UNHCR's Comments on the Draft Immigration Act (NOU 2004:20)

Introduction

UNHCR has a direct interest in national legislation of signatory countries that regulates the application of the 1951 Convention relating to the Status of Refugees (hereinafter 1951 Convention), in line with the supervisory responsibility which the UN General Assembly has entrusted UNHCR for providing international protection to refugees worldwide and for seeking permanent solutions for them[1]. The Office therefore appreciates the opportunity to provide comments on the draft Immigration Act.

General comments

UNHCR understands that the Norwegian Immigration Act Committee is proposing a new aliens legislation, which incorporates several provisions of the EU Council Directives in the field of asylum, in particular the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304/12 of 30.9.2004) (hereinafter Qualification Directive).

UNHCR issued Annotated Comments on the EC Council Qualification Directive in January 2005. Since these are highly relevant for the following comments, they are extensively drawn upon, as well as frequently quoted for the purpose of easy reference. (Please note that footnotes in the 'Annotated Comments' text have been omitted simply for the purpose of reducing the length of the text quoted.)

In this connection, UNHCR would like to emphasize that the provisions of the Qualification Directive do not fully reflect the standards of the 1951 Convention. UNHCR would also like to reiterate that the Qualification Directive aims to set minimum standards only, which leave EU Member States free to retain or introduce higher standards of protection if they so choose. UNHCR would like to encourage Norway to consider the introduction of best standards rather than mechanically copying the standards of this and other Directives, which are not binding on Norway.

Where relevant in the procedural part, UNHCR also draws on its Provisional Comments (issued in February 2005) on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004) (hereinafter Procedure Directive). As noted above, UNHCR questions why Norway has taken the approach to follow the

[1] Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950. Article 35 of the 1951 Convention relating to the Status of Refugees contains a corresponding obligation for States Parties, which undertake to: '*co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.*'

EU directives so closely, although they are not binding on Norway, and moreover only represent a threshold of minimum standards below which EU Member States should not go, not standards to which to descend to.

Specific comments

UNHCR limits itself to comment on selected chapters of the draft Immigration Act, namely Chapters 6 (Protection), 7 (Access to residence on strong reasonable grounds), 11 (Absolute protection against return (*non-refoulement*)), and 13 (Rules of administrative procedure). In its comments below UNHCR follows the order of the relevant provisions as they appear in the draft law proposal.

Proposed Chapter 6 Protection

Proposed § 38 Residence permit to an alien in need of protection (asylum)

Proposed § 38(1)

UNHCR welcomes the Proposal's intention to spell out the criteria for who is a refugee. The proposed definition to a large extent replicates the precise wording of the refugee definition contained in Article 1A(2) of the 1951 Convention. UNHCR notes, however, that the reference in the Convention definition to *stateless persons* is omitted and suggests that this be added.

UNHCR notes the aim of the Proposal to clearly distinguish between the two main situations when residence/protection should be granted: Residence is granted in accordance with, on the one hand, international obligations in situations where a person would risk serious harm upon return and, on the other, national legislation and policy on humanitarian grounds.

UNHCR notes that the draft law introduces a new, 'expanded' refugee concept, which includes the two categories of (a) 1951 Convention refugees and (b) persons who are not considered to be Convention refugees but who cannot under relevant human rights law (European Convention on Human Rights) be returned to a country where they would face a risk of torture etc. A person who fits under any of these categories shall be granted *asylum* as a *refugee*.

All the same, UNHCR notes that the Committee reportedly did not see the need to lay down in law a special provision on a complimentary form of/subsidiary protection, with language such as that laid down in Article 15 of the Qualification Directive ('serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'), or that supported by UNHCR in its Annotated Comments on the Directive ('persons fleeing indiscriminate violence and gross human rights violations more generally', p. 33). Instead, the Committee noted that those situations would be covered under Article 3 of the ECHR (i.e. such persons would be considered refugees under Norwegian law) and, consequently, that a separate protection category would be superfluous. The Committee noted that it must be assumed that, to return a person to a situation of armed conflict where he or she would be in real

danger of being subjected to an individual threat would always constitute inhuman treatment [NOU153].

UNHCR would be in favour of laying down directly in law such an expanded refugee definition which would include 'persons fleeing serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order'.

UNHCR notes that there are separate provisions on protection against *refoulement* for the two categories mentioned above. See further comments on proposed Chapter 11, below.

Proposed § 38(2)
UNHCR welcomes the inclusion of *sur place* claims in the scope of this provision. UNHCR welcomes the Committee's intention to recognize refugee status to a greater extent compared to the practice up to today in relation to a person who has become a refugee *sur place* as a result of his or her own actions.

See UNHCR's Comment on Article 5(2) in its Annotated Comments to the Qualification Directive, pp. 16-17:

"Even where it cannot be established that the applicant has already held the convictions or orientations in the country of origin, the asylum-seeker is entitled to the right of freedom of expression, freedom of religion and freedom of association, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments. Such freedoms include the right to change one's religion or convictions, which could occur subsequent to departure e.g. due to disaffection with the religion or policies of the country of origin, or greater awareness of the impact of certain policies. […]

There may be instances where an individual outside his or her country of origin who would otherwise not have a well- founded fear of persecution acts for the sole purpose of "manufacturing" an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article 4(3)(d) of the Directive. In UNHCR's view, such an analysis does not require an assessment of whether the asylum- seeker acted in "bad faith" but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase "without prejudice to the Geneva Convention" in Article 5(3) would therefore require such an approach."

Proposed § 38(3)

While providing a derivative status for family members of refugees, UNHCR encourages the law proposal to include as family members also *other close relatives* who lived together as part of the family unity and who are wholly or mainly dependent on the refugee. See further UNHCR's Comment on Article 2(h) in its Annotated Comments to the Qualification Directive, p. 12:

"UNHCR notes in this regard that the definition which was agreed upon in the [EC] Temporary Protection Directive encompasses these family members. [Footnote] This is in line with the right to family unity, as outlined in the UNHCR Handbook which stipulates that other dependants living in the same household normally should benefit from the principle of family unity. [Footnote] Furthermore, in UNHCR's view, respect for family unity should not be made conditional on whether the family was established before flight from the country of origin. Families which have been founded during flight or upon arrival in the asylum State also need to be taken into account."

Proposed § 39 Further on the concept of persecution in § 38(1)(a)
UNHCR notes that the proposed § 39 replicates Article 9 of the Qualification Directive. UNHCR notes the Proposal's express intention to incorporate the interpretation of what constitute persecution and acts of persecution as laid down in Article 9 of the Qualification Directive [NOU148].

Proposed § 39(1)
See UNHCR's Comment on Article 9(1) in its Annotated Comments to the Qualification Directive, p. 20:

"In UNHCR's view, the interpretation of what constitutes persecution needs to be flexible, adaptable and sufficiently open to accommodate its changing forms. Furthermore, it will depend on the circumstances of each case whether prejudicial actions or threats would amount to persecution. While international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the basis of serious or severe human rights violations. Severe discrimination, or the cumulative effect of various measures not in themselves amounting to persecution or severe violations of human rights, either alone or in combination with other adverse factors, can give rise to a well-founded fear of persecution; or, in other words, could make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of the predicament is to leave the country of origin. Although there may be situations where a violation of human rights cannot formally be attributed to a government because of its inability to provide protection against "violations" by a non-state actor, as stated above (see comment on Article 6), refugee protection is to be granted independently from the responsibility of the country of origin for the persecutory act [Footnote]."

Proposed § 39(2)(e) and (f)
See UNHCR's Comment on Article 9(2)(e) and (f) in its Annotated Comments to the Qualification Directive, p. 21:

"*UNHCR welcomes the recognition that prosecution or punishment for refusing to perform military service can constitute persecution. UNHCR understands that the provision will also apply where the refusal to serve relates to a conflict that in and of itself is contrary to public international law, such as for example when it has been condemned by the Security Council.*

Additionally, in line with the UNHCR Handbook [Footnote] and evolving human rights law [Footnote], punishment for refusal to perform compulsory military service in the form of draft evasion or desertion may also be considered to be persecutory, if the reasons for refusal to serve are based on deeply held moral, religious or political convictions (conscientious objection). The question as to whether the objection is selective is irrelevant in this regard. UNHCR trusts that [Member States] will take this aspect into account. […]

UNHCR welcomes the reference to gender-specific and child-specific persecution. Even though gender and age are not specifically referenced in the refugee definition, it has been UNHCR's position that the text, object and purpose of the 1951 Convention require such an interpretation. It is widely accepted that gender and age can influence, or dictate, the type of persecution suffered (see also comment on Article 10(d)) [Footnote]."

Proposed § 39(3)
UNHCR notes the Committee's intention to regularize what has already been established in practice, namely the recognition of refugee status irrespective of the source or agent of persecution [NOU149]. The inclusion of persecution emanating from non-State actors is one of the key elements of the Qualification Directive which UNHCR fully supports, see its Annotated Comments, pp. 17-18:

"UNHCR has long maintained that the 1951 Convention does not restrict persecution to acts by State agents. Rather, persecutory acts committed by non-State agents against whom the State is unwilling or unable to offer effective protection similarly give rise to refugee status under the 1951 Convention, provided, of course, the other criteria of the refugee definition are met. In this connection, the question of whether a State actor exists who could be held accountable for not offering protection is of no consequence [Footnote]. UNHCR recommends, for reasons of clarity, that an explanation to this effect be included in national legislation."

Proposed § 39(4)
UNHCR notes the Proposal's intention to introduce the 'relocation principle' in law. UNHCR notes that this was modeled after the Qualification Directive, although is less explicit in its wording. See UNHCR's Comment on Article 8 in its Annotated Comments to the Qualification Directive, p. 19:

"In analyzing the applicability of an internal relocation alternative, it has to be determined first whether the issue is of any relevance to an individual case. Otherwise there is no need to examine whether or not the proposed area would be a reasonable

alternative. Such an assessment should, for example, not normally be necessary where the feared persecution emanates from State agents, as they are regularly able to act throughout the territory.

Article 8(1) recognizes that an assessment needs to be made as to whether the applicant is safe from persecution or real risk of suffering serious harm in another part of the country. Apart from considering whether the applicant would not have a well- founded fear of persecution or would face serious harm in the area, it should also be considered whether the applicant could safely and reasonably relocate, without undue hardship. UNHCR suggests that these considerations be reflected explicitly when implementing the Directive.

Subparagraph (3) which foresees the applicability of an internal relocation or flight alternative in cases where return to the proposed part of the country is not possible due to "technical obstacles to return", is problematic in UNHCR's view and should not be implemented in national law or practice. The effect of this provision is to deny international protection to persons who have no accessible protection alternative. In UNHCR's view, this is not consistent with Article 1 of the 1951 Convention. An internal relocation or flight alternative must be safely and legally accessible for the individual concerned. If the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be reasonable. [Footnote]"

Proposed § 40 Further on the reasons for persecution in relation to § 38(1)(a)
UNHCR notes that the proposed § 40 replicates Article 10 of the Qualification Directive. UNHCR notes the Proposal's express intention to incorporate the interpretation of what constitute reasons for persecution as laid down in Article 10 of the Qualification Directive [NOU148]. See UNHCR's Comment on Article 10 in its Annotated Comments to the Qualification Directive, p. 22:

"While the Directive provides some guidance on the interpretation of the Convention grounds, it should in no way be considered to be conclusive or exhaustive. Other elements not outlined in this Article may prove equally relevant. The reasons for persecution are multifarious and may, moreover, change over time. The Convention grounds should therefore be interpreted accordingly."

Proposed § 40(1)(b)
As regards religion-based refugee claims, UNHCR recommends to consult the UNHCR 'Guidelines on International Protection: Religion-Based Refugee Claims within the context of Article 1A(2) of the 1951 Convention', HCR/GIP/04/06, 28 April 2004, as well as the UNHCR Handbook, paragraphs 71-73. As noted in its Annotated Comments to the Qualification Directive (p. 22), in UNHCR's understanding, the freedom to change one's religion is included in the concept of religion or conviction as outlined in Article 10(b) of the Directive. It may give rise to a *sur place* claim.

Proposed § 40(1)(d)

UNHCR notes that the Committee has concluded that in today's Norwegian practice, in particular the two persecution grounds 'political opinion' and 'membership of a particular social group' have been subject to discussions on interpretation [NOU147]. UNHCR notes the express proposal to regularize the definition of 'membership of a particular social group' as laid down in Article 10(d) of the Qualification Directive. According to the Committee, the main reasons for this are the ongoing harmonisation within Europe and the fact that the 'EU-definition is easier to apply than that of UNHCR' [NOU148]. See UNHCR's Comment on Article 10(d) in its Annotated Comments to the Qualification Directive, pp. 23-24:

"In UNHCR's view, the term "social group" should be interpreted in a manner open to the diverse and changing nature of groups in various societies and to evolving international human rights norms. [Footnote] Two main schools of thought as to what constitutes a social group within the meaning of the 1951 Convention are reflected in the Directive. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a cognizable group that sets it apart from the society at large. While the results under the two approaches may frequently converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that [Member States] reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts.

States have recognized women, families, tribes, occupational groups and homosexuals as constituting a particular social group for the purposes of the 1951 Convention. To avoid misinterpretation, UNHCR would encourage [Member States], to provide in their legislation for further examples of groups which can qualify for refugee status, beyond the example of "sexual orientation". Other examples would be gender, age, disability, and health status.

With respect to the provision [in Article 10(1)(d) of the Qualification Directive] that "[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of the article", UNHCR notes that courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1A(2). Gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of being persecuted based on her membership in the particular social group [Footnote].

Even though less has been said in relation to the age dimension in the interpretation and application of international refugee law, the range of potential claims where age is a relevant factor is broad, including forcible or under-age recruitment into military service, (forced) child marriage, female genital mutilation, child trafficking, or child

pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant.

UNHCR encourages States, in cooperation with UNHCR, to adopt guidelines on assessing the asylum applications of women and children [Footnote].”

Proposed § 41 International cooperation regarding the examination of applications for asylum

Proposed § 41(d)
UNHCR notes that the proposed provision stipulates that an application for asylum can be considered as inadmissible in relying on the ‘safe third country’ notion. In UNHCR’s Provisional Comments on the Procedure Directive, UNHCR noted that, since Norway has been included in the Dublin II regime, the ‘safe third country’ concept will no longer be relevant. In this connection, UNHCR noted that ‘none of the remaining countries now at the periphery of the [European] Union could legitimately be considered safe.’ See further UNHCR’s Provisional Comment on the safe third country concept in Article 27 of the Procedure Directive, pp. 35-36:

“As the preamble to the 1951 Convention and a number of Executive Committee Conclusions highlight, refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international co-operation. The primary responsibility to provide protection remains with the State where the claim is lodged. A transfer of responsibility should be envisaged only between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities. By contrast, the ‘safe third country’ notion, as defined in this Directive, rests on a unilateral decision by a State to invoke the responsibility of a third State to examine an asylum claim. Application of this concept should therefore be abandoned in favour of such multilateral agreements which ensure access to effective protection for asylum applicants. […]

If [Member States] nevertheless wish to rely on the ‘safe third country’ notion, the following requirements should be met:

(i) The applicant should be protected against refoulement and be treated in accordance with accepted international standards as outlined, inter alia, in the 1951 Convention – i.e. the third country should be ‘safe’ for the applicant. ‘Safety’ should be ensured under the country’s practice and not just under the formal obligations that it may have assumed (see also comment below on Article 27 (2)(b) and (c)).

(ii) The applicant should have a genuine connection or close links with the third country. This link should be stronger than the link to the State in which asylum is requested, so that it is fair and reasonable that he or she be called upon first to request asylum there. The asylum-seeker should have transited through the State concerned, although mere transit alone would not, in UNHCR’s view, constitute a connection or close link. The intentions of the asylum-seeker as regards the country in which he or she wishes to

request asylum should, as far as possible, be taken into account. Such an approach would also be likely to have a positive impact on the integration of persons who are recognized to be in need of international protection (see comment on Article 27 (2)(a)).

(iii) The third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure. It should also provide access to a durable solution for those recognized to be in need of international protection.

(iv) The provision should permit for exceptions inter alia for separated children and other vulnerable persons."

Proposed § 42 Admittance to put a case on hold
UNHCR is concerned about the proposed introduction of a possibility to postpone (up to one year) the examination of an asylum application lodged by a person originating from a country or region where there is an armed conflict, but where there is 'hope' for (or 'likelihood' of) an imminent end to hostilities and return to a situation of peace and stability [NOU182]. To the extent possible, UNHCR suggests that the conditions for applying this provision, in particular with regard to the interpretation and application of the expression 'at the prospect of a speedy improvement', be made more substantive.

Proposed § 43 Collective protection in the event of a mass influx
UNHCR notes that that the Committee has recommended that the provision on 'collective protection' in the current legislation is maintained in the proposed new law. For a more comprehensive account of UNHCR's position on temporary protection, refer to the 'UNHCR annotated comments on Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof'.

Proposed § 45 Exclusion clauses
UNHCR notes that the Committee has concluded that, in relation to exclusion under Articles 1D and 1E of the 1951 Convention, an alien who would fall under any of these would in any case not meet the criteria for Convention refugee status. These exclusion clauses are, therefore, considered to have no practical application and are not included in the draft law [NOU158]. UNHCR notes that what need to be examined in such cases is nonetheless whether protection is effectively available and accessible, and whether the person can 'return' or go to obtain such protection. With reference to Article 1D, this is particularly problematic, as Article 1D(2) is an additional inclusion article, by which Palestinians would ipso facto be considered refugees, if they cannot return. For further information, UNHCR recommends to consult UNHCR's 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees', 2 October 2002.

With respect to Article 1E, UNHCR again notes that protection must be accessible and effective, and that it cannot be presumed that such persons may not be refugees. However, there is no obligation on States to apply this exclusion clause. For further

information, see UNHCR's 'Note on the Interpretation of Article 1E of the 1951 Convention', 18 October 2001.

Proposed § 45(1)
UNHCR notes that the proposed § 45(1) more or less reproduces the 1951 Convention's exclusion clauses of Article 1F. UNHCR recommends that the proposed language in § 45(1)(b) replicates the precise wording of Article 1F(b), by adding the phrase 'prior to the individual's admission to Norway as a refugee'. It should be noted that 'admission' in this context includes mere physical presence in the country. UNHCR recommends to consult the UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003, and accompanying UNHCR 'Background Note', when interpreting the exclusion clauses. It should be borne in mind that the grounds for exclusion are exhaustively enumerated in the 1951 Convention, and that any deviation from the 1951 Convention text would amount to a reservation which is not permitted as regards Article 1.

Proposed § 45(2)
As far as § 45(2) applies to Convention refugees, UNHCR notes with concern the Committee's express intention to incorporate an interpretation of what constitute grounds for exclusion which goes beyond Article 1F of the 1951 Convention [NOU160]. UNHCR notes with concern that the Proposal introduces substantive modifications to the 1951 Convention's exclusion clauses of Article 1F, by adding the provision of Article 33(2) of the 1951 Convention (exceptions to the *non-refoulement* principle) as a basis for exclusion from refugee status and asylum.

UNHCR notes that § 45(2) draws on Articles 14(4) and (5) (regarding Convention refugees) and 17(1)(d) (regarding persons protected under §38(1)(b)) of the Qualification Directive. UNHCR notes that, while Article 14(4) of the Qualification Directive determines the conditions under which 'the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body' may be revoked, ended or refused (to be renewed), or according to (5) not granted in the first place 'where such a decision has not yet been taken', the Committee considers this as an additional exclusion clause [NOU160]. UNHCR is concerned that mixing two different concepts of the 1951 Convention – the exclusion clauses of Article 1F and the exception to the *non-refoulement* principle in Article 33(2) – runs the risk of violating the 1951 Convention.

UNHCR reminds that the Qualification Directive (in order to meet the strong criticism by UNHCR) does differentiate between 'refugee status' granted according to the 1951 Convention and the 'status' provided according to the Directive. Furthermore, the Directive clarifies in Article 14(6) that the refugee will maintain access to the rights of the 1951 Convention which do not require a legal residence. See UNHCR's Annotated Comments on Article 14(4)-(6), pp. 30-31:

"Under the Convention, the exclusion clauses and the exception to the non-refoulement principle serve different purposes. The rationale of Article 1F which exhaustively

enumerates the grounds for exclusion based on the conduct of the applicant is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refouled. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived as a ground for terminating refugee status (see comments to Article 21 (2-3). Assimilating the exceptions to the non-refoulement principle permitted under Article 33(2) to the exclusion clauses of Article 1 F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to a wrong interpretation of both Convention provisions.

"Status granted to a refugee" is therefore understood to refer to the asylum ("status") granted by the State rather than refugee status in the sense of Article 1A (2) of the 1951 Convention (see comment on Article 2(d)). States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned.

UNHCR further notes that, similarly to the cases under Article 14 (1-3), the burden of proof for establishing that the criteria under Article 14(4) are fulfilled should be on the Member State applying the provision."

Proposed § 45(3)
UNHCR notes that § 45(3) more or less replicates the wording of Article 17 of the Qualification Directive, which UNHCR in its Annotated Comments commented as follows, p. 34:

"Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 12 of the Directive would seem to apply. UNHCR notes, moreover, that [Member States'] obligations under international human rights law with regard to non-refoulement apply in such circumstances, as laid down in Article 21(1) of the Directive."

Proposed § 46 Cessation and revocation of a residence permit granted in accordance with §§ 38 or 43
Firstly, UNHCR notes that the Proposal seems to confuse the legal concepts of cessation (*opphør*) and revocation (*tilbakekall*) and refers to its Annotated Comments on the Qualification Directive, pp. 28-29:

*"**Cessation** refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified.*

Cancellation *means a decision to invalidate a refugee status recognition, which is appropriate where it is subsequently established that the individual should never have been recognized, including in cases where he or she should have been excluded from international refugee protection.* ***Revocation*** *refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in conduct which comes within the scope of Article 1F(a) or (c) of the 1951 Convention after recognition. UNHCR requests states to differentiate between these concepts and their legal requirements in the implementing legislation [Footnote] [Emphases added].”*

Secondly, UNHCR notes the Committee's intention to maintain today's law and practice as regards cessation of refugee status. UNHCR notes that this includes the possibility for a periodic review of the continued need of international protection with implications for an individual's continued residence in Norway [NOU157]. In this context, UNHCR notes that in Norwegian law and practice, refugees are provided with renewable temporary residence permits for a period of three years, after which permanent residence permits may be granted. Considering that a refugee's sense of stability should be preserved as much as possible, UNHCR in its Annotated Comments on the Qualification Directive remarked the following on residence permits, p. 39:

“Refugees require a secure status to be able to achieve self-reliance and to integrate more easily into the society of the host country, including into the labour market. UNHCR therefore suggests that they be granted permanent residency either immediately or, at the latest, following expiry of the initial permit. Similar rights to long-term residence should also be accorded to family members.

Further, UNHCR encourages [Member States] in line with Excom Conclusion No. 69 (XLIII)(1992) to favourably consider requests for renewal or reissuance of the residence permit after the refugee or subsidiary protection status has ceased, and the individual concerned is well integrated in the host country [Footnote].”

§ 46(1)(b)
This provision covers re-availment of national protection. For the interpretation of the provision, see UNHCR's Comment on Article 11(1)(a) in its Annotated Comments on the Qualification Directive, p. 24:

“*UNHCR notes that this cessation provision [voluntary re-availment of national protection] entails three requirements: that the refugee has acted voluntarily; that the refugee had the intention by his or her actions to re-avail him- or herself of the protection of the country of nationality; and that such national protection is available and has been obtained. A clear distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities [Footnote].”*

§ 46(1)(e)
The scope of the proposed § 46(1)(e) should not cover temporary visits to the country responsible of persecution. See UNHCR's Comment on Article 11(1)(d) in its Annotated Comments on the Qualification Directive, p. 25:

"*In line with the UNHCR Handbook, this clause [voluntary re-establishment in the country where persecution was feared] should be understood as return to the country of origin with a view to permanently residing there. A temporary visit by the refugee to his or her former home country would not constitute "re-establishment" and should not necessarily result in loss of refugee status [Footnote].*"

§ 46(2)
UNHCR welcomes the fact that the exception to the 'ceased circumstances' cessation clauses in Articles 1C(5) and (6) of the 1951 Convention relating to 'compelling reasons arising out of previous persecution' has been taken up in the Norwegian law proposal to be interpreted to extend beyond the actual wording of the provision and to apply to the broadened category of refugees as defined in the proposal.

Proposed Chapter 7 Access to residence on strong reasonable grounds

Proposed § 47 Residence permit on strong reasonable grounds
UNHCR notes the Committee's intention to maintain today's possibility to provide residence on humanitarian grounds. UNHCR welcomes the Proposal's clarification that, where the main reason for seeking residence in Norway stems from a need of international protection, the point of departure is to determine the claim for residence within the legal framework for protection [NOU265]. However, the Proposal also appears to provide an interpretation of § 47, which would enable that residence on humanitarian grounds be granted in situations where a mix of both protection and humanitarian reasons are manifest, but where no consideration is predominant [NOU22, 265]. UNHCR is concerned that this interpretation opens up for a discretionary application of asylum on protection grounds. UNHCR urges that the criteria for refugee status be interpreted in such a manner that individuals who fulfil the criteria are so recognised and protected, rather than being treated under the 'humanitarian grounds' scheme. UNHCR notes that there may be mixed reasons, but where there is reason to suppose 'refugeehood', the corresponding rights should be granted.

Proposed § 47(2)
UNHCR notes that the Proposal – as an example of the special circumstances which would constitute the basis for granting a residence permit on humanitarian grounds – refers to the situation of a woman who has been subjected to sexual assault in her home country and who in addition may have to face social consequences ranging from problems with immediate family members to stigmatization or ostracism by the wider community [NOU266]. UNHCR notes with some concern that it is suggested that a claim based on such a situation should lead to the granting of a residence permit on humanitarian grounds [NOU266]. As regards claims based on such gender-specific forms of harm or gender-related persecution, however, UNHCR recommends that Norway consult the UNHCR 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention', HCR/GIP/02/01, 7 May 2002. UNHCR reminds that the refugee definition, properly interpreted, covers gender-related claims and urges that this be reflected in the Norwegian context accordingly. As

also commented on Article 9(2)(f) in UNHCR's Annotated Comments on the Qualification Directive, p. 21:

"UNHCR welcomes the reference to gender-specific… persecution. Even though gender… [is] not specifically referenced in the refugee definition, it has been UNHCR's position that the text, object and purpose of the 1951 Convention require such an interpretation. It is widely accepted that gender… can influence, or dictate, the type of persecution suffered (see also comment on Article 10 (d)) [Footnote]."

Proposed § 47(4)
UNHCR welcomes the reference to the 'best interest of the child' principle enshrined in Article 3 of the Convention on the Rights of the Child. It should always be the basis for any application of provisions concerning children. UNHCR therefore recommends that it be included also in the proposed Chapter 6 concerning any protection considerations. It will be relevant for example in an age-sensitive interpretation of the refugee definition; see UNHCR's comments on Article 9(2)(f) in its Annotated Comments on the Qualification Directive, p. 21:

"UNHCR welcomes the reference to… child-specific persecution. Even though… age [is] not specifically referenced in the refugee definition, it has been UNHCR's position that the text, object and purpose of the 1951 Convention require such an interpretation. It is widely accepted that… age can influence, or dictate, the type of persecution suffered (see also comment on Article 10 (d)) [Footnote]."

Proposed Chapter 11 Absolute protection against return (non-refoulement)

Proposed § 84 Absolute protection against return
UNHCR notes that there are separate provisions on protection against *refoulement* for the two protection categories proposed in § 38 (discussed above). UNHCR notes that this is in line with Norway's obligations under international refugee and human rights law with regard to *non-refoulement*.

Proposed Chapter 13 Rules of administrative procedure
Proposed Part I. General rules of administrative procedure

Proposed § 92 Obligation to provide guidance
UNHCR welcomes this proposed provision, which stipulates that the police shall instruct refugee applicants that they have the right to contact a representative of UNHCR or a Norwegian refugee (nongovernmental) organization. In addition to being duly informed thereof, UNHCR would emphasize that all applicants should be provided with an effective opportunity to communicate with UNHCR (or with any other relevant organization working on behalf of UNHCR).

Furthermore, it should in this context be noted that both the Qualification Directive and the Procedure Directive have explicitly taken UNHCR's general role into account. UNHCR's supervisory responsibility under its Statute generally and pursuant to Article

35 of the 1951 Convention specifically has been acknowledged, as well as its access to asylum applicants (Procedure Directive, p. 26). UNHCR noted in its Annotated Comment on Recital (15) of the Qualification Directive as follows, p. 5:

"UNHCR trusts that States will consult with UNHCR and take its position into account when determining refugee status or complementary/subsidiary protection needs. In this connection, reference is made to the UNHCR Handbook and the UNHCR Guidelines on International Protection [Footnote] as well as to other legal statements of the Office which provide valuable guidance to [Member States]. In addition, UNHCR's positions with respect to specific groups of concern should be taken into consideration."

UNHCR suggests that a reference to UNHCR's legal guidance be included in the draft law.

Proposed § 93 Aliens' obligations to meet in person and provide information
Proposed § 93(2)
UNHCR notes that any alien is obliged to cooperate with the competent authorities in the establishment of his or her identity. UNHCR reminds that there may be limits to what an asylum applicant is able to submit in terms of documentation regarding, for example, identity. Persons in need of international protection may arrive with the barest necessities, and frequently without any documents.

Proposed § 97 DNA testing
UNHCR notes that DNA testing is proposed as a means of establishing family relationships for family reunification purposes. In UNHCR's view, DNA testing should be done with the consent of the refugee and the applicant(s) for reunification with a full explanation of the reasons for such testing. Care should be taken that the results of the tests are used only for the explicit purpose of verification of relationship, and that all relevant confidentiality provisions are observed.

Proposed § 98 Age testing
UNHCR notes the Committee's indication that age testing would be relevant typically in situations, for example, where separated/unaccompanied children are seeking asylum, or where children apply for family reunification [NOU341]. UNHCR commented as follows on Article 15(5) in its Provisional Comments on the Procedure Directive, p. 22:

"It is widely acknowledged that age assessment is subject to a considerable margin of error. UNHCR recommends that the examination be carried out by an independent paediatrician with appropriate expertise. If an age assessment is not conclusive, a person claiming to be a child should be given the benefit of the doubt. Furthermore, it should be explicitly provided in national legislation that persons claiming to be children should be provisionally treated as such, until an age determination has taken place."

Proposed § 101 Enforcement of administrative decisions
Proposed § 101(2)(a)
UNHCR notes that a decision may be enforced before it is final, where the claim for international protection is denied (considered inadmissible) on the basis of, for example,

the ‘first country of asylum’ and/or ‘safe third country’ concepts. See comment in connection with proposed § 101(2)(b), below.

Proposed § 101(2)(b)
UNHCR notes that a decision may also be enforced before it is final where the claim for international protection is considered manifestly unfounded. In practice this implies that the claimant would not have the right to remain in Norway pending the examination of the application [NOU174]. It is unclear to UNHCR what types of application may be categorized as ‘manifestly unfounded’, and it is suggested that these be clearly defined and delimited in law. UNHCR notes that the Proposal indicates that claims deemed to be manifestly unfounded would include those from presumed safe countries of origin [NOU179]. UNHCR notes that in Norwegian practice manifestly unfounded claims are considered in an accelerated (48-hour) procedure. According to the Committee, the 48-hour procedure may result in an appeal being denied suspensive effect [NOU174].

On the right to remain UNHCR commented as follows on Articles 6(2) and 38 (3) in its Provisional Comments on the Procedure Directive, p. 10:

“[Article 6(2)] UNHCR is concerned that the right to remain is limited to the duration of the first instance procedure. To ensure compliance with the principle of non-refoulement, appeals should, in principle, have suspensive effect, and the right to stay should be extended until a final decision is reached on the application. The threat to which refugees are exposed is serious and generally relates to fundamental rights such as life and liberty. In line with Executive Committee Conclusions No. 8 (XXVIII) of 1977 and No. 30 (XXXIV) of 1983, the automatic application of suspensive effect could be waived only where it has been established that the request is manifestly unfounded or clearly abusive. In such cases, a court of law or other independent authority should review and confirm the denial of suspensive effect, based on a review of the facts and the likelihood of success on appeal (see also comment on Article 38) [emphasis added]. […]

[Article 38(3)]… [T]here should be some form of review by a court or other independent body. The review and possible confirmation of denial of suspensive effect should take into account the chances of an appeal. Such a review could be simplified and fast, provided both facts and law are considered. In order to be meaningful, the applicant should always be permitted to stay until that review is completed and a decision taken. UNHCR considers that review prior to removal should be required explicitly. The principle of suspensive effect should otherwise be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of the ‘safe third country’ concept [refer to proposed § 101(2)(a) above] *or in a substantive procedure.”*

Proposed § 103(2) Legal assistance
UNHCR notes with concern that the Committee proposes that free legal assistance is ensured only in the event of a negative decision in the first instance. This is more or less in line with Article 13 of the Procedure Directive. UNHCR notes that *inter alia* claims from separated/unaccompanied children, and cases involving an application of the

exclusion clauses are exempted from this provision. In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex European asylum procedures. See further UNHCR's Provisional Comment on Article 13 in the Procedure Directive, p. 19:

"Asylum-seekers are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified early. The efficiency of first instance procedures is thereby improved. While guaranteeing free legal assistance and representation against negative decisions is a step in the right direction, UNHCR regrets that this is not available in first instance procedures [Emphases added]."

Proposed Part II. Special rules regarding applications for protection (claims for asylum)
Proposed § 104 Timeframe for the application for protection. Information regarding the claim

Proposed § 104(1)
UNHCR notes the proposed requirement that an application for asylum should be submitted 'without unfounded delay'. Failure to submit an asylum request within such delay, according to the Committee, will not lead to the request being excluded from consideration. However, where the applicant is unable to provide valid reasons for the delay it may in the overall consideration of the claim be in his or her disadvantage [NOU180]. In UNHCR's view, failure to apply for asylum promptly may be an element in the consideration of the credibility of a claim. However, it should never be the sole reason for rejecting an application. See also UNHCR's Provisional Comment on Article 7(1) of the Procedure Directive, p. 11:

"In the Office's experience, valid reasons may delay the filing of a claim. They include, for instance, illness, trauma, lack of access to information about the means to apply, the need to consult with a legal counsellor, or cultural sensitivities."

Proposed § 104(4)
UNHCR notes that refugee applicants are obliged to do their best to hand over relevant documents, and to cooperate with the competent authorities in the gathering of necessary information. UNHCR reminds that there may be limits to what the applicants are able to provide in terms of documentation, due to the circumstances of their flight. See further UNHCR's Provisional Comment on Article 9A(2)(b) in the Procedure Directive, p. 14:

"The duty to hand over documentation [should be] restricted to documents asylum-seekers actually have in their possession."

UNHCR, January 2006