

# **NEW ISSUES IN REFUGEE RESEARCH**

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## **Common burdens and standards: legal elements in assessing claims to refugee status**

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## Introduction

The 1951 United Nations Convention relating to the Status of Refugees (hereafter Refugee Convention) does not specify the requirements for refugee status determination procedures, the idea being that state parties to the Refugee Convention would establish appropriate procedures having regard to the particular legal traditions and constitutional and administrative arrangements in their respective country. It should be recalled that at the time the Refugee Convention was adopted fifty years ago, various aspects of law and practice in the administrative law field for example, which is a common framework for refugee determination, were not very well developed.

Since that time international and national legal standards and practices have significantly evolved. Of particular relevance in the refugee context is the development of international human rights law which has found form and application with the adoption of universal and regional human rights treaties and the establishment of enforcement mechanisms<sup>1</sup>. These complementary legal standards and practices have influenced the interpretation of the refugee law and practice. More generally they have informed the corpus of international and comparative jurisprudence which United Nations High Commissioner for Refugees (UNHCR) increasingly looks to in developing its legal doctrine.

Different jurisdictions have developed varied refugee status determination procedures which serve the common objective of deciding on the claim of asylum seekers. Differences of terminology, procedural rules governing the administrative and juridical bases for determining refugee status in European countries and, more generally, differences between common and civil law traditions, adds to the difficulty of proposing international standards for assessing refugee status. Despite these differences it is apparent that harmonised procedural guarantees and interpretation of refugee law are generally desirable.

In short, a common understanding and interpretation of the key aspects of refugee status determination would help avoid disparate interpretation of international standards<sup>2</sup>, first and foremost, and by consequence would result in more consistent

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<sup>1</sup> The UNHCR paper on 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', has noted that that preamble of the Refugee Convention "contains strong human rights language". The paper notes that the drafters of the Convention support that it was their aim "to incorporate human rights values in the *identification* and treatment of refugees ....", UNHCR Geneva, April 2001, at para 4.

<sup>2</sup> In the UK House of Lords decision of *Regina v Secretary of State for the Home Department, Ex Parte Adan, Regina v Secretary of State for the Home Department, Ex Parte Aitseguer*, Judgements of 19 Dec 2000, at <http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldjudgmt/jd001219/adan-2.htm>, Lord Steyn, in what is destined to become a oft-quoted passage concluded that: "It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 (of the 1969 Vienna Treaty Convention) and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal

recognition and treatment of refugees and asylum seekers. To this end common standards and approaches on refugee law and procedure are, slowly but surely, being promoted within the framework of the European Union (EU)<sup>3</sup>.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter Handbook) has noted the “unlikelihood that all states bound by the 1951 Convention and the 1967 Protocol could establish identical procedures” (para 192). The Handbook nonetheless highlights that “determination of refugee status, which is closely related to questions of asylum and admission, is of concern to [UNHCR]” (para 194). It should be recognised that in some countries UNHCR either undertakes refugee status determination under its Statute or is a party of the national determination procedure.

The Handbook, which was originally prepared by UNHCR in 1979 at the request of state parties to the Refugee Convention to assist them in applying the Convention, has been criticised by some commentators for not articulating very clear standards. Regardless of any apparent shortcomings, and the fact that since 1979 there has been a boon of developments in refugee law, the Handbook has been recognised by some courts<sup>4</sup> as playing a useful role in interpreting the refugee definition and related procedural requirements. More recent developments deriving from international and national jurisprudence in addition to UNHCR policy papers and guidelines have added to our common understanding of refugee law<sup>5</sup>.

An aspect of refugee law which seems to have been largely ignored in the academic literature is how to deal with evidentiary questions. This paper will look at the basic aspects of evidence which are employed in refugee status determination. As part of this effort the concepts of ‘burden’ and ‘standard’ of proof as well as ‘benefit of the doubt’

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culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.” (at para 68)

<sup>3</sup> The EU Presidency Conclusions from the Tampere Summit of October 1999 reaffirm the importance of the Union and Member states to “absolute respect of the right to seek asylum” and to “agree to work towards establishing a Common European Asylum System, based on the full and inclusive application of the (1951 Refugee Convention), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*.” The Conclusions note that “this System should include, in the short term, a clear and workable determination of the state responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status ....” (Tampere Summit Presidency Conclusions, paras 13 & 14)

<sup>4</sup> In the 19 December 2000 UK House of Lords decision in *Regina v Secretary of State for the Home Department, ex parte Adan*, Lord Justice Steyn opined that: “Under articles 35 and 36 of the (1951 Refugee) Convention, and under article II of the Protocol of 1967, the UNHCR plays a critical role in the application of the Refugee Convention: compare the Statute of the Office of the UNHCR, General Assembly Resolution 428(V) of 14 December 1950, para. 8. Contracting states are obliged to cooperate with UNHCR. *It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals ....*” (emphasis added)

<sup>5</sup> See note 1 *supra*. Also see, for example, UNHCR ‘Note on Burden and Standard of Proof in Refugee Claims’ of 16 December 1998 and ‘An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR’, UNHCR European Series, Regional Bureau for Europe, September 1995, as well as the expert papers, conclusions and in particular the UNHCR Guidelines on International Protection which have developed out of the UNHCR Global Consultations process and which are intended to complement and update the understandings in the Handbook. Available at [www.unhcr.org](http://www.unhcr.org).

and assessing ‘credibility’ will be defined. Differences in common and civil law traditions will be addressed in relation to some of these concepts and UNHCR’s pronouncements on these evidentiary questions will be surveyed.

A central argument put forward in this paper is that the humanitarian nature of international refugee law and the obligation of states to make good on the protection of refugees *a fortiori* requires that the refugee definition and determination procedures should be interpreted and applied in a liberal manner. Said another way, evidentiary standards in the refugee context should not be interpreted too strictly. In this connection Hathaway has noted that:

... (T)he concept of persecution should be *interpreted and applied* liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted ... (A)ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments”.<sup>6</sup>

If we accept that the concept of ‘persecution’ should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high of a standard in order for a victim of persecution to *prove* his or her claim. Indeed, Hathaway, who is a proponent of the approach that decision-makers in refugee matters need only concern themselves with the *objective risk* of being persecuted<sup>7</sup>, has floated the idea that “an individual can be untruthful and still be a Convention refugee”. In support of this seemingly odd comment he described the following scenario:

Take for example a case in which the decision-maker is satisfied of the identity of the claimant, and has adequate documentary evidence that persons of the claimant’s description face a well-founded fear of being persecuted. In such circumstances, no further evidence is required to recognise the refugee claim. If the applicant fails to testify truthfully – or indeed, to testify at all – then the decision-maker is left only with the documentary evidence as the basis for assessing the well-foundedness of the claim. But if that documentary evidence is in fact sufficient to make the case for a real chance or serious possibility of being persecuted, the fact of the applicant’s

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<sup>6</sup> See ‘Understanding Refugee Protection as Human Rights Protection’, James C Hathaway, Paper presented at EU Presidency Seminar entitled ‘International Protection within One Single Asylum Procedure’ organised by the Swedish Migration Board, the EU Commission and the US Department of State, Norrköping, 23-24 April 2001. The paper is reproduced in the Report from the Seminar published by the Migration Board.

<sup>7</sup> This approach was also adopted by Professor Atle Grahl-Madsen in his treatise *The Status of Refugees in International Law* (1966), whereby he noted that: “ ‘Fear’ is, generally speaking, a subjective condition, a state of mind ... The adjective ‘well-founded’ suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugee, but that this claim should be measured by a more objective yardstick ... In fact, the frame of mind of the individual hardly matters at all. Every person claiming ... to be a refugee has ‘fear’ of being persecuted ... irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all the hazards, or is simply apathetic or even unconscious of the possible dangers.”, at pp 173-174.

false statements does not negate the reality of the risk faced, and refugee status should be recognised.<sup>8</sup>

No one is suggesting that dishonesty be encouraged. Dishonesty is, however, sometimes explicable, especially in cases “when bad advice is received from traffickers or others viewed by an asylum-seeker as experts; when fear of return drives an asylum seeker to embroider his or her real story; or when decision makers appear to attach weight to matters such as travel routes which are, in truth, substantively irrelevant to qualification for refugee status”.<sup>9</sup> The following discussion will look more closely at what is meant by evidentiary terms used in refugee law.

### **Legal terminology**

In the refugee context, the terms ‘burden of proof’ and ‘standard of proof’ are used in the law of evidence in common law countries. In those common law countries which have adopted sophisticated systems for adjudicating refugee claims, legal arguments may revolve around whether the applicant has met the requisite evidentiary standard or degree of proof for demonstrating that he or she is a refugee.

While the question of the *burden of proof* is also a relevant consideration in countries with legal systems based on civil law, the application of the *standard of proof* generally does not arise in the same manner as in common law jurisdictions. By comparison, the principle applicable in civil law systems is that of *liberté de la preuve* (freedom of proof) or ‘free assessment of the evidence’ according to which the evidence produced to prove the facts alleged by the claimant must create in the decision-maker the *intime conviction* (deep conviction) that the allegations are truthful.

While the above common law terms have technical meanings and are of particular relevance in certain countries, these evidentiary standards have been widely used in the substantiation of refugee claims including in the practice of UNHCR. However, the application of the concepts of burden and standard of proof may vary according to the different aspects of the refugee procedure being undertaken. For example, the standard of proof for excluding someone from refugee status or the level of proof required to determine that an individual has a *prima facie* refugee claim differs from inclusion considerations. The focus in this paper will be solely on the inclusion aspects of refugee determination.

### **Burden of proof: a shared responsibility**

It is normally considered that the burden of proof, or the obligation to prove a claim or allegation, lies with the applicant. In addition to the general duty to tell the truth and co-operate with the decision-making authority a refugee applicant should be provided a reasonable opportunity to present evidence to support his or her claim. A refugee claimant must therefore make reasonable efforts to establish the truthfulness of his or her allegations and the accuracy of the facts on which the claim is based.

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<sup>8</sup> Hathaway *op cit.*

<sup>9</sup> *Ibid.*

In view of the particular nature of the refugee situation and the vulnerability of some asylum seekers, the decision-maker must share the duty to ascertain and evaluate all the relevant facts. Reference to relevant country of origin and human rights information by the decision maker will assist in assessing the objective situation in an applicant's country of origin.

In recent years UNHCR as well as a number of states and non-governmental organisations have made significant advances in compiling and disseminating country of origin and related human rights information.<sup>10</sup> Seeking and referring to such information in refugee status determination proceedings should be considered an essential undertaking by the decision-maker towards satisfying the shared responsibility of the burden of proof.

The Handbook acknowledges that evidentiary requirements should not be applied too strictly "in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself." (para 197) Although the burden of proof is discharged by the applicant through providing evidence, in the end the only available evidence may be an applicant's oral testimony. In addition to an applicant's individual testimony, other evidence such as documents or the testimony of witnesses who have expertise on relevant country conditions may be considered as part of the determination procedure.

In some national procedures, decision-makers commonly make use of sources of information which are not available to a refugee applicant including reports from diplomatic missions or fellow governments, or even in some cases reports from security intelligence agencies.

Administrative law principles of natural justice and fairness provide that an applicant normally be permitted to know what evidence is being relied upon to reach a decision. The use of internal reports by decision-makers without providing the asylum applicant or his or her legal counsel disclosure of such information may actually prejudice an applicant, as they would be unable to refute the evidence or provide a full and informed explanation in case of perceived discrepancies.

### **Assessing evidence and the link to credibility**

The 1995 UNHCR European Series publication entitled 'An Overview of Protection Issues in Western Europe' notes that:

- in the refugee context, given the potential seriousness of an erroneous negative decision and because objective evidence will frequently be unavailable or

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<sup>10</sup> The UNHCR REFWORLD CD-ROM contains country of origin information including national legislation, case law, human rights reports and replies to queries on specific practices of states. The CD-ROM version of REFWORLD contains the full text of documents, but information is also available on the public website: <[www.unhcr.org](http://www.unhcr.org)> . A special issue of *Refugee Survey Quarterly*, vol 16 (1997), Oxford University Press contains an extensive list of websites providing legal and country of origin information. Needless to say, country of origin and human rights information available via the world wide web is growing at an enormous pace.

inaccessible, assessing whether the applicant has proved a ‘well founded fear’ should be approached flexibly, in particular where;

- the fear which is the subject of an asylum claim relates to *sur place* or a future possibility and therefore is not capable of being demonstrated in the present;
- the circumstances of sudden and often clandestine flight and travel make it difficult or impossible to provide documentary evidence;
- the existence of fear and/or trauma following persecution and flight results in gaps or inconsistencies in the testimony;
- refugees cannot return to their country of origin, and enormous risks and difficulties are associated with obtaining original documentary evidence.<sup>11</sup>

The Resolution on Minimum Guarantees for Asylum Procedures<sup>12</sup> which was adopted by the EU Council of Ministers in 1995, has noted that “when examining an application for asylum the competent authority must *ex officio* take into consideration and seek to establish all relevant facts and give the applicant the opportunity to present a substantial description of the circumstances of the case and to prove them”.<sup>13</sup>

As noted above, in order to discharge the burden of proof the applicant must make sincere attempts to access and present all the relevant facts and circumstances of his or her case. The Resolution on Minimum Guarantees explicitly states that recognition of refugee status is not dependent on the production of any particular formal evidence. Even in the case of undocumented claims where the evidence is solely based on an applicant’s oral testimony, notwithstanding the inability to prove all the elements of the asylum claim, if an applicant’s statements are coherent, plausible, consistent and thereby credible it would be proper to grant the applicant ‘the benefit of the doubt’.

In assessing the evidence presented, which is of key importance in assessing an applicant’s credibility, the decision-maker must consider *all of the evidence*, both oral and documentary. Furthermore, the evidence must be assessed as a whole and not just in parts in isolation from the rest of the evidence. The decision-maker would be correct, however, to place greater weight on evidence that is directly relevant to the issues being addressed as some evidence may be more material to the refugee claim.

If there are inconsistencies or exaggerations in the evidence presented, the decision-maker must go on to assess those aspects of the evidence which are found to be credible to determine if they support the claim to refugee status in its totality. The rejection of some, and in some cases even substantial, evidence on account of lack of credibility does not necessarily lead to rejection of the refugee claim. The claim must

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<sup>11</sup> ‘An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR’ (hereafter ‘UNHCR Overview’), *op cit*, European Series, Vol 1, No 3, Geneva, September 1995, at p 33. This document is available on the UNHCR REF WORLD CD-ROM.

<sup>12</sup> Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, T.12 Official Journal C274, 19/09/1996 p. 0013-0017 (EUDOR) 396Y0919(05). Also see the Commission commentary prepared on the Resolution on Minimum Guarantees for Asylum Procedures dated 21 June 1995, document ref: OJ No. C274, 19.09.1996, p 13.

<sup>13</sup> ‘UNHCR Overview’, *op cit*.

still be assessed on the basis of the information that was found to be truthful, including documentary and other evidence relevant to the applicant's situation including as required persons who are similarly situated.<sup>14</sup> If aspects of a claim are in doubt, the applicant should be provided a reasonable opportunity to present further evidence in order to clarify any aspects which the decision-maker deems not credible.

Other considerations may come into play in assessing the evidence of children or persons suffering from mental or emotional disorders. In order to ensure that the *best interests* of a separated asylum-seeking child are taken into account, for example, a designated legal representative should be appointed to help the child through the determination proceeding.<sup>15</sup> Factors to consider in assessing the evidence of children include: a child's age at the time of the events; the time that has elapsed since the events; level of education; ability to understand and relate his or her experiences; understanding of the need to tell the truth; capacity to recall certain events and capacity to communicate intelligibly or in a form capable of being rendered intelligible.<sup>16</sup>

A minor refugee applicant may have difficulty recounting the events that led him or her to flee, and often the child's parents will not share distressing events with the intention of protecting the child. As a result a child's testimony may appear vague and uninformed about key events which are relevant to the claim of persecution. It is therefore essential when assessing the credibility of a minor applicant, that the child's sources of knowledge and his or her maturity and intelligence be taken into account. The seriousness of the persecution alleged must also be considered to determine whether past events have traumatised the child and hindered his or her ability to recount certain details.

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<sup>14</sup> An example of a refugee claim where the situation of 'persons similarly situated' would be a relevant consideration is where the claim is based on an individual's 'membership of a particular social group'. A 1998 decision of the Refugee Division of the Immigration and Refugee Board (IRB) of Canada is illustrative of this approach in assessing the standard of proof required to satisfy a well-founded fear of persecution. The case concerned a claimant who was a homosexual of Iranian nationality. The Board summarised its decision as follows:

"... Even though there was evidence that very few homosexuals have in fact been tried, sentenced or executed in Iran, the possibility of abuse of power by the authorities to humiliate and abuse homosexuals existed. It was not reasonable to ask the claimant to be discreet in his homosexuality, as his sexual orientation was a basic human right ... Considering country conditions in Iran, the arbitrariness with which authority is exercised in Iran, and the aversion to western lifestyles (which the claimant, by virtue of his open homosexuality, would be perceived as exhibiting), *there was more than a mere possibility that the claimant would be persecuted if he returned to Iran.*"(emphasis added)

Decision CRDD V96-03502 of 7 August 1998, reported in the REFLEX case law database on the IRB website at: <<http://www.irb.gc.ca>>

<sup>15</sup> See 'Separated Children in Europe Programme: Statement of Good Practice', (2<sup>nd</sup> ed, October 2000), which is a statement of protection principles for separated children jointly prepared by the International Save the Children Alliance in Europe and UNHCR. Also see the Immigration and Refugee Board (IRB) of Canada guidelines on 'Child Refugee Claimants: Procedural and Evidentiary Issues, IRB Ottawa, 30 September 1996, available at: <[www.irb.gc.ca](http://www.irb.gc.ca)>.

<sup>16</sup> The 'Statement of Good Practice' notes: "It is desirable, particularly for younger children or children with a disability, that an independent expert person carry out an assessment of the child's ability to articulate a well-founded fear of persecution ... Where interviews are required they should be carried out in a child-friendly manner (breaks, non-threatening atmosphere) by officers trained in interviewing children. Children should always be accompanied at each interview by their legal representative and, where the child so desires, by a significant adult (social worker, relative etc) ...." (at paras 11.4 & 11.5)

Persons who have suffered trauma or are suffering from mental or emotional disorders also require special care. The Handbook suggests that in such cases, whenever possible, the examiner should obtain expert medical advice.

The Handbook further recommends that a medical report should provide information on the nature and degree of mental illness and assess the applicant's ability to fulfil the requirements normally expected of an asylum seeker in presenting his or her case. The Handbook proposes that the decision-maker "lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant ... it may also be necessary to draw certain conclusions from the surrounding circumstances." (para 210)<sup>17</sup>

Female asylum seekers may also experience particular problems in providing evidence and thereby supporting the credibility of their refugee claim when they are not given access to the determination process independently from their husbands or male relatives. In some cases women may experience problems in obtaining travel documents prior to their flight, which may lead to undermining their credibility. Similarly, women from certain cultures where men do not share the details of their political, military or social activities with their female partners or family members may find themselves in a difficult situation when questioned about the experiences of their relatives.<sup>18</sup>

### **The benefit of the doubt**

The UNHCR Handbook provides the following guidance on when it is warranted to grant a refugee applicant the 'benefit of the doubt'. The relevant excerpts are:

196. 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 [or her] statements by documentary or other proof, and cases in which an applicant can provide evidence of all his [or her] statements will be the exception rather than the rule ... Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt.

203. After the applicant has made a genuine effort to substantiate his [or her] story there may still be a lack of evidence for some of his [or

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<sup>17</sup> See also UNHCR Training Module 'Interviewing Applicants for Refugee Status', Geneva, 1995, Chapter 5 'Interviewing Children' and Appendix 2 'Excerpt from UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence', available on the UNHCR REF WORLD CD-ROM.

<sup>18</sup> See IRB Guidelines on 'Women Refugee Claimants Fearing Gender-Related Persecution: Update' IRB Ottawa, 13 November 1996. Similar guidelines have also been developed in the UK, Australia, Sweden and the USA. A European Parliament Resolution of 14 November 1996 also urged all member states to adopt guidelines on women asylum seekers as agreed by the UNHCR Executive Committee. For a comprehensive study of gender issues and refugee status determination see *Refugees and Gender: Law and Process*, by Heaven Crawley, Jordan Publishing Limited, UK, 2001.

her] statements. As explained above (para 196), it is hardly possible for a refugee to “prove” every part of his [or her] case, and indeed, if this were a requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.

The application of the benefit of the doubt has been widely adopted in national determination procedures and as part of UNHCR’s practices in the field. It is worth emphasising that a key element in its proper use is to ensure that the applicant is deemed credible. Given the difficulty or impossibility in establishing all the facts of a refugee claim, and in consideration that the claim presented satisfies the refugee definition, then the benefit of the doubt may be properly exercised provided a certain credibility threshold is met.

### **The standard of proof**

In considering an applicant’s responsibility to prove facts in support of his or her refugee claim, the term ‘standard of proof’ means the threshold to be met by the claimant in persuading the decision-maker of the truth of his or her factual assertions.

Facts which need to be ‘proved’ are those which concern the background and personal experiences of the applicant which purportedly give rise to fear of persecution and the unwillingness to avail him or herself of the protection of the authorities in the country of origin. In this sense there must be a well-founded fear of persecution which has caused the applicant to flee their country of origin or residence. The applicant’s fear must be genuine and this is assessed in the light of his or her personal situation and background, as well as the evidence presented and the situation in the country of origin.

The refugee definition requires that a fear of persecution must be well-founded, but this does not mean there must have been actual persecution. The *travaux préparatoires* to the 1951 Refugee Convention supports this approach. The drafting group’s explanatory note on the refugee definition provides that an applicant:

(M)ust prove that he or she has either actually been a victim of persecution or can show ‘good reason’ why they, he or she fears persecution. It is generally accepted that the 1951 Refugee Convention does not require a causal relationship between persecution and flight. Thus, if the reasons to fear persecution have occurred after the applicant had already left the country (e.g. in case

of a change of regime), the granting of refugee status due to those “post flight reasons” is nevertheless justified.<sup>19</sup>

In the UK House of Lords decision of *Sivakumaran*<sup>20</sup>, it was established that the appropriate test to determine whether an applicant’s fear was well-founded was if there is a “reasonable chance”, “substantial grounds for thinking” or a “serious possibility” of the feared event occurring. The applied test was intended to be a lesser standard than the civil standard of balance of probabilities. The test for well-foundedness was further clarified by the Canadian Federal Court of Appeal in the case of *Ponniah*<sup>21</sup>, where Mr Justice Desjardins stated that:

‘Good grounds’ or ‘reasonable chance’ (of persecution) is defined in *Adjei*<sup>22</sup> as occupying the field between upper and lower limits; it is less than a 50 per cent chance (i.e. a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is ‘good grounds’.

The US Supreme Court has also articulated the test of well-foundedness in the leading case of *INS v Cardoza-Fonseca*<sup>23</sup>, which rejected the traditional “balance of probabilities” standard in favour of the more generous “reasonable probability” test. The Court stated:

There is simply no room in the United Nations definition for concluding that because an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening ... (A) moderate interpretation of the ‘well-founded fear standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a *reasonable possibility*<sup>24</sup>. (emphasis added)

The UNHCR Overview of Protection Issues in Western Europe also cites the example of the German Federal Constitutional Court which has ruled in a number of cases that there “should be a ‘considerable likelihood’ that the applicant would be exposed to persecution on return. However, according to the Court, ‘considerable likelihood’ of

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<sup>19</sup> ‘UNHCR Overview’, at pp 34-35.

<sup>20</sup> *Regina v Secretary for the Home Department, ex parte Sivakumaran*, (1988) 1 All England Reports 193. In the decision Lord Keith of Kinkel also cited with approval the US Supreme Court test in *INS v Cardoza-Fonseca*, 467 US 407 (1987) noted as follows: “In my opinion the requirement that an applicant’s fear of persecution should be well-founded means that there has to be demonstrated a *reasonable degree of likelihood* that he will be persecuted for a Convention reason if returned to his own country.” (emphasis added, at pp 197-198). A similar formulation is found in the UNHCR Handbook, at para 42, which states: “In general, *the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable for him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.*”

<sup>21</sup> *Ponniah, Manoharan v MEI* (Federal Court of Appeal, No. A-345-89), Heald, Hugessen, Desjardins, 16 May 1991, reported in 13 Imm. Law Reports (2<sup>nd</sup>) 241 (FCA), at 245.

<sup>22</sup> *Joseph Adjei v Minister of Employment and Immigration* (1989), 57 Dominion Law Reports (DLR) (4<sup>th</sup>) 153.

<sup>23</sup> 467 U.S. 407 (1987).

<sup>24</sup> *Ibid*, at 453, per Stevens J.

persecution exists even if the chances of persecution actually occurring are less than 50%. The important element is rather whether there are sufficient objective elements that would make a reasonable thinking person fear persecution".<sup>25</sup>

By comparison, the Nordic countries appear to place a relatively high standard of proof on the applicant. It must be recognised that the overall grant of Refugee Convention and subsidiary protection status in the Nordic countries is very generous.

As reported in the annual publication of the UNHCR Headquarters Population Data Unit, in recent years the Refugee Convention recognition rate in Denmark has been between 15-17%, while the average Refugee Convention rates in the other Nordic countries is between 1-2%.<sup>26</sup> Whether the low Refugee Convention recognition rate in some of the Nordic countries has anything to do with what is perceived to be a higher demand of 'standard of proof' is a relevant consideration.

In common law countries the law of evidence relating to criminal prosecutions requires cases to be proved by the state 'beyond a reasonable doubt'. In civil cases, the law does not require such a high standard; rather the decision-maker has to decide the case on a 'balance of probabilities'. For refugee claims, there is no necessity for the decision-maker to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The decision-maker needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, there is a 'reasonable likelihood' or 'good reason' that the claimant has a well-founded fear of persecution.

UNHCR favours the more generous test of 'standard of proof' as developed in some common law countries as the correct approach.<sup>27</sup> The flexibility which the decision-maker must take into account in assessing evidence on a refugee application, as well as the concern that placing too high an evidentiary burden on refugee applicants is inconsistent with the humanitarian nature of refugee law, supports the view that the standard of proof is satisfied if an applicant has demonstrated a 'serious possibility',

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<sup>25</sup> 'UNHCR Overview', at p 35.

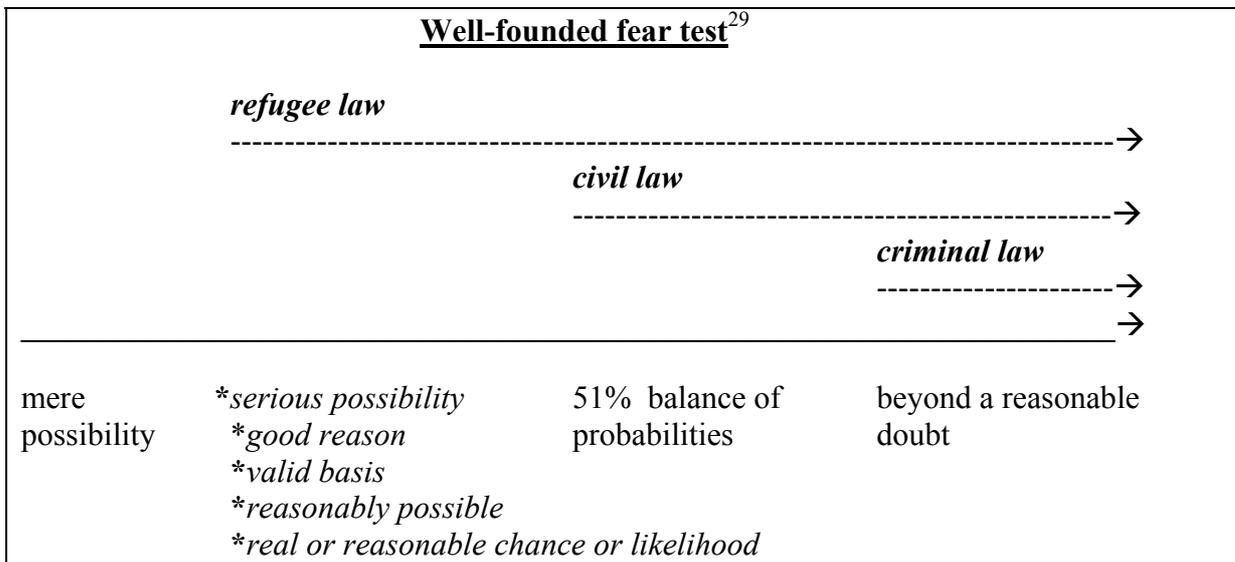
<sup>26</sup> *Trends in Asylum Decisions in 38 Countries, 1999-2000*, UNHCR Population Data Unit, Geneva, 22 June 2001, at pp 2-4, available at: < [www.unhcr.org](http://www.unhcr.org) >

<sup>27</sup> The 'UNHCR Overview' under the sub-heading 'Standard of Proof' provides that:

"The applicant has to show 'good reason' to fear persecution and that the fear is reasonable and plausible, based on an objective evaluation of the situation in the country of origin. The general civil standard in law, the balance of probabilities, is too strict in that it is difficult for an applicant to establish that persecution will 'probably' take place. In addition the possible repercussions of an erroneous decision renders such a level of proof inappropriate. *It is sufficient for him (or her) to show that his (or her) fear in this connection is a reasonable one.* If the asylum seeker satisfies this test, s/he should be considered a refugee even if s/he is unable to prove his (or her) case in full. S/he should be given the benefit of the doubt, subject of course to also satisfying the test of credibility."(emphasis added, at p 36)

The UNHCR paper on 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', *op cit*, citing the December 1998 UNHCR *Note on Burden and Standard of Proof in Asylum Claims*, has employed slightly different language as follows: "The standard of proof for establishing a well-founded fear of persecution has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters. It is generally agreed that persecution must be provided to be "reasonably possible" in order to be well-founded."(emphasis added, at p 3). See also UNHCR Training Module 'Interviewing Applicants for Refugee Status', *op cit*, at Chapter 6.

‘good reason’, ‘valid basis’ or ‘real or reasonable chance or likelihood’ of persecution<sup>28</sup>. The following illustration portrays these different standards:



### Credibility

Credibility is a key factor in establishing the validity of the refugee claim. The overall credibility of an applicant’s claim to refugee status is normally assessed by examining a number of factors including: the reasonableness of the facts alleged; the overall consistency and coherence of the applicant’s story; corroborative evidence adduced by the applicant in support of his or her statements; consistency with common knowledge or generally known facts; and the known situation in the country of origin. The applicant’s demeanour or behaviour may also be a relevant consideration.

Credibility is established where the applicant has presented a claim that is coherent and plausible and does not contradict generally known facts and is therefore, on balance, capable of being believed. There are a number of factors that may tend to place credibility in doubt. As noted in the UNHCR Overview, factors reducing credibility may include that: the applicant has withheld information, personal history data or submitted new information in a second interview; the applicant is unwilling to supply information; the behaviour of the applicant is inappropriate; the applicant has deliberately destroyed his passport or other documentation; the professed inability of the applicant to name the transit countries through which he or she has travelled.<sup>30</sup>

<sup>28</sup> The introduction to the December 1998 UNHCR ‘Note on Burden and Standard of Proof in Refugee Claims’ suggests that: “In examining refugee claims, the particular situation of asylum seekers should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian. On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood. Nonetheless, not all levels of likelihood can be sufficient to give rise to refugee status. A key question is whether the degree of likelihood which has to be shown by the applicant to qualify for refugee status has been established.”

<sup>29</sup> The illustration has been adapted from training materials prepared by Richard Stainsby, Director General, Professional Development Branch, IRB Canada, as presented at the Summer Course on Refugee Issues, Centre for Refugee Studies, York University, Toronto, June 1997.

<sup>30</sup> ‘UNHCR Overview’, at p 35.

However, these factors may be capable of rational explanation and should be assessed in each individual case in the broader context of refugee status determination. This requires that an asylum seeker be provided a sufficient opportunity to explain or help clarify any aspects of the claim which a decision-maker finds doubtful or simply not credible.

A number of national authorities are particularly strict when assessing an applicant's credibility. Even inconsistencies which are not central or material to the basis of the refugee claim may be considered as grounds for rejection. For example, some countries place great emphasis on an applicant's travel route when considering credibility or determining whether a third country may be considered responsible for assessing a particular refugee claim.

Given the extensive legislative and other measures states have in place in order to 'legally' access European territory, it is not surprising that many genuine asylum seekers would be obliged to resort to illegal or irregular means to enter a country.<sup>31</sup> Inconsistencies concerning a person's travel route may then be offered in order to protect the identity of the individuals who provided assistance, or to safeguard the travel route for future asylum seekers or to avoid return to a third country.

A more balanced analysis may be achieved by focusing on contradictions or discrepancies that are of a significant or serious nature. Inconsistencies, misrepresentations or concealment of certain facts should not lead to a rejection of the asylum application where they are not material to the refugee claim. Where an applicant is found to be lying and the mistruth is material to the claim, then it is necessary for the decision-maker to take this into account in light of the entire body of evidence to be assessed and decided upon.

Contradictions or inconsistencies should relate to the fundamental or critical aspects of the claim to be deemed to undermine an applicant's credibility. Rejecting a claim based solely on the non-credibility of marginal issues (e.g. delays in applying for refugee status), without evaluating the credibility of the evidence concerning the substance of the claim, is not a desirable practice. On the other hand, just as an applicant may be able to show on cumulative grounds that he or she has a well-founded fear of persecution, a series of discrepancies and contradictions taken individually which may appear insignificant, when considered together may support a finding of lack of credibility.

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<sup>31</sup> See Gregor Noll, *Negotiating Asylum*, Chapter 5 on 'Access to Territory under the EU Acquis', Martinus Nijhoff Publishers, 2000. A study by John Morrison sums up the problem as follows: "Although there is a growing body of work that looks at the phenomenon of human trafficking from a human rights perspective, very little has raised the question of refugee protection and the fact that *for many asylum-seekers, clandestine entry now represents the only way of claiming asylum in Europe, in particular the countries of the European Union* ... There is nothing particularly new about the trafficking or smuggling of refugees as the war time activities of Raoul Wallenberg or Oscar Schindler testify ....", 'The Policy Implications Arising from the Trafficking and Smuggling of Refugees into Europe', presented at the European Conference 'Children First and Foremost – Policies towards Separated Children in Europe', 21-22 September 2000 at Save the Children Sweden in cooperation with UNHCR.

## Relevant considerations under the UN Convention against Torture

A further element that may arise in assessing the credibility of a refugee applicant is the behaviour of victims of torture or trauma. In a number of decisions taken by the UN Committee against Torture (CAT)<sup>32</sup> in cases of rejected asylum seekers, the Committee has stated that torture survivors may be unable to provide exact details about elements of their refugee claims. Furthermore, the memory of individuals who are under stress or have suffered harm or are fearful of expressing themselves to a person in authority can play a crucial role in an applicant's inability to provide testimony which is consistent and coherent.<sup>33</sup>

Although the scope of the protection granted to persons fearing 'torture' in their country of origin or any other territory to which they could be returned is considerably broader under article 3 of the Torture Convention<sup>34</sup> than under article 33 of the 1951 Refugee Convention<sup>35</sup>, the decision of the Committee in the case of an Iranian woman seeking asylum is particularly instructive<sup>36</sup>.

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<sup>32</sup> The Committee against Torture, established under article 17 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA resolution 39/46 of 10 December 1984), took up its duties in January 1988. The Committee is composed of 10 expert members who are elected by state parties to the Convention for four-year terms. The Committee meets two times a year in Geneva. Its sessions can last three weeks and its functions are to examine state party reports, raise issues of concern and make observations and recommendations; review states and individual complaints in respect of states which have made declarations under articles 21 and 22; and conduct confidential inquiries where reliable information about the systematic practice of torture in a state party is received pursuant to its authority under article 20.

<sup>33</sup> CAT Communication No. 41/1996 concerned an activist of a Zairean opposition party who claimed to have been arrested by government security forces, detained for one year without trial, raped more than ten times and subjected to torture. The concerned authorities rejected Ms Kisoki's asylum request in a final decision, noting contradictions and inconsistencies in her story. In reaching its decision the authorities argued that country conditions had changed to a sufficient degree to permit Ms Kisoki to return to her country of origin. In its decision on the individual complaint the Committee against Torture acknowledged that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims". The Committee also referred to the position of UNHCR that country conditions indicated that persons who have a high profile continue to be at risk of persecution in the former Zaire.

<sup>34</sup> Article 3 of the 1984 Convention against Torture declares that: No state party shall expel, return (*refouler*) or extradite a person to another state where there are *substantial grounds for believing* that he (or she) would be in danger of being subjected to torture ... For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights. (emphasis added)

<sup>35</sup> Article 33 of the 1951 Refugee Convention prohibits the expulsion or return (*refoulement*) of a refugee in the following terms:

1. No Contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his (or her) life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he (or she) is, or who, having been convicted by a final judgement of a particularly serious offence, constitutes a danger to the community of that country.

<sup>36</sup> UN Committee against Torture Communication No. 149/1999. The full text of this and other decisions of the Committee as well as its general comment no. 1 of 27 November 1997 on the 'Implementation of article 3' are available at: <[www.unhcr.ch](http://www.unhcr.ch)>

CAT communication no. 149/1999 concerned an Iranian asylum seeker who claimed a fear of torture if returned to Iran. The applicant's asylum claim had been rejected by the concerned authorities based on her general lack of credibility as she *inter alia* reportedly failed to provide sufficient evidence which could be checked and verified, presumably in the country of origin. In reaching its decision the Committee noted that the applicant was the widow of a martyr, her deceased husband having been a high ranking official in the Iranian air force. The Committee further noted that the applicant claimed she was forced into a *sighe* or *mutah* marriage (i.e. a short-term marriage). The applicant's son who was seeking asylum in another European country also provided evidence which, in the Committee's view, assisted in corroborating her story.

An important aspect of the Committee's decision concerned the burden and standard of proof the applicant had to meet. In a key passage of the decision, the Committee commented as follows:

...the state party ... questions the author's credibility primarily based on her failure to submit controllable information and the reference in this context to international standards, i.e. UNHCR's Handbook, according to which an asylum seeker has an obligation to make an effort to support his (or her) statements by any available evidence and give a satisfactory explanation for any lack of evidence. The Committee draws the attention of the parties to its General Comment on the implementation of article 3 of the Convention in the context of article 22, adopted on 21 November 1997, according to which the burden to present an arguable case is on the author of a communication. The Committee notes the state party's position that the author has not fulfilled her obligation to submit the controllable information that would enable her to enjoy the benefit of the doubt. However, the Committee is of the view that the author has submitted sufficient details regarding her *sighe* or *mutah* marriage and the alleged arrest, such as names of persons, their positions, dates, addresses, name of police station etc, that could have, and to a certain extent have been, verified by the ... immigration authorities, to shift the burden of proof. In this context the Committee is of the view that the state party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture ... The state party does not dispute that gross, flagrant or mass violations of human rights have been committed in Iran.

The Committee decided in favour of the applicant taking into account various UN human rights reports which concluded that "little progress is being made with regard to remaining systematic barriers to equality" and for "the removal of patriarchal attitudes in society". The Committee's decision also refers to reports of non-governmental organisations which confirmed that "married women have recently been sentenced to death by stoning for adultery".

Notwithstanding that the Committee has no legal mandate to take a decision on the grant or refusal of asylum claims, a positive finding in respect of a communication based on a violation of article 3 would certainly be a relevant consideration in granting

asylum, refugee or subsidiary protection status to an individual who is the subject of the communication<sup>37</sup>. What is of interest in the decision is that the Committee suggests the state party demanded too much evidence, or too high a standard of proof, in terms of verifiable information to support the claim of being at risk of torture.

By comparison with refugee determination, one should recall that the standard of proof is ostensibly lower in the refugee context than that required under the UN Torture Convention. It is not required that a refugee applicant submit verifiable evidence to prove an asylum claim. In fact, there may be serious risks involved for an applicant or his or her remaining family members or friends if asylum states systematically demand and try to confirm certain information in a country of origin.

As a UN human rights treaty body which provides a mechanism to prevent the *refoulement* of genuine refugees or other cases of concern to UNHCR, the work of the Committee against Torture is of particular interest to UNHCR<sup>38</sup>. The decisions of the Committee are important sources of jurisprudence in furthering our understanding of international human rights protection as it relates to persons who may risk a particular form of persecution, that being torture<sup>39</sup>.

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<sup>37</sup> The European Commission *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection* notes in the explanatory memorandum that:

“The subsidiary protection measures proposed are considered complementary to the protection regime enshrined in the Geneva Convention and its 1967 Protocol and are to be implemented in such a manner that they do not undermine but instead complement the existing refugee protection regime. The definition of subsidiary protection employed in this Proposal is based largely on international human rights instruments relevant to subsidiary protection. The most pertinent of them being (Article 3 of) the European Convention on Human Rights and Fundamental Freedoms, (Article 3 of) the UN Convention against Torture, and (Article 7 of) the International Covenant on Civil and Political Rights”. (emphasis added, at p 5, the full text of the Proposal is available at: <http://europa.eu.int/eur-lex>)

<sup>38</sup> The relevance of the work of the international human rights mechanisms has not been lost on UNHCR. The Office’s interest in these bodies can be summed up as follows:

“As a rule, UNHCR’s interaction with the human rights mechanisms generally, and the torture provisions (in the Convention against Torture) in particular, should be linked to its mandate to protect from *refoulement*, all *bona fide* refugees and other individuals “of concern” to the Office. Where the treaty mechanisms and the torture provisions can be used to prevent the *refoulement* of *bona fide* refugees or other cases of concern, then UNHCR will have a legitimate interest in those alternative and parallel systems.” (UNHCR Memorandum nos 57/98 & 61/98 of 28 August 1998, at para 1.9, on file with the author).

<sup>39</sup> For example, in 1997 one state party carried out a deportation in contravention of a request by the Committee (re: CAT Communication No 99/1997). The applicant was expelled on the basis that he posed a security risk. The applicant acknowledged that he was an active member of the Dal Khalsa movement, a Sikh militant group. In finding a violation of article 3 Committee member Guibril Camara issued an additional individual opinion which noted the time to assess whether there are substantial grounds for believing that the concerned individual would be in danger of being subjected to torture is at the moment of expulsion, return or extradition. The Committee member further noted that, in what may be considered a positive pronouncement for asylum seekers:

“The facts clearly show that, at the time of his expulsion to India there were substantial grounds for believing that the author would be subjected to torture ... the fact that in this case the author was not subsequently subjected to torture has no bearing on whether the state party violated the CAT in expelling him. *The question of whether the risk – in this case, of acts of torture – actually materialises is of relevance only to any reparation or damages sought by the victim or by other persons entitled to claim. The competence of the Committee against Torture should also be exercised in the interests of prevention.* In cases relating to article 3, it would surely be unreasonable to wait for a violation to occur before taking note of it.” (at paras 16.3 & 16.4)

In terms of developing international standards concerning the assessment of evidence which is relevant to refugees, the pronouncements and observations of the Committee should also be of interest to decision-makers and refugee advocates. There is nevertheless concern that with increased demands on the Committee, and in view of its limited resources, the quality of its decision-making could be effected.<sup>40</sup>

## **Conclusion**

There is presently an absence of consensus amongst states on common standards for assessing evidence in refugee determination procedures. States with different legal traditions and histories have shown a reluctance to open the discussion on how the rules and standards on evidentiary questions are dealt with. Some commentators have argued that the task is just too difficult, which may speak more to obstacles in reaching political agreement than to articulating common rules and standards.

The UNHCR Handbook provides a framework of concepts and procedural approaches for assessing evidence in this area of decision-making. In addition to the Handbook, which should be considered a starting point, and guidelines and legal doctrine developed by national authorities and UNHCR, the work of human rights bodies such as the Committee against Torture as well as regional human rights mechanisms should be viewed as complementary sources of norms and standards. As part of ongoing efforts in Europe, and globally, to reaffirm and harmonise standards of refugee law these procedural questions however tricky and difficult should not be avoided.

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<sup>40</sup> CAT Communication no. 150/1999, which concerned a rejected male asylum seeker of Iranian nationality, reached an opposite conclusion to that of Communication no. 149 discussed *supra*. The application was rejected by the Committee as it was “of the opinion that ... (it) has not been given enough evidence by the author to conclude that the latter would run a personal, real and foreseeable risk of being tortured if returned to his country of origin ... the Committee considers that the author of the communication has not substantiated his claim that he would be subjected to torture upon return to Iran ...”.