and purpose" of the 1951 Refugee Convention is to offer protection against persecution, or rather, against something that might happen to the asylum seeker in the country of origin. The situation (that is the actual situation as to human rights) in that country is decisive for the risk of persecution, for the well-founded basis of the fear. It then concerns a) the general situation in that country and b) the situation of the asylum seeker if he would be staying in that country. What the asylum seeker feels is therefore not the issue but what might happen to him in view of the facts. On the basis of the genesis of the treaty, it can be stated that the element of fear only indicates that it is not required that the refugee has already experienced acts of persecution but that a threatening persecution can also be the reason for refugee status. The subjective state of mind of the asylum seeker is of minor importance for refugee status.[13] However, the emphasis on the subjective aspect has resulted in an overrating of the statements of asylum seekers and an underrating of the actual situation in the country of origin. In accordance with the original purpose of the 1951 Refugee Convention, however, the determination of refugee status primarily requires an evaluation of the actual situation in the country of origin.

The importance of the notion "fear" for the status determination and especially for what should be made plausible, is clearly expressed in the case *INC v. Cardozo-Fonseca* of 1987, judged by the Supreme Court of the United States.[14] The judgement is also of importance with regard to the meaning of the UNHCR Handbook in general: "In interpreting the Protocol's definition we are guided by the analysis set forth in the Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979)." This judgement by the US Supreme Court was rendered in the framework of the 1980 Refugee Act, which was passed after the United States became party to the 1967 New York Protocol in 1981. In the 1980 Refugee Act, the complete definition of a refugee of the Treaty and the Protocol was incorporated for the first time. Before that time, the United States

12 Art. 31, para. 1, Vienna Convention on the Law of Treaties.

13 See J. Hathaway, The Law of Refugee Status, Toronto-Vancouver 1991, p. 66 *et seq.*, especially pp. 68 and 69: "It was the intention of the drafters, however, that all (...) refugees should have to demonstrate 'a present fear of persecution' in the sense that they 'are or may in the future be deprived of the protection of their country of origin'. (...) The use of the term 'fear' was to emphasise the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind. (...) In consequence, it is not accurate to speak of the Convention definition as 'containing both a subjective and an objective element'." See also N. Robinson, Convention Relating to the Status of Refugees. Its History, Contents and Interpretation, New York, 1953, p. 48; A. Grahl-Madsen, The Status of Refugees in International Law, Vol. I, Leiden, 1966, p. 173, and R. Fernhout, Erkenning en toelating als vluchteling in Nederland [Recognition and admission as refugee in The Netherlands], Deventer, 1990, p. 55 *et seq.*

14 79 International Law Reports, p. 610 *et seq.*, especially pp. 622-623 and p. 628.

had a concept of refugees in which the element of fear was lacking. According to the Supreme Court, the change has far-reaching consequences for the status determination: "... it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility", and later: "... to show a "well-founded fear of persecution", an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country". The US Supreme Court explicitly rejects the "more likely than not" criterion. The imperative is: the *risk* of *refoulement* should, in as far as reasonably possible, be eliminated.

In this connection the situation in the country of origin should play an important role in the status determination. Yet the "burden of proof" is not relieved for the asylum seeker. Independent of the situation, he will have to make the facts stated by him plausible, in as far as that is reasonably possible for him. In this respect there is no difference. But as the situation in the country of origin is more serious, the authorities charged with status determination may, in their legal assessment of refugee status, sooner draw the conclusion that – in the words of the Supreme Court – "persecution is a reasonable possibility". This also holds true for the reverse.

As the situation in the country of origin is less serious, the authorities charged with status determination will also, on the basis of the facts stated and made plausible, less soon draw the conclusion that a reasonable, well-founded fear of persecution may exist. But there is no room for reversal of the burden of proof in the presence of a so-called "safe country of origin", in the sense that a legal presumption of unfounded basis applies, unless the asylum seeker can state special circumstances which indicate the opposite. Such a burden of proof cannot be imposed on the asylum seeker with regard to his situation, nor is it necessary. In this instance, the authorities charged with status determination will always have to examine whether there may be reasonably well-founded fear of persecution, by means of the personal facts made plausible and by what is known through the initiation of independent research.

Formulating rules for the distribution of the burden of proof necessarily cannot go beyond the general formulations which have been indicated above, which in themselves erect a barrier against a "probability"-standard. Most important for a harmonised application of the definition of refugee, however, is a joint public examination of the prevailing situation in countries of origin, precisely with a view to establishing "a reasonable possibility" of refugee status. The joint reports will prove to be more important in this context than the formulation of a common standard for the distribution of the burden of proof. The present Centre for Information, Discussion and Exchange on Asylum ("CIREA") does not, however, meet the requirements for an independent and accessible European Documentation Centre.[15]

5.3 Draft implementation rules

In section 2.B, the subjects are indicated for which the UNHCR Handbook, in view of the changed social conditions, has not (yet) or insufficiently given instructions for an adequate application of Article 1, paragraph A, *sub* 2, of the 1951 Refugee Convention.

In a "joint position" or a "joint action" as referred to in Article K.3, paragraph 2, *sub* a and b, of the TEU, or in a directive or order of the EC given pursuant to Article 7a of the EC Treaty, the following rules would promote legal protection and legal equality for these sub-

15 See H. Meijers *et al.*, A New Immigration Law for Europe?: The 1992 London and 1993 Copenhagen Rules on Immigration, Utrecht, NCB, 1993, p. 22 *et seq.*

jects, if a further elaboration of Article 1, paragraph A, *sub* 2, of the 1951 Refugee Convention were to be given, by means of one of the instruments mentioned. Even if the concept "refugee" were to be further elaborated by any other international instrument, the rules given below deserve adoption. In addition, a rule should be incorporated as to the establishment of facts that have to be gathered in order to determine refugee status.

A *Rule for further elaboration of the concept "Refugee" as defined in Article 1, paragraph A, sub 2, of the Convention relating to the Status of Refugees, which applies to* all *categories of refugees*

1 ***Rule I**: Well-founded fear of persecution*

Any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and who is unable or, owing to the above fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of the above events, is unable, or, owing to such fear, is unwilling to return to it, is a refugee.

Comment

This rule indicates that anyone who fulfils the definition of Article 1, paragraph A, *sub* 2, of the 1951 Refugee Convention is a refugee. The mere *existence* of the well-founded fear of being persecuted constitutes one of the criteria for the refugee status ex Article 1, paragraph A. The intent of the persecutor is irrelevant, the so-called "objective doctrine" is therefore excluded by this further definition. *A fortiori* the definition of Article 1, paragraph A, *sub* 2 does not contain the standard (the element): the refugee has well-founded fear that the persecution is especially directed at him or her ("singled-out criterion").

B *Three rules to further elaborate the concept "refugee" as defined in Article 1, paragraph A, sub 2, which apply to three special categories of refugees ("special cases", UNHCR Handbook, Chapter V)*

1 ***Rule II**: Draft-evasion*

Anyone having well-founded fear of being persecuted because of draft-evasion or desertion is a refugee:

(a) if the punishment or the execution of the punishment for draft-evasion or desertion threatens to be excessively discriminatory on the basis of race, religion, nationality, membership of a particular social group or political opinion of the draft-evader or deserter;

(b) or if the draft-evader or deserter has well-founded fear of other seriously discriminatory treatment than excessive punishment or execution of a punishment for the reasons mentioned under a;

(c) or if the draft-evader or deserter threatens to be forced to participate in a military action which is contrary to fundamental norms that apply during an armed conflict;

(d) or if the draft-evader or deserter comes to his evasion or desertion because otherwise he would be forced to act contrary to his religious or other deep-rooted conviction which prescribes his evasion or desertion, and there is no opportunity in his country of origin to perform non-military service instead of compulsory military service.

Comment
The cases mentioned under paragraphs a and b are generally accepted and are only repeated here for the sake of completeness. Paragraph c specifies what should be understood by "type of military action ... condemned by the international community as contrary to basic rules of human conduct", as referred to in paragraph 171 of the UNHCR Handbook: besides concrete acts of combat condemned as such, combat action contrary to fundamental norms applicable during an armed conflict should also be regarded as such. The standards laid down in the ICCPR, the Red Cross Treaties and the relevant Protocols should particularly be considered. The distinction between domestic and foreign conflict is not relevant in refugee law. Paragraph d elaborates paragraph 174 of the UNHCR Handbook in the light of Resolution 1989/59 of the United Nations Commission on Human Rights.

2 ***Rule III**: Sexual orientation*
Anyone having well-founded fear of persecution because of his or her sexual orientation is a refugee.

Comment
Sexual disposition or orientation is no legitimate reason for negative discrimination in the sense of Article 26 of the ICCPR. Therefore, persons who are threatened to be persecuted because of their homosexuality, transvestism or other sexual disposition or practices, are refugees. This leaves the general prohibition on the committing of sexual acts toward minors, or on the committing of violent sexual acts, unimpaired.

3 ***Rule IV**: Gender-related rules*
Anyone having well-founded fear of persecution because of contravention of gender specific social norms is a refugee.

Comment
This rule is aimed at those who are being persecuted because of deviation from gender specific majority ideas and behaviour. Likewise, it is the case with regard to other categories of persecuted persons, discrimination, also in the case of violation of gender-related rules, only exists where the violation implies such consequences for the person behaving deviantly, that one of his or her human rights threatens to be seriously violated.

Those persons persecuted because of rules of conduct do not only belong to a "particular social group", they are also persecuted because of their "political opinion". Social norms should not only imply legal rules: violation of norms that cannot be regarded as legal standards may also be the cause of persecution in the sense meant here.

C *Establishing the facts*

The burden of proof existing in a procedure between states party to the 1951 Refugee Convention, should be distinguished from the burden of proof applying in a procedure in which states are not opposed, but in which the host state confronts the individual who claims to be a refugee. The point of departure in both procedures is that the state has internationally committed itself to behave in such a way that the risk of infringing the 1951 Refugee Convention (and particularly the prohibition of *refoulement*) is avoided.

The following rule is limited to the distribution of the burden of proof – that is the

distribution of the burden to determine the relevant facts – between a person addressing the state to obtain refugee treatment and the state addressed. The addressing person is called a "refugee" hereafter.

1 ***Rule V**: Establishing the facts*
   1 *The asylum seeker should make the facts plausible on which he bases his request for recognition as a refugee, in as far as this can be reasonably expected of him.*
   2 *The authorities charged with determining refugee status will inform themselves on the political and human rights situation in the country from which the asylum seeker escaped, by all sources they can reasonably dispose of.*
   3 *By means of the facts made plausible by the asylum seeker on the basis of Article 1, and by the evidence gathered by the authorities on the basis of Article 2, the competent institution determines whether there is a reasonable, well-founded fear of persecution for the asylum seeker.*
   4 *As to the determination mentioned under 3, the competent authorities will give the asylum seeker the benefit of the doubt.*

Comment
Paragraph 1 of this rule expresses the point of departure that the burden of proof rests on the asylum seeker with regard to his personal circumstances connected with the facts, in so far as they are reasonably susceptible of proof by him, and this – in view of the special position of his refugee situation and the duty of the authorities to prevent the risk of *refoulement* – by giving him the benefit of the doubt (see paragraph 4). The authorities charged with the determination of refugee status have the duty to inform themselves on the situation in the country of origin. Namely, on the actual human rights situation in that country, which is decisive for the risk of persecution, in order to establish whether the fear is well-founded. Depending on how serious the situation in the country of origin is, the authorities charged with the determination of refugee status will, in their legal determination of refugee status, sooner conclude, on the basis of claimed and plausible personal facts, that a reasonable fear of persecution exists.