ASYLUM LAW

FIRST INTERNATIONAL JUDICIAL CONFERENCE

LONDON 1995

ASYLUM LAW

REPORT
and
PAPERS DELIVERED AT THE FIRST INTERNATIONAL JUDICIAL CONFERENCE HELD AT INNER TEMPLE LONDON
1 and 2 December 1995

Conference Papers Series No. 1 - 1996

A catalogue record for this book will be available from the British Library.

Published by
The Steering Committee of
THE JUDICIAL CONFERENCE
ON ASYLUM LAW
(London) 1995

Thanet House
231 Strand
London WC2R 1DA
Tel. 00 44 (0)171 353 3826
Fax 00 44 (0)171 3533960

ISBN 0 9527728 0 9

Printed in London
Bound by Print Kings

Edited by:
Geoffrey Care & Hugo Storey

ASYLUM LAW

FIRST INTERNATIONAL JUDICIAL CONFERENCE

LONDON, 1995

CONTENTS

CONTRIBUTIONS

NOTES ON CONTRIBUTORS

Dr. Igor Belko
Judge of the Supreme Court, Slovak Republic

Lord Cameron of Lochbroom PC
Judge of the Scottish Court of Session, United Kingdom

Geoffrey Care
SC(Zam) LL.M (Lond.) Deputy Chief Adjudicator, Immigration Appellate Authority, United Kingdom

Jacek Chlebny, Ph.D.
Judge of the Supreme Administrative Court, Poland

Conseiller J.J. de Bresson
Member of the French Conseil d'Etat, President C.R.R. , France

Conseiller Roger Errera
Member of the Conseil d'Etat, France

Guy S. Goodwin-Gill
Professor of Asylum Law, University of Amsterdam
Editor-in-Chief, International Journal of Refugee Law

Rodger P.G. Haines
Deputy Chairperson of the New Zealand Status Appeals Authority, lecturer in Immigration and Refugee Law, Auckland University, New Zealand

Dr. Joachim Henkel
Judge at the Federal Administrative Court, Berlin, Germany

The Hon. Mr. Justice Laws
Judge of the High Court of Justice, Queen's Bench Division. United Kingdom

Dennis McNamara
Director, Division of International Protection UNHCR, Geneva

Nurjehan Mawani
Chairperson, Immigration and Refugee Board of Canada

Nuala Mole
Director, AIRE (Advice on Individual Rights in Europe), United Kingdom

Dr. Richard Plender
LL.D, sometime legal adviser UNHCR and referendaire Court of Justice of the European Communities; Queen's Counsel. United Kingdom

Thomas Spijkerboer
Lecturer on Migration Law, University of Nijmegen, The Netherlands

Dr. Hugo Storey
Former Council of Europe Human Rights Research Fellow; former lecturer; now Honorary Research Fellow University of Leeds; co-editor Butterworths Immigration Law Service; Adjudicator, Immigration Appellate Authority, United Kingdom

Dr. Jan Vyklicky
President of The Association of Judges Czech Republic

LIST OF DELEGATES

AUSTIN, RHF Professor
Director
Legal & Constitutional Affairs
Division
Commonwealth Secretariat
London

BARBAGALLO, G Presidente
Consiglio del Stato
Italy

BELKO, Dr. Igor
Judge
Supreme Court
Bratislava, Slovakia

BONNOT, M. Frederic
C.R.R., France

BRONEE, Sten Mr
Deputy Representative
UNHCR, UK & Ireland

BROWN, Simon
The Rt Hon Lord Justice
Court of Appeal
England

CALLENDER, Victor Mr
Conference Administrator
London

CAMERON OF LOCHBROOM,
The Rt. Hon. Lord
High Court of Judiciary
Scotland

CARE, Geoffrey Mr
Deputy Chief Adjudicator
Immigration Appellate Authority
UK

CHASE, Jeffrey Judge
US Immigration Court
USA

CHETTY, Shun Mr
Deputy Director
Regional Bureau
UNHCR, Asia
and
Senior Member
IRT
Australia

CHLEBNY, Jacek Judge
Supreme Administrative Court
Lodz Poland

CLAESSENS, Tom Judge
President, Rechtbank
The Hague
Netherlands

CREPPY Michael J
Chief Immigration Judge
USA

De GROOT, Sebastiaan ,Judge
Vice President
Rechtbank, Netherlands

De MOFFARTS, Gaetan M
President , CPRL
Belgium

ERRERA, Roger Conseiller
Member
Conseil d'Etat
France

GERKENS, M W Mr
Acting Senior Member
I.R.T.
Australia

GOODWIN-GILL, Guy Prof
University of Amsterdam
Netherlands

GUKOV, Vladimir Judge
Supreme Court,
Russia

HAINES, Rodger Mr
RSAA
New Zealand

HELTON, Arthur C Mr
Director, Migration Programs
Open Society
USA

HENKEL, Joachim (Dr)
Judge
Federal Administrative Court
Berlin, Germany

JACOBS QC, Francis Mr
First Advocate General
European Court of Justice
Luxemburg

JAUMOTTE, M l'Auditeur
Conseil d'Etat
Belgium

KEMPER, Gerd-Heinrich (Dr)
Judge
Federal Administrative Court
Berlin, Germany

LAVANCHY, Philippe Mr
Representative
UNHC,
UK & Ireland

LAWS,Sir John,
The Hon Mr .Justice
England

LEU, Prisca (Mrs)
Judge
Switzerland

MACKEY, Allan Mr
Chairperson
RSAA
New Zealand

McNAMARA,Denis Mr
Director
Division for International
Protection, UNHCR
Geneva

MALINCONICO, Carlo
Presidente
Consiglio del Stato
Italy

MAWANI, Nurjehan Ms
Chairperson
IRB, Canada

MOLE, Nuala Ms
Director
AIRE, England

MOSE, Mr Justice Erik
High Court
Norway

O'MALLEY, Peter
Mr. Justice
Ireland

OSBORNE, Lord
High Court of Judiciary
Scotland

PALEOLOGO,Sr Giovanni
Presidente
Consiglio del Stato
Italy

PEARL, H H Judge David
Chief Adjudicator
IAA UK

RANG, C W (Mrs)
Judge
President, Rechtbank
Amsterdam, Netherlands

SCHAPPI, Judge Walter
Switzerland

SEDLEY,Sir Stephen
The Hon Mr Justice
England

SPIJKERBOER, Thomas Prof
University of Nijmegen
Netherlands

STAYKOV, Evgeny Judge
Chairman
Sofia City Court
Bulgaria

STOCKLI, Walter Judge
President
Asylrehurshommissiom
Switzerland

STOREY, Hugo (Dr)
Adjudicator
IAA UK

TAIROV, T F Prof
Russia & Uzbekhistan

TESSENYI, G Mr
Council of Europe

TIBERGHIEN, Mr
Conseil d'Etat
France

TOWLE, Rick Mr
Legal Officer
UNHCR
London

Van den STEENHOVER H. Mrs
Judge
President, Rechtbank
Netherlands

VARVAROVSKY, Pavel (Dr)
Judge
Czech Republic

WIKREN,Gerhard
Judge
Court of Appeal
Sweden.

ACKNOWLEDGEMENTS

The organising committee of this Conference are deeply grateful for the encouragement and assistance received from many people and institutions throughout the world without which this Conference could not have taken place.

There are many people whom we know would like to have been present but, owing to their other commitments and constraints, were unable to be so.

We should like to record our appreciation for such support and express our special thanks to :-

UNHCR - for the extensive financial and material help and unstinting assistance received from their London Office and their Geneva, Paris, and Athens offices as well as their offices in East and Central European countries.

The Council of Europe - for their heavy financial commitment, especially directed towards East and Central European countries.

The Joseph Rowntree Charitable Trust - for their financial assistance and enormous encouragement.

SOROS Foundation - and their offices in various East European countries.

Also to the secretaries in the Deputy Chief Adjudicator's office, particularly Mrs. Janice Cotton. To Mr. Victor Callender, formerly a Regional Adjudicator himself and Barbara Baker of Magpie Links, for all their patient, efficient, cheerful and indefatigable efforts.

And, particularly, are we grateful to the **Immigration Law and Practitioners Association** in the United Kingdom, who have a close interest in this topic and who have expressed their support in a practical manner by arranging and paying for the copying of all the papers we have before us.

REPORT

The Hon Mr Justice John Laws
Chairman

This conference, taking place between 30th November and 3rd December 1995, drew together judges from jurisdictions from the EU countries, Scandinavia, Eastern Europe, Australia, New Zealand, and the United States. The overriding theme concerned the potential for continuing judicial co-operation across the world in regard to the administration of the law relating to refugees. It was and is the responsibility of nearly all the judicial delegates present to administer within their own jurisdictions the provisions of the 1951 Geneva Convention Relating to the Status of Refugees. Unlike the European Convention on Human Rights, this Treaty does not provide for an international judicial body charged with its enforcement; the responsibility for giving its provisions legal effect lies with the judges and tribunals of the signatory states.

In this context, papers were presented to the Conference dealing both with substantive and procedural issues. Counseiller Roger Errera from Paris and Judge Joachim Henkel from Berlin gave an overview, on the first day, of the fundamental question **"Who is a Refugee?"**. The issue involves difficult and important questions as to the interpretation of the 1951 Convention. Who is to count as an agent of persecution - is it necessarily a person or group identified as an arm of the state itself? What is meant in the Treaty by the phrase **"Particular Social Group"** - may it in some circumstances refer to women as such a group? There is the issue how the national judiciaries should regard what has become known as the Internal Flight Alternative, such that a person is not to be treated as a refugee if there is some part of his country of origin where he may safely reside.

The Conference proceeded to discuss the impact of norms of international law relating to fundamental human rights, and in particular the European Convention on Human Rights, upon asylum problems. Dr. Richard Plender QC from England and Mrs. Nurjehan Mawani from Canada gave papers on

the subject. It is clear that the Strasbourg jurisprudence on Article 3 of the European Convention is of great importance for the assessment by national judicial authorities of refugee claims, given such decisions. Mrs Mawani's paper described the determination system in Canada, through the Immigration Refugee Board of which she is the Chairman, which accords to the claimant a right to an oral hearing and counsel and whose proceedings are conducted in a non-adversarial framework. These contributions, and indeed others, raised issues as to the proper legal test to ascertain whether an asylum applicant is indeed a refugee with the Convention, and also as to the policy, deployed generally by states signatory to the 1951 Convention, where an applicant may be removed to what is regarded as a safe third country through which he has travelled before arriving in the state where asylum is claimed.

Indeed the topic **"Safe Countries of Origin and Third Countries"** was the specific subject of the third session of the Conference. It was chaired by the President of the Italian Counseil d'Etat, Giovanni Paleologo, and the paper was presented by Professor Guy Goodwin-Gill of Amsterdam University. He placed emphasis on the problem, who is to take responsibility for an asylum claimant in the absence of any international legal rule (none is contained in the Geneva Convention) by which such responsibility is to be distributed; and reference was made to the Dublin and Schengen Agreements.

The Conference proceeded, in the fourth session, to look generally at suggestions for future international judicial co-operation in relation to asylum law. The speakers were Mr. Rodger Haines, an original member of the Refugee Status Appeals Authority in New Zealand, and Dr. Hugo Storey, who is both an academic and an immigration adjudicator in England. This was an important session, since a primary purpose of the Conference was the exchange of ideas with a view to greater understanding among judges, in very different jurisdictions, of what their fellow judges are doing elsewhere. Mr. Haines emphasized the significance of the international nature of jurisprudence concerning refugee issues. A primary concern is to share the jurisprudence emerging from different judiciaries dealing with the same difficult issues as regards the interpretation of the 1951 Convention, other international norms affecting asylum claims, and the procedural law which affects the administration of such claims. Mr. Haines discussed such questions as training, so as to acquaint judges with overseas decisions, future workshops and conferences, and in particular the

dissemination among national judiciaries of decisions made in one jurisdiction and another. Mention in particular was made of the desirability of an international set of refugee law reports; something which obviously engages questions of funding, editing, selection, and translations, but which would in principle be extremely desirable. Dr. Storey's paper largely reflected these concerns. He emphasized the obvious value of information technology, and later in the Conference Mr. Sten Bronee of UNHCR demonstrated the CD-ROM software, developed by UNHCR, which creates a database of factual and legal information concerning refugee issues across the world. Dr. Storey emphasized the need, in assessing asylum claims, for an enhanced evaluation of data, not least as regards the situation in any given case in the country of origin.

On the second working day of the Conference, the first session was devoted to **"Administrative Powers on the after Entry"**, and the speakers were Ms Nuala Mole, who has great experience in dealing with asylum claims in the English jurisdiction, and M. Tiberghien a member of the French Conseil d'Etat. The state's administrative powers themselves give rise to important questions: does the state have any responsibility to facilitate the making of asylum claims to it, when the claimant is still in his country of origin? What are the legal concepts involved in the notion that a claim may be rejected as manifestly unfounded? What legal difficulties arise from the powers of detention, or denial of social benefits or the right to work to claimants pending the resolution of their claims?

The last two sessions of the Conference were concerned with judicial remedies; first, remedies on the merits, and secondly higher judicial remedies. As regards the first, M. Tiberghien made a further presentation; the other participant was Mr. Geoffrey Care, the Deputy Chief Adjudicator in the UK, who also has been the prime mover in the establishment of this Conference. Mr. Tiberghien made it clear that the CRR very rarely refers to foreign jurisprudence; thus this picks up the theme of Mr. Haines presentation in the earlier session. Mr. Care was emphatic as to the need for international co-operation, and was also at pains to state that the judiciary should not allow the problem of numbers - the numbers of claimants - to determine the proper judicial approach to an individual claimant. In the last session, on **"Higher Judicial Remedies"**, the Conference had the value of the chairmanship of Lord Justice Simon Brown, who gave a short introductory address emphasizing the beneficial practical effects of a robust judicial review jurisdiction. The speakers were Lord Cameron of

Lochbroom, a High Court judge in Scotland, and Professor Spijkeboer from the University of Nijmegen. Lord Cameron emphasized the need for judicial knowledge of decisions in other jurisdictions. As will be plain this was a recurring theme of the Conference, and one of great importance. Professor Spijkerboer referred to the Strasbourg decisions of Soering and Vilvarajah, and referred the Conference to a decision of the Dutch Supreme Court to the effect that Article 16 of the 1951 Convention had effect so as to give asylum claimants, not only those who had been recognized as refugees, the benefit of its provisions.

This Conference was about the rule of law. It goes without saying that its participants were and are politically dispassionate. But in the Geneva Convention they have an international legal order to administer, though they must do it through their own courts. The overriding theme of the Conference was the need for greater judicial co-operation, by means of the dissemination of decisions between one jurisdiction and another and also the need for a better basis upon which factual information, affecting refugee claims, can be made available to this international judiciary. On this basis, and for these purposes, the Conference has been an important contribution to the maintenance of the rule of law, and to what is surely an international order concerning the status of persons claiming to be displaced through persecution. It is of the greatest importance that the initiative should be carried forward; into further conferences, further co-operation. That is what the Steering Committee intends to do.

.....

CLOSING STATEMENT OF THE LONDON CONFERENCE

Wishing to maintain and further develop international co-operation in the area of asylum law and procedures, the Conference resolves that its Steering Committee continue its work with a view to exploring and facilitating further steps aimed at ensuring that the initiative of the 1995 London Conference, and the opportunities it afforded for the exchange of ideas and information, are not lost but can be carried forward as a continuing process. The Conference further resolves that continuing links with the judiciaries in Central and Eastern Europe be furthered and strengthened.

Inner Temple,
London.
2nd December 1995

Chapter I

INTERNATIONAL JUDICIAL CONFERENCE ON ASYLUM LAW AND PROCEDURES

Inaugural address by
Dennis McNamara
Director, Division of International Protection UNHCR

Mr. Chairman, Distinguished Participants

At the outset, I want to express my gratitude to you, Mr. Chairman, and especially to Mr. Geoffrey Care, Deputy Chief Adjudicator of the UK Immigration Appellate Authority for coming up with the idea of this Conference. It is most timely and for me it is indeed an honour to be addressing such a distinguished gathering . I see jurists here from all over -- America, Europe, and even from as far away as New Zealand It is particularly gratifying to see representatives from Central and Eastern Europe -- from some countries which have only recently acceded to the 1951 Refugee Convention and 1967 Protocol. We greatly welcome their increasing participation in our system of refugee protection

With your permission, I must start with a reference to Bosnia. Just two days ago I returned from a visit to Zagreb, Sarajevo Zenicia and Mostar. I saw war damage there which looked to me like World War II footage. I heard countless stories of human suffering which -- even for those working for years in this area -- were horrifying: families systematically persecuted, attacked, shelled and terrorized in planned genocide of populations in specific areas; minority groups intentionally forced to flee their home areas forever. All this taking place, for more than three years, in the middle of Europe -- a two-hour flight from Geneva. And now, demographic engineering: forcing civilians into dangerous, newly-gained areas for purely political reasons. I mention all this because, despite having worked in another post-conflict situation, the Cambodian peace keeping operation, I am still stunned by it -- and because the total collapse of the rule of law, as in most civil wars, has played a key role. If we, as UNHCR, are to return or repatriate some 2-3 million displaced persons and refugees to Bosnia -- as the Dayton Agreements charge us to do -- re-establishment of the rule of law, with a functioning, independent judiciary, will be critical. The same is equally true of the nearly two million Rwandan and Burundese refugees. To carry out the difficult transition from a war to a civil culture, it is essential to

safeguard the basic human rights of those returning -- something which is far from assured at this stage --and to determine fairly key issues, such as the right to property or compensation, which go to the heart of any satisfactory implementation of the peace accords.

These are judicial prerequisites, not for asylum, but for the other side of the equation: safe, orderly and lasting voluntary repatriation to a life in dignity. Establishing and maintaining the rule of law is essential, both to protect refugees in exile and to create the minimum guarantees of basic rights needed to persuade refugees eventually to return home.

You may feel I have strayed away from the topic, but I felt I had to share my feelings on this charged and difficult problem, which we will be confronting daily in trying to implement our part of the agreed peace in Bosnia in the difficult months ahead.

Mr. Chairman:
This conference comes at a critical time. While UNHCR fully recognizes the commitments and problems of States -- and the invaluable contributions and impact of international and regional human rights conventions in enhancing the overall protection regime for refugees -- we nevertheless stand at the threshold of a new crisis in asylum. Refugee protection -- the system we have jointly developed, through diplomacy and jurisprudence, over nearly 50 years to protect the innocent victims of war and persecution -- is in deep trouble, perhaps more than at any time in its recent history. If we are to preserve the legal framework which has safeguarded millions of people since WWII, judges and lawyers have a key role to play. The U.N., I hope, is well aware of its limitations in this area.

How is protection under siege? Last week, the EU Ministers of Justice and Interior agreed on a set of guidelines to harmonize their application of the 1951 Refugee Convention definition. As you are undoubtedly aware, the Ministers, in doing so, adopted an interpretation of Article 1A of the Convention which could deny formal refugee status to thousands of asylum-seekers who happen to fear persecution from non-state actors, rather than at the hands of governments. The Convention, predicated as it is on the need for international protection, makes no such distinction. The EU interpretation could leave many people deserving of protection -- those forced to flee persecution resulting from civil wars or the chaos of failed states -- outside the formal protection regime.

In our opinion, this is not what the founders of the regime had in mind. It certainly does not follow from the "ordinary meaning" or the object and purpose of the Convention text, as required by the rules of treaty interpretation. This reading contradicts the definition of agents of persecution in UNHCR's 1979 Handbook -- a work commissioned, and subsequently adopted, by many of those states now seeking to change that position. It also disregards article 35, which obliges States to cooperate with UNHCR in the exercise of its supervisory function vis-a-vis supervising the Convention's application. This interpretation even contradicts the national criteria and jurisprudence of a majority of EU member States: 11 of the 15.

It is true that the EU text is only so-called "soft law". Judges are thus not bound by it and could take a different view. UNHCR has made its views known. But this construction of article 1A is worrisome because it is symptomatic of a wider retreat from the spirit -- and sometimes the letter -- of the 1951 Refugee Convention, a treaty ratified by two-thirds of all UN member States and the basic blueprint for protecting refugees as victims of human rights violations. Such legal backtracking could seriously erode the international refugee protection regime and the larger human rights system of which it is a part -- a system painfully and carefully constructed by governments, lawyers and diplomats over decades.

UNHCR appreciates the desire, and occasional need, of governments to take more stringent measures. In the developed world, public antipathy to immigrants has climbed to new levels in recent years and asylum-seekers have been muddled into the heap. The end of the Cold War produced neither the peace dividend expected by the West nor the instant prosperity anticipated by the East. Widespread economic stagnation has been coupled with unnerving political chaos; countries, suddenly bereft of their Superpower sponsors, disintegrating into stateless, tragic disarray; a prolonged war -- complete with genocide, rape and pillage -- piercing the calm of Europe for the first time in 50 years.

Perhaps it is understandable that the public, not fully informed of the complexities, might blur the line between migrants and asylum-seekers. After all, both need jobs. Both bring with them unfamiliar cultures and, sometimes, the baggage of what would otherwise be distant political, ethnic and religious disputes. Images spring to mind of Kurds closing down embassies in Germany, Islamic militants blowing up a Jewish school in

Lyon and a Middle Eastern asylum-seeker convicted in the bombing of New York's World Trade Center. However, it should not be forgotten that refugees and immigrants have also made valuable contributions to societies and cultures. (One of UNHCR's most potent posters points out that Einstein was a refugee).

Of course, governments must deal with terrorism and have a sovereign right to control their borders and immigration. Tragically, however, administrative and executive actions in this area often operate like broad drift nets. Set up to stop large flows of illegal migrants, they unintentionally deny the much smaller and manageable numbers of legitimate asylum-seekers access to needed and established legal protection mechanisms. In so doing, they restrict a vital legal regime -- one which, ironically, is an important cog in the human rights machinery needed to prevent and resolve the crises that force people to seek refuge in other countries in the first place.

Because of all this, the judiciary must to be able to step back from the political process and take a more dispassionate, longer-term, principled view. The law and the judiciary play a difficult and essential role, simultaneously progressive and conservative, creative and cautious; to build problem-solving structures on a bedrock of legal obligations and precedent. The judiciary is the natural and indispensable backstop against efforts to introduce inappropriately-motivated criteria in this sensitive area. Despite the setbacks, there has also been notable progress. Canada's Immigration and Refugee Board, for example, has developed one of the most liberal and broad-ranging refugee determination systems. Judicial rulings on gender-based claims have helped to make the Refugee Convention a contemporary instrument by recognizing that women face special kinds of persecution. Judges in other regions have held the line against executive or legislative attempts to set unduly rigorous burdens of proof for asylum-seekers. In other places, however, judges have unfortunately validated moves away from the spirit of the Refugee Convention by deciding, for example, that one particular government need not adhere to the treaty when interdicting asylum-seekers outside its borders. This ruling has meant that the sacred non-refoulement principle does not protect those expelled at -- or outside -- that State's frontier.

In all of these processes, a delicate and careful balance must be struck between the legitimate, sovereign right of States to protect their borders, and the broader international responsibility to deal fairly with the interlinked

problem of asylum and immigration. What is clear, however, is that the absolute shield of sovereignty has been eroded in the last twenty years and - rightly, in our view -- the protection of fundamental human rights is gradually gaining ascendancy. States can no longer routinely invoke sovereignty to limit their international humanitarian treaty obligations.

In many respects, we are at a cross-roads, and the areas of concern are plentiful; "accelerated" procedures which give asylum-seekers no chance to make a meaningful claim or appeal; "safe third country" or "first country of asylum" concepts which guarantee neither that an asylum-seeker will be admitted to, allowed to apply for asylum nor to stay in a third country that is safe. These are all of concern. You will be discussing them in more detail later in this Conference. For those of us concerned with protecting refugees -- including the institution of asylum -- constant vigilance is required, even in States presenting themselves as the guardians of democracy and the rule of law. Again this year, we have received regular reports of countries -- including some in Europe -- sending recognized refugees back to the countries they fled -- a violation of the most basic premise of refugee protection. Although we are often, at the last minute, able to prevent countries from actually returning refugees to danger, the increased use of ill-conceived "country of first asylum" schemes is placing a growing number of people at risk. While some moves are extrajudicial, judges can assist by giving asylum-seekers the benefit of any doubt when a denial of their claim might lead to deportation.

This potential role is greater, of course, where states retain formal refugee determination procedures, but reduce its substance. By simultaneously linking the refugee definition and making broad use of lesser, administratively-based humanitarian categories, one traditionally generous Western state last year formally turned down 99.5% of refugee claims -- while allowing 40% of applicants to stay on other grounds. We count on the judiciary not to let restrictive applications of the refugee definition -- especially those leading to an alternative status which precludes full refugee rights -- eat away at Convention protection

The lack of agreed immigration policies and the determined political desire to control external borders -- particularly of an internally-borderless Europe -- have caused particular concern. The trend to "streamline" removal procedures frequently undermines basic due process. Especially worrisome is the decision of several states to allow the deportation, after a first decision

only, of those filing allegedly abusive claims -- effectively precluding the right to appeal. Despite UNHCR reservations, the European Union, as part of its harmonization efforts, recently endorsed the possibility of appeals without suspensive effect in such cases. Others are producing the same result by moving rejected asylum-seekers out of the country so quickly that they have no time to file for a review. In the same manner, summary proceedings at the point of entry can effectively eliminate the right to an initial hearing by allowing claimants no time to prepare a case. Likewise, the use of detention -- which is also on the rise -- may be understandable as an immigration control device but can violate basic principles of international law when governments house asylum-seekers with ordinary criminals or confine them for prolonged periods.

States, of course, have a right to detain asylum-seekers or others under limited and prescribed circumstances, just as they have a right to try to make their judicial processes efficient. But certain basics -- the right to a fair hearing, to an opportunity to conclude an appeal, to be free from unwarranted incarceration -- are fundamental to any credible asylum regime. They should apply no less -- and, in our view, sometimes more -- to asylum-seekers as to any others. We must count on the judiciary to uphold these fundamentals, to keep the drift nets away from the most vulnerable groups.

New ideas in this domain certainly have their place. Humanitarian status and temporary protection have, in some settings, constructively augmented traditional protection. When used in the spirit of the Convention, they have been able, in a combined pragmatic and legal way, to fill the refugee treaty's well-known lacunae, while making it possible to protect masses of people when individual refugee determinations are impracticable. Today, some 700,000 people from the former Yugoslavia have found refuge in Europe, a large proportion of them under temporary protection schemes.

Unfortunately, these schemes come in greatly varying forms and applications. Some States have made temporary protection or humanitarian status virtually identical to protection under the Convention -- and have given beneficiaries the eventual right to convert to full refugee status. Others, however, have been as expansive in their definition of temporary as they are restrictive in their interpretation of protection. If we are to preserve the substance of the Convention, all asylum-seekers must eventually have the right to a full and fair refugee determination hearing and, if recognized all the attendant refugee rights and obligations. The 1951 Convention is a bill of

refugee rights; economic and social as well as political and civil. The right to be with one's close family, to seek employment and to travel are all elements of the Convention missing from many of the refugee status alternatives. Perhaps the most disturbing aspect of this retreat from principles is that the architects of the international refugee protection regime -- those, by definition, with well-developed legal systems -- are legislatively, administratively or jurisprudentially leading the way. This comes at a critical juncture, just as a whole group of emerging states are grappling with refugee principles -- indeed, often with international law and formal judicial procedures -- for the first time. For example, fifteen central European and CIS states have acceded to the Refugee Convention since 1991. Most have yet to pass enabling legislation or establish proper refugee determination procedures.

Setting up fair asylum procedures is, of course, part of a monumental judicial task facing these countries, few of which previously had independent judiciaries or allowed citizens to appeal administrative actions or decisions. We are aware that many poorly-paid and overloaded judges today must deal with a whole array of new legal regimes -- of which international human rights and refugee law is just a part, and perhaps not always the highest priority.

It would only be natural for these judges, as well as governments, to take their cues from those more experienced in asylum matters. Already we are seeing echoes in some Eastern and Central European states of their neighbours' safe third country policies, sometimes with even fewer safeguards against refoulement. Some are also following the lead by instituting expedited asylum procedures at the border -- often without trained officials or necessary safeguards.

UNHCR stands ready to help jurists and officials in this area -- and has already started, as have some NGOs. We would hope that experienced asylum and immigration judges from other countries might also offer their assistance. Developing an adequate refugee regime in Central and Eastern Europe will undoubtedly be a taxing endeavor. But failing to do so will also have its price, both for these countries and for those to the west, since unprocessed asylum-seekers may well go further afield in search of protection. It is in this context that we especially see the value of a Conference like this, which, hopefully, will highlight the need for enhanced international judicial cooperation in this area.

Those of you from countries with developed legal systems have, if I may say so, an enormously critical as well as creative challenge here. As I said at the start -- and which my recent trip to Bosnia so dramatically drove home to me -- protecting displaced asylum-seekers is only one part of the protection system. Protecting the basic concept of the rule of law in all its aspects is, in many ways, as important as protecting individuals. Without one, it is difficult to have the other. We have only to look to the former Yugoslavia to be reminded of the absolute imperative of promoting respect for the rule of law and human rights. Disregard of these notions -- which started, prolonged and exacerbated these hostilities -- could equally undo the new peace accords if allowed to persist.

Our rapidly-changing geopolitical world demands that the international refugee protection scheme also adapt. The Convention was drafted in another age; when persecution (in Europe, at least) generally emanated from states; when civilians generally fled inter-nation wars, not factional hostilities or just plain chaos; when combatants usually targeted each other, not women, children and old people. Despite this, the basic treaty can be a living document, capable of meeting new contingencies, provided it is used in a liberal and positive spirit. We should build on it -- as the OAU Convention in Africa, the Cartagena Declaration in Central America or the Comprehensive Plan of Action in Southeast Asia have done successfully -- not replace or restrict it.

Mr. Chairman:
As we pass the fiftieth anniversaries of V-Day and the founding of the United Nations, one hardly needs extra reminders of the enormous suffering and dislocation that made possible our human rights system -- including refugee protections. It took the bombing and displacement of millions of people in the heart of Europe to convince its countries to relinquish a little sovereignty in this domain to further the greater, longer-term good. Another such opportunity is not likely to arise -- at least we all hope not. If we let this vital and precious system erode, we cannot count on easily restoring it. We urgently need your help in meeting this very immediate challenge, both judicially, jurisprudentially, and as part of the broader humanitarian alliance. I hope that your deliberations in the next two days will help to clarify how this might be best accomplished.

Thank you, Mr. Chairman.

Chapter 2

WHO IS A REFUGEE?

(Agents of persecution; avoidance of military service and desertion; attacks on basic rights of women)

Roger Errera
Member of the French Conseil d'Etat

Agents of persecution: persecution by third parties, State responsibility

The Geneva Convention is silent on the agents of persecution. According to the UNHCR Handbook: "Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."[1]

Situations like those described here are to be found more and more frequently in Europe, in Africa and Asia. The following distinctions can be made:-

1. Persecution may come from de facto authorities, be they local[2] or foreign ones.[3]

2. A refusal of protection by public authorities amounts to a voluntary toleration of persecution.[4]

3. Persecutions by private persons or groups, organised or not, amount to persecution within the meaning of the Convention

whenever they are knowingly tolerated or encouraged by public authorities.[5]

4. What should be decided when there is no more any lawful authority and when a country is torn by a civil war offering several factions and claims which cannot be regarded even as de facto authorities? There are divergences in the case-law here, even when the cases relate to the same country. An illustration is Somalia, where the French CRR appears to be stricter than the Belgium CPRR.[6]

5. The mere impossiblity or the incapacity of the legal authorities to ensure an efficient protection against persecution cannot always be assimilated in a voluntary toleration of such behaviour.[7]

NOTES

1 UNHCR Handbook No. 65, p 17.

2 See C.R.R. December 12, 1994, Bourji, Rec. CRR p 109 (authorities controlling South Lebanon); Mar 30 1994, Becirevic, id., p 110 (militia of the self-proclaimed "Serb Republic of Bosnia"); October 28, 1994, Lovric, id. p 110 ("Croatian Defence Council" in Bosnia). See also July 5, 1991, Kapa and September 4, Freemans (for Liberia) cf. F. Tiberghien, "Les situations de guerre civile et la reconnaissance de la qualité de réfugié; Documentation - Réfugiés, No.181 April 21-30, 1992.

3 See CRR, May 10, 1994, Amine El Rami, id, p.109 (Syrian forces in Lebanon).

4 See CRR Terahi, February 25, 1994 id p 46 Christian Kabyl Algerian); March 18, 1994, Oukolova id. p 50 (for a Russian in Ouzbekistan); June 1, 1994, Slepcik, id. p 59 (for a Slovak gipsy).

5 See French Conseil d'Etat, May 27, 1983, Dankha rec. p.297, (for a Christian Iraqi); C.R.R. October 5, 1994, Isaak, rec. C.R.R. p 110 (for a Christian in Sudan); October 25, 1994, Satanjan, id, p.111 (for a Lituanian of Armenian origin) - See also Elkébir, July 22, 1994, id p.66 and two Canadian decisions: Federal Court of Appeal, Vancouver, 1984, Z Rajudeen v Minister of Employment and Immigration, reported in I.J.R.L, 1992, VOL 3, No.4, P.334, No 00/76; K. Surujpal v. Minister of Employment and Immigration, Federal Court of Appeal, Toronto, ibid, same page.

6 See CRR November 26, 1993, Ahmed Abdullahi CRR rec. p. 60; CP.R.R., June 6, 1994, mentioned by S Bodart, "Les réfugiés apolitiques: guerre civile et persécution de groupe au regard de la Convention de Genéve", I.J.R.L, vol. 7, no. 1, 1995, p.39 at p.46.

7 See the C.R.R's case-law analyzed by its President, Mr de Bresson, in his report on "Judicial Remedies on the Merits." The answer is in the negative.

Avoidance of Military Service, Conscientious objection and desertion

Deserters and other persons avoiding compulsory military service, in times of peace or of war often ask to be recognized as refugees.[1] A body of case-law has progressively developed over the years. A brief overview of it will be followed by recent examples drawn from the situation in ex-Yugoslavia.

1. Desertion, or voluntary avoidance of compulsory military service are not, per se, enough for a person to be recognized as a refugee.[2] The situation is different:

   a) if the desertion has been motivated by one of the grounds mentioned in art. 1 A.2 of the Convention;[3]

   b) if the level of punishment (e.g. for refusal of the draft for religious reasons) exceeds acceptable levels of enforcement.[4]

2. Avoidance of military service, conscientious objection and desertion in times of civil wars and internal armed conflicts; the case of the wars in ex-Yugoslavia.

Refugee law in civil wars is one of the most compelling issues of refugee law today. The case-law relating to avoidance of military service is but one of its many facets. The Yugoslavian tragedy or, rather, tragedies, are an apt illustration, as shown by the recent case-law of the French *Commission des recours des réfugiés.*

The rationale of the case-law has been expressed by the C.R.R as follows:

> In view of the situation in ex-Yugoslavia the fear, expressed by a national of one of the States created after the break-up of Yugoslavia, to return to one of these countries after deserting from one of the armed forces or refusing to obey to the call of the military authorities will lead to recognition of refugee status if it is established that his behaviour is dictated by personal political motives or grounds of conscience.[6]

In 1993 and 1994 a number of decisions have applied this principle to certain situations arising from the wars. [6 bis] See e.g.

- The case of a Yugoslav citizen, from Montenegro, born and living in Croatia. He was ordered to join a Croatian militia in 1991, refused, and left Croatia. Back in Belgrade, he would be drafted and expose his family in Zagreb to grave reprisals. He is now regarded as a deserter both in Belgrade and in Zagreb.[7]
- The case of a member of the Romanian minority of Voivodina, a Yugoslav citizen. He refused, on political grounds, to obey the draft, in view of the Serbian policy in Voivodina.[8]
- The case of a Serbian Bosnian, an Orthodox, refusing mobilization in Serbian paramilitary group in Bosnia on political grounds.[9]
- The case of a Montenegrin Yugoslav, a Catholic, refusing to fight the Croats, on conscientious grounds.[10]
- The case of a Croatian national, a Uniate of Russian origin who lived near Vukovar, then in the Krajina, occupied by the Serbs, and refused to join the Croatian Army. Back in the Krajina, he would be forced to join the local Serbian militia.[11]
- Or the case of a Yugoslav citizen, an Albanian Catholic from Kossovo, living in Montenegro, who refused in 1991 to join the Yugoslav Army to fight Slovenia, then Croatia.[12]

These decisions do not mention military actions condemned by the world community or the risk, for the individual, to participate in serious violations of internationally recognised human right. [13]

One further comment. Even if a change of political regime took place in the countries of ex-Yugoslavia, suppressing the direct cause of the fear of persecution justifying the recognition of refugee status to these individuals, they might well invoke article 1 - C - 5, second paragraph of the Geneva Convention.[14] The French C.R.R. has used recently this clause to recognize as a refugee a Tutsi woman: members of her family had been victims of acts of genocide committed in Rwanda in 1994. In spite of the change of regime, the physical and psychological consequences of persecution were of such a gravity that the woman could invoke the clause mentioned above.[15]

NOTES

1 See UNHCR Handbook, Nos. 167 - 171. pp 39 ff.

2 See CRR, April 1956, Gietmann in F. Tiberghien, la Protection des Réfugée in France, 2nd edition, Paris and Aix en Provence, 1988, p.349; Gomes Sanchez, December 18, 1990.

3 Id., Miksic, March 4 1980, in Tiberghien, op cit, bid. See also, for a refusal of refugee status in the absence of one of the grounds mentioned in Article 1 - A - 2 of the Convention: CRR, Dyakounda, June 17, 1993, Rec. CRR p 112; Yaghialan, September 16 1994, ie. p 71; Gasparian September 22, 1994, id. p. 104.
- For a refusal of military obligation on religious grounds see CRR Mallonhib, October 2 1989; on political ones Hegedus, July 10 1987; Hessabi, same date.

4 See, for a refusal of military service on religious grounds, the 1984 Immigration Appeal Tribunal decision, D P M v Secretary of State for the Home Department reported in IJRL, 1989, vol. 1 no 2, p.128, No. 0066; for a decision which could lead to a death sentence, CRR October 18, 1985 Agha Ahmadi in Tiberghien, op. cit., p. 349. See also December 12 1990, Gezici Abidin.

5 On civil wars and refugee law see W. Kälin, "Refugees and Civil Wars: only a matter of interpretation?" I.J.R.L vol 3, no. 3 1991, p 435; Mark R. von Sternberg, "Political asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns", id. vol. 5, No. 2, 1993, p. 153; S. Bodart, "Les réfugée apolitiques. guerre civile et perécution de groupe au regard de la Convention de Genève; id. vol 7, No. 1 1995 p 39.

6 Such a principle can be found in many CRR decisions. See e.g. January 29, 1993 Dabetic, Rec. CRR p.35.

6 bis On this case-law see F Tiberghien's valuable comments in Documentation -Réfugiés, supplement to no. 223, August 17-23, 1993.

7 Dabetic, quoted sup. n.6.

8 Sporea, same date, 14, p. 35

9 Dzebric, February 12, 1993 id p.37

10 Pavlovic, November 24 1993, id p.58

11 Hurdi, March 2, 1993, id p.114

12 Dedunkaz, March 8 1993, i.e. p.115

13 See UNHCR Handbook No. 171. For a Dutch non-refoulement decision, see the 1991 case reported in I.J.R.L, vol 7, no. 1 p.139. No. 0225.

14 Article 1C of the Geneva Convention mentions five situations in which the Convention shall cease to apply. Paragraph 5 reads as follows:-
"(5). He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;"

15 CRR Mrs N, see Le Monde, February 16, 1995.

Attacks on basic rights of women as persecution and the notion of membership of a particular social group

One of the reasons for the well-founded fear of persecution may be according to the Geneva Convention "membership of a particular social group". This notion will be briefly explored before examining the problem of the attack on basic rights of women.

1. "Membership of a particular social group" as a category can be construed narrowly or widely. According to the HCR "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution".[1]

In a 1992 decision, the US Court of Appeals for the 7th Circuit held that the notion of "particular social group" referred to discrete, relatively homogeneous group targeted for persecution because of assumed disloyalty to the regime (Reported in I.J.R.L Vol 7, no. 1, 1995, p. 132, No. 0220). It has been used in many countries on a number of occasions. See the case-law of the Commission des recours des refugiés (C.R.R.) relating to Communist countries (1 bis) and Indochina. [2]

Persecution on account of sexual disposition can, in certain cases and reasonably interpreted, relate to that category.[3]

2. Attacks on the basic rights of women have been the subject of comments[4] and an important and new case-law is emerging in some countries. "Persecution on the basis of sex is not recognized in any international refugee definition, and those victimized for transgressing social mores .... may be denied protection; social group arguments are not universally recognised".[5]

Several tendencies can be detected in the case-law so far:

a) Some decisions have held that certain women, in certain conditions, are to be regarded as persecuted by reason of their membership in a particular social group.[6]

b) Other decisions have held that women victims of rape or of other forms of violence were entitled to refugee status. These decisions are not, however, based on their membership of a particular social group.[7]

c) In other cases the existence of other grave forms of violence specifically directed against women has led, when certain conditions were met, to recognition of refugee status. Here are two recent illustrations:

Miss X, from Mali, alleged that she had to leave her country in 1990 to escape family pressure demanding that she underwent female circumcision, and discrimination against women refusing female circumcision. The CRR held that if public authorities demand that such an act be performed or encouraged and voluntarily tolerate it, it does constitute a persecution within the meaning of the Convention if the person has been personally exposed to such a danger against her will. It also held that in Mali excision was knowingly tolerated by public authorities, especially on young girls and unwilling adults. As a consequence a Malian woman may be recognised as a refugee if she has been personally exposed to such a mutilation.[8]

Mrs Elkébir, a young Algerian woman, went back to Algeria with her family in 1985, after spending 12 years in France, where she was educated. In Algeria her life became difficult and dangerous because she wanted to carry on working and refused to adopt a traditional Islamic lifestyle. She was physically assaulted and had to leave the country. The CRR refused to regard her as belonging to a social group within the meaning of the Convention. It condemned the attitude of the local authorities, which turned a blind eye to the attacks. She was granted refugee status.[9]

d) In view of the birth-control policy imposed by the Chinese government, can the Chinese women, and their husbands too, be recognised as refugees because of their membership of a "social group"? The answer has been a negative one in the French case-law so far.[10]

NOTES

1 UNHCR Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Geneva 1992, No. 79, p. 10. see J. C. Hathaway. The Law of Refugee Status, Toronto, 1991, pp 157, 163; A. Helton, "Persecution on account of Membership in a social group as a basis for Refugee Status", (1993) 15 Columbia Human Rights Law Review, P.39. M. Fullerton, "A comparative look at refugee status based on persecution due to membership in a particular social group" Cornell International Law Journal vol. 26, No. 3 1993, p.505.

1 bis For Romanians of "bourgeois" origin, see September 24, 1934, Bastaké, and October 8, 1984. Doiescu.

2 For Cambodia under the Khmer Rouges, Thach So, July 12 1985: Chea, November 26 1985: Yea February 2 1987:. For Laos, Hoynh Lao December 5 1985; Rathjhackdy December 20 1985.

3 See a 1981 Dutch case, decided by the Council of State, reported in I.J.R.L. vol 1 1989, p 246. (No. 010) and CRR December 12 1993, Koloskov, in Rec. CRR 1993 p.62
- See also a Bundesverwaltungsgericht decision of 1988, reported in IJRL vol 1, no.1 1989 p 110, 0040. The recent decision of the UK Immigration Appeal Tribunal, Vraciu v Home Secretary is commented on by N Bamforth, "Protected social groups, the Refugee Convention and judicial review: the Vraciu case", Public Law, 1995, 382. It was held that homosexuals could, at least in Romania, count as a "particular social group" for Convention purposes. The Tribunal thus departed from its decision in Golchin v Home Secretary.

4 See "Report on the International Consultation on Refugee Women, Geneva, 15-19 November 1988, with particular) reference to protection problems", I.J.R.L. vol. 1, No.. 2, 1989 P. 233; Anders B. Johnsson". The International Protection of Women Refugees. A Summary of Principal Problems and Issues", ibid p. 221.

5 "Report...", p. 235

6 See, for Iranian women which, in addition to fear of persecution because of their opposition political activities, were also subject to persecution specific to women, two German cases reported in I.J.R.L. 1989, vol 1, No.2 P 566, I.J.R.L/00 22 and I.J.R.L./ 0170, P. 611. But see an English Immigration Appeal Tribunal of 1987, reported in I.J.R.L 1989 vol. 1, p. 566 No. 0023. See also in 1991 Canadian decision holding that the claimant, a Somalian woman, had established a well-founded fear of persecution by reason of her membership in a particular social group, "young women without male protection" (I.J.R.L. vol. 5. No. 2 1993, p. 276)

7 See three decisions of the French CRR of 1991 (I.J.R.L./0173) and 1992 (id/0172 and /0175) relating to Sri Lanka.

8 CRR Mademoiselle X, September 19 1991, commented by R. Errera in Public Law 1993, 196.

9 CRR Mn. Elkébir, July 22 1994, Rec. CRR 1994 p 66; commented by R. Errera, Public Law 1994. 655. See the remarks of Mr. de Bresson, President of the CRR in Le Monde July 24-25 1994.

10 See Conseil d'Etat, December 20, 1993, Mme Cheng, Rec. p. 780; R.G.D.I.P. 1995 156, note D. Alland (same decision for Mr. Cheng); June 24, 1992, Zhow, Rec. p. 988.

Chapter 3

WHO IS A REFUGEE?

- refugees from civil war and other internal armed conflicts -

Dr. Joachim Henkel
Judge at the German Federal Administrative Court, Berlin

A. Protection needs of persons fleeing internal armed conflicts

Most asylum-seekers coming to Europe these days originate from countries torn by civil war or other internal armed conflicts. The authority of the central government is either threatened by rebel or terrorist forces or has entirely collapsed. Refugees from these countries claim asylum for a variety of reasons. They are afraid for their lives because of the fighting. They can no longer endure the general hardship caused by the fighting (lack of food or medical treatment, closing down of schools, etc). They fear being drafted into the army either by the government or rebel forces and, thus, risking to lose their life in combat or to be forced to fight against members of their own community or to have to participate in acts contrary to basic rules of human behaviour ("ethnic cleansing", genocide). More generally, they are afraid of being asked to take sides in a conflict - be it by providing shelter or food, be it by participating in civil patrols, be it by reporting on neighbours - thus, risking persecution because of whatever they might do or fail to do. They fear being arrested, detained, harassed or tortured by government forces simply because they belong to an ethnic community which terrorist groups claim to represent. They fear to become victims of "systematic" rape or to be detained in concentration camps with an unknown future. They are afraid of losing their homes and fields in counterinsurgency moves aimed at depriving the enemy of its supply basis.

B. Scope of Geneva Refugee Convention

1. No protection against general consequences of civil war

The first and foremost reaction to asylum-seekers from countries in a state of civil war is that persons leaving their country of origin as a result of

internal armed conflict are not normally considered refugees under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. [1]Their applications for asylum are often denied - even as obviously unfounded -[2] on the grounds that they are "only" fleeing the general consequences of civil war; that the risk of becoming a victim of the fighting is not related to their political opinion, race or religion; that the likelihood of their being hurt was no higher than that of the other members of the population or their community; that the danger of losing one's life in the course of the conflict was more a matter of chance than the consequence of an action directed against them personally. Certainly, the Geneva Refugee Convention does not provide protection against all the suffering caused by civil wars or other internal armed conflicts.

2. Efforts to enlarge the refugee concept

The limited scope of the Geneva Refugee Convention as regards asylum-seekers from countries in a state of civil war has long been realized. For many years, there have been numerous efforts by the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations General Assembly and others to remedy this situation. As a model served the OAU Convention of 1969 which expressly states that the term "refugee" shall apply also to persons who have been compelled to leave their country of origin owing to events seriously disturbing public order in either part or the whole of it. [3]First, the mandate of the UNHCR has been enlarged to provide assistance and then as well international protection to externally displaced persons in a refugee-like situation. [4]Furthermore, States have been called upon in various resolutions to provide at least temporary safe haven to Convention refugees and externally displaced persons in a refugee-like situation. [5]States in many instances have responded positively to these resolutions. States in Latin America even have adopted in 1984 a declaration which similar to the 1969 OAU-Convention accepts that the refugee concept includes "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." [6]Thus, it has been argued that the concept to provide at least temporary shelter to persons fleeing situations of civil war, has developed into a rule of customary international law. [7]This may well be the case for Africa and Latin America. Whether it is the case worldwide, however, is open to question [8] and highly contested in particular by many countries in Europe which maintain that they do not

grant protection to victims of violence as a matter of international law but as a matter of discretion on the basis of their humanitarian tradition.

3. Persecution versus "general consequences" of civil war

The general rule that the Geneva Refugee Convention does not provide protection against the general consequences of civil war is correct, but is often applied too broadly. Certainly, the danger of being caught up in the fighting and thus losing one's life more or less by accident is a general consequence of civil war. Furthermore, the danger of losing a limb by treading on a land mine is a general consequence of civil war. Lack of food or water, lack of electricity and heating, lack of medical treatment and many other sufferings are general consequences of civil war. But, in my view, it amounts to persecution if one of the warring parties as part of its strategy subjects the female members of the enemy community to wide-spread rape; if the warring parties resort to the practice of "ethnic cleansing"; if the warring parties detain all male members of the enemy community in concentration camps in which they are abused and ill-treated; if one of the warring parties after having captured a city takes to killing even the civilian members of the enemy community. Even though such atrocities may be common in today's civil wars they clearly are directed against persons as individuals; they are not just the unavoidable more or less anonymous consequences of a war. Thus, if one of the warring parties singles out a person or a group of persons for reasons of race, political opinion or one of the other elements enumerated in the refugee definition and subjects it to serious human rights violations this clearly constitutes persecution. It appeared as if this approach was generally accepted in Europe since a Note of the Presidency of the Council of the European Union of February 20, 1995 on a harmonized application of the Geneva refugee definition stated that the use of the armed forces in a civil war or in other internal armed conflicts, in principle, does not constitute persecution where it is in accordance with internationally recognized practice; it becomes, however, persecution "if it takes the form of reprisals against opponents or sections of the population or of a campaign to annihilate them. [9]The "Joint Position" on this issue, adopted "in principle" by the Council (Justice and Interior) on 23 November 1995, [10]however, seems to take a narrower approach since it states that the use of the armed forces "becomes persecution where, for instance, authority is established over a particular area and its attacks on opponents or on the population fulfil the criteria in section 4" which defines what is meant by persecution. Hence, the European Union seems to accept

as persecution primarily atrocities committed by the armed forces in areas over which authority is already established, thus leaving a population exposed to such atrocities in situations of civil war before such "authority" is established outside of the scope of the Geneva Refugee Convention. For them "other forms of protection may be provided under national legislation", as the "Joint Position" points out.[11]

4. Agents of persecution in situations of civil war

Normally persecution is related to action by the authorities of that country. [12]It is generally accepted as well that offensive acts committed by sections of the population or other autonomous groups (third parties) can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse to offer effective protection. Whether this is also the case if the authorities are unable to offer adequate protection, however, is still an open question the answer to which is especially important for persons fleeing countries in a state of civil war.

a) German case-law

The Courts in Germany have held regularly that offensive acts of third parties can be considered as persecution only if the authorities in some way can be held accountable for their acts. This would be the case if the authorities "in principle" did not provide effective protection against such acts. [13]However, if the authorities would try to provide protection employing all the means usually at their disposal to uphold public order, but would fail to succeed in individual cases they could not be held accountable for such acts which, therefore, could not be considered as persecution. [14]If persecution in this way is linked to State accountability, it follows that there can be no persecution in areas over which the government has lost effective control and, moreover, there can be no persecution in countries in which no longer exists any State authority. Consequently, the German Federal Constitutional Court has held that persecution generally requires that the State is effectively in control of the area it is acting in. [15]Thus, in situations in which the State has lost control of certain areas to insurgent forces there does not exist the possibility of persecution as long as the State is in fact only acting in the role of a party to a civil war. Under such circumstances the State does not exist as an effective force of order; its actions, therefore, do not constitute persecution as long as they are of a military character and aim at the recovery of areas which de jure still belong to its territory but de facto

have been lost to other forces. This general rule does not apply, however, if the Government forces conduct the combat in a way which aims at the physical destruction of persons or groups of persons because of their actual or perceived ethnic origin or political opinion or religious beliefs in case they no longer offer resistance or do not or no longer participate in the fighting. Moreover, it does not apply in situations in which the actions of the Government forces aim at the physical annihilation or destruction of the ethnic, cultural or religious identity of the entire insurgent community. This concept, developed by the Federal Constitutional Court, in interpreting the constitutional right to asylum (Article 16a of the Fundamental Law) was recently adopted by the Federal Administrative Court for the application of the Geneva Refugee Convention as well stating that there can be no persecution within the meaning of Article 1A para. 2 of the Convention in countries in which the State authority had ceased to exist. [16]This would apply especially in situations of total anarchy in the asylum-seeker's country of origin. If, however, in the country whose government had ceased to exist regional state-like powers had evolved gross human rights violations of these powers could be considered as persecution.

b) Concept evolving within the European Union

The concept that offensive acts can constitute persecution only if a State or State-like authority can be held accountable for them appears to be favoured by the majority of governments in Europe today. Thus, in the Note by the Presidency of the Council of the European Union of 20 February 1995, already referred to, it is pointed out that "(P)ersecution within the meaning of the Geneva Convention presupposes that the State must assume responsibility in some way or other. Persecution is generally the act of a state organ (central State or federal States, regional and local authorities) or of parties or organizations which have a stranglehold on the State. In some cases bodies which de facto control all or part of the territory within which they exercise the State's powers may be equated with the State." [17]The "Joint Position" of the European Council referred to before takes the same approach stating that "(P)ersecution is generally the act of a State organ (central State or federal States, regional and local authorities) whatever its status in international law, or of parties or organizations controlling the State."[18]

Addressing the issue of **persecution by third parties** the Note of the Presidency 20 February 1995 states that "(P)ersecution by third parties is

deemed to stem from the State itself and falls within the scope of the Geneva Convention where it is encouraged or permitted by the authorities." Persecution by persons or groups acting autonomously, the Note points out, as a general rule, does "not in itself warrant the grant of refugee status." As an exception to this rule, the Note concludes, that the State may be held responsible, however, "where authorities tolerate such persecution knowingly or fail to act upon it although they are able to provide protection. Refugee status may be provided under such conditions. Temporary absence of satisfactory protection does not, however, constitute sufficient justification here." [19]On this issue the "Joint Position" of the Council (Justice and Interior) of 23 November 1995 points out [20] that "(P)ersecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The person concerned may be eligible in any event for appropriate forms of protection under national law." [21]Hence, the European Union clearly takes the view that there can be no persecution within the meaning of the Geneva Refugee Convention in countries in which a State authority has ceased to exist.

c) Critical comments

The approach adopted by the European Union, in my view, is not consistent with the spirit of the Geneva Refugee Convention. [22]First, there is nothing in the travaux preparatoires of that Convention to suggest such a limited concept. The authors of the Convention discussed primarily whether it should apply to refugees from Europe alone or instead without any geographical limitation to refugees world-wide, but they did not address the issue whether persecution had to be attributable to government authorities. [23]The wording of the Geneva Refugee Convention as well does not in any way indicate that only offensive acts which a government can be held responsible for constitute persecution. The refugee definition does not qualify the term persecution in this way, but simply states that a person is a refugee who owing to a well-founded fear of persecution is unable or unwilling to avail himself of the protection of his country (Article 1A para. 2 of the Convention). Thus, the term persecution is not linked to a misbehaviour on the part of the government of the refugee's country of

origin. On the contrary, the Convention only asks whether or not the refugee can obtain protection from his home country. Furthermore, the Convention clearly was enacted in order to provide protection to persons who in their country of origin cannot enjoy their fundamental human rights and freedoms without discrimination. [24]Therefore, the essential reason for extending international protection to refugees is the absence of national protection against persecution, whether or not this deficiency can be attributed to an intention to harm on the part of the State. It is not the purpose of the Convention to judge the country of origin or to establish its responsibility. The sole purpose is to provide protection to those in need of it. The Convention does not appeal to the countries of origin to address their deplorable human rights record. It does not foresee any sanctions against refugee-producing countries. Instead, it appeals to Governments that they continue to receive refugees in their territories [25] and underlines the urgency of assuring refugees the widest possible exercise of their fundamental rights and freedoms. [26]A look at the general discussion on State responsibility in international law shows as well that the accountability of the asylum-seeker's country is not decisive in defining the term persecution. State responsibility is only of importance if a State is to be called to account for an action contrary to international law. Hence, it generally plays a role only in cases in which a State is asked to make reparations or to give satisfaction. [27]The Geneva Refugee Convention, however, does not address the question of reparations to be made by the country of origin. It does not even blame countries because of their inability to provide effective protection. Instead, it simply tries to secure that refugees do not have to suffer the consequences of the lack of protection by their country of origin. [28]This approach, to my knowledge, has been shared by a considerable number of States in the past including member States of the European Union. [29]I should like to refer only to decisions handed down by courts and administrative tribunals in Australia, [30]Canada, [31]Denmark, [32]France, [33]New Zealand, [34]the Netherlands[35], the United Kingdom [36] and the United States. [37]in which clearly the "incapacity standard" as opposed to the "complicity standard" was applied, thus granting asylum to individuals trying to escape gross human rights violations by private parties even in situations in which there was no State complicity involved, but in which the Government had ceased to exist or for other reasons simply was incapable to offer effective protection. Hence, I wonder whether the approach taken by the European Union truly reflects world-wide state practice on this issue or simply reflects the growing restrictive tendencies in the application of the refugee definition in today's Europe. [3839]

4. Domestic flight alternative

In situations of civil war or other internal armed conflicts persecution may well be confined to a specific part of a country's territory. Thus, we have to ask ourselves whether or not asylum may be denied if a person could avoid persecution by moving elsewhere within the territory of his country of origin. According to the German Federal Constitutional Court a person who can find protection against persecution in his own country is not in need of protection abroad. This would be the case if he has to fear persecution in one part of his country but could live without that fear in another part of his country. [40]However, it could be expected of him to move to another part of his country only if it is established, first, that he would be sufficiently safe from persecution there and, second, that he would not have to suffer there from other serious disadvantages or dangers which did not exist at his previous residence. Hence, he would not be denied asylum for example if he could move to a region in which he would be safe of persecution, but in all likelihood could not survive economically. [41]He also could not be expected to move to a "liberated area" where he would be safe from persecution by government authorities, but where his life would be in constant danger because of military attacks by government forces. Finally, the German Federal Administrative Court has recently held that, as a matter of course, asylum may not be denied if the asylum-seeker would be safe from persecution in certain regions of his country of origin, but would not be able to reach them. [42]The concept that there is no need of protection abroad in the case of a domestic flight alternative as a general rule is widely accepted, but it must be applied with great care. This is especially true if the asylum-seeker is fleeing direct persecution from the authorities of his country of origin. [43]Under such circumstances it has to be assumed that, normally, the asylum-seeker is threatened with persecution country-wide unless, exceptionally, it is clearly established that the risk of persecution by government authorities is limited to a part of the country which may be the case especially in situations in which persecution is part of a regional conflict with rebel or terrorist forces. [44]That an asylum-seeker should not be asked lightly to move to another part of his country is also recognized by the "Joint Position" of the Council (Justice and Interior) mentioned before pointing out [45] that in situations in which "it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary (...) to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may

reasonably be expected to move." The previous draft had underlined as well that there must be certainty, first that the alternative location can be reached by the asylum-seeker and, second, that it "guarantees internal stability and safety." [46]Finally, it has to be established that the domestic flight alternative does exist, as a matter of course, at the time of the final hearing of the asylum-seeker's case.

5. Punishment because of draft evasion or desertion

Many asylum-seekers from civil war countries claim that upon return they may face punishment because of draft evasion or desertion. Fear of prosecution and punishment for desertion or draft evasion, however, does not in itself constitute a well-founded fear of persecution under the refugee definition. [47]On the other hand, it is generally accepted that a deserter or draft evader may be considered a refugee if he would suffer disproportionately severe punishment for his offence on account of his race, religion, nationality, membership of a particular social group or political opinion. Whether he may be a refugee if his sole claim to refugee status is that for reasons of conscience he cannot perform military service is still an issue of controversy. Such a claim would not be accepted in Germany for example. On the contrary, the Federal Administrative Court has held that the reasons which may have caused the asylum-seeker to refuse to perform military service are irrelevant. In assessing the asylum claim of a draft evader or deserter, according to the Court, it is of relevance alone whether the punishment as such is directed against his political opinion or one of the other reasons enumerated in the refugee definition which would be the case, for instance, if owing to one of these reasons he would have to face harsher punishment than others under the same circumstances. [48]This general approach, I find, is to narrow. If a person can show, for example, that against his conscience he would have been compelled to participate in military action contrary to basic rules of human conduct, in my view, the order to engage in such actions in itself would amount to persecution. Consequently, prosecution and punishment for draft evasion or desertion committed in order to avoid being compelled to participate in such actions also constitutes persecution irrespective of whether or not it would be disproportionately severe. [49]In order to evaluate whether certain actions are to be considered contrary to rules of basic human behaviour due regard should be had to the Geneva Conventions of 1949 relating to the Protection of Civilian Persons in Time of War and the Treatment of Prisoners of War and the 1977 Protocols Additional to the Geneva Conventions of 1949

relating to the Protection of Victims of International and of Non-International Armed Conflicts. Only gross or systematic violations of these rules, however, may justify the conclusion that the actions of a warring party are to be considered as contrary to the basic rules of human behaviour. This broader approach to draft evasion or desertion as a reason for granting asylum is also taken in the already mentioned "Joint Position" of the Council (Justice and Interior) which states that "refugee status may be granted, in the light of all the other requirements of the definition, in cases of punishment of conscientious objection or deliberate absence without leave and desertion on grounds of conscience if the performance of his military duties were to have the effect of leading the person concerned to participate in acts coming under the exclusion clauses in Article 1F of the Geneva Convention." [5051]

B. Scope of European Convention on Human Rights

Because of the limited scope of the Geneva Refugee Convention persons fleeing the consequences of civil war or other internal armed conflicts increasingly invoke the European Convention on Human Rights (ECHR), especially its Article 3 which provides that "(N)o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The question we have increasingly to deal with is whether and in which respects the European Human Rights Convention may offer protection against refoulement beyond the scope of the Geneva Refugee Convention.

1. Applicability of Article 3 ECHR in expulsion and deportation cases

That the decision by a Contracting State to extradite, to expel or to deport a fugitive may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention has been recognized by the European Court on Human Rights and the European Commission on Human Rights in numerous cases. [52]Thus, it can be considered a well-established and generally accepted practice that Article 3 of the Convention does not only prohibit ill-treatment of nationals and others residing on the territory of a Contracting State, but it prohibits as well to expose a person to the risk of ill-treatment in a third country which may not even be a Contracting State. Hence, Article 3 of the European Human Rights Convention, like Article 33 of the Geneva Refugee Convention, imposes responsibility on a Contracting State for acts which occur outside

its jurisdiction. It, therefore, has to take into account the consequences which the removal of a person to a third country may have there.

2. Constituent elements of Article 3 ECHR

a) Inhuman or degrading treatment

As inhuman the Court considers treatment if it causes either actual bodily injury or at least intense physical or mental suffering to the persons subjected thereto. Such treatment is degrading if it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. [53]In other words, the notion of inhuman treatment covers at least such treatment as deliberately causes severe mental or physical suffering. Further, treatment of an individual is degrading if it grossly humiliates him before others or drives him to act against his own will or conscience. [54]As torture the Court considers an aggravated form of inhuman or degrading treatment; it must occasion a suffering of a particular intensity and cruelty.[55]

b) Minimum level of severity

The Court regularly states that the ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[56]

c) Agent of ill-treatment

Normally, the risk of ill-treatment is related to action by the authorities of the country the individual is deported to. Under such circumstances the responsibility of the removing State under Article 3 is well-established. This is not yet as clear in cases in which the deportee risks being exposed to ill-treatment by third parties (private individuals, political parties, para-military groups, ethnic or religious communities or other autonomous groups). [57]The inclusion of ill-treatment by private parties should, however, be accepted[58], as is the case under the Geneva Refugee Convention, at least in situations in which their actions are tolerated by the authorities or in which the authorities

are unwilling to provide effective protection, since in such cases there still exists a State authority to which the act of ill-treatment can be attributed. There are indications that the Commission may even go somewhat further since in the case of **Memis v. Federal Republic of Germany** [59] it pointed out that it had already considered cases in which the risk of ill-treatment had not emanated from the authorities of the receiving country, and then underlined that of relevance was alone the existence of an objective danger the establishment of which did not necessarily mean that the receiving State was responsible for it. Irrespective of the receiving State's responsibility, in the cases in which the Commission had considered ill-treatment by third parties thus far there still existed a Government in the receiving country.

Today, however, we are increasingly confronted with cases in which applicants risk ill-treatment from warlords or other groups in countries where in the course of civil war any kind of State authority has ceased to exist (Somalia, Afghanistan). The Commission in the recent case of **Ahmed v. Austria** has held [60] that even under such circumstances there may be a substantial risk of ill-treatment within the meaning of Article 3. It expressly dismissed the Austrian Government's position that for the Somali applicant there could be no substantial risk of persecution since the State authority had ceased to exist in his home country. Under those circumstances, the Commission underlined, it is sufficient that those who hold "substantial power" within the State, even though they are not the Government, threaten the life and security of the applicant. As such a substantial power it recognized the clan of General Aideed in Somalia. In consequence, ill-treatment emanating from a Mudjaheddin group in Afghanistan could as well be considered under Article 3. This decision is of considerable interest as it may well be argued that a clan in Somalia or a Mudjaheddin group in Afghanistan, powerful as it may be, is not a quasi-state authority and hence a group which in a number of countries would not be accepted generally as a possible agent of persecution within the meaning of the Geneva Refugee Convention. [61]In this respect, therefore, the protection against refoulement provided by Article 3 ECHR may reach further than that provided by certain States under the Geneva Refugee Convention.

d) Point of reference for ill-treatment: Act of removal or offensive actions in receiving country ?

Normally, the individual invoking Article 3 against deportation will have to show substantial grounds for assuming ill-treatment in the country he is

going to be deported to. Thus, the risk of becoming a victim of a famine would not constitute ill-treatment in his country of origin; it is only the general consequence of a natural disaster. It could also be argued that the risk of becoming a victim of civil war does not amount to ill-treatment within the meaning of Article 3 ECHR of the Convention since "treatment" is to be understood as an act directed against a person individually which is not the case if a person loses his life in the course of general combat. On the other hand, it is well established that it is not the behaviour of the receiving country which is under scrutiny but the behaviour of the removing country. Looking at the act of removal, however, it could well be argued that it in itself constitutes inhuman treatment if it is foreseeable that the deportee for example is facing certain death in the country of destination, irrespective of whether this is the general consequence of a natural disaster or of a civil war or whether it follows from treatment directed against the individual personally. Decisive would be only whether the risk for the deportee is real and foreseeable by the removing State.

Personally, I find this broader interpretation of Article 3 ECHR convincing. [62]First, it is the logical consequence of the fact that only the Contracting State's and not the country of destination's responsibility is at stake. [63]Second, it is in itself inhuman and degrading knowingly to send a person into a country in which he will probably lose his life or physical integrity. Third, already the order of deportation as such can cause under those circumstances severe mental suffering which amounts to ill-treatment within the meaning of Article 3 of the Convention. Furthermore, there are some cases decided by the European Human Rights Commission which point in this direction. To be mentioned here are especially decisions in which the Commission has declared admissible the application of juveniles who had argued that they had no relatives in the country they were ordered deported to who would take care of them which in consequence could lead to serious mental disorder. [64]In these cases, the applicants evidently did not substantiate a risk of ill-treatment personally directed against them in their country of origin, but simply pointed to the mental suffering caused by the fear of being deported to a country in which they did not know who would take care of them. Since the Convention, as the Court often recalled, is a living instrument which must be interpreted in the light of present-day conditions, [65]Article 3 ECHR could well be interpreted more broadly today in this respect than it used to be in the past.

It has to be recognized, however, that the case-law of the European Court of Human Rights and State practice apparently point in a different direction. First of all, the Court has observed that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3 ECHR, to control the entry, residence and expulsion of aliens. Moreover, it noted that the right to asylum is not contained in either the Convention or its Protocols. [66]Furthermore, the Court has pointed out that the basis of State responsibility in such cases "lies in the exposure of a person by way of deportation or extradition to inhuman or degrading treatment in another country". [67] The reference to ill-treatment in another country could be taken to mean that the act of removing a person to a third country as such is a neutral act which constitutes inhuman or degrading treatment only if the deportee risks ill-treatment in his country of origin. The exposure to the general consequences of natural or man-made disasters, however, cannot be regarded as "treatment" since treatment normally means an action directed personally against an individual. For these reasons, the German Federal Administrative Court recently held [68] that Article 3 ECHR protects an individual against refoulement only if in his home country he would be exposed to practices contrary to that Article. The act of removing a person to his home country, it pointed out, in itself is neutral and, therefore, could engage the Contracting State's responsibility only if what happened to him upon return would constitute ill-treatment within the meaning of Article 3. Hence, removing a person to a country in which he would in all probability starve to death as a consequence of a famine or other natural disasters would not be considered as contrary to Article 3 since it does not constitute "ill-treatment" in his home country.

3) Protection against refoulement in situations of civil war

a) No protection against general consequences of civil war

What constitutes ill-treatment in situations of man-made disasters such as civil war is open to controversy as well. There are Governments who as a general rule would submit that Article 3 ECHR does not provide protection against refoulement to a country in a state of civil war irrespective of the consequences this might have for the individual concerned. [69]This view, evidently, is far too restrictive. On the contrary, especially in times of civil war practices of ill-treatment may be rather frequent. That there can be instances of ill-treatment also in countries in a state of civil war is clearly borne out by the case-law of the European Commission and the European

Court of Human Rights both of which have considered applications by persons who had come from countries ravaged by civil war claiming ill-treatment at the hands of the security forces or other substantial powers if they were returned home. [70]It is commonly accepted, however, that the removal of a person to a country in which he may become a victim of the general consequences of civil war is no less contrary to Article 3 of the European Human Rights Convention than it is to Article 33 of the Geneva Refugee Convention.[71]

b) Exposure to risk faced by entire population or community

The opinion, however, is often expressed that in situations of internal armed conflict the applicant has to show that he would be worse off than the rest of the population or the community he belongs to. The case-law of the European Court of Human Rights indeed may point in this direction. Thus, the Court in the case of Vilvarajah and others has dismissed the applications of young male Tamils by stating inter alia that the evidence before it did not establish "that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country." [72]To infer from this judgment that Article 3 is not applicable in cases in which the entire population of a country or one of its communities is exposed to the risk of being ill-treated would not be justified in my opinion. First, in the Vilvarajah-case the Court had also taken note of the fact that the overall situation in Sri Lanka had improved and that a UNHCR voluntary repatriation programme had begun to operate. The Court still had regarded the situation as being unsettled so that in its assessment there existed for the applicants the possibility of ill-treatment, but it held that a mere possibility of ill-treatment is not sufficient to give rise to a breach of Article 3. The Court, thus, evidently assumed that there was no longer a real risk of ill-treatment for returning young Tamils. Second, the Court previously had never considered it decisive whether a certain risk was common or not in the country to which the applicant was to be removed. For example, in the Soering case the Court did not rule out "the death row phenomenon" as a practice of ill-treatment only because it is generally faced by all persons sentenced to death in certain States of the United States. Furthermore, in the Vilvarajah-case the court has emphasized that in assessing the consequences of the applicants' removal to Sri Lanka it had to take into account the general situation there as well as their personal circumstances. [73]Hence, I would submit that Article 3 protects a person from being removed to a country in a state of civil war even if the entire

population of that country or the entire community he belongs to is exposed to the risk of being ill-treated. The decisive question in such situations, in my view, is only whether the risk for the individual is real and foreseeable, but his risk of being ill-treated must not be higher than that of the other members of the population or his community as long as it is real.

5) Real risk of ill-treatment

If we now turn to the requisite likelihood of ill-treatment the Court from the very beginning has emphasised that there must be a r e a l risk of ill-treatment in the country the individual is removed to. [74]Furthermore, it has pointed out that the mere possibility of ill-treatment is not sufficient in itself to give rise to a breach of Article 3 of the Convention. [75]On the contrary, it has held that there must be s·u·b·s·t·a·nt·i·a·l grounds for fearing that the individual would be subjected to ill-treatment in breach of Article 3. The risk must be a s e r i o u s one. In addition, it has underlined that the consequences of the persons removal to his home country have to be f o r e s e e a b l e by the removing State. [76]The seriousness of the risk, thereby, is evaluated on the basis of the objective situation prevailing in the country of origin. Therefore, the standard used to assess the likelihood of ill-treatment within the meaning of Article 3 ECHR seems to be somewhat stricter than the standard used to determine a well-founded fear of persecution within the meaning of Article 1A para. 2 of the Geneva Refugee Convention, since the latter clearly contains also a subjective element.[77]

6) Possibility of escape within home country

As we have seen above, [78]it is established practice in asylum law that a person who has a well-founded fear of persecution in part of his home country, nevertheless may be refused asylum if he would be safe in another part of his country. This concept, in my view, also applies to Article 3 ECHR. Thus, if a person has the possibility to avoid ill-treatment by moving to another part of his country he is not entitled to protection against refoulement under that article. However, it has to be clearly established that he is sufficiently safe against ill-treatment there and that he can reach that part of the country without risking ill-treatment on his way there. This issue has not yet been discussed in detail by the European Commission and Court of Human Rights. In rejecting the application of a Turkish national who had alleged owing to his sympathies for the Kurdish Labour Party (PKK) he would risk being tortured in police detention, however, the Commission has

pointed out inter alia that he had not established that he had been prevented from moving to other more secure parts of Turkey. [79]The Court, moreover, in the case of Vilvarajah and others has indicated a similar approach in observing that large parts of the applicants' home country remained quiet, thus implying that the danger of their becoming victims of the civil war did not exist in all parts of Sri Lanka. [80]Therefore, it may well be assumed that the risk of ill-treatment must exist country-wide in order to establish a case under Article 3 of the Convention.[81]

7) Questions of proof

In the case of **Ireland v. United Kingdom**, the Court stated that in order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, it will not rely on the concept that the burden of proof is borne by one or the other of the two Governments. On the contrary, it will examine all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtain material propio motu. [82]Thus, the burden of proof is not on the applicant. Nevertheless, the burden to substantiate his fear that he will be exposed to treatment or punishment contrary to Article 3 clearly lies on him. [83]

D. Conclusions

Comparing the scope of protection provided by Articles IA (2) and 33 (1) of the Geneva Refugee Convention with that provided by Article 3 of the European Human Rights Convention we have to find that there are many similarities, but some differences as well:

First, I think, the protection provided by Article 3 ECHR may go further in that

- it restrains a Contracting State from removing a person to a country in which he would be exposed to the risk of ill-treatment even if in this country there exists no State authority any more; it is sufficient that the risk of ill-treatment originates from a "substantial power";

- the applicant need not establish that he runs the risk of ill-treatment because of his race, religion, nationality, membership of a particular social group or political opinion; any reason or no reason at all would do; all he has to establish is a real risk;

On the other hand, I would submit, that the protection provided by Article 3 ECHR may be somewhat narrower in that

- the requisite level of severity may be higher for assessing a treatment as inhuman or degrading than that for assessing a treatment as persecution; thus, the risk of being detained for a few days may not constitute inhuman treatment, but may well be persecution if it happens for the specific reasons enumerated in the refugee definition;

- the likelihood of becoming a victim of ill-treatment must be more substantiated and more serious than that of becoming a victim of persecution since the risk of ill-treatment must be based on objective elements alone whereas the refugee definition contains a subjective element (well-founded f e a r of persecution) as well;

- it provides only (temporary) protection against refoulement whereas the Geneva Refugee Convention aims at securing for the refugee a legal status which eventually would allow him fully to integrate into his country of asylum and finally even become a national of it (see Article 34 of that Convention).

Both Conventions coincide, however, in that they do not provide protection against refoulement to a country in which the applicant may avoid ill-treatment or persecution by moving to another part of that country. More importantly, Governments generally contend that both Conventions alike do not provide protection against refoulement to a country in which the applicant may become a victim of a natural disaster or the general consequences of a man-made disaster, irrespective of the seriousness of the risk involved.

In closing, I think, we have to recognize that the Geneva Convention as well as the European Convention on Human Rights have a limited scope. They do not answer the hopes of many who are in need of international protection. Other concepts for their protection have to be developed further in international and domestic law. However, both Conventions, for the time being, remain the basic international instruments for the protection of persons in need of it and their scope is not as narrow as it is often assumed. Therefore, in applying these Conventions we should try to keep an open and unbiased mind despite the pressure public opinion might bring to bear on us

these days to adopt stricter standards and thus to limit further the already limited access to and acceptance of refugees in our countries.

---

[1] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR-Handbook), Geneva 1979, p. 39 at para. 164.

[2] See Art. 30 para. 2 of the German Asylum Procedures Act (Asylverfahrensgesetz) of 27 July 1993 (BGBl. I S. 1442)

[3] See Art. I para. 2 of the OAU Convention of 1969 governing specific aspects of refugee problems in Africa; Conclusion no. III, 3 of the Cartagena Declaration on Refugees of 22 November 1984

[4] See Türk, Das Flüchtlingskommissariat der Vereinten Nationen, Berlin 1992

[5] See for instance Executive Committee of the UNHCR Programme, Conclusion No. 22 (XXXII) of 1981 on Protection of Asylum-Seekers in Situations of Large-Scale Influx

[6] Cartagena Declaration, supra note 2, chapter II at para. 3.

[7] See Goodwin-Gill, Non-Refoulement and the New Asylum-Seekers, 26 (4) Virginia J. of Intl. L., p. 897 (1986); Perluss/Hartmann, Temporary Refuge: Emergence of a Customary Norm, 26 (3) Virginia J. Intl. L., p. 551 (1986)

[8] See Hailbronner, Non-Refoulement and "Humanitarian Refugees": Customary International Law or Wishful Legal Thinking, 26 (4) Virginia J. of Intl. L., p. 857; Hathaway, The Law of Refugee Status, Toronto, Vancouver 1991, p. 24 et seq.

[9] Note of the Presidency of the Council of the European Union of 20 February 1995 to the Asylum Working Party (4245/1/95, Rev. 1), para. 5

[10] See "Joint Position defined by the Council on the Basis of Article K 3 of the Treaty on European Union on the Harmonized Application of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees", Doc-No. 12105/95 ASIM 331, p. 10 at para. 6

[11] This approach appears to be even narrower than that taken by the German Federal Administrative Court, see below p. ? at para. 4a).

[12] UNHCR-Handbook, supra note 1, p. 17 at para. 65.

[13] Bundesverwaltungsgericht, decision of 5 July 1994 - BVerwG 9 C 1.94 -, Informationsbrief Ausländerrecht 1995, p. 24.

[14] Bundesverwaltungsgericht, decision of 18 February 1986 - BVerwG 9 C 104.85 - BVerwGE 74, 41.

[15] Bundesverfassungsgericht, decision of 10 July 1989 - 2 BvR 502, 1000, 961/86 - BVerfGE 80, 315.

[16] Bundesverwaltungsgericht, decision of 18 January 1994 - BVerwG 9 C 48.92 - BVerwGE 95, 42.

[17] Note of the Presidency, supra note 9, p. 3 at para. 4.

[18] Note of the Presidency, supra note 9, p. 3 at para. 4.

[19] Note of the Presidency, supra note 9, p. 5 at para 4.2.

[20] See "Joint Position", supra note 10, p. 9 at para 5.2.

[21] The Swedish Delegation has declared that in its opinion persecution by third parties may fall within the scope of the Convention as well in situations in which the authorities prove unable to offer protection, see Council of the European Union, Document No. 12866/95 ASIM 344 of 19 December 1995, Annex.

[22] UNHCR Geneva, Information Note on Article 1 of the 1951 Convention, March 1995, p. 3 at para. 5.
[23] See Takkenberg/Tahbaz, The Collected Travaux Preparatoires of the Geneva Convention Relating to the Status of Refugees, 1988.
[24] See its Preamble
[25] See Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons
[26] See its Preamble
[27] Ipsen, Völkerrecht, 1990, p. 108 ff.
[28] See the detailed discussion by Hathaway, supra note 7, p. 124 et seq.
[29] See Brill, The 1951 Convention Definition of Refugee Status and the issue of Agents of Persecution: A Comparative and Human Rights Based Analysis, (unpublished) paper presented in 1992 at the University of Geneva (Institut Universitaire de Hautes Etudes Internationales); Evans, Agents of Persecution: A Question of Protection, Refugee Law Research Unit, Osgoode Hall Law School, York University (Canada), 1991 (unpublished)
[30] Australia: High Court of Australia, decision of 12 September 1989 in the case of Chan Yee Kin and others; Federal Court of Australia, New South Wales District, decision of 16 February 1990 in the case of Shanmugarajah Thavarajasingham claiming that the Sri Lankan Government could not protect him against persecution at the hands of the LTTE because of his support for the PLOTE
[31] Canada: Supreme Court of Canada, decision of 30 June 1993 in the case of Patrick Francis Ward, on asylum-seeker from Northern Ireland claiming that the Government could not protect him against persecution at the hands of the terrorist group INLA; see also the cases cited in a paper by Gary Evans, Agents of Persecution: A Question of Protection, York University 1991.
[32] Denmark: Spijkerboer, A bird's eye view of asylum law in eight European countries, Amsterdam 1993, p. 22 and 47.
[33] France: Thiberghien, Les Situations de Guerre Civile et la Reconnaisance de la Qualite de Refugie, Documentation-Refugies, Supplement au No. 181 from 21/30 April 1992 who describes in detail how the "Commission des Recours des Refugies" first accepted actions by private parties as persecution only if the State tolerated or even supported them, and lately accepts such actions as persecution even if the State is not capable of protecting the individual against them, irrespective of whether or nor there still is a Government in existence. See for example "Commission des Recours des Refugies", decision of 4 September 1991 in the case of Freemans, a refugee from Liberia who at the time had no Government to protect him against offensive acts by either of the two warlords sharing power in the country; decision of 21 February 1993 in the case of Dudic, a refugee of Croatian origin from the Krajina who could not avail himself of the protection of the Government of Croatia against persecution at the hands of the militia of the so-called Serb Republic of Krajina.
[34] New Zealand: Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 9/91 Re Amr, decision of 27 August 1991.
[35] Netherlands: Spijkerboer, supra note 30, p. 22 and 74.
[36] United Kingdom: Immigration Appeal Tribunal, Appeal No. TH/7065/89 (7349), decision of 14 August 1990, in which the tribunal expressly rejected the proposition that if there is no governing body because law and order has

broken down a person suffering at the hands of a faction is outside the ambit of the Refugee Convention.

[37] United States: Anker, The Law of Asylum in the United States, 2nd edition, p. 120. See also for example Court of Appeals, Ninth Circuit, decision of 13 October 1981 in the case of McMullen v. INS; Board of Immigration Appeals, decision of 14 February 1990 in the case of Villata, a national of El Salvador whose asylum claim was accepted since the Government obviously was not able to control the para-military death squadrons at the hands of which he feared persecution because of his student activities.

[38] In a Memorandum from the Dutch Presidency of the Council of the European Communities of 1 October 1991 to the Ad Hoc Group Immigration the question whether a person can be considered a refugee if the government concerned is prepared to offer protection, but is unable to do so is still regarded as an open question which requires "further clarification during harmonisation", see text reproduced in Spijkerboer, supra note 30, Annex 2, p. 91 at para. 3.2.

[39] This approach is strongly criticized by UNHCR, Update of 24 November 1995, underlining that even within the European Union only France, Germany, Italy and Sweden do not recognize victims of persecution by non-state agents as refugees.

[40] Bundesverfassungsgericht, decision of 10 July 1989 - 2 BvR 502, 1000, 961/86 - BVerfGE 80, 315

[41] Bundesverwaltungsgericht, decision of 24 March 1995 - BVerwG 9 B 747.94-, Deutsches Verwaltungsblatt 1995, p. 868; decision of 31 March 1992 -BVerwG 9·C 40.91 -, Deutsches Verwaltungsblatt 1992, p. 1541.

[42] Bundesverwaltungsgericht, decision of 13 May 1993 - BVerwG 9 C 59.92 -, Neue Zeitschrift für Verwaltungsrecht 1994, p. 1210.

[43] See UNHCR Geneva, Information Note on Article 1 of the 1951 Convention, March 1995, p. 3 at para. 5.

[44] Federal Administrative Court (Germany), decision of 10 May 1994 - BVerwG 9 C 434.93 -, Deutsches Verwaltungsblatt 1994, p. 1407

[45] See "Joint Position", supra note 10, p. 13 at para 8.

[46] See Note of the Presidency, supra note 9, p. 7 at para. 7.

[47] UNHCR-Handbook, supra note 1, p. 40 at para. 167.

[48] Bundesverwaltungsgericht, decision of 24 November 1992 - BVerwG 9·C 70.91 -, Deutsches Verwaltungsblatt 1992, p. 325.

[49] UNHCR-Handbook, supra note 1, p. 40 at para. 171.

[50] See "Joint Position", supra note 10, p. 15 at para. 10.

[51] Not to provide protection to those refusing to participate in war crimes would also be in contradiction to the efforts of the international community to bring war criminals to justice as shown for instance by the establishment of the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991".

[52] Judgment of 7 July 1989 in the Soering case, Series A no. 161, p. 35 at para. 91; judgment of 20 March 1991 in the case of Cruz Varas and others, Series A no. 201, p. 28 at para. 69; judgment of 30 October 1991 in the case of Vilvarajah and others, Series A no. 215, p. 34 at para. 102

[53] Judgment of 18. January 1978 in the case of Ireland v. United Kingdom, Series A no. 25, p. 66 at para. 167.

[54] See the Commission's opinion in the Soering case, supra note 50, p. 57 at para. 104.

[55] Judgment of 18 January 1978 in the case of Ireland v. United Kingdom, supra note 51, p. 66 at para. 167.

[56] Judgment of 20 March 1991 in the case of Cruz Varas and others, supra note 50, p. 31 at para. 83 and the cited authorities therein.

[57] See Swiss Federal Court (Schweizer Bundesgericht), judgment of 29 May 1985, BGE 111, I.b, p. 68 considering the appeal from a person risking to become a victim of a blood feud in his home country ; see also European Commission of Human Rights, decision of 6 March in the case of Kilic v. United Kigdom on application no. 8581/79, p. 12 considering the application of a Turkish national fearing ill-treatment at the hands of the "Grey Wolfes".

[58] See van Dijk/van Hoof, Theory and Practice of the European Convention on Human Rights, p. 236; Webemdörfer, Schutz vor Abschiebung nach dem neuen Ausländergesetz, 1991, p. 140.

[59] Decision of 15 March 1984 in the case of Memis v. Federal Republic of Germany on application no. 10499/83, Europäische Grundrechtszeitschrift 1986, p. 324 (325).

[60] See European Commission on Human Rights, report of 5 July 1995 on application No. 25964/94 by Sharif Hussein AHMED v. Austria, p. 11 at paras 67 and 68.

[61] See for example Bundesverwaltungsgericht (Germany), decision of 18 January 1994 - BVerwG 9 C 48.92 - BVerwGE 95, 42; see as well Köfner/ Nikolaus, Grundlagen des Asylrechts in der Bundesrepublik Deutschland, Vol. 1, 1986, p. 364 and the cases cited there.

[62] See as well for example Treiber, Gemeinschaftskommentar Ausländerrecht, 53 Rn. 207; Kälin, Drohende Menschenrechtsverletzungen im Heimatstaat als Schranke der Zurückschiebung gemäß Art. 3 EMRK, Zeitschrift für Ausländerrecht und Ausländerpolitik 1986, p. 172 (177).

[63] Frowein/Zimmermann, Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts, 1993, p. 31.

[64] See Commission, decision of 19 January 1984 on application No. 9330/81 in the case of Bulus v. Sweden, Europäische Grundrechtszeitschrift 1985, p. 748; decision of 3 December 1984 on application No. 11026 in the case of Taspinar v. Netherlands, Europäische Grundrechtszeitschrift 1985, p. 748; see also judgment of the European Court of Human Rights of 20 March 1991 in the case of Cruz Varas and others, supra note 50, p. 31 at para. 84 in which the Court considered a post-traumatic stress disorder of one of the applicants which he had claimed would deteriorate in case of deportation to his country of origin in which according to his statements he had been tortured in the past.

[65] Judgment of 25 April 1978 in the Tyrer case, Series A no. 26, p. 15 at para. 31; van Dijk/van Hoof, Theory and Practice of the European Convention on Human Rights, p. 227.

[66] European Court of Human Rights, judgment of 30 October 1991 in the Case of Vilvarajah and others, supra note 50, 34 at para. 102.

[67] Judgment of 7 July 1989 in the Soering case, supra note 50, p. 55 at para. 96.

[68] Bundesverwaltungsgericht, decision of 17 October 1995 - BVerwG 9 C 15.95 -

[69] See for example the Austrian Government's position as reported by the Commission in its report in the case of Ahmed v. Austria, supra note 58, p. 18 at para. 3.

[70] See Court, judgment of 30 October in the case of Vilvarajah and others, supra note 50.; Commission, report of 5 July 1995 in the case of Ahmed v. Austria, supra note 58.

[71] See above p. 3 at para. 3.

[72] Judgment of 30 October 1991 in the case of Vilvarajah and others, supra note 50, p. 37 at para. 111.

[73] Judgment of 30 October 1991 in the case of Vilvarajah and others, supra note 50, p. 36 at para. 108.

[74] Judgment of 20 March 1991 in the case of Cruz Varas and others, supra note 50, p. 29 at para. 75.

[75] Judgment of 30 October 1991 in the case of Vilvarajah and others, supra note 50, p. 37 at para. 111.

[76] Judgment of 7 July 1989 in the Soering case, supra note 50, p. 35 at para. 90.

[77] UNHCR-Handbook, supra note 1, p. 11 at para. 38.

[78] See above p. 8 at para. 4.

[79] Commission, report of 10 May 1994 on application no. 23551/94, cited according to Hailbronner, Ausländerrecht, Commentary, 1992, section 53 at para. 52.

[80] Court, judgment of 30 October 1991, supra note 50, p. 36 at para. 109.

[81] Bundesverwaltungsgericht, decision of 17 October 1995 - BVerwG 9 C 15.95 -

[82] Judgment of 18 January 1978 in the case of Ireland v. United Kingdom, supra note 44, p. 64 at para. 160.

[83] Opinion of the Commission in the Soering case, supra note 43, p. 55 at para. 94.

Chapter 4

HUMAN RIGHTS

Dr. Richard Plender*

INTERNATIONAL (HUMAN RIGHTS) LAW ON ASYLUM AND REFUGEES

Fundamental Right to Asylum

1. On 10 December 1948, the Universal Declaration of Human Rights was adopted by the United Nations General Assembly[1] as "a common standard of achievement for all ... nations, to the end that every ... organ of society ... shall strive ... to secure their universal and effective recognition and observance ..."[2]. The Universal Declaration of Human Rights is not a treaty and does not create legal obligations in the ordinary sense of that expression although there is some support for the view that it may be used as an aid to the interpretation of the Charter of the United Nations[3]. It remains however the basic standard-setting instrument of the international community in the field of human rights.

2. Article 14 of the Universal Declaration provides that one of these rights is "the right to seek and to enjoy in other countries asylum from persecution", subject to restrictions in the case of "prosecutions genuinely arising from non-political crimes and from acts contrary to the purposes and principles of the United Nations."[4]. Article 14 does not include, either expressly or by implication, a right to *receive* asylum. Indeed, the word "receive" was removed from an earlier draft during the course of the negotiation of the text.

3. The reluctance of the members of the United Nations to accept an obligation to grant asylum from persecution can be seen in others of the principal multilateral texts on the subject. No such right was incorporated into the International Covenant of Civil and Political Rights 1966 ("ICCPR")[5], although it had been included in the draft prepared by the

Human Rights Commission in 1954. Nor was such a right included in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[6] ("ECHR"). In both instances the proposal to include such a right was rejected as incompatible with the sovereign power of States to decide whether to admit or exclude aliens from their territory[7].

4. Following a British proposal, the UN Human Rights Commission nevertheless incorporated a provision into the ICCPR which provides protection for aliens, lawfully in the territory of a member State, from being arbitrarily expelled from that country. Article 13 provides:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

5. The ICCPR has been ratified by 128 States[8] which include all Member States of the European Community, with the exception of Greece. Only 7 States have made reservations or interpretative declarations regarding the rights guaranteed by Article 13[9], 3 of which are Member States of the EC. The United Kingdom reservation entered upon ratification of the ICCPR reads:

> "The Government of the United Kingdom reserve the right not to apply Article 13 in Hong Kong in so far as it confers a right to review of a decision to deport an alien and a right to be represented for this purpose before the competent authority."[10]

6. No such provision was incorporated into the original ECHR. It was not until 22 November 1984, when the Council of Europe adopted Protocol No. 7 to the ECHR, that the Contracting Parties undertook the obligation to refrain from the arbitrary expulsion of aliens from the territory of a Contracting State in whose territory they are lawfully resident[11]. This protocol has currently only been ratified by seven of the 15 Member States

of the EC, viz. Austria, Denmark, Finland, France, Italy, Greece, Luxembourg and Sweden.[12]

7. Certain of the principal relevant international instruments with which we are concerned, in particular the ICCPR and the ECHR, provide for some form of international supervisory mechanism, both by way of periodic State reports[13] on their compliance with the obligations as well as by a way of judicial or quasi-judicial determination of individual petition or inter-state complaints[14]. In general, the right of the Treaty organs to receive either inter-State complaints or individual petitions requires a separate expression of consent by the Member State[15]. The United Kingdom has accepted both the right of individuals to bring complaints before the European Commission on Human Rights (under Article 25 ECHR) and the compulsory *ipso facto* jurisdiction of the European Court for Human Rights (under Article 46 ECHR). In relation to the ICCPR, however, she has only accepted the competence of the UN Human Rights Committee to receive and consider inter-State complaints (under Article 41 ICCPR)[16] and has not yet ratified the Optional Protocol which allows for the Committee to consider complaints brought by individuals[17].

Human Rights Protection under International Refugee Law

8. On 28 July 1951, about eight months after the ECHR had been opened for signature, the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons adopted the Convention Relating to the Status of Refugees[18]. This defines a Convention refugee[19] and provides for certain rights which those refugees are to enjoy[20]. First and foremost amongst these rights is the right of *non-refoulement*. Article 33(1) of the 1951 Convention provides:

> "1. No Contracting shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 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 is, or who, having been convicted by a final judgment of a particularly

serious crime, constitutes a danger to the community of that country."

9. The rights guaranteed by the 1951 Convention further include:

a. Non-discrimination on grounds of race, religion or country of origin in the application of the Convention[21];
b. Non-discrimination between refugees and own nationals in respect of freedom to practise their religion and religious education for their children[22], access to elementary education[23], public relief and assistance[24], remuneration[25], social security[26];
c. Non-discrimination between refugees and other aliens generally[27] and in particular in relation to the right of establishment[28], practice a liberal profession[29], access to housing[30], access to education other than elementary education[31];
d. Non-discrimination between refugees and nationals of foreign countries in respect of freedom of association (in non-political associations and trade unions)[32], the right to engage in wage-earning employment[33];
e. Non-discrimination in relation to access to courts[34];
f. The right to choose their place of residence and to move freely within the Contracting State's territory[35] and to identity papers[36] and Travel Documents[37]; and
g. The right not to be arbitrarily expelled[38].

10. However, the enjoyment of these rights is dependent on the status of the person concerned as a Convention refugee. This is defined as

> "... any person who [...] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[39]

11. A further restriction on the enjoyment of the rights guaranteed by the 1951 Convention is included in Article 1(F) which states:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of his refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

12. Despite the elaborate list of rights accorded to refugees under the Convention, no separate enforcement mechanism has been provided for by the 1951 Convention. The Convention depends for its enforcement on the co-operation of the national authorities with the United Nations High Commissioner on Refugees. There is no mechanism for individual petitions nor, in the strict sense, for inter-State complaints where the provisions of the Convention have not been complied with[40].

13. Although it has been said that the 1951 Convention has been "incorporated into English law"[41] any such "incorporation", be it through the Immigration Rules or the Asylum and Immigration Appeals Act 1993, is strictly limited to the determination of an applicant's status as a refugee and his right of non-refoulement but not to his or her treatment once recognised as a refugee. This also applies to the great majority of the extensive national case-law that has developed on the interpretation of the 1951 Convention. These cases usually come before the courts where there is a dispute about whether a person qualifies as a refugee under the Convention or not.

14. It should, however, be noted that the economic, social and cultural rights set out in the 1951 Convention have expressly been incorporated into the 1961 European Social Charter[42] by way of an Appendix entitled "Scope of the Social Charter in terms of Persons Protected". Para. 2 of that Appendix provides:

"Each Contracting Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Contracting Party under the said Convention and under any other existing international instruments applicable to those refugees."[43]

15. These rights are therefore, indirectly, subject to the supervisory mechanism set up under the European Social Charter, which includes the examination of the two yearly State reports[44] by a Committee of Independent Experts[45]. The European Social Charter has been ratified by all the Member States of the European Community including the United Kingdom[46].

International Human Rights Law Applied to Asylum Seekers

16. Contracting Parties to the general multilateral conventions and instruments governing the protection of human characteristically require Contracting States to secure the extension of the rights in question to "everyone within their jurisdiction"[47] or to any person "within [their] territory and subject to [their] jurisdiction"[48]. Thus the individual State continues to enjoy, subject only to very specific exceptions[49], the sovereign right to exclude or admit an alien to its territory. In general, the question of a person's human rights only arises once he or she has entered the territory of a Contracting Party. Aliens unlawfully present and seeking asylum may, however, enjoy the protection of the international machinery for the protection of human rights. In its recent "Comments" on the UK periodic report[50] the UN Human Rights Committee re-iterated its main concerns in relation to the treatment of asylum seekers by the United Kingdom[51]

Entry and Residence - Non-refoulement

17. The one provision of international human rights law that expressly includes the right to non-refoulement and which is subject to an independent enforcement mechanism is Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[52]. This provides:

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

2. For the purposes of defining 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."[53]

18. The CAT has been ratified by the United Kingdom which has also made a declaration under Article 21 of the CAT, recognising the competence of the Committee against Torture to receive and consider communications from other State Parties to the effect that the United Kingdom has not fulfilled its obligations under the Convention. However, as in the context of the ICCPR, the United Kingdom has not made a declaration recognising the competence of the Committee against Torture to receive and consider individual complaints.[54]

19. In a recent decision upon just such an individual complaint against Switzerland, the Committee against Torture set out the principles to apply when considering whether the expulsion of an asylum seeker would violate Article 3:

"The aim of the determination, however, is to establish whether the individual concerned would be ***personally*** at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances."[55]

20. In finding that there were substantial grounds for believing that the author would be in danger of being subjected to torture, the Committee had

regard to *inter alia* reports on the human rights situation in the applicant's home country (Zaire) prepared by the UN Secretary General and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the UN Special Rapporteur on Torture and the UN Working Group on Enforced or Involuntary Disappearances.

> "Moreover, the Committee considers that, in view of the fact that Zaire is not a party to the Convention, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but *of no longer having the legal possibility of applying to the Committee for protection*"[56]

21. A similar protection against non-refoulement has been developed by the European Court and Commission of Human Rights under its jurisprudence under Article 3 of the ECHR. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

22. Following its decision in *Soering v. United Kingdom*[57], which concerned the extradition of the applicant to the United States where he could have been subject to the death penalty and, potentially, faced years on death row, the European Court of Human Rights, in its judgments in *Cruz Varas v. Sweden*[58] and *Vilvarajah v. United Kingdom*[59], established that, in cases of expulsion as well as extradition, the Contracting States have an inherent obligation towards individuals, who if expelled or extradited, faced a real risk of being exposed to torture, inhuman or degrading treatment.

> "It is a liability incurred by the Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to such treatment."[60]

23. This line of cases has recently been affirmed by the European Commission on Human Rights in its decision in *Chahal*[61]. In that case, despite the United Kingdom's attempt to argue that Contracting States are liable for torture, inhuman or degrading treatment only if this is inflicted within their own jurisdiction[62], the Commission[63]:

"reject[ed] the Government's challenge to the constant case-law of the Convention organs under Article 3 of the Convention and reaffirms the following principles:
`103. ... (the) expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence, engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned. ...

The Commission is further unable to accept the Government's submission that Article 3 of the Convention may have implied limitations entitling the State to expel a person because of the requirements of national security, notwithstanding the existence of a real risk that the person concerned would be subjected to torture or to inhuman or degrading treatment in the receiving State. [...] the guarantees of Article 3 of the Convention are of an absolute character, permitting no exception."

24. Unlike the 1951 Convention which by definition only applies to persons outside their country of nationality[64], it seems that under the terms of Article 3 ECHR the circle of protected persons includes those children or other dependant relatives, nationals of the expelling State, who, through the deportation of their custodial parent(s) or provider, are effectively forced into exile and are faced with a serious threat of torture or of inhuman or degrading treatment. In the case of *Fadele v. United Kingdom*[65] the Commission declared admissible a complaint under Article 3, where the United Kingdom denied the Nigerian father of 3 British children the right to come to the United Kingdom to settle with his children. They complained that by forcing the children to change radically their lifestyle to join their father in extremely poor living conditions in Nigeria, rather than allow him to settle with them, the United Kingdom acted in breach of Article 3[66]. No decision on the merits was ever reached as the case settled through the good offices of the Commission[67].

25. The European Court of Human Rights laid down the test for what constitutes "a real risk of treatment contrary to Article 3" in its judgment in *Cruz Varas v. Sweden*[68], where it stated

"In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*.
Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light after the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears. [...]
It is recalled that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim."[69]

26. However, in the case of *Vilvarajah*[70] the Court stated that

"The [Convention organs'] examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe."

27. Unlike the 1951 Convention the ECHR, in keeping with the non-derogable character of Article 3, does not provide for nor allow any restriction as to who is protected by Article 3[71]. There is therefore no restriction to those persecuted on grounds of "race, religion, nationality, membership of a particular social group or political opinion"[72]. Article 3 therefore has the potential of covering those groups which may not necessarily fall within the protection of the 1951 Convention.

28. Furthermore, there is no exclusion of those who have committed a "serious non-political crime outside the country of their refuge"[73], as the European Court of Human Rights made clear in the *Soering* case, where it stated that the protection of Article 3 applies to everyone no matter "however heinous the crime allegedly committed"[74]. Nor is there an exclusion of anyone of "whom there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"[75]. The Commission, dealing specifically with this issue in the case of *Chahal*[76] stated

> "Nevertheless, once the risk to the individual of being subjected to such treatment has been established, it is not the case, in the Commission's view, that the individual's background, or the threat posed by him to the national security of the deporting State, can be weighed in the balance so as to reduce the level of protection afforded by the Convention. To this extent the Convention provides wider guarantees that Articles 32 and 33 of the 1951 United Nations Convention Relating to the Status of Refugees. While it is accepted that this may result in undesirable individuals finding a safe haven in a Contracting State, the Commission observes that the State is not without means of dealing with any threats posed thereby, the individual being subject to the ordinary criminal laws of the country concerned."[77]

29. Like the Commission in *Chahal*, the European Court of Human Rights has also had the opportunity to consider the relationship with other, more specific, international instruments dealing with the problem of removal of persons to other jurisdictions where "unwanted consequences" may follow. In the *Soering* case the Court held, contrary to the submissions of the UK Government, that despite the existence of *inter alia* the 1951 Refugee Convention (Article 33) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3)

> "These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction. ...

The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed"[78]

30. Article 3 of the ECHR, Article 3 of the CAT and Article 7 of the ICCPR[79] each create a separate and independent obligation for Member States not to expel (or extradite) an alien, if by doing so the Member State would expose the individual to a real risk of being subject to torture or inhuman or degrading treatment or punishment. A Member State that acts in contravention of this obligation is itself (though indirectly) in breach of the prohibition on torture, inhuman or degrading treatment. The prohibition of torture, inhuman or degrading treatment included in these provisions is absolute and does not allow for any derogation, even in times of war or public emergency which threatens the life of the nation[80].

31. The Commission has further held that Article 3 also applies to the case of the so-called "refugee in orbit". In its report in the case of *Harabi v. The Netherlands*[81], the Commission, following an earlier admissibility decision[82], held

"... that the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention. Such an issue may arise, *a fortiori*, if an alien is over a long period of time deported repeatedly from one country to another without any country taking measures to regularise his situation."[83]

32. This aspect of the application of Article 3 is likely to assume a greater importance as the impact of the increased use of the "Safe Third Country" principle is being felt by the Strasbourg organs. This principle has seen a particular increase in its use by EC Member States of the European

Community since the Ministers responsible for immigration, at their meeting in London from 30 November to 1 December 1992, adopted

a. a Resolution on manifestly unfounded applications for asylum; and

b. a Resolution on a harmonised approach to questions concerning host third countries[84].

33. Although these documents are legally non-binding[85] they are being applied in practice by the Member States of the EC, at least until the Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention") of 15 June 1990 finally enters into force[86]. The Resolution on manifestly unfounded applications for asylum includes within that category any application made by a person who falls within the application of the Resolution on the Host Third Countries[87]. Any application falling within the ambit of the Resolution on manifestly unfounded applications for asylum, may be dealt with under an accelerated procedure and may be rejected "very quickly on objective grounds"[88]. In the context of the ECHR neither the Resolution nor the practice thereunder requires that the country, designated a safe third country, should give its prior consent to the return of an asylum seeker. The possible problems this may raise were recognised by Evans LJ. in his concurring judgment in *R v. Home Secretary ex p. Colak*[89].

> "...He said that if Mr Colak's asylum application is not considered by the French authorities, then the Home Secretary will be prepared to consider it here.
> Precisely what the mechanics will be to ensure that the applicant is not returned to Turkey in that event without a chance to renew his application here, I am not sure, but I should like to make it clear that I, for my part, accede to the Secretary of State's submission that we should refuse this application only on the basis that that safeguard will, in fact, be provided for Mr Colak."[90]

Detention of Asylum Seekers

34. Articles 5 (1)(f) and (4) of the ECHR provide:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[91]

35. In its decision in the case of *Lynos v. Switzerland*[92] the Commission established that, though there is no right not to be extradited or expelled under the Convention, only the existence of extradition (or deportation) proceedings are capable of justifying the deprivation of liberty under Article 5(1)(f)[93]. Therefore, where such proceedings are not conducted with "due diligence" or where the detention results from a misuse of authority the detention ceases to be so justified. These principles were reiterated in the Commission's admissibility decision in *X v. United Kingdom*[94]. In that case, however, it was found that the delay in the deportation proceedings was caused by (a) the applicant's own conduct and (b) the complicated nature of the procedure and that there was, therefore, no appearance of lack of diligence. The detention was held not to have been rendered unlawful and the application to the Commission was therefore declared inadmissible as manifestly ill-founded.

36. In its admissibility decision in the case of *Caprino v. United Kingdom*[95] the Commission stated that the term "prescribed by law" in Article 5(1) has to be read as "lawful under the applicable domestic law", which includes EC law, in that case specifically EC Directive 64/221 "On the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health"[96]. In its examination of the lawfulness of the detention in question the Commission therefore exclusively considered whether the detention complied with the requirements of Article 3(1) of Directive 64/221.

37. The Commission, however, went on to hold that, having considered whether the detention was "prescribed by law" it was necessary to determine separately whether the detention was necessary to secure the deportation of the applicant. In doing so it recalled that Article 5(1)(f), as an exception to the general right to liberty and security of person, had to be interpreted strictly[97]. However, it was sufficient that "action is being taken against him with a view to deportation"[98] and the eventual outcome of the deportation proceedings was irrelevant in the determination of whether the detention was "necessary". In the instant case the Commission found that the relationship between the detention and the deportation were adequate to justify the detention under Article 5(1)(f). This was reiterated in the substantive decision in this case[99] where the Commission reaffirmed that detention under Article 5(1)(f) had to be subject to principles such as necessity and proportionality.

38. In its recent decision in the case of *Chahal* the Commission had the opportunity to reconsider the criteria to be applied in the context of Article 5(1)(f). In its decision the Commission held:

> "... the first applicant has been lawfully detained under Article 5 para. 1 (f) of the Convention as a 'person against whom action is being taken with a view to deportation'. It would be unduly narrow to interpret Article 5 para. 1 (f) as confined to cases where the person is detained solely to enable the deportation order to be implemented. The words of the provision are broad enough to cover the case where the person is originally detained with a view to deportation, but challenges that decision or claims asylum, and continues to be detained pending determination of that challenge or claim. [...]
>
> ... The issue which arises is whether the first applicant's detention has ceased to be justified because the proceedings have not been pursued with the requisite speed (cf. E.C.H.R., Kolompar judgment of 24 September 1992, Series A No. 235, p. 55, para. 36). The first applicant has now been detained for nearly five years, albeit partly awaiting the outcome of the Strasbourg proceedings. Nevertheless, an examination of the domestic proceedings does not demonstrate particular diligence: three months elapsed between the grant of leave and the first judicial review proceedings; six months elapsed between

the quashing of the first deportation decision and the taking of the second decision; seven months elapsed between the second grant of leave and the second judicial review proceedings, and eight months elapsed between the second judicial review proceedings and the determination of the first applicant's appeal. Therefore, the judicial review proceedings alone resulted in a delay of some eighteen months, during the whole of which period the first applicant remained in detention.

The Government's submission that, by comparison with the norm, the case was dealt with expeditiously is unconvincing when the person is detained pending deportation, unconvicted and without charge. It is important that proceedings to challenge the decision to deport should be handled with the utmost urgency."[100]

The Commission therefore concluded that there had been a breach of Article 5(1)(f).

Judicial Control of the Lawfulness of the Detention

39. In the admissibility decision in *Caprino v. United Kingdom*[101] the Commission made it quite clear that Article 5(4) is a provision separate from Article 5(1), as every person detained, whether lawfully or unlawfully, is entitled to have his detention supervised by a court[102]. This also forms part of the Court of Human Right's constant jurisprudence[103]. This is even more crucial where the decision to detain was taken by an administrative body. In such a case Article 5(4) creates an obligation for the Contracting State to provide recourse to a court. The Commission observed that para. 18(4) of Schedule 2 of the Immigration Act 1971 created a presumption that the detention was legal custody and that the courts refrained from controlling the exercise of the Minister's discretion except where that exercise was *ultra vires* or *mala fides*. In declaring the application admissible, the Commission indicated that judicial review proceedings may be insufficient for the purposes of Article 5(4), as the procedure favours the respondent who cannot be forced to disclose the information underlying the decision, therefore leaving the Applicant with the onus of discharging the whole burden of proof in a case of which by its nature he may know very little[104].

40. In the substantive decision in the *Caprino* case[105] the Commission noted that Article 5(4) does not require judicial control of the underlying deportation proceedings but only of the legality of the detention itself[106]. However, judicial proceedings under Article 5(4) must include a review of the substantive grounds of the detention[107]. In relation to *habeas corpus* proceedings under English law

> "it is open to dispute whether that will always be sufficient for the control required by Article 5(4)."[108]

However, in the context of that case the Commission did not have to form a final view about this question as the applicant had not applied for *habeas corpus*.

41. The UN Human Rights Committee in its General Comment 8/16 (Personal Liberty)[109] stressed that Article 9(4),

> "i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest of detention."[110]

This is in addition to a Contracting State's obligation to provide an effective remedy under Article 2(3) (equivalent to Article 13 ECHR). The Committee went on to state that

> "Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (paragraph 1), information of the reasons must be given (paragraph 2) and court control of the detention must be available (paragraph 4) as well as compensation in case of a breach (paragraph 5)."[111]

42. It should also be noted that the ICCPR, unlike the ECHR, provides a specific rule, in Article 10(1) that

> "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

This is generally seen as providing for a positive duty on the Contracting State to provide detention conditions which are humane and secure respect for the dignity of the detained, unlike Article 7 ICCPR or Article 3 ECHR which only provide a duty not to subject a person to inhuman or degrading treatment. This positive obligation exists irrespective of material resources of the Contracting State in question[112].

43. The Committee in its General Comment 9/16 states that ultimate responsibility for the observance of the principle of humane treatment of detainees rests with the State in respect of all institutions where persons are lawfully held against their will, including detention camps, hospitals etc.[113]. This was reiterated in the recent Comments of the Human Rights Committee on the UK Periodic Report[114] where the Committee stressed:

> "The Committee is concerned that the practice of the State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons weakens the protection of rights under the Covenant. The Committee stresses that the State remains responsible in all circumstances for adherence to all articles of the Covenant."[115]

44. It will also be recalled that the Committee expressed its concern about the treatment of illegal immigrants, asylum seekers and those ordered to be deported and the use of detention and the duration of such detention of persons ordered to be deported[116].

The Right to Family Life

45. Article 8 ECHR provides:

> "1. Everyone has a right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."[117]

46. Article 8(1) protects the "famille naturelle" and does not make a distinction between a "legitimate family" and "illegitimate family" in respect of its definition of "family life"[118]. This includes the right of spouses[119] and children to be given the opportunity to live together, even if a family life has not yet been fully established[120]. Family life as such includes cohabitation by those concerned[121].

47. The Court even went so far as to state that

> "In the Court's opinion 'family life', within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grand-parents and grandchildren, since such relatives may play a considerable part in family life.
>
> Respect for family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally."[122]

On the other hand

> "Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal, emotional ties."[123]

48. However, the Court in *Abdulaziz* established that

> "The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.
> In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them"[124]

It is therefore a question of whether it is reasonable to expect persons to conduct their family life elsewhere.

49. Even if an interference with family life under Article 8(1) has occurred, this interference may be justified on the grounds set out under Article 8(2). To be so justified the interference has to be

a. in accordance with law,
b. pursue one of the "legitimate aims" listed in Article 8(2) and
c. necessary in a democratic society.

50. In the case of *Chahal*, which concerned the deportation of an Indian citizen and Sikh militant, from the UK on grounds of national security, the Commission found a violation of Article 8 on the ground that the interference with the applicant's right to family life was disproportionate and therefore not necessary in a democratic society. The applicant in that case had been resident in the UK for 19½ years and his wife for 19 years; they had two children, both born and brought up in the UK, both of whom were teenagers. On that basis the Commission concluded that deportation of the applicant "would almost certainly lead to a permanent break up of the family"[125]. The Commission stated that

> "Whilst the Commission acknowledges that States enjoy a wide margin of appreciation under the Convention where matters of national security are concerned, with possibly lower standards of proof being required under Article 8 compared to Article 3, it remains ultimately for the Government to satisfy the Commission that the grave recourse to deportation is in all the circumstances both necessary and proportionate."[126]

51. In that case the Commission considered that in light of the fact that the applicant did not have a criminal record and had never been convicted of terrorist crime either in India or the UK and the fact that objections raised by the Government before the Commission had not been raised before the national courts, the interference with his right to family life were neither proportionate nor necessary in a democratic society.

52. Under the ICCPR, the Human Rights Committee has established that the term "family" has to be given a broad interpretation

"... to include all those comprising the family as understood in the society of the State party concerned."[127]

The Committee has held that

"the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of Article 17(1). In principle Article 17(1) applies also when one of the spouses is an alien."[128]

However, where the members of a family had been separated for 17 years, the Committee held that there was no family life and the Contracting State was under no obligation to take positive steps to facilitate the re-establishment of family life[129].

53. The Covenant, in Article 23(1), also contains a right of the family to enjoy the protection "by society and the State"[130]. In the case of *Aumeeruddy-Cziffra v. Mauritius*[131] the UN Human Rights Committee held that a policy which restricted the access of foreign spouses of Mauritian women to Mauritius but did not restrict the access of foreign spouses of Mauritian men was in breach of Article 2(1)(discrimination) in conjunction with Article 23(1)[132] as there had been discrimination in the way in which the protection of Article 23(1) was afforded to a family depending upon whether the Mauritian partner was a man or a woman[133].

54. In the jurisprudence of the Strasbourg organs the relationship between parents and minor children has been recognised of being worthy of particular protection as the contact of children with their parents is of particular importance to their development and well-being. As one commentator observed:

"It would seem that, while the admission of a person to permanent residence may not imply the obligation to admit his spouse (present or future) it may imply an obligation to admit his dependent children"[134]

55. The special protection of the parent-child relationship recognised by the ECHR jurisprudence has been reinforced by the UN Convention on

the Rights of the Child[135]. Under this Convention special protection is provided for refugee children. Article 22 of the Convention provides:

> "1. States Parties shall take appropriate measures to ensure that a child ***who is seeking refugee status*** or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and ***in other international human rights or humanitarian instruments*** to which the said States are Parties.
> 2. ... . In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention."(emphasis added)

56. The protection as required by Article 22(2) second sentence includes "special protection and assistance provided by the State"[136], provision of "alternative care"[137], including, for example, "foster placement"[138]. This protection for the child is not dependant on the legal presence of the child within a State party's territory but merely on the fact that it is seeking refugee status or is considered a refugee under ***inter alia*** the 1951 Refugee Convention.

57. Furthermore, Article 9 provides that

> "... a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures that such separation is ***necessary for the best interests of the child***"(emphasis added)

58. This protection of a child's family is reinforced by Article 10 of the Convention which provides that applications by children or their parents to enter or leave a state party for the purpose of family reunification shall be dealt with by the State Party in a "positive, humane and expeditious manner".

59. However, unlike the ECHR and the ICCPR, the Convention on the Rights of the Child does make provision for either inter-state complaints nor for the right to individual petition. The compliance with the obligations undertaken by the State Parties to the Convention are solely monitored by period State reports which are considered by the Committee on the Rights of the Child[139].

The Right to Effective Remedy

60. Article 13 ECHR provides:

> "Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity."[140]

61. In order for Article 13 to come into play it is not required that a violation of a right under the Convention has been found; it is sufficient that the applicant has an "arguable claim" that such a violation has occurred[141]. Furthermore, Article 13 does not require access to a court but merely to a "national authority", as long as that authority is sufficiently independent of the decision maker[142]. In the case of *Uppal v. United Kingdom*[143] the Commission held that recourse to an adjudicator and the Immigration Appeal Tribunal constituted an effective remedy under Article 13, as they are "empowered under the Immigration Act 1971 to review and reverse the Home Secretary's decision"[144].

62. However, Article 13 does not apply (a) where the violation of the applicant's rights has been committed by way of legislation[145] nor where the violation has been committed by a court of law[146]. Furthermore, Article 13 does not create an obligation for a Contracting State to incorporate the ECHR into national law. Where the Convention has not been incorporated, however, there is a presumption that no effective remedy is available where the violation has been committed by secondary legislation[147].

63. On a number of occasions a question has arisen whether an application for judicial review constitutes an effective remedy under Article 13. In the judgments of the Court in *Soering v. United Kingdom*[148] and *Vilvarajah v. United Kingdom*[149], the Court found that judicial review

proceedings constituted an effective remedy. The decision in *Soering* is more easily comprehended than that in *Vilvarajah* for in the former case, no evaluation of evidence was involved. The applicant and the Home Secretary were not in dispute on the identification of the treatment that the applicant would face if returned to Virginia: their dispute concerned the reasonability of the decision to return him in circumstances known to exist. In the case of *Vilvarajah* on the other hand the dispute between the parties was one of fact: the applicants complained that they were likely to be maltreated if returned to Sri Lanka whereas the Home Secretary did not accept that complaint. In their partly dissenting opinion in that case, Judges Walsh and Russo, quoted a passages by Lord Brightman and the Lord Chancellor, Lord Hailsham in the case of *Chief Constable of North Wales Police v. Evans*[150] to the effect that judicial review was concerned not with the decision but with the decision-making procedure. On that basis they both concluded that

> "It appears to me that a national system which it is claimed provides an effective remedy for a breach of the Convention and which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13."[151]

64. In its recent decision in the case of *Chahal* the Commission distinguished both *Soering* and *Vilvarajah* on the basis that *Chahal* involved an issue of national security, while the latter two cases did not. The Commission found

> "As appears from the Court of Appeal's judgment, where national security considerations are invoked as a ground for the deportation decision, the powers of review of domestic courts are limited to determining, first, whether the decision of the Home Secretary that the deportation was required for reasons of national security was irrational, perverse or based on a misdirection and, secondly, whether there was sufficient evidence that the Home Secretary balanced the gravity of the national security risk against all other circumstances, including the likely risk of persecution if the person were deported. As the Court of Appeal pointed out, the scrutiny of the claim that a person should be deported in the interest of national security may in practice be defective or incomplete if all the relevant facts are not before the courts. This deficiency is illustrated by the facts of the

present case, in that the domestic courts did not even have available to them the further information which has been put before the Commission concerning the perceived threat posed by the first applicant to the national security of the United Kingdom.
Furthermore, even when the relevant facts are before the courts, they are not empowered to carry out their own assessment of the respective risks ..."[152]

The Commission therefore found a violation of Article 13.

65. The UN Human Rights Committee, in its recent "Comments" on the latest periodic report made by the United Kingdom[153] stated that

"The Committee notes that the legal system of the United Kingdom does not ensure fully that an effective remedy is provided for all violations of the rights contained in the Covenant. The Committee is concerned by the extent to which implementation of the Covenant is impede by the combined effects of the non-incorporation of the Covenant into domestic law, the failure to accede to the first Optional Protocol and the absence of a constitutional Bill of Rights. [...]
The Committee also notes with concern that adequate legal representation is not available for asylum-seekers effectively to challenge administrative decisions."[154]

66. In its decision in the case of *Hammel v. Madagascar*, where the applicant was not given the opportunity to challenge his expulsion order, the Committee, in its analysis under Article 13 ICCPR, found that there was no compelling reason of national security to deprive him of that remedy. Therefore

"an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances be an effective one."[155]

Non-discrimination

67. Article 14 ECHR provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground

such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[156]

68. The issue of discrimination under Article 14 is only an subsidiary right which is inseparably connected to the exercise of the rights and freedoms set out in the Convention. By contrast Article 26 of the ICCPR further provides an independent right of equality before the law and prohibition of discrimination on grounds of sex, colour, race etc. which imports an active duty on State Parties to protect those within its jurisdiction from any form of discrimination.

69. In the case of *Abdulaziz v. United Kingdom*[157] the Court set out the criteria to be applied when considering whether there has been a violation of Article 14:

"It would point out that Article 14 is concerned with the avoidance of discrimination in the enjoyment of Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention"[158]

70. The Court went on to hold that Immigration Rules, the main and essential purpose of which was to protect the labour market at a time of high unemployment, were

"grounded not on objections regarding the origin of the non-nationals wanting to enter the country, but on the need to stem the flow of immigrants at the relevant time"[159]

and therefore did not constitute discrimination on grounds of race.

71. Furthermore, the Commission in a case concerning the question of whether the fact that one group of "aliens" received preferential treatment under the Immigration Rules than another group of aliens held

"the difference in immigration rights between a Commonwealth citizen and an alien in the United Kingdom has an obvious objective and reasonable basis, i.e. in acknowledging the right of a country to limit the number of foreign persons who are entitled to reside in its territory, a State may reasonably give priority to the citizens of those countries with whom it has the closest links."[160]

72. In the context of the question of discrimination it should also be pointed out that Article 16 of the ECHR expressly states that nothing in Article 14 should prevent the Contracting States from imposing restrictions on the political activities of aliens, in particular in their exercise of their rights under Articles 10 (freedom of expression), 11 (freedom of peaceful assembly). Though no such provision authorising the restriction of political activities of aliens was incorporated in the ICCPR a number of EC Member States have entered a reservation to the ICCPR, effectively importing the restrictions permitted by Article 16 ECHR into the ICCPR[161]. In its recent judgment in the case of *Piermont v. France*[162] the Court expressly recognised the special status of citizens of other Member States of the European Community as compared to "aliens". In the context of an argument raised by the respondent Government on the basis of Article 16 of the Convention, the Court stated

"The Court cannot accept the argument based on European citizenship, since the Community treaties did not at the time recognise any such citizenship. Nevertheless, it considers that Mrs Piermont's possession of the nationality of a member State of the European Union and, in addition to that, her status as member of the European Parliament do not allow Article 16 of the Convention to be raised against her..."[163]

Human Rights under purely domestic law (excluding EC Law)

73. In the case of *Vilvarajah* the United Kingdom government submitted before the European Court of Human Rights that

"... a court would, in application of these [Wednesbury] principles, have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of

inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one which no reasonable Secretary of State could take."[164]

74. The relevance of the international human rights law, especially the status of the European Convention on Human Rights in domestic law (not including EC law) was the topic of an article by Sir John Laws writing extra-judicially[165] in which he concluded that

> "... we may have regard to the ECHR (and, for that matter, other international texts) but not think of incorporating it. We should apply differential standards in judicial review according to the subject-matter, and to do so deploy the tool of proportionality, not the bludgeon of *Wednesbury*. A function of this is to recognise that decision-makers whose decisions affect fundamental rights must inevitably justify what they do by giving good reasons; and the judges should not construe statutes which are said to confer power to interfere with such rights any more favourable than they would view a clause said to oust their own jurisdiction. Indeed such a clause is but an example of a denial of one fundamental right."[166]

75. The issue was also recently considered by the Divisional Court (Simon Brown LJ and Curtis J) in the case of *R v. Ministry of Defence ex parte Smith et al*[167]. After a thorough review of the case-law[168] the court reiterated that the Convention had not been incorporated into English law but came to the conclusion, following the dicta of Neill LJ and Lord Ackner in the *Brind* case, that

> "... even where fundamental human rights are being restricted, 'the threshold of unreasonableness' is not lowered. On the other hand, the Minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised. Even that approach, therefore, involves a more intensive review process and a greater readiness to intervene than would ordinarily characterise a judicial review challenge."[169]

Human Rights under domestic law
(incorporating EC law)

76. As in the case of purely domestic English law, the European Convention on Human Rights has not been incorporated as such into Community law, nor is the Community as such a Contracting Party to the Convention[170]. However, the ECJ, in light of resistance by the Courts of a number of Member States to accept the concept of supremacy of Community law unless the protection of fundamental right was guaranteed by Community law[171], has consistently held that

> "... fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the elaboration of which the Member States have collaborated or of which they are signatories. ... The European Convention on Human Rights has special significance in that respect."[172]

77. In the *ERT* case the ECJ concluded that

> "... it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and a reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights."[173]

78. In addition to the special role occupied by the ECHR, both the Community Courts and the Advocates General have made frequent reference to both the ICCPR[174] and the European Social Charter[175] to establish whether national rules or rules of Community law complied with the fundamental rights guaranteed by those Conventions. The prime example is the case of *Sevince*, which concerned freedom of movement under the EC-Turkey Association Agreement. In that case Advocate General

Darmon referred to Articles 12(1) and 13 of the ICCPR as well as Article 19 of the European Social Charter and Article 2(1) of Protocol No. 4 to the ECHR[176].

79. This jurisprudence of the ECJ has now also found its way into the Treaty on European Union (the Maastricht Treaty), Article F(2) of which provides that

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[177]

80. It should also be pointed out that the Maastricht Treaty included provisions which, for the first time, formally established a co-operation *inter alia* in matters concerning asylum policy and immigration policy[178]. Article K.2 contains a further commitment of the European Union (not the European Community) to international human rights standards. It states:

> "The matters referred to in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds."

81. However, like Article F.2, Article K.1 and K.2 do not fall within the ECJ's power of judicial control and therefore are no more than obligation of the Member States binding only in international law. they do, however, reaffirm the general principle of Community law which guarantees the protection of fundamental human rights.

NOTES

• QC, LLD; sometime legal adviser UNHCR and *référendaire* Court of Justice of the European Communities. The author acknowledges with thanks the assistance of T. Eicke, barrister, in preparing this paper.

[1] GA Resolution 217 A (III) of 10 December 1948, (1949) 42 AJIL, Supp. 127

[2] *Ibid.* Preamble, emphasis added.

[3] See Sir Robert Jennings QC and Sir Arthur Watts KCMG, QC *Oppenheim's International Law*, Vol. I Parts 2 to 4, Ninth edition, at § 437.

[4] *Ibid.* Article 14(2).

[5] Adopted by the General Assembly and opened for signature, ratification or accession on 16 December 1966 by Resolution 2200 A (XXI) and entered into force on 3 January 1976, three months after the 35th ratification; (1967) 6 ILM 368.

[6] Adopted in Rome on 4 November 1950 and entered into force 3 September 1953, after the tenth ratification by a Member State of the Council of Europe; 213 UNTS 223.

[7] See: M. Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll - CCPR Kommentar*, 1989, NP Engel Verlag, Kehl ("Nowak"), Article 13/3-13/4.

[8] As of 24 August 1994.

[9] These are: Finland (withdrawn on 29 March 1985), France, Iceland, India, Malta, Mexico and the United Kingdom (in relation to Hong Kong); see UN document CCPR/C/2/Rev.4 of 24 August 1994.

[10] See UN Doc. CCPR/C/2/Rev.4 of 24 August 1994, at p. 39.

[11] This Protocol entered into force 1 November 1988, ie. 2 months after the seventh ratification by a Member State of the Council of Europe. Article 1 of Protocol No. 7 reads:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> a. to submit reasons against his expulsion;
>
> b. to have his case reviewed; and
>
> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

[12] However, unlike the Universal Declaration, the ECHR and the ICCPR, the two major remaining regional human rights instruments, the 1969 American Convention on Human Rights (Art. 22(7)) and the 1981 African Charter on Human and Peoples' Rights (Art. 12(3)) both contain an express right to seek and be granted/obtain asylum in another country/territory.

[13] Article 57 ECHR (however, only on demand from the Secretary General) and Article 40 ICCPR

[14] Articles 24, 25ff. and 48 ECHR, Article 41 ICCPR and Articles 1ff Optional Protocol to the ICCPR; see also Articles 21 and 22 of the 1984 Convention against Torture (below). No such mechanism is provided for by the 1989 Convention on the Right of the Child (below).

[15] Eg. under Article 25 ECHR (in relation to individual petitions to the Commission) and Article 46 (in relation to the compulsory jurisdiction of the European Court for Human Rights); and Article 41 ICCPR (in relation to inter-State complaints) and Article 1 of the Optional Protocol to the ICCPR (in relation to individual petitions).

16 Declaration dated 20 May 1976, providing that it accepts this competence only in relation to complaints brought by State parties who, 12 months prior to bringing the complaint, have also made a declaration under Article 41. See UN Doc CCPR/C/2/Rev. 4 at p. 122

17 Such a right of individual petition has been recognised by 12 out of the 15 Member States of the EC: Austria, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden.

18 UNTS No. 2545, Vol. 189 @ p. 137. The Convention entered into force on 22 April 1954, ie. ninety days after the Convention had been ratified by six States.

19 Though it is worth noting that even the 1951 Convention did not grant a right to be granted asylum.

20 Though the 1951 Convention has been amended by the 1967 Protocol Relating to the Status of Refugees, this amendment only affected the temporal and geographical limitations that had been included in the original Convention.

21 Article 3.

22 Article 4.

23 Article 22(1).

24 Article 23.

25 Article 24(1)(a).

26 Article 24(1)(b) with certain exceptions.

27 Article 7.

28 Article 18.

29 Article 19.

30 Article 21.

31 Article 22(2).

32 Article 15.

33 Article 17.

34 Article 16.

35 Article 26.

36 Article 27.

37 Article 28.

38 Article 32.

39 1951 Convention, Article 1(A).

40 Any dispute between parties to the Convention regarding the interpretation or application of the Convention may be referred to the International Court of Justice (Article 38); no such case has so far been brought.

41 *R. v. Secretary of State for the Home Department ex parte Singh (Parminder), The Times*, 8 June 1987

42 Signed in Turin on 18 October 1961 and entered into force on 26 February 1965, ie. 30 days after it had been ratified by 5 States

43 Article 38 of the European Social Charter stipulates that the appendix "shall form an integral part of it".

44 *Ibid.* Article 21.

45 *Ibid.* Articles 24 and 25 (as amended by Articles 2 and 3 of the Protocol amending the European Social Charter of 21 October 1991).

46 Correct as of 17 July 1995.

47 Article 1 ECHR; in its admissibility decision in Application No. 1611/62 *X v. Federal Republic of Germany* (1965) 8 Yearbook 158, the Commission stated:

> **"Whereas in certain respects, the nationals of a Contracting State are within its 'jurisdiction' even when abroad; whereas, in particular, the diplomatic and consular representations of their country perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention"**, at p. 168.

48 Article 2 ICCPR.

49 The rules applicable in those circumstances relate in particular to the right of non-discrimination, the prohibition of inhuman and degrading treatment and respect for family life. See para. 5, UN Human Rights Committee General Comment 15(27) "The position of aliens under the Covenant" of 9 April 1986 (Ref.: CCPR/C/21/Add.5)

50 UN Doc. CCPR/C/79/Add.55, of 27 July 1995

51 The Committee stated:

> "The treatment of illegal immigrants, asylum-seekers and those ordered to be deported gives cause for concern. The Committee observes that the incarceration of persons ordered to be deported and particularly the length of their detention may not be necessary in every case and it is gravely concerned at incidences of the use of excessive force in the execution of deportation orders. The Committee also notes with concern that adequate legal representation is not available for asylum-seekers effectively to challenge administrative decisions.".

Ibid. para. 15.

52 Adopted by the UN General Assembly and opened for signature on 10 December 1984 (Resolution 39/46) and entered into force on 26 June 1987, ie. 30 days after it had been ratified by 20 States.

53 This provision is not mirrored in the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which "merely" sets up a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which is authorised to visit "any place within [a Party's] jurisdiction where persons are deprived of their liberty by a public authority" (Article 2) with a view to strengthening the protection from torture provided *inter alia* by Article 3 of the ECHR.

54 Article 22; correct as of 1 January 1995.

55 Communication No. 13/1993 *Balabou Mutombo v. Switzerland*, decision of 27 April 1994, at para. 9.3.

56 *Ibid.* at para. 9.6, emphasis added.

57 Judgment of 7 July 1989

58 Judgment of 20 March 1991, Series A No. 201, (1991) 14 EHRR 1

59 Judgment of 30 October 1991, Series A No. 215

60 *Soering*, at para. 91.

61 Application No. 22414/93, Report of the Commission, adopted on 27 June 1995.

62 *Ibid.* para. 92.

63 *Ibid.* at para 101, quoting a passage from *Vilvarajah v. United Kingdom* at paras. 103

64 Article A.(2).

65 Application No. 13078/87.

66 Report at 70 D&R 159, at para. 8.

67 The settlement took the form of the father being issued with an entry clearance for settlement and the United Kingdom government paying both the air fare for the whole family as well as the legal costs actually and reasonably incurred. *ibid.* para. 12

68 Series A No. 201, (1991) 14 EHRR 1

69 *Ibid.* paras. 75, 76 and 83; see also judgment in *Vilvarajah*, para. 107 - 108 and the Commission report in *Chahal*, para. 107.

70 *Ibid.* para. 108.

71 Article 15 of the ECHR provides:

> "1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in relation to deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."

72 1951 Convention, Article 1(A).

73 1951 Convention, Article 1(F).

74 At paras 88, quoted below; see also *Chahal* paras. 104-105.

75 1951 Convention, Article 33(2).

76 Application No. 22414/93, report of 27 June 1995

77 *Ibid.* para. 104.

78 Judgment of 7 July 1989, at paras. 86 and 88.

79 There has not, so far, been a decision by the Human Rights Committee under considering the expulsion of an alien to a third country under Article 7 of the ICCPR. However, para. 5 of its General Comment 15/27 on the position of aliens under the Covenant, makes clear that, exceptionally, an alien may enjoy the protection of the Covenant even in relation to entry and residence, when *inter alia* considerations of the prohibition of inhuman treatment arise. See Nowak, at 7/21-23

80 See Article 15(2) ECHR, Article 4(4) ICCPR and Article 2(2) CAT.

81 Application No. 10798/84, reported in 46 D&R 112

82 In the case of *Giama v. Belgium*, Application No. 7612/76, reported in (1980) Yearbook 428 or 21 D&R 73.

83 *Ibid.* at p. 116.

84 European Community Council Press Release, 30 November 1992, 10518, Annex I and II

85 See Plender, "Asylum Policy" in

86 EC Series No 40; 1991 Cm 1623; The Dublin Convention has been ratified by eight of the (now) 15 Member States: Denmark (13 June 1991), the United Kingdom (1 July 1992), Portugal (1 February 1993), Italy (26 February 1993), Greece (22 July 1993), Luxembourg (22 July 1993), France (10 May 1994) and Germany (22 September 1994).

87 Annex I, Article 1(b).

88 Letter from the IND to Jan Henneman, UNHCR Deputy Director Regional Bureau for Europe, dated 24 November 1992.

89 [1993] 3 CMLR 201.

90 *Ibid.* at paras. 12 and 13; It is understood that there are currently informal bilateral arrangements between the UK and Germany and the UK and France. These

arrangements which are based on an exchange of letters seem to apply the same principles as are incorporated into the Dublin Convention.

91 The equivalent provision of the ICCPR is Article 9(1) and (4). These provide

> "1. Everyone has the right to liberty and security of person.
> No one shall be subjected to arbitrary arrest or detention.
> No one shall be deprived of his iberty except on such grounds and in accordance with such procedure as are established by law.
> ... 4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.";

Article 9(5) ICCPR, unlike the ECHR, also provides an enforceable right to compensation where a person has been the victim of unlawful arrest or detention.

92 Application No. 7317/75, 6 D&R 141.

93 In the context of the ICCPR the Human Rights Committee held that detention pend ing deportation did qualify as deprivation of liberty under Article 9(1); see Communication No. 155/1983 *Hammel v. Madagascar* and, despite submissions by the Canadian government to the contrary, Communication No. 236/1987 *V.M.R.B. v. Canada* at paras. 4.4 and 6.3; see Nowak, 9/23

94 Application No. 8081/77, 12 D&R 207, which concerned a delay in deportation proceedings before the IAT of 10 months.

95 Application No. 6871/75, 12 D&R 14; this case concerned the deportation of an Italian national on grounds that it was "conducive to the public good" under the Immigration Act 1971.

96 OJ Special Edition 1963-4, at p. 117.

97 In this analysis the Commission further relied on Article 18 of the Convention which stipulates that

> "The restrictions permitted under this Convention to the said rights shall not be applied for any purpose other than those for which they have been prescribed."

98 *Ibid.* at p. 20.

99 22 D&R 5.

100 *Ibid.* paras. 119 to 121.

101 See above note 95.

102 At para. 73.

103 See judgment in *Kolompar v. Belgium*, Series A No. 235-C, at para. 45 and judgment in *De Wilde, Ooms and Versyp v. Belgium*, Series A No. 12, at para. 73

104 However, in its recent decision in *Chahal v. United Kingdom* the majority of the Commission formed the view that it was not necessary for it to consider the complaint under Article 5(4), as the question of the adequacy of the remedies available was more appropriately dealt with under Article 13 (see below) and the question as to the speediness of the proceedings under Article 5(4) was resolved by its finding that the duration of the detention of the applicant violated Article 5(1)(f) (Application No. 22414/93, at paras. 124 to 129). In his partially dissenting opinion, Mr Trechsel took issue with this conclusion on two grounds: (a) the decision on the duration of the detention did not deal with the adequacy of *habeas corpus* proceedings, in particular as the need for Article 5(4) control was "particularly acute" whenever problems arose under Article 5(1), and (b) that this conclusion was not in conformity with the case-law of the European Court of Human Rights;

Application No. 22414/93, at p. 33; in relation to point (b) Mr Trechsel particularly referred to the Court's decision in the *Bouamar* case, judgment of 29 February 1988, Series A No 129, in which a violation of both Article 5(1) and 5(4) was found.

105 22 D&R 5.

106 *Ibid.* at para. 65.

107 Article 5(4) only relates to remedies available during the detention and does not, therefore, cover possible actions for false imprisonment which may be brought after the detention has ceased.

108 *Ibid.* at para. 67.

109 See Nowak, supra note 7, *Anhang B.2.* pp. 881 - 882

110 *Ibid.* para. 1.

111 *Ibid.* para. 4; a violation of Article 9(4) was found in relation to the case of *Hammel v. Madagascar*, Complaint No. 155/1983 at para. 20; in that case a French national was arrested and held in incommunicado detention for 3 days and then expelled. As he was not afforded the opportunity to challenge the expulsion order prior to his expulsion a violation was found.

112 General Comment 9/16, see Nowak, *Anhang B.2.* at p. 882

113 *Ibid.* para. 1.

114 27 July 1995, UN Doc. CCPR/C/79/Add.55.

115 *Ibid.* para. 16.

116 *Ibid.* para. 15, see above note 55.

117 The equivalent provision in the ICCPR is Article 17 which states:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interferences or attacks.

118 European Court of Human Rights in *Marckx v. Belgium*, Series A No. 31 at para. 31.

119 ie. relationships arising from a lawful and genuine marriage.

120 European Court of Human Rights in its judgment of *Abdulaziz v. United Kingdom* Series A No. 94 at para. 62

121 See also Article 12 (right to found a family); it appeared to the Court in *Abdulaziz* that it was "scarcely conceivable that the right to found a family should not encompass the right to live together."(para. 62)

122 *Marckx* judgment, at para. 45

123 Commission in Application No. 10375/83 *S and S v. United Kingdom* 40 D&R 196 at 198

124 *Ibid.* para. 68.

125 *Ibid.* para. 135.

126 *Ibid.* para. 136.

127 General Comment 16/32 (Privacy), para. 5, see Nowak *Anhang B. 2.* on page 892

128 Communication 35/1978 *Aumeeruddy-Cziffra v. Mauritius*, para. 9.2 (b)

129 Communication No. 68/1980

130 "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

131 Communication No. 35/1978.

132 The relevant rules were also held to have been in breach of Articles 3 (equal rights of men and women) and Article 26 (equality before the law and prohibition of discrimination).

133 See *Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee*, by de Zayas, Möller and Opsahl, reprint from the German Yearbook of International Law, vol. 28 (1985) pp. 9 - 64.

134 Francis Jacobs, *The European Convention on Human Rights*, 1975 at p. 132,

135 Adopted and opened for signature by the UN General Assembly (Resolution 44/25) on 20 November 1989 and entered into force on 2 September 1990, ie. 30 days after the Convention had been ratified by 20 States. The United Kingdom has ratified the Convention on the Rights of the Child.

136 *Ibid.* Article 20(1).

137 *Ibid.* Article 20(2).

138 *Ibid.* Article 20(3).

139 Such reports have to be submitted to the Committee in 5-yearly intervals; Article 44(1).

140 The equivalent ICCPR provision is Article 2(3)

"Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted."

141 European Court of Human Rights in *Silver* Series A No. 61 at para. 113.

142 Judgment in *Silver*, at para. 116.

143 Application No. 8244/78, 17 D&R 149.

144 *Ibid.* at p. 157.

145 Commission in Case *Young, James and Webster*, Series B 39 at pp. 48 f.

146 The original Convention, Article 6 (right to a fair trial), does not provide for a right of appeal, unlike Article 14(5) of the ICCPR; see judgment of the European Court of Human Rights in the *Delcourt* case, Series A No. 11 at para. 25. Such a right has only been introduced by Protocol No. 7, which has not so far been ratified by the UK.

147 Judgment in *Silver* at p. 42.

148 *Soering* judgment, paras. 116 - 124..

149 *Vilvarajah* judgment, paras. 123 - 124.

150 [1982] 1 WLR 115.

151 (1991) 14 EHRR 248 at 295, para. 3.

152 *Ibid.* paras. 149 to 151.

153 UN Doc. CCPR/C/79/Add.55, of 27 July 1995.

154 *Ibid.* paras. 9 and 15 (last sentence).

155 Communication No. 155/1983 at para. 19.2; see also General Comment 15/27 (on the position of aliens under the Covenant).

156 The equivalent ICCPR provision, Article 2(1) reads:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the

rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

157 Judgment of the European Court of Human Rights, Series A No. 94

158 *Ibid.* para. 82.

159 *Ibid.* at para. 85.

160 Application No. 9285/81 *X, Y, Z* v. *United Kingdom*, 29 D&R 205 at 210

161 E.g. the German reservation reads:

"Articles 19, 21 and 22 in conjunction with Article 2, paragraph 1, of the Covenant shall be applied within the scope of Article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms."; see p. 20 of CCPR/C/2/Rev.4 dated 24 August 1994

162 Judgment of 27 April 1995.

163 *Ibid.* para. 64.

164 (1991) 14 EHRR 248 at 273, para. 90.

165 Published in (1993) Public Law 59.

166 *Ibid.* at p. 78, the reasoning contained in this article was also adopted by Sedley J in his judgment in *R. Secretary of State for the Home Department, ex parte McQuillan.*

167 Judgment of 7 June 1995.

168 In particular the cases *ACI v. Guardian Newspaper (No 2)* [1990] 1 AC 109, *R v. Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, *R v. Secretary of State for the Environment ex parte NALGO* (1993) ALR 785, *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670 and *R. Secretary of State for the Home Department ex parte Mc Quillan* [1995] 4 All E R per Sedley J.

169 Page 27 of transcript.

170 Opinion 2/94 of the ECJ on the issue of whether it would be compatible with the EC Treaty for the Community to ratify the Convention, is currently awaited. 1994 OJ C 174/8

171 See in particular the decisions of the German *Bundesverfassungsgericht* and the ECJ in the cases of *Stauder* and *Internationale Handelsgesellschaft.*

172 Case C-260/89 *ERT* [1991] ECR I-2925 @ para. 41; see also Case 5/88 *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2633 @ para. 19, Case 4/73 *Nold* v. *Commission* [1974] ECR 491 @ para. 13 and Case 222/84 *Johnston* v. *Chief Constable of the RUC* [1986] ECR 1651 @ para. 18.

173 *Ibid.* para. 42.

174 Eg. the ECJ in Joined Cases 297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763 (Article 14), Case 27/88 *Solvay* v. *Commission* [1989] ECR 3355 and Case 374/87 *Orkem* v. *Commission* [1989] ECR 3283 and the AG in Case C-410/92 *Johnson* v. *Chief Adjudicating Officer* [1994] ECR I-5483 (Article 26) and Case 236/87 *Bergemann* v. *Bundesanstalt für Arbeit* [1988] ECR 5125 (Article 17).

175 The ECJ in Case 24/86 *Blaizot* v. *University of Liege* [1988] ECR 379 and Case 149/77 *Defrenne* v. *SABENA* [1978] ECR 1365, the CFI in Case T-45/90 *Speybrouck* v. *European Parliament* [1992] ECR II-33 and the AG in Case 236/87 *Bergemann* v. *Bundesanstalt für Arbeit* [1988] ECR 5125

176 Case C-192/89 *Sevince* [1990] ECR I-3461, at 3493, paras. 64 to 65

177 This provision has, however, by virtue of Article L of the Maastricht Treaty been taken outside the ECJ's power of judicial control.

178 Article K.1

Chapter 5

"WOMEN, CULTURE AND THE LAW"

Nurjehan Mawani
Chairperson
Immigration and Refugee Board of Canada

I am deeply honoured to be here today to address the theme of "Women, Culture and the Law".

There will be two components to my remarks. Firstly, I would like to speak about the universality of human rights, a philosophical position which is the subject of long-standing debate both in the academic literature on international human rights, and among political leaders. Decisions made by the Immigration and Refugee Board of Canada reflect our strong belief that the universality of human rights is inherent to their nature and that their independence, from ideological, cultural or political considerations, is essential to their respect. Secondly, I will explain the human rights-based, gender-inclusive approach to refugee determination which we in Canada have developed, and in which we take great pride.

THE UNIVERSALITY OF HUMAN RIGHTS

Respect for human rights in the contemporary world is a universally accepted goal. All states regularly proclaim their acceptance of and adherence to international human rights norms, reflected in, for example, the Universal Declaration of Human Rights, the most widely known international document. Half the world's states have undertaken international legal obligations to implement these rights by becoming parties to the International Human Rights Covenants, and almost all other nations have either signed the Covenants or have otherwise

I would like to acknowledge the research and analysis work of Linda Koch, IRB. Legal Counsel and Chantal Bernier, IRB, Special Advisor to the Chairperson.

expressed approval of their content. The American political scientist Jack Donnelly refers to this as the "international normative universality" of human rights.[1]

Human rights are considered in international law to be rights held equally by every individual by virtue of his or her humanity, and for no other reason. Proponents of the theory of cultural relativism have criticised the international human rights system as a "Western construct with limited applicability".[2] In its extreme form, cultural relativism may embody the belief that any practice of an indigenous society is theoretically defensible merely on the grounds that it is a local custom.[3] Since all cultures are morally equal, discussions by "outsiders" of local violations of human rights are viewed as "cultural imperialism".

We at the Immigration and Refugee Board of Canada believe that we can insist on what Jack Donnelly refers to as "weak cultural relativism", which permits deviations from universal human rights standards primarily at the level of form.[4] Weak cultural relativism holds that culture may be an important source of the validity of a moral right or rule. Universality is initially presumed, but the relativity of human nature, community, and rights may result in some modifications of the human rights standards. This notion is particularly brought into play with respect to women's human rights.

THE GENDER-INCLUSIVE APPROACH OF THE IMMIGRATION AND REFUGEE BOARD OF CANADA TO REFUGEE PROTECTION

Women' Concerns Overlooked in the Normative Structures of International Refugee Law

Feminist scholars have attempted to explain the historical existence of gender discrimination in Western legal systems through an analysis utilizing the so-called "public-private distinction".[5] In refugee law, this phenomenon is obvious. For example, the criterion that the alleged persecution be attributable to the State has traditionally excluded from refugee status women persecuted by private citizens with the passive co-operation of the State. In fact, severe pain and suffering which occurs in the private sphere, within the home or by private persons, is the most pervasive violence sustained by women. Yet, it has not qualified as torture and often has not

given way to refugee status despite its impact on the dignity and integrity of the person.

The Approach of the Immigration and Refugee Board

The definition of "refugee" and the refugee determination process apply in the same way to women and men. Members of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board must determine at an oral hearing whether a refugee claimant is a Convention refugee according to the definition of the 1951 United Nations Convention Relating to Refugee Status. A Convention refugee is any person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, and who cannot receive the protection of her own State.

Women refugees sometimes fear persecution for the same reasons as men - because of their race, religion, nationality, political opinion, or membership in a particular social group, such as student organizations or trade unions. While the grounds of persecution may therefore be the same for both sexes, women and men may experience the persecution differently and forms of persecution against women often differ from persecution against men. In particular, women are often persecuted through sexual assault or insidious forms of harassment and for the activities of a relative rather than their own. Also, persecution against women often takes form of severe discrimination.

We became aware that, while the language in the Convention refugee definition is gender-neutral, persecution against women was traditionally overlooked and women were having difficulty presenting their claims in an effective manner. In response, the Immigration and Refugee Board released, in 1993, its Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution.[6] We believed that all members would benefit from some guidance in this area by way of a recommended approach to hearing and deciding these claims. The Guidelines, which I am authorized to issue pursuant to our Immigration Act, contain such a recommended approach. Through the Guidelines, Canada led the world in acknowledging that women suffer serious human rights violations because of their gender and that the fear of such violations may constittute grounds for refugee status. The United States adopted, in May 1995, Guidelines, similar to ours, to assist Asylum Officers in evaluating claims by women alleging persecution based on their gender. In 1993, the Executive Committee of the

United Nations High Commission for Refugees pursued its work regarding refugee women and adopted Resolution 73 which encourages States to interpret sexual violence as a form of persecution.

Membership In A Particular Social Group As A Ground for Refugee Status

Women sometimes become the targets of persecution because of the activities or views of their spouses or other family members. Women may be subjected to violence, or harassed, not because they possess political convictions of their own, but in order to pressure them to reveal information about political activities of family members. Women are also persecuted as women, on the basis of their gender and the IRB has found women to be refugees because of their membership in a particular social group.[7]

The IRB Guidelines also apply to women who fear persecution in the form of severe gender discrimination. They apply to women who fear persecution in the form of acts of violence by public authorities, or by private citizens, where adequate state protection from the actions of these private citizens is not available. Women who are victims of wife abuse have been found by the CRDD to be members of a particular social group.[8]

The IRB Guidelines also direct members to consider whether women who transgress certain gender-discriminatory religions or customary laws and practices in their countries of origin belong to a gender-defined social group. This was endorsed by the Executive Committee of the United Nations High Commission for Refugees (UNHCR) in 1985, in its Conclusion No. 39 which recognizes that States, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of "refugee".

For example, in accepting claims of a woman and her two daughters, who feared whipping and imprisonment for non-compliance with the Islamic dress code and other social mores, the CRDD found that their fear of persecution was based on their membership in the particular social group "women and girls who do not conform to Islamic fundamental norms".[9]

The Guidelines recognize that a woman's claim to refugee status cannot be based only on the fact that she is subject to a national policy or law to which she objects. For example, a claimant cannot be found to be a refugee solely

because she refuses to follow religious laws or policies governing her dress. She must also show that these laws or policies, even if they have legitimate goals, are administered through persecutory means in her society or that the punishment for non-compliance is disproportionately severe.

In recent years, there has been a great deal of discussion about changing the UN Convention definition to include "gender" as separate ground. I share the view of many in Canada that gender is already included in the definition of "refugee" within the notion of "particular social group". In fact, the Supreme Court of Canada confirmed that women can form a particular social group. The Ward decision stated that groups defined by "an innate or unchangeable characteristic" such as gender or sexual orientation could constitute particular social groups within the meaning of the Convention refugee definition.[10]

Our experience in Canada has shown that an interpretation of the current Convention refugee definition in such a way that is cognisant of the reality of persecution against women necessarily leads to providing protection for women who fear gender-related persecution and for whom no adequate State protection exists.

A Human Rights Based Definition of Persecution

Our recognition, at the Immigration and Refugee Board, of the reality of the persecution of women stems both from our awareness of the plight of women and from our human rights-based approach to refugee protection.

Persecution, as defined by the Supreme Court in Ward is a "sustained or systematic violation of basic human rights demonstrative of a failure of state protection".[11]

A recent case decided by the Refugee Division involving a mother-led family from an African country illustrates the CRDD's approach to the question of persecution.[12] The mother feared returning to her homeland and losing custody of her two children, a daughter age 10 and a son, 7. According to documentary evidence, children belong to the clan of their father, and for this reason a divorced woman would not be awarded custody of her children.[13] She also feared she would be powerless to prevent her

daughter from being subjected to genital mutilation, against the mother's wishes. At her refugee hearing, the mother described the terror of her own experience of genital mutilation and the resulting health problems she experienced upon reaching adulthood. The panel cited provisions in the Universal Declaration on Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women dealing with equality before the law and equality of rights during marriage and at its dissolution. It concluded "The psychological trauma which the claimant would suffer upon losing custody and access to her two remaining children would constitute 'serious harm' in the Convention refugee sense" and that the discrimination in the rule is so severe as to constitute persecution.[14]

With respect to the claim of the ten year old female, the panel found that her right to personal security would be grossly infringed if she were forced to undergo genital mutilation.[15] Article 3 of the Universal Declaration on Human Rights provides that "everyone has the right to life, liberty and security of the person". The decision makers also considered the United Nations Convention on the Rights of the Child, which explicitly protects children from acts of cruelty and torture, and requires states to take steps to abolish traditional practices prejudicial to the health of children.

Regarding the young male claimant, the panel, in accordance with the Convention On The Rights of the Child, considered whether his "best interests" would be considered in the matter of custody and concluded that they would not. All three claimants were found to have a well-founded fear of persecution in their homeland.

It should be noted that a claimant must adduce "clear and convincing proof" of the state's inability to protect before a finding that the fear is well-founded can be made.[16]

The determination of claims by women in a way that reflects the reality of the persecution they have suffered has challenged certain traditional notions but also raises evidentiary issues.

Special Problems At Refugee Determination Hearings

Women from cultures where the preservation of their virginity or marital dignity is of paramount importance may be very reluctant to disclose that they have been sexually assaulted. They fear that their disclosure may bring

disgrace or dishonour to their family or community. In order to make it easier for a female claimant to testify about sexual assault, a female interpreter, female members, and a female refugee hearing officer (RHO), whose function it is to assist the panel, are often provided.

Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms known as Rape Trauma Syndrome. These symptoms may include "persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion".[17] The Guidelines provide that in cases of sexual or domestic violence, evidence may be given outside the hearing room, by affidavit or by videotape. It should be mentioned that most refugee hearings are non-adversarial in nature.

Women whose fear of persecution is based on the activities of male family members may have difficulty substantiating their claims, as they are often unable to provide details of their relative's activities. In some cultures, women are not informed of the activities of men, even those who are close relatives. This point is illustrated by the case of a young African woman, in which the panel stated:

> "Part of her inability to provide detailed information on issues such as her father's involvement in ... [an armed group] may be explained by her young age. Furthermore, for cultural reasons, as a young girl in ... [Africa], it is not unreasonable to assume that she would not have been privy to this kind of information."[18]

Demeanour is an important factor that may be taken into consideration when determining the credibility of a refugee claimant. Due to their having been extensively trained in inter-cultural sensitivity, however, members assess demeanour in light of cultural differences. A refusal to make eye contact with members, for example, is not necessarily a sign of deceitfulness; in some cultures,, it is a sign of respect for authority.

Cultural differences in approaches to the importance and passage of time may, if not understood by decision makers, lead to adverse findings on the credibility of a refugee claimnat's testimony. Canadians who testify in our courts are expected to recall dates and times with a high degree of precision and consistency. However, rural Central Americans, for example, may be

more accustomed to defining events in terms of local personal chronology. Their frames of reference may consist of lifespan, agricultural processes, fiestas, or momentous events.[19]

As Walter Kalin has pointed out, words, notions and concepts which carry the same label often embody different meanings in different cultures. [20] For example, the terms "brother" or "cousin" for many Africans covers not only very close relatives but all members of his or her tribe. IRB members are aware of the use of terms in certain cultures, and thus would assess in that light the plausibility of a claimant's statement that he was able to leave the country with help from his brother in the jail, the passport office or the airport in light of this understanding.

Inter-cultural misunderstandings can also be caused when a decision-maker unintentionally interprets statements in the light of his or her own legal concepts. Kalin cites the case of a young worker whose asylum application in a European country was rejected for credibility due to contradictions in his evidence. In his written request for asylum he declared himself to be a former member of an illegal political party whereas during the hearing he stated that he was only a supporter of the party who had distributed propaganda materials. As Kalin points out, one can make a legal distinction between "member" and "supporter" of political parties in some Western countries, but the distinction is not a meaningful one when analyzing membership in illegal, underground organizations where "supporters" may face the same dangers as "members".

Problems in assessing credibility can be aggravated by the need to communicate through interpreters. In an effort to minimize the problems created by the intervention of interpreters, the Board provides for training, monitoring and evaluation of interpreters on a continuing basis. Further, the Board has an accreditation programme to provide an objective and uniform means of ensuring that interpreters meet an established standard as a prerequisite to providing interpretation service.[22] We offer interpretation in 90 languages.

Misunderstandings can arise when "common sense" from a Canadian perspective is used as a guide in making credibility determinations. For example, while it might appear as an affront to common sense that a refugee woman claimant may not have told her husband about her sexual assault at the hands of the police, it makes far more sense when one has an

understanding of the condition of women in her country of origin and what sexual assault means for her within her society.

Conclusion

Sadly, we live in a world in which massive violations of human rights occur daily, forcing women and men to flee across borders, and in some cases to seek asylum in foreign states.

According to the United Nations High Commission for Refugees, the majority of the world's refugees are women and children. Women asylum seekers have unique problems in presenting their claims. At the IRB we attempt to address them through our Gender Guidelines, through extensive cross-cultural training and training on gender issues of decision makers, and through hearing room procedures that are sensitive to the needs of women refugee claimants.

IRB decisions reflect our belief that women and men are persecuted when their universal human rights, as guaranteed in international documents like the Universal Declaration on Human Rights, are infringed or denied. If we were to retreat from our belief in the universality of human rights, it would be tantamount to taking the position that only women from some nations are entitled to have their human rights respected and others do not. We would in effect be saying that some women's human rights can be violated in the name of respect for cultural autonomy.

Perhaps nowhere more than in the adjudication of refugee claims do cultural and gender particularities affect the decision-making process. Our everyday challenge is to respect and yet overcome cultural differences. We hope to achieve our goals in this regard and even serve as a model for greater human understanding.

.....

NOTES

1 Donnelly, Jack, *Universal Human Rights in theory and Practice*, Cornell University Press, Ithaca, N.Y., 1989, p.2.
2 Pollis, Adamantia and Schwab, Peter, "Human Rights; A Western Construct with Limited Applicability" in Human Rights: Cultural and Ideological Perspectives, eds. Adamantia Pollis and Peter Schwab, (New York: Praeger, 1980), 1-8.
3 Tesen, Fernando R., "International Human Rights and Cultural Relativism", Virginia Journal of International Law (Summer 1985) 870.
4 Donnelly, p.110.
5 Charlesworth, Hilary, "Feminist Approaches to International Law", The American Journal of International Law 85 (1991) 613- 645, at p. 626, Thomas, Dorothy and Beasley, Michelle, "Domestic Violence as a Human Rights Issue", Human Rights Quarterly 15 (1993) p.36
6 Immigration and Refugee Board, "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution", Ottawa, March 1993.
7 CRDD T-89-03943, Kapasi, Jew, July 25, 1990. Where a political opinion was imputed to the claimant because of the actions of her brothers.
8 CRDD U92-08714, Maraj, Shecter, June 14, 1993, involving a woman from Ecuador.
9 CRDD T89-06969, Nicholson, BAJWA, July 17, 1990.
10 Ward v. Canada [1993] 2 S.C.R. 689, at 739.
11 Ibid.
12 T93-12198, Ramirez, McCaffrey, May 10, 1994.
13 United States Department of State, Country Reports on Human Rights Practices for 1993, February 1993, at 263.
14 Note 12, above, at 6,
15 Ibid., at 10
16 Note 10, above, at 726.
17 UNHCR Executive Committee Guidelines on Refugee Women, EC/SCP/67, July 22, 1991, at 27.
18 CRDD T90-01590, Liebich, Clarke, March 7, 1991
19 *Kot, Veronika, "The Impact of Cultural Factors on Credibility in the Asylum Context", Father Moriarty Central American Refugee Project, San Francisco, 1988*
.20 Walter Kalin, "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing", (1986) 20 International Migration Review, at 2334.
21 Ibid., at 234-235.
22 Immigration and Refugee Board, Annual Report (Ottawa: Immigration and Refugee Board, 1991) at 32.

Chapter 6

THE PROTECTION OF REFUGEES AND THE SAFE THIRD COUNTRY RULE IN INTERNATIONAL LAW

Guy S. Goodwin-Gill
Professor of Asylum Law, University of Amsterdam

The Protection of Refugees and the 'Safe Third Country' Rule in International Law

Introduction

States have so far not accepted an obligation to grant asylum to refugees, and, otherwise than on a regional basis, have likewise failed to agree upon principles which would establish the appropriate State to consider applications in any given case. Article 31 of the 1951 Convention relating to the Status of Refugees requires refugees present or entering illegally not to be penalized, but is limited to those 'coming directly from a territory where their life or freedom was threatened'.[1] In discussions on this issue at the 1951 Conference of Plenipotentiaries, the then High Commissioner for Refugees, Mr. van Heuven Goedhart, expressed his concern about the occasions when transit was necessary. Recalling that he himself had fled the Netherlands in 1944 to escape persecution, he told how, still at risk, he had been helped by the resistance to move on from Belgium to France, then Spain and finally to safety in Gibraltar. It would be unfortunate, said the High Commissioner, if refugees in similar circumstances were penalised for not proceeding 'directly' to a country of refuge.[2] At the time, however, a number of States were concerned that refugees 'who had settled temporarily in a receiving country' or 'found asylum', should not be accorded a 'right of immigration' that might be exercised for reasons of mere personal convenience.[3] The final wording of article 31 is in fact something of a compromise, limiting the benefits of non-penalization to refugees 'coming directly', but without further restricting its application to the country of origin.

With the background of this somewhat ambiguous reference, a practice developed in certain States of excluding from consideration the cases of those who have found or are deemed to have found asylum or protection elsewhere, or who are considered to have spent too long in transit.[4] Asylum and resettlement policy tends to concentrate on refugees 'still in need of protection'. Consequently, a refugee formally recognized by one State, or who holds an identity certificate or travel document issued under the 1951 Convention,[5] generally has no claim to transfer residence to another State, otherwise than in accordance with normal immigration policies. Much the same approach has also been applied to refugees and asylum seekers who, though not formally recognized, have found protection in another State.[6] In resettlement countries, too, eligibility for special entry programmes may be conditional upon the refugee not otherwise having found a durable solution. Under United States law, a refugee has long been liable to refusal of admission if already established in another State.[7] A temporary refuge may not prejudice the claim to resettlement, but this will depend on all the circumstances, including whether the individual has established any business, or held an official position inconsistent with status, and the duration of stay.[8] This limitation now appears in the United States 1980 Refugee Act and regulations made thereunder,[9] and has also been used as a criterion for qualification in Canada's designated classes.[10]

Access to procedures and responsibility to determine claims

Article 31 contains an obligation of essentially negative scope, prescribing what States shall *not* do with respect to certain refugees. Today, the problem is no longer non-penalization, but that of identifying which State is 'responsible' for determining a claim to asylum and ensuring protection for those found eligible. The 1951 Convention as a whole is silent with respect to such positive obligations,save so far as article 31 has come to be seen by some States parties as implicitly endorsing a concept of 'first country of asylum' and various legal consequences.

Problems arise, however, where the candidate for refugee status has not been formally recognized, has no asylum or protection elsewhere, but is nevertheless unilaterally considered by the State in which application is made to be some other State's responsibility. Individuals can end up in limbo, unable to return to the alleged country of asylum or to pursue an application and regularize status in the country in which they now find

themselves. The absence of any convention or customary rule on responsibility in such cases, the variety of procedural limitations governing applications for refugee status and asylum, as well as the tendency of States to interpret their own and other States' duties in the light of sovereign self-interest, all contribute to a negative situation potentially capable of leading to breach of the fundamental principle of *non-refoulement*.

At the abortive 1977 United Nations Conference on Territorial Asylum, States reached a measure of agreement on the principle that,

> Asylum should not be refused... solely on the ground that it could be sought from another State. However, where it appears that a person before requesting asylum from a Contracting State already has a connection or close links with another State, the Contracting State may, if it appears fair and reasonable, require him first to request asylum from that State.

The UNHCR Executive Committee adopted much the same approach in its 1979 Conclusion No. 15 on refugees without an asylum country, stressing the need for agreement on criteria to allow positive identification of the responsible State, taking account of the duration and nature of any stay in another country, as well as of the asylum seeker's intentions. Debate over the right of access to procedures and the related question of responsibility to determine claims has continued in various fora. The UNHCR Executive Committee in 1985, for example, examined the question of so-called irregular movements of refugees and asylum seekers, defined to include those who move, without first obtaining authorization, from countries in which they have already found protection in order to seek asylum or permanent resettlement elsewhere.[11] Executive Committee Conclusion No. 58, finally adopted in 1989, recognized that there might be compelling reasons for such onward movement, and emphasized that return should only be contemplated where the refugee was protected against *refoulement*, allowed to remain in the country in question, and treated in accordance with basic human rights standards pending a durable solution.

Since then, both the Executive Committee and the United Nations General Assembly have repeatedly endorsed the general principle of access to refugee procedures,[12] and the specific need for agreement on responsibility.[13] Some States have been careful to emphasize that *non-*

refoulement does not stand in the way of returns to 'safe third countries',[14] while others have stressed the dangers inherent in refusing admission at the border 'for purely administrative reasons'.[15] Generally, however, States have accepted that 'the fundamental criterion when considering resort to the notion (of safe third country), was protection against *refoulement*'.[16]

Recent State practice: some examples

The resolution on 'host third countries', adopted in December 1992 by European Community Ministers responsible for immigration, proposes a number of 'fundamental requirements' as a precondition to the identification of a State as one to which asylum seekers and refugees may be returned. Specifically, the applicant's life or freedom must not be threatened in the country in question, within the meaning of article 33 of the 1951 Convention; he or she must not be exposed to torture or inhuman or degrading treatment; either the applicant must already have been granted protection, or have had a previous opportunity to contact the country's authorities to seek protection;[17] and finally, the applicant 'must be afforded effective protection in the host third country against *refoulement*, within the meaning of the Geneva Convention'.[18] This formulation is by no means free of ambiguity, however, and there is also no *necessary* connection between having had 'a previous opportunity' to apply for asylum/refugee status and thereafter being able to access the full range of refugee protection. Nevertheless, this approach has been largely followed in practice, particularly among European States.

For example, the July 1993 constitutional amendments in the Federal Republic of Germany provide that the right of asylum may not be invoked by those entering from a Member State of the European Communities or from a third country where application of the 1951 Convention and the European Convention on Human Rights is guaranteed.[19] In the United Kingdom, the Asylum and Immigration Appeals Act 1993 established a 'fast-track' appeal procedures for asylum seekers refused on the basis of safe third country. The immigration rules closely follow the resolution cited above, and provide that asylum claims will not normally be considered on their merits if the applicant can be sent to a country, 'in which the life or freedom of the asylum applicant would not be threatened (within the meaning of Article 33 of the Convention) and the government of which would not send the applicant elsewhere in a manner contrary to the

principles of the Convention and the Protocol'.[20] The rules further provide that an applicant will only be removed if, not having arrived directly from the country in which persecution is claimed to be feared, he or she 'had an opportunity at the border or within the territory of a third country to make contact with that country's authorities in order to seek their protection'.[21]

The rationale for this policy was explained in a paper prepared by the United Kingdom delegation in Geneva, as a contribution to discussion within the UNHCR Executive Committee.[22] 'Protection needs', it is said, to distinguish refugees from other migrants, and 'once refugees have reached a country from which they could safely seek protection it is that country's obligations under the 1951 Convention which are engaged, and any subsequent migratory movements do not normally result in the transfer of those obligations.[23] The United Kingdom nevertheless noted that full account must be taken of a State's obligations with respect to *non-refoulement*, including indirect *refoulement*.[24] Safe third country removals must therefore take account of receiving country practice, as well as their formal legal obligations, and no return should take place if there are 'substantial grounds for thinking that the third country would send the applicant on to a country of claimed persecution without properly considering the case'.[25] Finally, although consultations are desirable, and agreements for the allocation of responsibility are best, they are not a precondition to removal.

Canada's 1976 Immigration Act, as amended, conditions eligibility to have an asylum claim determined on the applicant not having been recognized as a Convention refugee in a country to which he or she may still be returned; and on not having come, 'directly or indirectly', from a 'prescribed' country (that is, one which complies with article 33 of the 1951 Convention), other than his or her country of origin.[26] Finally, the Minister is empowered to conclude agreements 'with other countries for the purpose of facilitating the coordination and implementation of immigration policies and programs including... agreements for sharing the responsibility for examining refugee claims and for sharing information concerning persons who travel between countries that are parties to such agreements'.[27] Although available in various forms since 1988, Canada's 'safe country' provisions were not implemented for a variety of practical and political reasons.[28] Towards the end of 1995, however, agreement appeared likely on a memorandum of understanding with the United States of America, dealing with

responsibilities for refugee and asylum applicants transiting the territory of one, en route to the other.[29]

Identifying the State responsible to determine a claim

As part of the process of regional harmonization or co-ordination of immigration, asylum and visa policies, European States concluded two agreements in 1990, namely, the Dublin and Schengen Conventions.[30] These agreements have simple, limited objectives: to determine which participating State is responsible for deciding the asylum claim of an individual within the area of application; to provide in appropriate cases for the readmission of such individual, and for the exchange of information; and to confirm the responsibility of the State for the removal of unsuccessful applicants from European Union or Schengen territory, as the case may be. Responsibility is based on formal elements, including the presence of family members (defined strictly) having refugee status, the issue of visas, residence permits, or authorization to enter the territory by one or other State.[31] Additional declared purposes include the identification of a ***single*** responsible State, thereby reducing the likelihood of multiple, successive applications; and the elimination of the 'orbiting' of asylum seekers, by ***requiring*** claims to be determined by the State so identified.

Both Dublin and Schengen are premised on the assumption that Member States will implement a common standard, namely, the protection of refugees as defined in the 1951 Convention/1967 Protocol, in particular, by the determination of claims. Relevant procedural and substantive questions, such as due process, rights to counsel or interpreters, appeal and review, as well as interpretations of definitional elements in the international standard, are not dealt with, however. Arrangements such as these could certainly improve the situation of refugees and reduce the number requiring protection,[32] especially as participating States undertake to determine the asylum claims for which they are responsible. The reality, however, is less engaging; far from effectively providing for a substantive decision on every asylum claim lodged in the European Union, article 3(5) of the Dublin Convention expressly reserves to each Member State, 'the right... to send an applicant for asylum to a third State'. Indeed, the Dublin scheme for attributing responsibility *only* comes into operation if there is no other non-European Union State to which the claimant may be sent by a Member State, 'pursuant to its national laws'.

This intent was confirmed by the Ministers responsible for immigration, in their 1992 resolution on a harmonized approach to so-called host third countries. This provides that formal identification of a host third country shall *precede* the substantive examination of an asylum application; and in language that is far from clear and unambiguous, that the application 'may not' be examined if there is a host third country; and that the Dublin Convention shall apply only if the asylum applicant 'cannot in practice be sent to a host third country'. If no such country exists, a Member State will consider whether another Member State is responsible, and if so, hand over the applicant.[33] Although the notion of a single responsible State obliged to determine an asylum claim was hailed, among others, as bringing an end to refugees in orbit and making the right to seek asylum effective, this prospect is limited to those refugees and asylum seekers who cannot be sent out of Europe. As Achermann and Gattiker have observed, 'The principle of the responsible State has thus been turned upside down; expulsion to a third State is no longer the exception but the rule'.[34]

Practical issues

Having a 'safe third country' rule in national legislation is one thing; being able effectively to implement it, quite another; in places, a marked chasm separates rhetoric and reality, whether it relates to other States compliance with obligations towards refugees and asylum seekers, or to the effectiveness of removals policies. The United Kingdom considers that although consultations are desirable and agreements for the allocation of responsibility are best, they are not a precondition to removal.[35] Several European States have backed up their domestic provisions with a network of re-admission agreements, principally with States in Central and Eastern Europe. Traditionally, such agreements provide for and facilitate the re-admission by States of their own citizens. In addition, they now generally also apply to third country nationals who have crossed a common border, and can thus be used to return asylum seekers to a 'safe third country',[36] even though they contain no provision obliging the receiving State to consider any such claims on their merits, let alone to provide protection.[37]

Both practice and principle suggest that inter-State agreements on responsibility, return, and procedural and substantive guarantees, including

non-refoulement, are essential if the protection of refugees is to be effective.[38]

In a note presented to the Executive Committee in 1991, UNHCR called attention to many difficulties of application with the safe third country concept, both at the threshold of identification and thereafter, on implementation. Relevant issues of concern include uncertainty with respect to the length of stay, standards of application, treatment, and monitoring.[39] The discussion in the Sub-Committee revealed various positions; one representative suggested that the only relevant criterion in deciding on return was the risk of *refoulement*;[40] others that the notion of a safe third country should be taken into account before resort to determination of status under the 1951 Convention, and that there should be 'no forum shopping'.[41] No conclusions were adopted, save that it was agreed to give the subject further attention. Different views have in fact surfaced over the years, with some States emphasising that the right to seek asylum did not imply the right to travel to a particular country in order to apply;[42] some, that the individual's choice should be respected, while still others noted the overall negative impact of such measures, or specifically, that they were coming under pressure to take more refugees and asylum seekers in order to protect western Europe.[43]

In 1993, UNHCR stated that the return of those who have obtained effective protection in another country is permissible, subject to the conditions laid down in Executive Committee Conclusion No. 58 (1989) on irregular movements. Practical problems, however, included determining whether another country in which an asylum seeker can reasonably be expected to request asylum will in fact accept responsibility for examining the request and granting protection. Examples of summary removals onwards in turn confirmed that exclusion from asylum procedures is a substantive issue requiring appropriate procedural safeguards, including an opportunity to rebut any presumption that a State is 'safe' with respect to the individual concerned, together with prior consent and cooperation of the country of return. UNHCR also called attention to the problem of return from countries with developed procedures to those with none or with few resources, which was likely to result in the serious risk of denial of protection.[44]

The Conclusions on irregular movements of refugees and asylum seekers are commonly invoked as a source of common standards for returns to so-

called safe third countries. Although considered by many States to be well-balanced, at the time of their adoption they produced a substantial batch of 'interpretative declarations'. Among them, Turkey considered that the conclusions did not apply to those 'who are merely in transit in other country';[45] Italy considered them limited to *recognized* Convention refugees and to asylum seekers who have *already found protection* on the basis of the principles of the Convention and Protocol; Thailand opposed any hierarchy among durable solutions that gave priority to local settlement before third country resettlement; Germany, with Austria concurring, asserted that a 'formal residence permit' was not a necessary pre-condition to return; while Greece thought that first asylum countries should bear the burden of refugees on an equitable basis, that 'the will of a refugee to choose freely the country of... destination should not be overlooked...', and that with respect to returns, the 'sovereignty of the State and its rules and regulations under which entry is allowed cannot be ignored'.[46]

State practice and the views of States reveal a clear division between those who would argue that the international responsibility (of other States) to determine status and provide protection is engaged by the fact of passage through or earlier presence in their territory; and those who look for more substantial evidence of connection or attach greater weight to the wishes or intentions of the asylum seeker, either as a matter of principle or because this leads in fact to a more equitable spread of refugees and asylum seekers.[47] Among the persistent objectors, Turkey has consistently voiced its opposition to safe third country returns, also arguing that resettlement should not continue as the solution of last resort, lest first asylum or transit countries be required to shoulder most of the burden.[48] In 1990, Turkey declared that it was wrong to perceive transit countries as permanent havens where the movement farther west or north could be contained. In the absence of voluntary repatriation, equitable burden-sharing should be the guiding principle, with the choice of solution based on the desire of the refugees and asylum seekers themselves and conditions in the host country. The principle of first asylum should not be used to impose the necessity of hosting increasingly large numbers of refugees for an indefinite period of time.[49]

The 'safe third country' rule in international law

The fact of an asylum seeker's presence in or transit through a State does raise certain issues of jurisdiction. However, at first glance and from the

perspective of customary international law, these appear more permissive than mandatory, in the sense that such State *may* determine whether an asylum seeker is a refugee, but is not *obliged* so to determine unless minded to return the individual to a country in which his or her life or freedom may be threatened. Possible exceptions, such as arise in the case of obligations to extradite or to prosecute, are almost exclusively based on formal agreements.

State practice, apart from the responsibility-determining context of the Dublin and Schengen Conventions, has been mostly unilateral, in the sense that one or other State has declined to consider an asylum application or extend protection, after determining, generally without consultation, that another State was responsible. Alternatively, asylum seekers have been dealt with under general bilateral agreements on the readmission of nationals and non-nationals, but without the issue of responsibility for asylum determination being considered.

There is certainly no consistent practice among 'sending' and 'receiving' States as would permit the conclusion that any rule exists with respect to the return of refugees and asylum seekers to safe third countries, simply on the basis of a brief or transitory contact. Equally, it cannot be said that, in relation to the 1951 Convention, there is 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[50] In the absence of any applicable agreement, such returns therefore run the risk of violating article 33 of the 1951 Convention, for example, where the receiving State fails to provide protection.[51] Writing in 1989, Crawford and Hyndman included the practice of sending asylum seekers on to other States as one of 'three heresies' in the application of the 1951 Convention.[52]

> "It is... clear that more than one State may share joint responsibility for decisions which result in the *refoulement* of a refugee... It follows that a State may not rely on the obligation of another State party to the Convention, even where there are good grounds for saying that the latter State is indeed under a particular obligation with respect to the refugee, if that reliance is likely to result in a violation of Article 33."

Returns may also breach other applicable human rights provisions, where the process of refusal and return amounts to cruel, inhuman or degrading

treatment.[53] The standards of the International Civil Aviation Authority on the return of inadmissible travellers govern an essentially administrative situation,[54] and are not intended by themselves to activate the substantial treaty-based protection responsibilities involved in refugee determination.

So far as States have accepted returned asylum seekers, either unilaterally or on the strength of re-admission agreements, this process is flawed from the refugee protection perspective, because it is not indissolubly linked to the obligation of the receiving State to proceed to a substantive evaluation of the asylum claim, if any, and to provide protection in appropriate cases.

While the UNHCR Executive Committee has recognized 'connection or close links' with another State as a discretionary basis for refusal to consider an asylum claim, it has approved returns only to countries in which refugees or asylum seekers 'have already found protection', if they are protected there against *refoulement*, are permitted to remain and are treated in accordance with recognized basic human standards. The European resolution on so-called host third countries also confirms that returns are conditional upon the availability of a certain minimum standard of protection.

The most that can be said at present is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter. A supplementary rule or practice may be emerging at the European regional level, which will allow return if there is evidence of a *sufficient* 'territorial connection' with another State, such as is laid down in the Dublin and Schengen Conventions.[55] Compliance with article 33 of the 1951 Convention is a further key factor in the criteria for safe third country status. *Non-refoulement* is most likely to be observed if there is access to a fair and effective procedure for the determination of claims to refugee status, in accordance with prevailing international standards. However, formal effectiveness may be prejudiced by restrictions on access, for example, because of time limits, geographical limitations on the extent of obligations, policy reasons affecting particular groups, or legal reasons affecting certain classes, such as illegal entrants. In either case, actual return is likely to satisfy a best practice standard only if the receiving State is able to provide certain effective guarantees, including (1) willingness to re-admit asylum seekers; (2) acceptance of responsibility

to determine claims to refugee status, notwithstanding departure from the country in question or the circumstances of initial entry; (3) the treatment of applicants during the determination process in accordance with generally accepted standards;[56] and (4) some provision with respect to subsistence and human dignity issues, such as social assistance or access to the labour market in the interim, family unity, education of children, and so forth. Besides the question of fulfilment of obligations deriving from the 1951 Convention/1967 Protocol, a country's human rights record will also be relevant. This may include both procedural and substantive standards, including questions of remedies, non-discriminatory or equivalent treatment with local nationals, and protection of fundamental human rights.

Conclusions

Ironically, the essential error in the safe third country debate has been to approach the question as a substantive one of protection and (assumed) obligations. Rather, it should be seen as procedural, but premised on the participation of States in a formal regime of responsibility and protection, regulated by treaty. The debate and the legislation must be recast away from the notion of 'safe third country', with all its substantive implications, and in favour of formal agreements with other States on the precise issues of responsibility to determine claims and common standards of treatment that concord with the 1951 Convention and applicable human rights instruments.[57] Merely attributing responsibility, however, is likely to fall short of securing effective protection or the fullest implementation of international obligations.

Although there is much to be said for the standards of protection endorsed in the British statement described above, United Kingdom practice fully confirms the practical difficulties of making safe third country policy work in the absence of agreement.[58] Only within the area of application of the Dublin and Schengen Conventions is there an obligation to determine a claim for asylum; but even there, inadequate protection is possible (considered from an international law perspective), because of variations in procedural entitlements and aberrant interpretations of refugee criteria.[59]

NOTES

[1] Art. 31: 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

[2] UN doc. A/CONF.2/SR.14, pp. 4-5.

[3] France first favoured a limitation to refugees coming directly from their *country of origin*, objecting to the first draft which would have allowed the refugee, 'to move freely from one country to another without having to comply with frontier formalities': UN doc. A/CONF.2/SR.13, p. 13. Italy also initially considered that the 'exception from the consequences of irregular entry should only be considered in the case of the first receiving country': ibid. Both positions were moderated in acceptance of the present wording, which is capable also of covering unsafe transit countries. What remains unclear is whether the refugee is entitled to invoke art. 31 when continued flight has been dictated more by the refusal of other countries to consider the claim or to grant asylum, for example, because of time limits, or exclusionary provisions such as those on safe third country, or safe country of origin.

[4] For earlier accounts of the problem, see Melander, G., *Refugees in Orbit*, (1978); also, Gruhl-Madsen, A., *Territorial Asylum*, (1980), 95-101; Raoul Wallenberg Institute, *Responsibility for Examining an Asylum Request*, Report of a Seminar in Lund, 24-26 April 1985, Report No. 1 (1986); Uibopuu, H.-J., 'Ss. 7(2) Asylgesetz und der "anderweitige Schutz" des Asylbewerbers', 34 *Österr. Z. Recht und Völkerrecht* 30 (1984); Kooijmans, P. H., 'Ambiguities in Refugee Law: Some Remarks on the Concept of the Country of First Asylum', in Nowak, M., Steurer, D., & Tretter, H., eds., *Fortschritt im Bewusstsein der Grund- und Menschenrechte. Progress in the Spirit of Human Rights. Festschrift für Felix Ermacora*, (1988), 401-14.

[5] 1951 Convention, arts. 27 and 28.

[6] Effective 'protection' in this context would appear to entail the right of residence and re-entry, the right to work, guarantees of personal security and some form of guarantee against return to a country of persecution; see Uibopuu, H.-J., 'Ss. 7(2) Asylgesetz und der "anderweitige Schutz" des Asylbewerbers', 34 *Österr. Z. Recht und Völkerrecht* 30 (1984), proposing certain conditions for an international standard of 'protection elsewhere', namely, that protection must be explicit, stay in the third State must have been of a particular duration, accompanied by residence permit and/or work permit and/or other possibility to integrate; above all, there must be protection against expulsion, extradition or *refoulement* to a State where life or freedom would be endangered. Cf. 1951 Convention, arts. 1C(3) and 1E. See also Tiberghien, *La protection des réfugiés*, 110-12, 466f. During the 1980s, courts in the Federal Republic of Germany developed particularly strong, qualitative principles of protection on behalf of individual asylum seekers, thereby rendering 'protection elsewhere' ineffective as a basis for summary exclusion from the asylum procedure; see Marx, R., *Asylrecht*, (5. Aufl., 1991), vol. 1, 163-200. The 1993 constitutional changes, however, significantly strengthened limitations on access; see Ablard, T. & Novak, A., 'L'évolution du droit d'asile en Allemagne jusqu'à la réforme de 1993', 7 *IJRL* 260, 276-87 (1995).

[7] *Rosenberg* v. *Yee Chien Woo* 402 US 49 (1971): 65 *AJIL* 828 (1971): US Supreme Court held that presence in the United States must be a consequence of the flight in search of refuge, 'reasonably proximate to the flight and not following a flight remote in point of time or intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge'. See also *Min Chin Wu* v. *Fullilove* 282 F. Supp. 63 (D.Ct., 1968); *Alidede* v. *Hurney* 301 F. Supp. 1031 (D.Ct., 1969). For early United Kingdom practice, see 469 HC Deb. col. 811 (1949).

[8] In 1979, the Australian DORS Committee disregarded the fact that various Indo-Chinese applicants had spent some time in camps in Malaysia and Thailand before travelling on by boat to Australia, on the ground that the 'transit' States could not be considered as potential countries of asylum. The *Conseil d'Etat* has held on several occasions that the mere fact of having resided in an intermediate country is not alone sufficient to justify refusal of refugee status; see *Conté*, 20.527, 16 janv. 1981; *Chin Wei*, 21.154, 27 mars 1981: Tiberghien, *La protection des réfugiés*, 238, 239, 466-7.

[9] S. 201 introducing new s. 207(c) into the Immigration and Nationality Act 1952. The combined effect of statute and regulations is to disqualify refugees 'firmly resettled' in third countries from overseas admission. The individual will be considered 'firmly resettled' if, before arriving in the US, he or she entered another State with, or received while there, an offer of permanent residence, citizenship or other type of permanent resettlement. The person concerned will not be considered firmly resettled, however, if he or she can show, either that entry into the other State was a necessary consequence of flight, that he or she remained there only so long as was necessary to arrange onward travel, and that no significant ties were established; or that the conditions of residence there were so 'substantially and consciously restricted by the authority of the country of refuge', that he or she was not in fact resettled. Relevant factors for consideration by the decision-maker include the living conditions of residents, type of housing and employment available, property and other rights and privileges, such as travel documents, rights of entry and return, education, public relief: 8 CFR §208.15. A similar disqualification applies to asylum, and the regulations require mandatory denial if 'the applicant has been firmly resettled within the meaning of §208.15': INA §207(c), §208(a); 8 CFR §208.14(c)(2). One denied asylum under 8 CFR §208.14(c)(2) may still be entitled to the benefit of withholding of deportation under INA §243(h); see Anker, D. E., 'First Asylum Issues under United States Law', in Bhabha, J. & Coll, G., eds., *Asylum Law and Practice in Europe and North America*, (1992), 150. Similarly, a refugee recognized in Canada, but denied landing under *Immigration Act*, s. 46.04(1)(d), is nevertheless entitled to non-removal under s. 53: 'no person who is finally determined... to be a Convention refugee... shall be removed from Canada to a country where the person's life or freedom would be threatened...'

[10] The Indo-Chinese and Self-Exiled Designated Classes regulations (SOR/78-931 and 933) referred to persons who 'have not become permanently resettled'.

[11] UNHCR, 'Irregular Movements of Asylum Seekers and Refugees': UN doc. EC/SCP/40/Rev.1; *Report* of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/671 (Oct. 1985); *Report* of the 36th Session of the Executive Committee: UN doc. A/AC.96/673, (Oct. 1985), paras. 77-82. Adoption of the Conclusions was delayed until 1989, owing to German reservations.

[12] See, for example, UNGA res. 49/169, 23 Dec. 1994, para. 5, reiterating 'the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status...'

[13] See for example Executive Committee General Conclusion on International Protection No. 71 (1993), paras. (k), (l), recognizing 'the advisability of concluding agreements among States directly concerned... to provide for the protection of refugees through the adoption of

common criteria and related arrangements to determine which State shall be responsible for considering an application for asylum... and for granting the protection required..,' and emphasizing 'that such procedures, measures and agreements must include safeguards adequate to ensure... that persons in need of international protection are identified and that refugees are not subject to *refoulement'*.

[14] Mr. Wrench (United Kingdom): UN doc. A/AC.96/SR.430, para. 53, (1988). This interpretation was reiterated the following year; see UN doc. A/AC.96/SR.442, para. 51 (1989).

[15] Mr. Strassera (Argentina): UN doc. A/AC.96/SR. 442, para. 46 (1989).

[16] *Report* of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/781 (9 Oct. 1991), para. 34. The notion of 'internal flight alternative' raises similar questions relating to the availability of protection, though in a quite different context. See decision of the Bundesverfassungsgericht = Federal Constitutional Court, 10 Jul. 1989, *BverfGe* 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86, noting that an internal flight alternative presupposes that the territory in question offers the asylum seeker reasonable protection against persecution: Case Abstract No. *IJRL/0084*: 3 *IJRL* 343 (1991); also *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 1256; [1992] FC 706, in which the Canadian Federal Court of Appeal held that for an internal flight alternative to exist, the decision-maker should be satisfied, 'on a balance of probabilities that there was no serious possibility of the applicant being persecuted in Colombo, and that, in all the circumstances, including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the Appellant to seek refuge there': Case Abstract No. *IJRL/0099*: 3 *IJRL* 95 (1992).

[17] Alternatively, there must be clear evidence of admissibility to a third country.

[18] Ministers of the Member States of the European Communities responsible for Immigration, Resolution on a harmonized approach to questions concerning host third countries, London, 30 Nov.-1 Dec. 1992; text in ECRE, 'Safe Third Countries: Myths and Realities', (1995), appx. C. See Julien-Laferrière, F., 'Commentaire des résolutions et conclusions adoptées par le Conseil européen d'Edimbourg sur le pays ou il n'existe pas de risques sérieux de persécution, les pays tiers d'accueil et les demandes manifestement infondées', *Doc. réf.* no. 205-6, supp., 17 déc. 1992.

[19] Art. 16a(2), *Grundgesetz* (Basic Law); see also *AsylVfG* 1993, art. 26a, prescribing that asylum may not be claimed where the applicant comes from a safe third State; besides the Members of the European Union, the following States had been listed as safe at 31 January 1995: Czech Republic, Norway, Poland, Switzerland. See also art. 27, excluding the applicant who has already found protection against persecution; residence for three months or more raises a presumption that protection has been found, which can be rebutted by credible evidence of a risk of expulsion to a State in which the claimant fears persecution. Marx, R., *Asylverfahrensgesetz: Kommentar* (1995); also Blay, S. & Zimmermann, A., 'Recent Changes in German Refugee Law: A Critical Assessment', 88 *AJIL* 361 (1994); Ablard, T. & Novak, A., 'L'évolution du droit d'asile en Allemagne jusqu'à la réforme de 1993', 7 *IJRL* 260, 276-87 (1995); Hailbronner, K., 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective', 5 *IJRL* 31, 46ff (1994).

[20] Immigration Rules (HC 395, in force 1 Oct. 1994), para. 345.

[21] Ibid. An applicant may also be removed if there is clear evidence of admissibility to a third country.

[22] United Kingdom Delegation, Geneva, 'Sending Asylum Seekers to Safe Third Countries', 7 *IJRL* 119 (1995); the notion of safe third country is considered to be somewhat wider than other terms, such as 'host third country' or 'first country of asylum', and includes countries to which the claimant has not in fact been, if there is a country to which he or she can

nevertheless he safely sent. See also UNHCR's reply, 'The Concept of "Protection Elsewhere",' ibid., 123.

[23] Ibid., 121. See also Hailbronner, K., 'The Right to Asylum and the Future of Asylum Procedures in the European Community', 2 *IJRL* 341, 348 (1990).

[24] Cf. *R. v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514.

[25] Note the careful use of language relating to the degree of risk, essentially reproducing the language of art. 3, 1984 Convention against Torture. For assessments of returns to unsafe conditions, see Amnesty International British Section. 'United Kingdom: Deficient Policy and Practice for the Protection of Asylum Seekers'. London. Nov. 1990; Amnesty International, *Turkey - Selective Protection: Discriminatory treatment of non-European refugees and asylum-seekers,* (Mar. 1994: AI Index EUR 44/16/94) - recommending no return of any non-European asylum seeker to Turkey.

[26] *Immigration Act, 1976,* as amended, s.46.01(1); coming from a country in which the applicant was present solely for the purpose of joining a flight to Canada is disregarded. The Act further provides that a claim is inadmissible where the country that the person claims to have left or outside of which he or she claims to have remained by reason of fear of persecution is 'prescribed' as one that respects human rights: ibid., s. 69.1(10.1); for the power to make regulations prescribing such countries, see s. 114(1)(s), (s1).

[27] Ibid., s. 108.1.

[28] Plaut, whose report contributed significantly to the process of Canadian legislative reform, recommended against 'prior protection' as a ground of inadmissibility, arguing that though it 'appears accessible to objective judgment... the actual determination of whether a claimant in fact enjoys the protection of another country is frequently highly complex': Plaut, W.G., *Refugee Determination in Canada,* (1985), 103-4. As Achermann and Gattiker note, under the revised German law, the
substantive aspects of 'protection elsewhere' are no longer taken into account. In 'safe third country', but not 'safe country of origin' cases, a simple administrative decision is now involved, based on the legislated fact of entry from a country considered safe: Achermann & Gattiker, 'Safe Third Countries', 28-9.

[29] See also Melander, G., 'The Principle of "Country of First Asylum" from a European Perspective', in Bhabha, J. & Coll, G., eds., *Asylum Law and Practice in Europe and North America,* (1992), 122;

[30] The Convention determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (Dublin Convention) was signed by eleven Member States on 15 June 1990, and was signed and ratified by the twelfth State, Denmark, on 12 June 1991. By 31 Dec. 1995, France, Germany, Greece, Italy, Luxembourg, Portugal and the United Kingdom had also ratified the Convention, which will enter into force only when all Member States are parties. The Schengen Supplementary Convention, also concluded in June 1990, entered into force between Belgium, France, Germany, Luxembourg, the Netherlands, Portugal and Spain on 26 March 1995: Italy and Greece have signed, but entry into force has been delayed in each case. As and when the Dublin Convention enters into force, the Schengen scheme will likely be abolished; see art. 142. On 29 March 1991, the Schengen States concluded an agreement with Poland, under which the latter agreed to readmit persons found in Schengen territory in an irregular situation; it came into force on 1 May 1991 for Germany, France, Italy, Luxembourg and Poland; see Achermann, A. & Gattiker, M., 'Safe Third Countries: European Developments', 7 *IJRL* 19, 24, 36-7 (1995). See generally Joly, D., 'The Porous Dam: European Harmonization on Asylum in the Nineties', 6 *IJRL* 159 (1994); also Achermann, A., 'Schengen und Asyl: Das Schengener Übereinkommen als

Ausgangspunkt der Harmonisierung europäischer Asylpolitik', in Achermann, A., Bieber, R., Epiney, A., Wehner, R., *Schengen und die Folgen,* (1995), 79; Meijers, H., et al., *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Security and the Police,* (1991.

Mahmoud, S., 'The Schengen Information System: An Inequitable Data Protection Regime', 7 *IJRL* 179 (1995).

[31] See arts. 3, 4-8, 10, Dublin Convention; also art. 2, in which States reaffirm their obligations under the 1951 Convention/1967 Protocol without geographic restriction, and 'their commitment' to co-operate with UNHCR.

[32] Cf. UNHCR Statute, para. 8(a),(b). See Hailbronner, K., 'Perspectives of a Harmonization of the Law of Asylum after the Maastricht Summit', 29 *CMLR* 917 (1992), for the view that Dublin and Schengen cannot be characterised as in breach of the 1951 Convention or the European Convention on Human Rights, there being no obligation in the former either to determine a refugee claim or not to return applicants to third States (at 925-6). He notes, however, that safe third country policies can work only on the basis of international agreements which establish States' willingness to assume jurisdiction (at 936). Also, Hailbronner, K., 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective', 5 *IJRL* 31 (1993).

[33] Paras. 1, 3. The second Member State, in turn, may re-examine the possibility of removal to a host third country.

[34] Achermann & Gattiker, 'Safe Third Countries', 23.

[35] United Kingdom Delegation, Geneva, 'Sending Asylum Seekers to Safe Third Countries', 7 *IJRL* 119, 122 (1995); Immigration Rules, para. 345.

[36] Achermann & Gattiker, 'Safe Third Countries', 23-5; UNHCR, 'Overview of Readmission Agreements', Sept. 1993. For an early multilateral agreement, limited to nationals, see 1957 European.

Agreement on the Movement of Persons between Member States of the Council of Europe: *ETS* No. 25.

[37] Achermann & Gattiker, 'Safe Third Countries', 36-7.

[38] See Amnesty International British Section, *Playing Human Pinball: Home Office Practice in 'Safe Third Country' Asylum Cases,* Jun. 1995. This comprehensive and compelling report by Richard Dunstan tracks sixty cases over a nine month period, to show that the policy on safe third country denials had achieved nothing, with the Home Office rescinding its original decision in the majority of cases and agreeing to consider the claims on their merits.

[39] *Background Note on the Safe Country Concept and Refugee Status:* UN doc. EC/SCP/68 (26 Jul. 1991), paras. 11-17.

[40] A point also made by Norway in 1993: UN doc. A/AC.96/SR.483 (1993), para. 21.

[41] *Report* of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/781 (9 Oct. 1991), paras. 34-7.

[42] UN doc. A/AC.96/SR.472 (1992), para. 78 (United Kingdom, on behalf of the European Community and Member States).

[43] See UN doc. A/AC.96/SR.485 (1993), para. 2 (Brazil); UN doc. A/AC.96/SR.475 (1992), para. 37 (Poland).

[44] *Note on International Protection:* UN doc. A/AC.96/815 (31 Aug. 1993), para. 20-2; *Report* of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/819 (5 Oct. 1993), para. 13- one delegate queried whether it was right to hold a sending State indirectly responsible for *refoulement* effected by a third country.

[45] See *Report* of the Sub-Committee: UN doc. A/AC.96/671 (9 Oct. 1985), para. 68.

[46] Executive Committee Conclusion No. 58 (1989), *Report* of the 40th Session: UN doc. A/AC.96/737 (19 Oct. 1989), para. 25; p. 23, N, Interpretative declarations. For a review of Danish law and practice, see Kjaerum, M., 'The Concept of Country of First Asylum', 4 *IJRL* 514 (1992); the concept can be used either as an admissibility question, or as a 'kind of national exclusion clause' (515f). However, the decision-maker must first decide whether the asylum seeker is in need of protection, *before* looking at whether another country is more appropriate; this has the advantage of providing a fall-back if removal to the other State does not come through (517). Note also that the burden of proof is on the Danish authorities; it is not for the applicant to prove that protection is not available (522).

[47] Cf. Parliamentary Assembly of the Council of Europe. CE Doc. 6633, 16 Jun. 1992. 'Report on migratory flows in Czechoslovakia, Hungary and Poland.' Rapporteurs, Miss Guirado, Miss Szelényi - proposing that Member States should share the burden 'with the new immigration countries through practical cooperation and the provision of financial assistance as well as the acceptance of asylum seekers and migrants from the countries of first asylum'; also Parliamentary Assembly of the Council of Europe. CE Doc. 7052, 23 Mar. 1994. 'Report on the right of asylum.' Rapporteur: Mr. Franck - proposing common action, among other things, to reduce friction over sharing asylum responsibilities; Parliamentary Assembly of the Council of Europe. CE Doc. 6413, 12 Apr. 1991. 'Report on Europe of 1992 and refugee policies.' Rapporteur: Sir John Hunt.

[48] UN doc. A/AC.96/SR.388 (1985), para. 52; SR.407 (1986), paras. 45-8; SR.426 (1988), paras. 19-20; also SR.427 (1988), para. 69 (Sudan); para. 10 (China); SR.430 (1988), para. 66 (Turkey).

[49] UN doc. A/AC.96/SR.456 (1990), para. 6-7; see also SR.468 (1991), paras. 15, 20 - the fundamental right of asylum seekers to be free to choose the country they wished to go to had to be accepted.

[50] Art. 31(3)(b), 1969 Vienna Convention on the Law of Treaties. Hailbronner, K., 'The Concept of "Safe Country" and Expeditious
Asylum Procedures: A Western European Perspective', 5 *IJRL* 31 (1993), finds as yet no agreement within Europe on key terms, such as how long an asylum seeker needs to have stayed in a country, or what is considered safe.

[51] This could easily arise, for example, where the receiving State denies admission to its asylum procedure because of lapse of time since first contact; or where it sends the asylum seeker to another country deemed to be responsible, which then *refoules* the individual; or where it sends the claimant to a State that only considers those who come directly from their country of origin, which then passes him or her back to a transit State that in turn applies exclusion on the basis of a geographical limitation on its obligations.

[52] Crawford, J. & Hyndman, P., 'Three Heresies in the Application of the Refugee Convention', 1 *IJRL* 155, 171 (1989). See also the authors' review of a number of Australian cases, including *Azemoudeh* (at 168), returned by Australia to Hong Kong, thereafter to India and probably then to his country of origin.

[53] On the earlier practice of 'shuttlecocking' migrants, see Goodwin-Gill, G.S., *International Law and the Movement of Persons between States*, (1978), 287-8.

[54] See generally Feller, E., 'Carrier Sanctions and International Law', 1 *IJRL* 48, 53-5, 65 (1989).

[55] In a recent article, Marx suggests that removals without consent amount to abuse of rights, and also criticises the adequacy of existing re-admission agreements: Marx, R., *'Non-refoulement,* Access to Procedures and Responsibility to Determine Claims', 7 *IJRL* 383, 396-7 (1995).

[56] Ideally, such standards will deal with detention or other restrictions on liberty, the length of proceedings, the availability of interpreters, legal advice, access to UNHCR, and so forth.

[57] In 1991, the Council of the Presidency of the European Community committed itself to harmonisation of asylum procedures by 31 Dec, 1993. It also agreed that readmission agreements with third States should be examined, and recognized the desirability of elaborating common positions on immigration at international meetings: Council of the Presidency, Luxembourg, 28-9 June 1991: Doc. ROV SN/151/3/91; see also Communication from the Commission on Immigration and Asylum Policies, 23 Feb. 1994, to the Council and the European Parliament. With the entry into force of the Treaty on European Union (the Maastricht Treaty), asylum policy is a matter of 'common interest': Art. K.1. A standard bilateral readmission agreement with third States was adopted by the Council for Justice and Home Affairs in 1994; see ECRE, 'Safe Third Countries: Myths and Realities', (1995), appendix e; Inter-governmental Consultations, 'Working Paper on Readmission Agreements', (Aug. 1994). A June 1995 resolution on minimum guarantees for asylum procedures, set a very low level. Cf. Amnesty International 'Europe: Harmonization of asylum policy. Accelerated procedures for "manifestly unfounded" asylum claims and the "safe country" concept'. AI EC Project. Brussels. Nov. 1992; European Council on Refugees and Exiles (ECRE), 'A European policy in the light of established principles,' Apr. 1994.

[58] Amnesty International British Section, *Playing Human Pinball: Home Office Practice in Safe Third Country Asylum Cases,* (1995).

[59] The critical areas of difference include the relevance of agents of persecution, persecution in the context of civil war, among others.

Chapter 7

INTERNATIONAL JUDICIAL CO-OPERATION IN ASYLUM LAWS SUGGESTIONS FOR THE FUTURE THE PERSPECTIVE OF A DECISION-MAKER

Rodger P.G. Haines[1]

Introduction

As decision-makers committed to the rule of law, it is unlikely that any of us would deny the logic of international judicial cooperation in the asylum law context. The logic is reinforced by the fact that on a daily basis, we interpret and apply the same international instrument, namely, the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees ("the Refugee Convention").

It must be recognised, however, that judicial cooperation in and harmonisation of the interpretation of the Refugee Convention does not mean downward harmonisation. As impartial decision-makers, we must be careful not to be trapped in the fierce debates over the merits of government to government initiatives seeking to achieve "harmonisation" in other areas of asylum law.[2] I am referring, of course, to the Dublin Convention of 13 June 1990 and the Schengen Agreement of 19 June 1990 which, as Kay Hailbronner points out, do not lead to a harmonisation of asylum laws in the sense of an adjustment of substantive and procedural law, but rather are limited to a determination of uniform criteria for jurisdiction.[3] It is of concern, however, that neither the Dublin Convention nor the Schengen Agreement provide for a review by an international court and the lack of democratic and judicial control has been one of the main criticisms voiced against both the Treaty of Maastricht and other recent products of intergovernmental cooperation between Member States of the European Community in the field of immigration and asylum law.[4] A separate European Court for
refugee cases has been mooted, but the debate on the issue is far from over and little of a concrete nature has emerged. One commentator has made the point, however, that an independent, international court competent to make

binding decisions could curb a downward spiral of increasingly stricter interpretations by national bodies.[5]

That does not mean to say that progress is to be equated with an increasingly liberal interpretation of the Refugee Convention. The point is forcefully made by David A Martin when he points out that overly expansive standards for asylum must be avoided if we are to sustain the political will necessary for retaining asylum as a legal entitlement:[6]

> "... courts and agencies must resist the temptation to expand the legal standards governing asylum, for each expansion potentially sweeps in a large number of new potential claimants, thus threatening the political support that is indispensable if such entitlements are to continue. ".

Given the dilemmas we face as decision-makers, the organisers of this conference are to be congratulated for providing an opportunity for the initiative to be seized not by government, but by judicial officers who daily carry the burden of discharging a substantial part of their governments' obligations under the Refugee Convention.

As to the specific topic of this paper, "International Judicial Cooperation in Asylum Laws - Suggestions for the Future", it is to a degree presumptuous for me to make any suggestions at all in advance of a discussion which will draw on the collective wisdom and experience of so many distinguished persons. What follows is therefore more in the nature of an antipasto before the main feast.

Two preliminary points

The first point to be made is that while the "big picture" may be overly large, if not depressing, and compounded by the difficulties each of us has at the domestic level dealing with an ever increasing number of cases with static or dwindling resources, we must take advantage of the fact that we work, by and large, from the same basic document (the Refugee Convention), interpret the same basic provisions (e.g. the Inclusion, Exclusion and Cessation clauses) and apply the same basic refugee law. This must be seen as a **strength** rather than as an additional complication, for the simple reason

that each of us is able to draw on the experience of others in grappling with complex and difficult issues.

The second point I wish to make is that at this inaugural conference we might perhaps concentrate initially on what can be achieved at the practical level. Our focus should perhaps be on identifying areas where there is a **realistic** prospect of judicial cooperation. The process we initiate here will, of course, have considerable potential and, in time, will hopefully bring us to a stage when the more intractable problems can be addressed. In brief, it would be helpful were we to order our priorities.

To illustrate what I mean by practical measures, may I be permitted to draw on the New Zealand experience as it may permit an insight into the benefits of judicial cooperation at the coalface of refugee determination.

New Zealand and the Refugee Convention

Although New Zealand acceded to the Refugee Convention on 30 June 1960[7] and to the 1967 Protocol on 6 August 1973[8], it was not until 1991 that the New Zealand government put in place a procedure for determining refugee status which could properly be described as meeting the minimum levels of fairness and independence. Prior to 1991, decisions on refugee status were made by the Minister of Foreign Affairs and the Minister of Immigration on the recommendation of an ad hoc committee of civil servants. The Committee's role was confined to interviewing the claimant and making a recommendation to the Ministers. Neither the Committee's recommendations nor the Ministers' decisions were ever published, and it was not possible to discover the legal principles (if any) applied by the decision-makers.

Since January 1991, New Zealand has operated a two-tier system for determining "spontaneous" refugee applications. At first instance,applications are processed by officers of the Refugee Status Branch of the New Zealand Immigration Service. The Refugee Status Branch conducts an oral interview with the applicant who is entitled to be accompanied by a lawyer or other representative.

Where the application for refugee status is declined, there is a right of appeal to the Refugee Status Appeals Authority, an independent body presently staffed by practising or recently retired lawyers drawn entirely from outside Government. A representative of the United Nations High Commissioner for Refugees is *ex officio* a member of the Authority, a feature of some significance which will be touched upon again later. Appeals proceed by way of a hearing *de novo* and all issues of law, fact and credibility are at large. The appellant attends in person to give his or her evidence. All decisions of the Authority are delivered in writing. The Authority considers only the question whether the appellant is a refugee. It has no jurisdiction to consider immigration issues and, in particular, whether or not an individual should be granted a permit under the Immigration Act 1987.[9]

The refugee status determination procedure is non-statutory and has been set up under the prerogative powers of the Executive.[10] The Terms of Reference under which the Authority operates are based on the principle that an adversarial procedure is inappropriate for the refugee determination process, and although the New Zealand legal system is essentially based on the adversarial Common Law model, hearings before the Authority are investigative or inquisitorial in nature. That is, while the burden of proof rests on the appellant, the enquiry into the facts is shared between the appellant and the Authority.[11] There is no other "party" at the hearing, and the New Zealand Immigration Service is only heard in rare cases.[12]

Upon its creation, the Authority inherited an almost complete vacuum of domestic refugee jurisprudence. In the 30 years from 1960 to 1990, the New Zealand courts had only once been called upon to consider a refugee case, and then, only in the context of an administrative law challenge to the fairness of the pre-1991 procedures.[13] New Zealand therefore has more in common with those States which have only recently become parties to the Refugee Convention than it does with
other State Parties which share its domestic Common Law heritage, such as the United Kingdom, Canada, the United States of America and Australia.

The absence of domestic precedent has, however, been a distinct advantage. As late starters, we have been able to learn from the mistakes of others and we consciously seek out the best of overseas refugee jurisprudence in the hope of identifying points of consensus and convergence in the often

motley collection of authorities. We would like to believe that, on occasion, we have been able to make some modest improvements of our own.[14] Perhaps it would be worthwhile to provide a few randomly chosen illustrations of these points.

Choosing the best

One of the fundamental issues arising out of the Inclusion Clause provisions of Article 1A(2) of the Refugee Convention is the meaning of the requirement that the fear of persecution be "well-founded". The Supreme Court of the United States of America grappled with this issue in INS v Cardoza-Fonseca[15], a case frequently cited as authority for the proposition that the refugee claimant must establish "a reasonable possibility" of persecution. Almost a year later, the English House of Lords in R v Secretary of State for the Home Department, Ex parte Sivakumaran[16] favoured "a reasonable degree of likelihood" test[17]. However, two years later when the High Court of Australia considered the issue in Chan v Minister for Immigration and Ethnic Affairs[18] that Court preferred Atle Grahl-Madsen's formulation of "a real chance".

Coming safely upon this much litigated scene in 1991, the Authority in its first decision was grateful to be in the comfortable position of being able to choose "the best" formulation.[19] We have preferred the "real chance" formulation because it is a test more readily capable of comprehension and application by sometimes harassed decision-makers.

Minor Modifications

One of the largest groups of asylum seekers in New Zealand comprises Indian nationals from the Punjab. A large number claim to hold a well-founded fear of persecution at the hands of Sikh militants (non-state agents). They do not claim to be at risk at the hands of state agents. Others fear state agents of persecution only in specific areas of the Punjab, generally in the area of their home village. These cases raise the issue of state protection.

Generally speaking, we have applied what is known in some jurisdictions as the "Internal Flight Alternative" (IFA), though we have chosen to call it the "Relocation Principle", as an enquiry whether there is an Internal Flight

Alternative is an enquiry based on the wrong question. The question is not one of flight, but of protection and is to be approached fairly and squarely in terms of the refugee definition which specifically emphasises the protection issue.[20]

The Relocation Principle was formulated in New Zealand within months of the Authority's first hearings, but has been developed since then in a line of cases which have established that relocation turns on two issues:

1. Can the individual **genuinely access** domestic protection which is **meaningful**?
2. Is it reasonable, in all the circumstances to expect the individual to relocate?

In other words, before an individual possessing a well-founded fear of persecution can be expected to relocate within the country of origin, it must be possible to say **both** that meaningful domestic protection can be genuinely accessed by that person **and** that in all the circumstances, it is reasonable for that individual to relocate.[21]

We have recognised that where the claimant has suffered torture at the hands of a state agent, there are a number of circumstances which might make it unreasonable to expect the individual to relocate with the result that the IFA alternative will not apply.[22] This jurisprudence is analogous to the "compelling reasons" exception to the cessation provisions of Article 1C(5) and (6) of the Refugee Convention.[23]The term "relocation" has in recent times also been adopted by the
Federal Court of Australia in a decision in which, it is gratifying to note, there is citation not only of English refugee case law, but of New Zealand jurisprudence as well.[24]

Difficult cases and new frontiers

Overseas case law and academic writing has been particularly important in the resolution of really difficult cases. Only two will be mentioned here.

The first involved an Iranian national who, having lost his (first) appeal on credibility grounds, took his case to the media. His name, nationality and the

basis for his claim to refugee status received wide publicity. He then submitted a fresh claim on the basis that his actions had now placed him at risk of persecution in Iran. The issue for decision was whether a refugee claimant in a *sur place* situation is required to act in good faith. The decision[25] contains an extensive review of academic writing on the subject and draws on case law from the Federal Republic of Germany, Switzerland, France, Austria, the United Kingdom, the United States of America, Canada and Australia. The Authority concluded that while the picture was less than clear, the weight of authority (both academic and case law) favours a good faith requirement it goes without saying that without the assistance of overseas jurisprudence, particularly that of Australia and the United Kingdom, we would have found resolution of the issue far more difficult than otherwise. At the very least, after drawing upon the experience of others, we felt more confident in our conclusion. It must, however, be emphasised that accessing European jurisprudence is, at New Zealand's geographic distance, problematical, and is compounded by language factors. May I apologise for the fact that in New Zealand, European law is primarily accessed through secondary sources such as journals, articles and textbooks.

The second case raised the issue whether sexual orientation can be accepted as a basis for finding a social group for the purposes of the Refugee Convention.[26] The Authority was fortunate in being able to draw heavily on the seminal decision of the Supreme Court of Canada in Canada (Attorney General) v Ward[27] and to thus steer a middle course between too expansive an interpretation on the one hand, and too narrow an interpretation on the other. We decided that the key lay in the statement in Ward[28] that the social group category is informed by the anti-discrimination notions inherent in civil and political rights. By a stroke of luck, the United Nations Human Rights Committee had only recently, in Toonen v Australia[29], examined sexual orientation in the context of the International Covenant on Civil and Political Rights 1966.

Although this decision is not entirely free from difficulty[30], it is authority for the proposition that sexual orientation is a prohibited ground of discrimination under the International Covenant on Civil and Political Rights.[31] Having adopted the Ward interpretational approach to the Refugee Convention, it was relatively easy to link the non-discrimination principle in both the Refugee Convention and the International Covenant on Civil and

Political Rights to sexual orientation and to hold that sexual orientation can be accepted as a basis for finding a social group. On the facts, it was found that homosexuals in Iran do comprise a particular social group. The only other point examined was whether a social group should be identified by the internal characteristics of the group or whether the external perceptions of the group by society at large, or the agent of persecution in particular, should be determinative. The first approach is most notably exemplified by the Ward decision, while the "objective observer" approach is seen in a 1983 decision of the Verwaltungsgericht Weisbaden (Administrative Court in Weisbaden) in its judgment of Apr. 26, 1983, No. IV/I E 06244/81[32]. It was our conclusion that the difficulty with the "objective observer" approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group. We were of the view that the Refugee Convention was not intended to afford protection to every such persecuted group and we once again relied on the Ward decision.[33] The following passage from the New Zealand decision relies on United States and Canadian jurisprudence, as well as the opinion of Professor Hathaway:

> "Herein lies the significance of the interpretative approach to the Refugee Convention discussed at length earlier in this decision and which recognises that the grounds of race, religion, nationality and political opinion focus on the claimant's civil and political rights. The Acosta *ejusdem generis* interpretation of "particular social group" firmly weds the social group category to the principle of the avoidance of civil and political discrimination. In this way, the potential breadth of the social group category is purposefully restricted to claimants who can establish a nexus between who they are or what they believe and the risk of serious harm: Ward 738-739; Hathaway, The Law of Refugee Status (1989) 137. For the nexus criterion to be satisfied, there must be an internal defining characteristic shared by members of the particular social group. In the Acosta formulation, this occurs when the members of the group share a characteristic that is beyond their power to change, or when the shared characteristic is so fundamental to their identity or conscience that it ought not be required to be changed. In the very similar Ward formulation, the nexus criterion is satisfied where there is a shared defining characteristic that is either innate or

unchangeable, or if voluntary association is involved, where that association is for reasons so fundamental to the human dignity of members of the group that they should not be forced to forsake the association.

In this way, recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way: Hathaway *op cit* 108 approved in Ward at 733.

On this interpretation, the issue of sexual orientation presents little difficulty. As we have earlier remarked, sexual orientation is a characteristic which is either innate or unchangeable **or** so fundamental to identity or to human dignity that the individual should not be forced to foresake or change the characteristic.Sexual orientation can, therefore, in an appropriate fact situation, be accepted as a basis for finding a social group for the purposes of the Refugee Convention."

Were it not for the Canadian, German and USA case law, we would never have been able to advance our own thinking on the social group issue in the way that we have. Our debt to overseas case law is substantial. We also derived great benefit from a survey of sexual orientation as a basis for claiming refugee status in Germany, the Netherlands, Sweden and Denmark, the United Kingdom, Canada, the United States of America and Australia.

The grant of refugee status to an Iranian homosexual may not, in this context, be as important as the reasons given for justifying the result. This is not the appropriate forum to debate the correctness of the decision. The simple point being made is that the New Zealand experience has been that the accessing of overseas refugee case law has been utterly indispensable in the development of our understanding of the Refugee Convention, and hopefully has allowed us to participate in the evolution of the Convention constructively and in a manner which does not go beyond permissible limits.

Sources

Overall, we draw most frequently on Canadian case law which has proliferated in the ten years after the watershed decision of the Supreme

Court of Canada in Singh v Minister of Employment and Immigration[34] led to a wholesale reform of the refugee determination system in that country. Deserving of comment in this context are the strides made by the Canadian courts in interpreting (if not expanding) the Exclusion Clause provisions of Article 1F of the Refugee Convention.[35] For example, the three decisions of the Canadian Federal Court of Appeal in Ramirez v Canada (Minister of Employment and Immigration)[36], Moreno v Canada (Minister of Employment and Immigration)[37] and Sivakumar v Canada (Minister of Employment and Immigration)[38] are essential reading for any decision-maker dealing with war crimes or crimes against humanity. We are in particular the richer for the observation in Ramirez[39] and Sivakumar[40] that when addressing issues of complicity in war crimes or crimes against humanity, there are dangers in reading an international convention in the light of one's own domestic criminal law concepts of aiding and abetting. International instruments are not to be interpreted according to the legal system of any one country.

Similarly, when interpreting the meaning of "serious non-political crime" in Article 1F(b), the Canadian Federal Court of Appeal in Gil v Canada (Minister of Employment and Immigration[41] drew inspiration from the extradition law of both the United Kingdom and the United States of America, although reference was also made to one decision of the Supreme Court of the Netherlands and one decision of the High Court of Ireland.[42] Various texts were also cited.

By way of contrast, in a decision delivered two weeks later on very similar facts, the English Court of Appeal in T v Secretary of State for the Home Department[43] interpreted Article 1F(b) by referring exclusively to English extradition law. Both cases involved a claim to asylum by individuals who had carried out bombing attacks in which innocent civilians had been killed in Iran and Algeria respectively. Both were found to be excluded from the Refugee Convention under Article 1F(b). To that degree, it could be said that the Canadian and English decisions are in accord. This is not the time or place to examine whether this is indeed the case. What can be said, however, is that because the Canadian decision has drawn on a greater range of material, it is the stronger for it and the articulation of principle is, on one view, clearer and more persuasive. At the very least, these two decisions highlight the desperate need for judicial cooperation in the interpretation of

the Refugee Convention and the benefits to be obtained by decision-makers informing themselves of international refugee jurisprudence before attempting a unilateral interpretation and application of the Refugee Convention.

To avoid misunderstanding, I should stress that it is not a case of holding up one country's jurisprudence as a paradigm of virtue. Far from it, there is much in the Canadian case law which is driven by the imperatives of the Canadian Charter of Rights and Freedoms, especially in relation to issues of procedural fairness. There are also aspects of its particular social group jurisprudence which can only be understood in terms of a **policy** decision to issue "guidelines"[44] pursuant to legislative amendments introduced from 1 February 1993 by the new Immigration Act Bill C-86. Canada's jurisprudence on social group and gender issues is interesting not just for what has been done, but **why** and **how** it has been done. These observations are not intended as an implied criticism of the Canadian initiative, now followed by the United States of America.[45] Far from it. The point being made is that if we are to increasingly borrow the best refugee jurisprudence from a particular country, we must necessarily be aware of the domestic law setting and of the considerations which may have influenced (positively or negatively) that country's jurisprudence.[46] Nor can we overlook the fact that in Central America and Africa, there is the additional overlay, at international level, of the Cartagena Declaration of 1984 and the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa.[47]

Lessons from the New Zealand experience

What then are the principal lessons to be learnt from the New Zealand experience in "internationalising" its refugee jurisprudence:

(a) In few countries do decision-makers recognise the international nature of refugee jurisprudence, or draw on overseas case law in interpreting and applying the Refugee Convention. It is staggering, for example, to find how infrequently the United States Courts draw on Canadian case law. The same observation may be made in relation to the United Kingdom. In Australia and New Zealand, the picture is happily quite different. In both countries, decision-makers go out of their way to search out relevant overseas cases. But even then, "overseas" means North America and

Europe. To those in Central and South America and Africa, for example, this might appear to be a serious flaw.

(b) It is rare for decision-makers in the Common Law countries to draw on European jurisprudence, or upon decisions of the European Commission of Human Rights, the European Court of Human Rights, the Human Rights Committee established under the International Covenant on Civil and Political Rights 1966 and the Committee against Torture established under the United Nations Convention against Torture 1984.

(c) Because the domestic setting can have a considerable influence on the shape and direction of a country's refugee jurisprudence, the degree to which those factors are understood and recognised by decision-makers in other jurisdictions will directly bear upon whether and how far the first country's jurisprudence will be found relevant or helpful to a second country.

(d) The fact that overseas decisions may be written in an unfamiliar language and the often complete absence of a law reporting system for asylum cases presents formidable obstacles to the sharing of jurisprudence.

(e) If all these difficulties can be overcome, there are immense benefits to be gained from employing the experience of other decision-makers.

(f) Working as we do from the same international instrument, we as decision-makers have a duty to achieve a high degree of uniformity in the interpretation and application of the Refugee Convention. This is no abstract ideal.[48] It goes to the heart of conceptions of the judicial process and to the meaning of justice itself. At the international level, it goes to the heart of the meaning of the protection afforded by the Refugee Convention. A durable refugee jurisprudence must recognise the universality of the norms enshrined in the Convention.

Suggestions for the future

As previously mentioned, the proposal is that the initial focus be on achievable objectives and, in particular, the sharing of experience and jurisprudence. The proposals which follow are not necessarily listed in order of importance.

1. Training

At both domestic and international level, there should be training programmes specifically designed to disseminate relevant, important jurisprudence from the various jurisdictions. In the setting of an international training programme, it is envisaged that decision-makers from different countries would deliver papers presenting and explaining the jurisprudence of their respective countries, as well as the particular domestic law factors which may have influenced the shape and direction of that jurisprudence. The emphasis of the training programmes would perhaps be on the sharing of information and upon the comparative analysis of jurisprudence. At domestic level, decision-makers could arrange for colleagues from other countries to participate in local training programmes. There is a clear opportunity for universities or other institutions to design and present, whether at international or national level, training programmes which concentrate specifically on the harmonisation of refugee jurisprudence. Between programmes, research staff might usefully engage in abstracting the best decisions and circulating that information.

2. Workshops/Conferences

Judicial workshops or conferences should be held frequently. Given the rapid evolution of refugee law, it is suggested that annual events should be organised. Certainly, nothing less frequent than biennial meetings should be envisaged. The emphasis at these meetings should, again, be upon the dissemination, analysis and discussion of important cases. Another advantage of such gatherings is the opportunity they provide for "networking" and the establishment of personal contacts. These benefits should not be underestimated, as it is very often at this level that information and experience are exchanged, or bridges created for the future exchange of such information.

3. Practical Observation/Participation/Exchange

Thirdly, it would be of immeasurable benefit were decision-makers able to gain first hand knowledge of systems in other countries by formally or

informally participating in the refugee determination process of those countries.

In this regard, the New Zealand experience is a salutary one. From the outset, a representative of the UNHCR has been an *ex officio* member of the Authority, and protection officers from the Canberra office of the UNHCR have sat on the Authority for the past five years. We have benefitted immeasurably from the insight, techniques and knowledge of individuals drawn from all over the world and who have been schooled in very different legal systems. They, in turn, are able to use the experience they have gained to enrich their own understanding of the Refugee Convention.

The exchange of personnel is possibly the most effective means of sharing and gaining experience in this area.

4. Reporting Systems

Fourthly, to facilitate the dissemination and sharing of jurisprudence, serious consideration should be given to the publication of a set of international refugee reports. The sad fact is that in most countries, important refugee jurisprudence is inaccessible by virtue of it being:

(a) Unreported;
(b) In a language which restricts its circulation.

While the International Journal of Refugee Law has performed a valuable service in publishing extracts of important decisions, very often a decision-maker will find an abstract a tempting appetiser without being able to whet the appetite due to the almost impossible task of obtaining the full text of the decision (or a translation thereof). Similarly, while in the so-called Common Law countries the jurisprudence of Canada and the United Kingdom may be readily accessible, one is left to enquire whether the important jurisprudence evolving in both Australia and New Zealand can be accessed readily on the North American continent, or in Europe itself. Very often, relevant decisions are not even readily available at the **domestic** level, and it is clear that publishing houses must be encouraged to venture into this area, a step they are more likely to take if recognition is

given to the fact that the market is not as small as imagined, but rather an international one.

Perhaps there is room for modern technology to be more effectively employed than it has been.

5. But above all, we must find some mechanism whereby the recommendations of this Conference will be translated into both **practical** and **ongoing** effect. This will be the greatest challenge. The Chairman, Sir John Laws, and my colleague, Dr Hugo Storey, look forward to your comments and suggestions.

NOTES

[1] The Author of this paper is Deputy Chairperson of the New Zealand Refugee Status Appeals Authority and lecturer in Immigration and Refugee Law at Auckland University. The opinions in this paper are the personal views of the author.

[2] For an introduction to some of the issues, see for example H Myers *et al.*, Schengen; Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police (Kluwer, 1991); Guy Goodwin-Gill, "Safe Country? Says Who" (1992) 4 IJRL 248; James C Hathaway, "Harmonizing For Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration" 26 Cornell Intl. L.J. 719 (1993).

[3] Kay Hailbronner, "Perspectives of a Harmonization of the Law of Asylum after the Maastrict Summit" (1992) 29 Common Market Law Review 917, 923.

[4] See C A Groenendijk, "The Competence of the EC Court of Justice" in P Boeles *et al.*, A New Immigration Law for Europe? The 1992 London, and 1993 Copenhagen Rules on Immigration (Nederlands Centrum Buitenlanders, 1993) 45. See by way of further example, Marie-Claire S F G Foblets, "Europe and Its Aliens After Maastricht. The Painful Move to Substantive Harmonization of Member-States' Policies Towards Third-Country Nationals" (1994) 42 American Journal of Comparative Law 783 where, at 802, reference is made to the so-called "democratic deficit" of Europe.

[5] C A Groenendijk, *op cit* 47.

[6] David A Martin, "The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource" in Howard Adelman Ed, Refugee Policy: Canada and the United States (York Lanes Press, 1991) 30, 37.

[7] New Zealand Treaty series 1961, No. 2.

[8] New Zealand Treaty series 1973, No. 21.

[9] See further R P G Haines, "The Legal Condition of Refugees in New Zealand" (1994) 7 JRS 260, 261.

[10] Santokh Singh v Refugee Status Appeals Authority [1994] NZAR 193 (Smellie J).

[11] Refugee Appeal No. 523/92 Re RS (17 March 1995) 19.

[12] For example, where allegations are made that an officer of the Immigration Service acted improperly in his or her dealings with the appellant: Refugee Appeal No. 523/92 Re RS (17 March 1995) 7.

[13] The landmark decision is Benipal v Ministers of Foreign Affairs and Immigration (High Court Auckland, 29 November 1985, A878/83 & A993/83, Chilwell J) in which a person refused refugee status by Government officials was found to satisfy the inclusion provisions of Article 1A(2) of the Refugee Convention.

[14] The Authority's principal decisions represent the consensus of opinion among members. Hence the use of the word "we".

[15] INS v Cardoza-Fonseca 94 L. Ed 2d 434 (1987) (US:SC).

[16] R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958, 994 (HL).

[17] It is accepted that a close reading of both Cardoza-Fonseca and Sivakumaran will reveal alternative formulations to those referred to in this paper. In the interests of simplicity, however, the most obviously contrasting formulations have been chosen for mention.

[18] Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 (HCA). Dawson J at 398 suggested that the House of Lords formulation of a "reasonable degree of likelihood" was a more restrictive test than that suggested in Cardoza-Fonseca.

[19] Refugee Appeal Nos. 1/91 Re TLY and 2/91 Re LAB (11 July 1991). See further Refugee Appeal No. 523/92 Re RS (17 March 1995) 23-27.

[20] Article 1A(2) relevantly provides:

> "... is unable or ... is unwilling to avail himself or the protection of that country".

See Refugee Appeal No. 11/91 Re S (5 September 1991) 0-9.

[21] Refugee Appeal No. 135/92 Re RS (18 June 1993) 25-27 and Refugee Appeal No. 523/92 Re RS (17 March 1995) 31-32.

[22] Refugee Appeal No. 135/92 Re RS (18 June 1993) 27-40.

[23] The "compelling reasons" exception to cessation of refugee status applies only to so-called statutory refugees, i.e., those refugees falling under Article 1A(1). However, the Executive Committee of the High Commissioner's Programme has recommended that the "compelling reasons" exception be applied also to refugees falling under Article 1A(2). See Conclusion No. 69: Cessation of Status para (e) (1992).

[24] Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 124 ALR 265, 269, 278, 280 (FC: Full Court)

[25] Refugee Appeal No. 2254/94 Re HB (21 September 1994) now reported at (1995) 7 IJRL 332.

[26] Refugee Appeal No. 1312/93 Re GJ (30 August 1995). The claimant, an Iranian national, was a homosexual who had "come out" after his arrival in New Zealand.

[27] Canada (Attorney General) v Ward [1993] 2 SCR 689.

[28] At 734, 739.

[29] Toonen v Australia (Communication no. 488/1992; CCPR/C/50/D/488/1992, 4 April 1994).

[30] See, for example, Sarah Joseph, "Gay Rights under the ICCPR - Commentary on *Toonen v Australia*" (1994) 13 University of Tasmania Law Review 392; Anna Funder, "The Toonen Case" (1994) 5 Public Law Review 156; Wayne Morgan, "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 Melbourne University Law Review 740.

[31] See Articles 2(1) and 26. The majority decision of the Human Rights Committee is based on a finding that the reference to "sex" in these articles encompasses sexual orientation. The contrary view is that it is the reference in these Articles to "other status" which encompasses sexual orientation.

[32] The Authority did not have access to the full text of this decision. It relied on the summary of the case provided by Maryellen Fullerton in "Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany" (1990) 4 Geo.Immigra.L.J. 381, 408.

[33] At 732.

[34] Singh v Minister of Employment and Immigration [1985] 1 SCR 177.

[35] For a general introduction to the Canadian jurisprudence, see Joseph Rikhof, "War Crimes, Crimes Against Humanity and Immigration Law" (1993) 19 Imm LR (2d) 18; Joseph Rikhof, "The Treatment of the Exclusion Clauses in Canadian Refugee Law" (1994) 24 Imm LR (2d) 31; Joseph Rikhof, "Exclusion Update: Three Years of Federal Court Decisions" (1995) 27 Imm LR (2d) 29.

[36] Ramirez v Canada (Minister of Employment and Immigration) [1992] 2 FC 306 (FC:CA).

[37] Moreno v Canada (Minister of Employment and Immigration) [1994] 1 FC 298 (FC:CA).

[38] Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1 FC 433 (FC:CA).

[39] At 316.

[40] At 437-438.

[41] Gil v Canada (Minister of Employment and Immigration) [1995] 1 FC 508 (FC:CA).

[42] At 529.

[43] T v Secretary of State for the Home Department [1995] 1 WLR 545 (CA).

[44] See Nurjehan Mawani, "Introduction to the Immigration and Refugee Board Guidelines on Gender-Related Persecution" (1993) 5 IJRL 240; IRB: Guidelines on Gender-Related Persecution (1993) 5 IJRL 278.

[45] See "INS Publishes Gender Persecution Guidelines" 72 Interpreter Releases 771 (June 5, 1995) and Appendix 1 at 781 where the Guidelines are reproduced.

[46] See, by way of further example, Kay Hailbronner, "Asylum Reform in the German Constitution" in Immigration Law: United States and International Perspectives on Asylum and Refugee Status Am. U.J. Int'l L. & Pol'y & Loy.L.A. Int'l & Comp.L.J. eds., 1994, 159. In the United States, the system of "designating" cases as "precedent cases" can be confusing. See, for example, "Reno Designates Gay Case as Precedent" 71 Interpreter Releases 859 (July 1, 1995).

[47] For recent commentaries see Eduardo Arboleda, "The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention - A Comparative Perspective" (1995) IJRL *Special Issue* 87; Arne Piel Christensen, "Comparative Aspects of the Refugee Situation in Europe" (1995) IJRL *Special Issue* 102.

[48] For example, if there is to be a system of safe third countries, the Refugee Convention should be interpreted as uniformly as possible even though there will always be room for differences of interpretation.

Chapter 8

INTERNATIONAL JUDICIAL COOPERATION ON ASYLUM LAW AND PROCEDURES

Hugo Storey*

Francis Bacon, famous English essayist, once warned:

> "Let judges...remember that Solomon's throne was supported by lions on both sides. Let them be lions, but yet lions under the throne: being circumspect they do not check or oppose any points of sovereignty".[1]

Whilst modern-day judges might not digest too readily any maxim that favours unchecked sovereignty, few, I imagine, would mind being described as lions. And lions they may well be, in their capacity as constitutional court or superior court or administrative court judges etc.. But when it comes to their capacity as judges of *asylum* issues, the worldwide problem is that, far from being lions, they function more like dolls in the Swiss weather clocks of yore. Whether we get to play a role at all depends entirely on how temperate run the feelings of our executives, our parliaments, our peoples.

The period since 1951 has witnessed a continuing trend towards states giving more scope over decisions on asylum to *judicial* bodies, both at a national and supranational level. But in a significant number of states, decisions largely remain the preserve of executive and purely administrative organs.[2] These simple observations suggest that it would be unwise for anyone to overlook the fact that the notion of an ***asylum jurisdiction*** remains, in the last analysis, a fragile one.

It is evident too that even in some states where the judicial role is strong, the judiciary continues to play little or no part in executive decisions reached about persons who have been found *not* to fall within the Convention definition of refugee but to have some basis for fearing that refoulement would cause them detriment.

The lack of any international asylum court has meant that most states have evolved or are now evolving their own distinct sets of national jurisprudence, with the unsurprising result that application and interpretation of the Convention is diverse and sometimes divergent. But as more authoritative studies have being written that identify points of difference and points of accord,[3] so have more active efforts being made by national judiciaries,amongst other bodies, to seek more convergence.

The emergence of this new judicial trend is proving to be complex and multi-faceted, with much depending on how engaged different states have had to be or become in dealing with asylum claims. And even in states where there has been ongoing experience of processing asylum claims and where judicial responsibilities are securely established, *internal* coordination between judges of first instance and judges of appeal or judicial review can remain problematic, as can their respective attitudes to *external* judgments or views pronounced by national judges in other countries or by supranational judicial organs. Notice taken of the views of UNHCR also continues to vary considerably.

Against this background, and in an era where asylum continues to be a vexed international issue , it is imperative that any measures of international judicial cooperation must be constructive, supportive, tolerant and and based squarely on consensus.

Below I aim simply to furnish a tentative map of some of the points which seem to call for greater clarity, if we are to take seriously the idea of international judicial cooperation as an ongoing process and as a truly global enterprise.

The core question addressed is this: given our concern as "asylum judges" at a *national* level with ensuring that we give, in the well-known words of one English judge, "anxious scrutiny" to asylum claims,[4] what can we gain from *international* judicial cooperation? In deliberate contrast to Rodger Haines' paper, which seeks an answer through focus on just one country's judicial experience, my paper seeks to pose questions on a global level. If our reasonings are sound, we should hopefully arrive, by these different routes, at very similar answers.

WHY WE NEED INTERNATIONAL JUDICIAL COOPERATION

The initiative of this Conference bears testimony to growing belief in the utility and practicality of establishing closer links. But can it be given a sound jurisprudential basis? The answer must be a clear yes, based on modern rule of law principles, which include:

-Transparency

States, international bodies and individuals need to know the scope and meaning of rights and duties created by the 1951 Convention and other related international instruments, so that their consequences are more precise, predictable, foreseeable and definite.

-Uniformity

Given the major importance in asylum law of a multilateral treaty, the 1951 Convention and its 1967 Protocol, and of other human rights treaties,there would seem to be an especial need to adopt a *principle of convergence* in matters of application and interpretation. Generally, rule of law principles are undermined by conflicting national and international decisions on definitions of terms in an international treaty. Whilst in respect of provisions in some international human rights treaties, there may be viable arguments for approving a certain degree of diversity, it is less easy to see how to justify them in the context of asylum, where movement across national frontiers forms the crux of every claim and can involve countries from all over the globe.

Case law is more likely to be sound, well-reasoned, stable and enduring if made in full knowledge of judgments in other fora.

Lack of even-handedness of like cases may also give cause for complaints of discriminatory effect.

-Effectiveness

Unless legal safeguards are shown to have practical effect in their application and interpretation by judicial bodies, they risk being seen as illusory or as the playthings of the executive organs.

Failure of judicial bodies to exercise some degree of control over executive actions affecting the lives and liberties of individuals in matters relating to asylum and immigration can imperil the very status of the independence and the impartiality of the judiciary.

It is submitted that the above summary of underlying principles would find broad acceptance in most quarters and generally reflects current international norms, particularly as expressed in the U.N. context, the Commonwealth context and in the ongoing work of the International Commission of Jurists, as well as in academic literature.[5]

By the same token it is submitted that there is increased recognition that principles and reality do not conform. If it is a rule of law principle that an asylum-seeker contemplating flight should clearly know that if he goes to any stable Convention-observing country he can expect to have applied to him uniform and definite rules, can we truly say that this will happen, even in countries with a highly developed asylum jurisdiction? Can he expect to have applied the same standard of proof, the same definition of "agents of persecution", the same definition of "social group", for example? In practice, international consistency remains an ad hoc, elusive affair, despite the valiant efforts of the UNHCR and other bodies to promote it over the past forty years or so.

Lack of uniform and precise criteria can also be a problem, not only across national jurisdictions but within them. On the basis that it is more courteous to confine criticism to self-criticism, I shall illustrate this by reference to a recent determination of a U.K. Immigration Appeal Tribunal(IAT), which concerned the case of an AIDS-sufferer from Jamaica who claimed persecution there as a member of a "social group". When addressing the issue of whether homosexuals could constitute a social group within the meaning of the 1951 Convention, this tribunal stated:

> "Some countries did adopt the view that they were a social group within the meaning of the Convention but the U.K. were not bound by such decisions. In areas where the Convention had been deliberately left vague each signatory is entitled to come to its own conclusion as to the ambit of the term 'social group'".[6]

The approach made here to the interpretation of an international treaty and the deductions drawn are highly puzzling.[7] And it is not easy to see how the

same stance, if endorsed, could not be extended to other key Convention terms, "political opinion" for example.It is not an approach which is followed in the bulk of IAT determinations.

Safer in the knowledge that we have at least some jurisprudential basis for seeking more international cooperation, let us now turn to address a more practical question.

WHAT IT SHOULD COVER

-Better systems of information-sharing

The principle of non-refoulement poses an awesome challenge for any judicial body seeking to base its decisions on comprehensive knowledge of case law elsewhere and on objective and verifiable facts. But new technology is fast making possible access to databases held by various bodies, governmental and nongovernmental, whether for purposes of pure research or policy or technical support and assistance programmes, or preparation of legal cases or other reasons. Well-documented fact-sheets, country profiles etc. that are regularly updatable are now- or can be made - an affordable reality.Much material is already available on the World Wide Web, Internet etc. Within the U.K., 1996 should see the launch of an **Electronic Immigration Network(E.I.N.)** combining relevant international and U.K. data bases relating to both immigration and asylum.[8]

-Clearer approaches to evaluation of data.

The very success of new technology in enhancing the quality and quantity of available information has made more problematic the judicial tasks of sifting and evaluating it. More shared information about *how* the data has been collected, *by whom, by what methods, over what periods of time, from what sources etc* has become just as vital a need.How far, if at all, can we gainsay how much weight we are likely to attach to particular sources(e.g. "state reports" under the growing number of human rights treaties which require these on a periodic cycle;Amnesty International Reports; U.S. State Department Reports etc)?

Currently there is no obvious agreement about why one source should be preferred to another, in the case of conflict. Again by way of self-criticism, one could note the seemingly opposite views taken in two recent U.K.

Immigration Appeal Tribunal determinations concerning asylum applicants from Romania. In one, considerable notice was taken of reports by Amnesty International and the Research Directorate of the Canadian Refugee Board, stressing the continuity in the new Romanian regime of Securitate personnel. In the other, a differently-composed Tribunal preferred the more sanguine picture furnished by a slightly more up-to-date U.S.State Department report, citing as reason for doing so the fact that the latter was "...more authoritative, based on wider information and more objective" than those other reports of which "some at least are designed to plead a cause".[9] Until greater experience is acquired in evaluating sources, and until valued sources more regularly contain a precise self-description of their survey methods etc.,such differences are likely to remain discomforting facts of judicial life.

There are also visible disparities in the depth of judicial examination of relevant data which different countries are able to manage, owing to variations in case loads, access to such data, availability of "in-house" legal research resources and levels of expertise, to name but four variables. The masterly survey of available research data on Sikh militants in the Punjab area of India, as displayed by the Refugee Status Appeals Authority, New Zealand in a 1995 decision dealing,inter alia, with the issue of relocation(or the"internal flight alternative"), **Re: RS**,[10] surpasses anything managed so far within the U.K.,for example.

-Greater clarity about the status of supranational judicial decisions.

(a) on issues of law

This is a complex area, but one in which judges must have a special interest. Should any special status attach to judicial decisions made at a ***supranational*** level? Or should they merely be seen variously as persuasive or unpersuasive, instructive or uninstructive, helpful or unhelpful, in much the same way as are decisions of national judges in other countries? Should interpretation of key asylum-related concepts by the HRC (the Human Rights Commitee which supervises the International Covenant on Civil and Political Rights) or by the CAT (the Committee against Torture which supervises the 1984 U.N. Convention against Torture) be treated as more authoritative or decisive than, say, a judgment by a national court in another country, or even by the top court in one's own country? Admittedly the case law of the HRC and CAT on asylum issues is still extremely sparse; but

one has only to consider the great interest being taken in two recent CAT cases dealing with expulsion of asylum-seekers - **Mutombo v.Switzerland(13/1993, 15 HRLJ 164(1994))** and **Khan v Canada (15/1994 15 HRLJ 426(1994))** - to grasp the potential of this new source. It would thus seem opportune to address such questions now. The potential for their increasing significance is heightened by the fact that as yet no parties to the 1951 Convention have referred a dispute regarding the interpretation or application of the Convention to the International Court of Justice under Article 38.[11]

The relevant case law of regional human rights judicial bodies such as the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples Rights might also seem to require distinct attention, as might decisions of the Judicial Committee of the Privy Council within the British Commonwealth jurisdiction. Within Europe asylum cases dealt with by Strasbourg have for some time attracted a good deal of attention from national courts, even in states such as the U.K. where the ECHR remains unincorporated: the case of the **Chahal Family v U.K.(Application No.22414/93,report of 27 June 1995,extracts in 20 E.H.R.R. C.D.19)** appears likely to have major repercussions, regardless of whether it is ultimately dealt with by the European Court of Human Rights.

Even if only in relation to the issue of "mandate" refugees, there would appear to be a need for fuller agreement about the extent to which it is possible to identify and make use of a distinct asylum "case law" originating from UNHCR itself.

(b) on issues of fact

Without trespass upon the fundamental principle that issues of fact remain to be determined in every individual case, it is still valid to ask the question whether findings of fact by supranational judicial bodies on *country-specific factors*,e.g.the overall pattern of gross and systematic violation of human rights in a particular country, might not serve as the basis for reaching "similar fact" conclusions when there is no significant new material or fresh evidence available.

Similar questions can be raised in relation to the findings of various internationally composed **committees of independent experts**, especially

those whose number include *judges* (e.g. that sent in 1994 by the Council of Europe's Parliamentary Assembly to assess, inter alia, Russias's human rights record[12] or the recent report of November 1994 on the situation of human rights in Cambodia drawn up by an Australian judge, Mr Justice Michael Kirby, acting as special representative of the Secretary-General for Human Rights in Cambodia).

-Fuller or at least more frequent guidance from the UNHCR on the interpretation of the 1951 Convention and procedures to be followed.

The current text of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* was published at the request of its Executive Committee in 1979. Subsequent editions employ the same text. Although it is widely accepted by judiciaries as an indispensable guide to the interpretation of the Convention and the procedures to be followed in order to comply with it, the growing gap of years since its production make it decidely less valuable as an aid to construction of an international treaty. (It has come to operate as a virtual "travaux preparatoires" Mark 2). In the light of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, the UNHCR could arguably play a more prominent role in helping consolidate and keep current the insights that have been gained from its own experiences and its own wealth of knowledge of case law developed throughout the world over the past 15 years or so.The absence of authoritative guidance taking into account changing patterns of asylum-seeking, burden-sharing etc., appears to be one reason why in areas such as Europe there have sprung up makeshift regional agreements whose subject-matter includes the "harmonising"of various Convention-related terms, for example "agents of persecution" by the Ministers of Justice and Interior of the 15 EU states in early November 1995 (8628/6/95 ASIM 209 REV 6).

- More comprehensive and systematic knowledge of each country's asylum systems.
At least two points of focus here must be:

(a) each country's body of national case law or jurisprudence on asylum.

That is a prerequisite for any sustained attempt at greater international convergence of interpretation of the 1951 Convention. But it is also vital for ascertaining to what extent most countries have either attained or now accept in principle levels of protection *higher* than those contained in this

instrument. In this regard it must not be forgotten that Article 5 of the Convention contains a specific provision designed to preserve and promote higher standards. Entitled "Rights granted apart from this Convention", it stipulates that: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a contracting state to refugees apart from this Convention".

(b) procedures for determination of refugee status and machineries of review and appeal.

Information about this aspect is more fragmented and less accessible.To some extent it can be found in background literature, e.g. in Professor Goodwin Gill's standard work , in journals such as the International Journal of Refugee Law and - just in time for this Conference - **A Guide to Asylum Law and Practice in the European Union,** compiled by Geoffrey Care and published by Immigration Law Practitioners' Association,London 1996. But even if only for the sake of those states or groups of states whose asylum laws and procedures have undergone or are undergoing rapid revision , there is a pressing need for judges to learn how their counterparts in other countries have coped with the need to balance judicial protection safeguards against executive calls for more rapid processing of large numbers of outstanding claims. Such information is also integral to the endeavour to elicit more common and uniform standards of international judicial protection. Hopefully the UNHCR and certain regional bodies , for example those connecting the 15 EU states inside and parallel to the EU , could make available more of this information than they do currently.

The last-mentioned item leads on to another essential topic.

-Judicial protection and rights of defence.

(NB.I adopt the term "rights of defence" here in view of its established usage, but would stress the point that in essence the *judicial* function must always seek to preserve "equality of arms" between the parties . In the context of a public law dispute over an asylum claim, therefore, none of the parties should be disadvantaged in the conduct of proceedings).

Rights to an effective system of national or domestic remedies, to a fair hearing, to speedy access to a court, not only figure as human rights in key human rights treaties, but are integral perhaps to the very notion of *judicial*

control or supervision. Access to justice makes no sense if there is no system of justice to access.

Nevertheless if application of such principles to a state's own citizens is now the norm,their wholesale extension to *aliens and asylum-seekers in particular* remains to some degree controversial. The 1951 Convention itself only creates express rights of appeal in relation to refugees *"lawfully"* in the territory of the host state. Procedural safeguards accorded to aliens by Article 13 of the ICCPR(International Covenant on Civil and Political Rights) and by matching provisions in other human rights instruments contain a similar prerequisite of *"lawful"* presence. The European Court of Human Rights continues not to view its Article 6 "fair hearing provisions" as applicable to matters of asylum or immigration. Its Article 5 guarantees concerning judicial control of arrest and detention have proved of considerable force in some asylum, immigration and extradition cases; but generally they have been limited to the context of deprivation of liberty.Studies by leading international law jurists on evolving norms of international law chart an almost continuing rise in the standards of judicial protection of aliens generally, but codification creating minimum guarantees remains a goal not a reality[13] and, in any event, asylum-seekers are usually considered separately, as, by definition, they cannot look to protection from their state of origin.

Illustration: the issue of a right to an oral hearing.

The problems this state of affairs can present in asylum adjudications are best illustrated, perhaps, by current judicial opinions expressed on the subject of the *right to an oral hearing in the context of asylum claims.* In **Chen Zhen Zi v Minister for Immigration and Ethnic Affairs(1994) 121 ALR 83**, the Full Court of the Australian Federal Court followed well-established case law within "common law" countries on the requirement of oral hearing in administrative review, according to which it was not an essential element of the rules of natural justice that a decision-maker must always afford an oral hearing to a person who would be affected by a decision **(Local Government Board v Arlidge(1915) AC 120,etc)**.Reference was also made to well-known Canadian and U.S. cases **(Re Singh and Minister for Employment and Immigration(1985) 17 DLR(4th)422; Re Conway(1992) 86 DLR(4th)655; Goldberg v Kelly(1970) 397 US 254; Matthews v Elridge(1976)424 US 319).** At the same time the careful phrasing of this judgment, confining itself to rejection

of the need for an oral hearing "in every case", has left the issue wide-open for further litigation.

Within Europe, national judges, directly or indirectly, are aware that the European Court of Human Rights sees the issue of right to an oral hearing in adminstrative review generally as one of great importance.Albeit still reluctant to extend Article 6(1) rights to a fair hearing under the European Convention on Human Rights to public law matters *simpliciter*, and despite a recent conclusion that in the sphere of social security there was no right to an oral hearing, this Court appears increasingly open to the view that decisions on procedural safeguards in matters which affect fundamental issues of life and liberty are ultimately for *judicial* , not executive or legislative determination.(see,e.g. the recent European Court of Human Rights judgment in the case of **Fischer v Austria(A/312)** -not an asylum case - reported in **1995 20 EHRR 349).** This shift in emphasis is likely to strengthen arguments for an oral hearing of asylum claims, as essential to judicial determination of such issues.Much will depend on to what extent this Court's case law sees fit to apply its generally dynamic human rights jurisprudence to the area of asylum law.

But even were the European Court of Human Rights eventually to affirm such a view, and some asylum judges change their views in consequence,that does not resolve the central problems that arise for international judicial cooperation conceived as a global enterprise. (Indeed such an advance might simply add fuel to the argument that ECHR case law is in some respects out of step with *universal* as distinct from *European* human rights norms[14] and that, if there is a divergence, asylum law must adhere to less advanced but more universal norms). The underlying issue would rather seem to be that of the proper extent of any *judicial consensus* regarding the range and contents of the principles of judicial protection of asylum-seekers.

But is it wise to seek consensus in an area in which debates continue to rage about the doctrines of judicial restraint v doctrines of judicial activism? The heart of the dilemma is the fact that most surveys appear to show that, world-wide, the different interests of legislative and executive organs can result in judicial safeguards affecting asylum-seekers not being made available or being withdrawn or denied. In the absence of any judicial voices being raised, there is always the danger that states, either unilaterally,

inter-governmentally or even by way of treaty, will ignore or unduly restrict such rights.

In the light of such tensions and uncertainties, the most useful thing here would seem to be to furnish a simple catalogue of the "rights of defence" that are most commonly advanced, in the hope that this conference might help explore and clarify the degree of consensus that does exist as to its scope and contents.

Rights of defence

Broad recognition of the gravity of the issues at stake in relation to decisions to expel asylum-seekers back to their country of origin appears, then, to incline judges to apply as far as possible the following principles:

-any decision to expel must be in accordance with the law
-decisions affecting expulsion must be written and reasoned and be served with enough period of notice to allow the individual to contact sources of legal advice and assistance and receive help from them if wanted
-the asylum-seeker must be allowed to submit reasons against his expulsion
-he must have the right to have his case reviewed by a competent body
-At least at some level of review or appeal the body concerned must be judicial in character if not always in name and must possess the attributes of independence and impartiality
-he must have the right of access to the documents in any proceedings
-he must have the right to adequate interpretation and translation into his own language at all stages of the proceeding
-he must have reasonable opportunity to contest evidence against him, to obtain and present witnesses and evidence in his own behalf, reasonable opportunity to consult representatives and time to prepare for the proceeding
-he must have the right to be represented before that authority, subject only to minimal provisos of competency and probity .

Arguably modern asylum and human rights law now considers that this catalogue should also include:
-the right to have one`s case individually examined
-the right to an appeal prior to removal
-the right to have one`s "in-country" appeal cause a suspensive effect in relation to any measure of expulsion

-the opportunity to appear in person at a hearing of his own appeal(but see above for continuing doubts about the status of this right):

Some would argue that the catalogue goes further still, encompassing:

--the need for the written reasons for refusal to contain information about rights of appeal and how to exercise them
-entitlement to legal aid
-a further level of judicial review, both of the original executive/administrative decision(s) and any subsequent levels of review or appeal .

Similarly inspired safeguards will apply to **special categories of asylum-seekers** - e.g. those whose position is affected by **extradition** or other legal regimes relating to the exercise of extra-territorial jurisdictions(war-crimes, crimes of genocide, international terrorism etc), albeit some of these categories may bring more into play state derogations on the grounds of public order, public health and public security.

Certain categories,e.g.unaccompanied minors, may need additional safeguards.

The treatment of asylum-seekers who experience **detention** also calls for careful cataloguing of guarantees of judicial control of the *length* of their detention, its *real and ongoing purpose* and the *conditions of their detention.*

THE FORM INTERNATIONAL JUDICIAL COOPERATION SHOULD TAKE

The goals of the present Conference are exploratory. Even were it thought desirable by some, it would seem premature for participants to attempt at a first gathering any agreed text of principles. Personal contacts made are likely to be the most effective source of outcomes.

More feasible an objective might be some agreed statement about the continuation, under the auspices of this Conference, of a **process** of international judicial cooperation. In this area more seems necessary than a one-off gathering. Such a statement could cover:

-intent to publish the proceedings(already in hand)
-extending the role of a planning group to map future structures of cooperation, including :
-completion of systematic questionnaires on a country-by-country basis, describing and self-evaluating the extent to which each protects the catalogue of rights outlined above(or as amended after further collaboration)
- future conferences/colloquies/workshops
- exchange visits
- shared information technology and use of common data bases
shared training
- monitoring of the extent of judicial guarantees in the field of asylum as currently recognised by regional legal orders (e.g. the European Union, the Schengen area, etc). This should take in both existing and planned treaties or amendment to treaties.

It would be helpful if such a statement could specify **priorities** for future cooperation.

Completion of a systematic questionnaire is an example of one item which could not be done properly overnight. Yet in view of the fact that it would make possible a more precise source of comparative law data of use to broader audiences, it is one to which an international process might attach considerable importance.

It is hoped that this brief map might prove of use both within the confines of this Conference and beyond.

---

*Dr. Hugo Storey, B.A.Hons (University of Sydney), B.Phil (Oxon), Ph.D (University of Leeds) is a full-time immigration and special adjudicator in the U.K. He is an Honorary Research Fellow at the Department of Law, University of Leeds, a former Council of Europe Human Rights Research Fellow, and has published mainly in the areas of international human rights law and immigration. He is also co-editor of Butterworths Immigration Law Service.

NOTES

1. Francis Bacon, "Of Judicature", cited in J H McCluskey, Law, Justice and Democracy, the Reith Lectures 1986, Sweet and Maxwell/BBC Books 1987, 108.
2. For further background, see G. Goodwin Gill, The Refugee in International Law,1983,Clarendon Press, chapters 8,9.
3. Grahl-Madsen,A, The Status of Refugees in International Law, vols i and ii, Sijthoff, Leiden, 1966,1972; Goodwin Gill,G.,op.cit; Hathaway,J, The Law of Refugee Status 1991, Butterworths Canada Ltd. Much credit must also go to the establishment of the International Refugee Documentation Network's International Thesaurus of Refugee Terminology, Martinus Nijhoff,Dordrecht,The Netherlands,1989 and the International Journal of Refugee Law,Oxford University Press; see further Thoolen,H.,"The Development of Legal Databases and Refugee Work," 1 IJRL 89(1989).
4. .Lord Bridge of Harwich in **Bugdaycay v Secretary of State for the Home Department and related appeals** [1987] 1 All ER 940.
5. The recent creation of a Special Rapporteur on the Independence and Impartiality of the Judiciary, pursuant to Commission on Human Rights resolution 1994/41 of 4 March 1994 as approved by Economic and Social Council decision 1994/251 of 22 July 1994;Developing Human Rights Jurisprudence:The Domestic Application of International Human Rights Norms,Judicial Colloquium in Bangalore,24-26 February 1988,Commonwealth Secretariat,London;Judicial Protection against the Executive,vols i,ii and iii,Max Planck Institute for Comparative Public Law and International Law,Heidelberg, Germany,1971, Heymann Oceana
6. **Jacques (11580), determination of 22 November 1994.**
7. See R.Bernhardt, "Interpretation in International Law" in R.Bernhardt(ed.),Encyclopaedia of Public International Law(EPIL),Instalment 7(1984).
8. E.I.N. c/o Milan Shah, Manchester CCAB,20 Swan St, E.I.N.c/o Milan Manchester M4 5JW, Internet:ein-support @mcri.poptel.org.uk8;fax 0161 834 9163.
9. **The citation is from Ionescu (11914); cf. Tiganov(11931).**
10. Refugee Appeal.No.523/92,decision of 17 March 1995 delivered by Member R.P.G.Haines.
11. Albeit the ICJ has played an important indirect role in developing and clarifying concepts of state responsibility for action or inaction by its agents: see e.g. **U.S. Diplomatic and Consular Staff In Iran Case 1980 ICJ Rep 3.**
12. Report on the conformity of the legl order of the Russian Federation with Council of Europe standards. HRLJ, pp 249-300 (1994).
13. See e.g. Judicial Protection against the Executive, supra no. 5.
14. Storey "Human Rights and the New Europe : Experience and Experiment" , Political Studies vol. 43 Special Issue 1995 pp 131 -154

Chapter 9

BACKGROUND NOTE ON SEEKING ASYLUM AND ADMINISTRATIVE PROCEDURES

Nuala Mole
Director
AIRE
(Advice on Individual Rights in Europe)

This paper provides a brief outline of the framework of principles of international law which govern the administrative procedures for the determination of asylum claims. It is too brief to be a comprehensive review of either the instruments or the jurisprudence but is written merely to form the basis for discussion by the participants at this conference. The references are mainly to European measures and case-law though some other international materials are included.

The general principle of international law which prohibits expulsion to a country where a person is at risk of exposure persecution or torture or inhuman or degrading treatment is enshrined in all the fundamental human rights instruments. The Geneva Convention on the Status of Refugees is only one of those instruments. Paradoxically it is arguably the one which gives the asylum seeker **least** protection, both substantively and procedurally.

The Geneva Convention and its precursors were drafted to fill a legal vacuum by providing a status for those who found themselves stateless or displaced after political upheavals or war. The Geneva Convention was also a tool of cold war politics as the wording of Article 1 makes clear. "The strategic dimension of the definition comes from successful efforts of Western States to give priority in protection matters to persons whose flight was motivated by pro-western political values" [1]

The Geneva Convention itself contains no provisions at all governing the administrative procedures or safeguards for the determination of asylum claims. It was not until 1977 that the Executive Committee of UNHCR felt

the need to fill this gap and to recommend[2] the production of the Handbook. It therefore fell to the Handbook to make some suggestions and to the conclusions of the Executive Committee to put more flesh on them. But whilst the Handbook and Conclusions are at least illustrative of the standards that should be met, or may be regarded even as "persuasive" they are not part of the black letter law of the Convention obligations.[3]

The lack of any reference to procedural safeguards in the text of the Convention itself makes for imperfect protection. It is not insignificant that the US Supreme Court in the recent decision in INS v Zacarias[4] (one of only three cases which have come before it concerning the application of the U.S. 1980 Refugee Act) failed even to consider the Handbook as a source of interpretative authority.[5]

The Universal Declaration of Human Rights enshrined in Art 14 (1) the right to seek asylum from persecution. Of all the provisions of the UDHR this was the only one which did not find itself converted into black letter law in the ICCPR and the ICESCR.

The ICCPR is conspicuously silent, as is the ECHR on Refugee protection, perhaps because it was felt that the Geneva Convention provided a lex specialis. The American Convention on Human Rights in Articles 22(7) and (8) expressly provides for the right to seek and be granted asylum and to be protected from expulsion to a country where there is a risk of persecution. All three instruments however do contain specific provisions concerning the prohibition of torture and unhuman and degrading treatment which is a general principle of international law. The jurisprudence of their supervisory bodies both in General Comments and in the consideration of individual complaints has made it clear that these provisions also cover expulsion to a country where the person will risk exposure to such treatment, but procedural safeguards have to be deduced from other provisions or found in the jurisprudence. The Organisation of African States (OAU) Refugee Convention establishes different criteria for the definition of a refugee from that contained in the Geneva Convention , but remains equally silent on the topic of procedural safeguards. The UN Torture Convention contains express provisions with at least a suggestion, at Art 3(2) that the authorities should take into account a pattern of gross violations of human rights in the receiving country as part of the asylum determination criteria. In the case of Mutombo v Switzerland,[6] the UN Torture Committee was specifically

concerned that as Zaire was not a party to Torture Convention, the applicant would lose the protection of that Convention altogether if returned to Zaire and would no longer have the legal possibility of applying to the Committee for protection.

The right to documentation

Articles 27 and 28 of the Convention Relating to Stateless Persons confer on refugees who are also stateless the right to identity papers and travel documents.

The right to administrative and judicial review

A common feature of international human rights instruments is the inclusion of provisions which are intended to ensure that the protection of the rights described is "secured" to everyone within the jurisdiction of the Contracting state, and those which state that everyone whose rights are breached has " an effective remedy before a national authority".[7] The jurisprudence of the ECHR makes it clear that this protection is afforded not only to those who show an actual violation of substantive right but also to those who merely show that they have an arguable case . We shall come back to this point later.

Access to the asylum determination procedure- the extra territorial responsibility of States

The responsibility of states is engaged in international law to all those "within their jurisdiction". This responsibility includes not only the actions of states within their own territory, but also the actions of their officials outside the territory. It is here that the difference between the protection offered by the Refugee Convention and other human rights standards is highlighted. The concept of alienage is inherent in the Refugee Convention for the historical reasons noted above as well as because of the doctrine of state sovereignty and the reluctance of the international community to assume responsibility for other people's problems. The other instruments know no such restriction and their protection extends to "everyone within the jurisdiction" irrespective of their territorial location or the legality of their stay.

In recent years, a widespread mandatory visa regime, and carrier's liability provision have had the practical effect of limiting asylum seekers ability to leave their own country or to access those countries which impose the regimes. Although such people are not outside their country of origin and therefore are not protected by the Geneva Convention , the responsibility of the state where asylum is sought may nevertheless exist even before asylum seekers have left their own territory. It was many years ago that the European Commission of Human Rights first found that in principle the acts of visa officials in an embassy can engage the responsibility of the state concerned[8] and several cases since then have upheld this principle. Because in the application of asylum law most states still tend to refer only to the Geneva Convention and consequently apply the principle of alienage enshrined in Art 1, in most jurisdictions it is not legally possible to be granted a visa as a refugee. still less as an asylum seeker. This is a serious gap in international standards of protection. In practice because most diplomatic posts employ local staff in their visa sections, disclosing the basis of an asylum application before one is securely outside the territory may anyway be fraught with danger. In the case of Loizidou v Turkey (Preliminary Objections)[9] the Court held "the responsibility of a contracting party may also arise when, as a consequence of military action - whether lawful or unlawful it exercises effective control of an area outside its national territory ... [the obligation] derives from the fact of such control whether it be exercised by a state directly through its armed forces or through a subordinate local administration." The principle in Loizidou would appear to be capable of being applied equally to situations involving consular officials and local embassy staff.

Where mandatory visa regimes operate states may well have a duty to ensure that they are not effectively denying people access to asylum by a very restrictive technical visa regime or by a failure to have visa procedures in place which protect the confidential nature of information given.

Accessing the asylum procedure on arrival

The decisions of international tribunals make it clear that international human rights standards also oblige states to ensure that those who claim asylum have access to asylum determination procedures.[10] This is a principle which it is particularly important to be well understood by airport immigration officials and even the lowest ranking border guards. Carrier's

liability sanctions have led to the practice in Belgium,France, Germany the Netherlands and Portugal of keeping asylum seekers who appear at first sight to have manifestly ill-founded claims in "international zones ". The assertion is frequently made that airport transit zones are not part of a state' sovereign territory and therefore outside the law. As has been shown above this is clearly not consistent with international law. The European Commission of Human Rights noted the French practice in its recent Report in Amuur.[11] In that case OFPRA had declared that it had no jurisdiction to consider the applications for asylum, given that they had been made "before the applicants had been admitted to French territory." The applicants in that case had thus been refused access to the asylum determination procedure. Because they had not been returned by the French to Somalia but to Syria, where it was asserted they were not in danger, their applications under Articles 3, 6 and 13 of the ECHR were found inadmissible. Unfortunately this meant that a timely opportunity to provide clear guidance as to the rights of asylum seekers to gain access to the asylum determination procedures in Europe has been missed.

The 1995 Draft Resolution of the Council of Ministers on Minimum Guarantees for Asylum Procedures[12] requires (at paras 7 and 10) Member States to adopt administrative measures ensuring that any asylum seeker arriving at their frontiers is afforded an opportunity to lodge an asylum application.

Fairness and equality of arms

International treaties and the jurisprudence made under them have little advice to offer on the standards to be observed in the initial asylum determination procedures. Though many decisions of international tribunals have examined the review of adverse decisions. This is unfortunate since many of the problems in asylum determination arise because an initial refusal raises a negative presumption which is difficult to rebut on review. Procedural safeguards are of vital importance from the very first moment that the examination of an asylum claim begins.

The European Commission and Court of Human Rights have long held that decisions on expulsion are not a determination of a person's civil rights and that the safeguards enshrined in Article 6 of the Convention do not therefore

apply.[13] Article 6 guarantees access to a fair and independent tribunal and equality of arms as between the individual and the executive.

Secondary sources of international law are more helpful. As long ago as 1977 the Executive Committee of UNHCR adopted its Conclusion on the Determination of Refugee Status. The Committee made several recommendations concerning training for immigration officials, the provision of adequate facilities including interpretation and access to review of an adverse decision. The UNHCR Handbook was the child of this Conclusion.

In 1981 the Council of Europe adopted a Recommendation;[14] the 6th principle is of particular significance: "The applicant shall receive the necessary guidance as to the procedures to be followed and shall be informed of his rights. He shall enjoy the guarantees necessary for presenting his case to the authorities concerned and shall have the right to be heard, when necessary with the assistance of an interpreter; the intervention of a lawyers shall be permitted at an appropriate stage of the procedure, including procedures on appeal as well as the possibility to communicate freely with the office of UNHCR and to approach a voluntary agency working for refugees.

Earlier this year (1995) the European Council (Council of Ministers of the European Union) agreed to a Draft Resolution on Minimum Guarantees for Asylum Procedures. The Resolution lays down principles relating to the rights of asylum seekers during examination, appeal and review procedures.

The right to review of the decision

The right to have access to an effective remedy for arguable violations is a feature of all international human rights instruments. The European Court expressed the matter clearly in the case of Klass v FRG: Art 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention , he should have a remedy before a national authority in order both to have his claim decided, and if appropriate to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated"

Subsequent jurisprudence[15] has somewhat obfuscated the clarity of the Court's dicta in Klass, but the principle remains.

In the case of Vilvarajah v U.K,[16] the Court surprised everyone, including the respondent Government, by reversing the Commission's findings of a violation of Article 13 and holding that the British system of judicial review, which does not permit the judge to examine the merits of an asylum claim but only to consider whether the decision is procedurally flawed, nevertheless is an effective remedy. Judges Walsh and Russo disagreed , and in a partly dissenting opinion stated: "a national system which it is claimed provides an effective remedy for a breach of the Convention and which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13"

Detention pending the determination of the claim

The Geneva Convention is silent on the question of detention, perhaps not anticipating that those who fled persecution in one country would find themselves imprisoned once more in the country where they sought asylum. The general human rights instruments are quite clear on the matter. Article 5 ECHR and Art 9 ICCPR provide that all detention must be susceptible to review. Article 5 ECHR moreover spells out an exhaustive list of situations in which a person can be detained. This include detention to "prevent an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. In Lynas v Switzerland[17] the Commission found that where proceedings were not conducted with the requisite diligence, or where the detention results from some misuse of authority, it ceases to be justifiable under Article 5, para 1(f). Lynas was an extradition case but the principle applies mutatis mutandis to deportation or removal cases. The Commission's approach in Lynas was endorsed by the Court in Kolompar v Belgium[18], another extradition case. In the recent case of Chahal v U.K[19] the Commission found that detention for five years was excessive and that the Government had not pursued the proceedings with the requisite speed. It commented that the applicant had not brought his continued detention on himself, in that there had been no abuse of the judicial review process to delay his application. Chahal has been referred to the Court and the decision is expected early in 1996. Many asylum seekers arriving in Europe are either not in possession of identity documents, or those documents which they have are clearly

false. If their asylum claims are rejected the fear is that they will abscond if not detained, but without documentation it is difficult to remove them. the Commission has not yet ruled on the lawfulness of detention in such cases. The Vice President of the Commission expressed the personal view in a recent publication[20] that where a person who cannot be permitted to stay in the country cannot be deported or extradited, because , for example, he or she is from a state where he or she would run a serious risk of ill-treatment and whom no other country is prepared to accept, "it might be necessary to submit such foreigners, at least for some time to a regime of internment amounting to a deprivation of liberty."

In view of the Commission's jurisprudence on refugees in orbit, it is difficult to see how a refusal to grant a residence permit would be justified in the circumstances described, and even more difficult to see how any detention of this kind could be justified under Article 5. Moreover Article 18 of the Convention prohibits the use of any restriction for a purpose other than those for which they have been prescribed.

In Amuur v France[21] the Commission found that the detention in the international zone of the airport (extended to a nearby hotel) was not a deprivation of liberty of the kind governed by Article 5, because the detainees were at liberty to leave for another country. Their movement was only restricted in that they were not permitted to enter France. They found consequently that it was immaterial that the "detention" had been declared illegal by the French courts. Not surprisingly ten members of the Commission dissented from this view. the case has been referred to the Court and will be heard early in 1996.

In 1986 the Executive Committee of UNHCR adopted a Conclusion on the Detention of Refugees and Asylum Seekers[22] It expressed the opinion, at para (b) that detention should normally be avoided and suggested a limited number of situations in which it might be justified.

National Security and asylum

The prohibition on torture and inhuman and degrading treatment contained in Article 3 ECHR and Article 7 ICCPR is absolute, - nonjustifiable, not limitable and non-derogable. The provisions of Article 33(2) of the Refugee Convention - which remove the benefit of the Convention for those who

have committed serious crimes or who present a threat to national security - are consequently valueless in any country which is a party to either of the two instruments mentioned. In the case of Chahal [23] the U.K. Government sought to remove a person whom they considered to be a threat to national security and sought further to exclude review of their decision because of the security aspects of the case. The Commission found in contrast to Vilvarajah that the remedy of judicial review was inadequate because of the restrictions which applied in national security cases. The case has been referred to the Court and will be heard early in 1996.

Refugees in Orbit

The European Commission of Human Rights has clearly ruled in Harabi and Giama[24] that the repeated bouncing back of asylum seekers is in contravention of article 3 of the European Convention on Human Rights. The Dublin Convention was designed, in part, to minimise this phenomenon, but sometimes seems to create repeated expulsions rather than reducing them. Of crucial importance, under all the instruments is that there are procedural mechanisms in place to ensure that a person who is returned to a "safe third country" is actually, rather than potentially admitted to the asylum determinations process in that country. If there is a risk either of successive deportations, or of eventual refoulement to the country where the person is at risk then the first expelling country may well be held responsible.

Too much attention is frequently paid in discussions of asylum determination procedures to the Geneva Convention and the Handbook and too little to general principles of international human rights law. This background note is intended to stimulate a discussion that will redress that balance.

NOTES

1 Hathaway, The Law of Refugee Status , Butterworths 1991 at p 6
2 1977 Conclusion No 8 (XXVIII) Determination of Refugee Status
3 .See eg R v SS HD, ex parte Mehari 1994 Imm AR 151 at 164
4 112 s ct 812(1992)

5 For a commentary on this case see Musalo, irreconcilable differences? Divorcing Refugee Protections from Human Rights 'Norms', Michigan Journal of International Law Vol 15 No 4 summer 1994

6 .Mutombo v Switzerland Comm No 13/1993 UN Doc CAT C12 D13 1993

7 E.g. Article 2 ICCPR, Arts 3 and 13 ECHR

8 .Cyprus v Turkey Appl 6780/74 and 6950/75, 2 D&R 125; X V Federal Republic of Germany, Application No 1611/62, Yearbook 8(1965) 158 at 163

9 Judgement 23rd March 1995.

10 see e.g Giry v Dominican Republic

11 Amuur v France appl 1976/92, Report adopted 10 January 1995

12 2nd March 1995 5354/95 Draft Resolution on minimum guarantees for asylum procedures

13 See e.g. Moustaquim v Belgium Judgement

14 Recommendation R(81) 16 on the Harmonisation of National Procedures Relating to Asylum

15 See e.g. Powell v Rayner, Friedl v Austria

16 Judgement 30th October 1991

17 6 D&R 141

18 Judgement of 24th September 1992

19 Commission Report of 27 June 1995

20 Trechsel, "Liberty and Security of the Person" in MacDonald Matscher and Petzold, eds 'The European system for the Protection of Human Rights', Martinus Nijhoff 1993, p 277 et seq.

21 Report of 10th January

22 1986 Ex Com 37th Session No 44 (XXXVII) Detention of Refugees and Asylum Seekers

23 Chahal v UK (70/1995/576/662)

24 46 D&R 112 and 21 D&R 73

Chapter 10

Judicial Remedies on the Merits

Geoffrey Care[1]

Refugee Origins

Since the end of the Second World War there has hardly been a newly independent country which has not claimed to be democratic or populist, many have even included such a description in their title. Regretfully they and many others in the world continue to kill, torture, mistreat and arrest arbitrarily. When they do so, either because of political repression, civil war or ethnic divisions or due to situations of hunger starvation or natural disaster, their citizens can only vote with their feet.[2]

As one country joins this dismal and sordid band hopefully one or two leave it: but to forecast for tomorrow let alone judge for today which country creates no refugees and which does, requires a better system of selection than any government has so far shown itself to possess.

Refugee Population

At the present time there are some fifty million refugees in the world of whom around half could conceivably claim to be such owing to their fear of persecution for one of the reasons set out in the Refugee Convention.[3] Of the other half (displaced persons) those in Africa flowing between countries who are signatories to the OAU Convention most are likely to fall within the provisions of Article 1.2 of that Convention which covers those fleeing disasters, natural or man made.[4]

Of those numbers of refugees for which the United Nations High Commission for Refugees has responsibility (23 million) about 6 million are in Europe, but it is significant and frequently overlooked that the greatest burden for refugees actually falls upon the poorest countries.

1951 Convention and the OAU Treaty

The distinction between these two treaties graphically illustrates that whereas the 1951 Treaty aims at the protection of a closely defined type of refugee and one whose claim to refugee status, I wish to emphasise, can only be determined on a case by case and individual basis[5] the OAU Treaty seeks to alleviate the misery of the displacement of large groups of people.

The victims of deprivation and man made or natural disasters in European countries overall are not generally granted permanent stay notwithstanding that they are frequently seeking to escape life threatening situations.

Recognition Policy

In 1991 the claims for asylum per head of the population varied from 0.5 in Switzerland to 0.005 in Portugal. Between 1992 and the present claims rose in the United Kingdom from about 26,000 to over 35,000.[6] The number of applicants for asylum from any particular country varies markedly from year to year. Rules for recognition of refugee status also tend to vary from country to country. Unfortunately no current accurate statistics exist in the United Kingdom, but my observation is that there have been noticeably fewer recognitions of, for example, claimants from Sri Lanka and Nigeria in the United Kingdom than in Canada. At the other end of the scale there is an observable similarity of approach in most countries toward the applications received for recognition from Iran, Iraq and Turkey.

Both policies and practice on the control and regulation of immigration in Western Europe have in the past varied widely. The machinery now in place to deal with immigration is unbelievably complicated. There are several different classes with different rules, EC Nationals, Nationals of Associated countries, Nationals of countries where there are cooperation agreements, Third Country Nationals and so on.

AHI

A number of working groups exist in Europe (with inevitable overlapping activities), the most important of these groups is the Ad Hoc Immigration Group (AHI) created in October 1986 which has produced three of the

more important (Minister's) Resolutions, those of the 30th November - 1st December 1992, and the resolution directed at harmonisation, proposed at Brussels on the 22nd December 1994 and lastly those of 21-22 November 1995. The Brussels Resolution raised a number of important issues, not the least of which it has been suggested will dramatically change the relationship between the individual and the State .[7]

"Bogus"

In Europe the humanitarian underpinning of asylum policy has weakened with the falling of the Berlin Wall and the increase in numbers of refugee claimants from outside Europe. There is a general perception of an economic basis for claims and a heightened fear in asylum receiving countries of being swamped by people from poor and unstable countries. The public perception of vast numbers of so called "bogus" claimants for refugee status is likely to influence the approach to the claim of the initial decision-makers in immigration departments of governments.

This suspicion of the motives of the asylum seeker for his flight also seems to lie at the root of the approach not only to the application at the initial stage but also when an independent body reviews that decision.

Manifestly Unfounded

The notion of the 'Manifestly Unfounded' application is aimed at identifying the "bogus" claims and reducing the burden upon the decision takers and the length of time which an asylum seeker stays in the country. The safe first country or safe host country legislation is part of this package. Until such time as the Dublin Convention is in operation it is likely to continue to be so and to give rise as what are known as 'Refugees in Orbit'; though even the Dublin Convention is unlikely to remove all such Refugees.

Further forum of appeal?

It is significant that at the moment there are no provisions for resolving disputes under Schengen or the Dublin Convention or even to provide a remedy for the United Kingdom citizen who (as you may recall) recently

arrived in Spain to spend a summer holiday only to find that he was refused entry because the Spanish immigration authorities maintained that his name appeared on the non-admissible visa list! Suggestions have been made for rights of appeal within the European Union either to a free standing tribunal or to the European Court - neither of which appear to have found any favour.

The current moves to restrict access to asylum systems[7] in Western Europe indicates that Governments are increasingly treating asylum as an 'immigration' rather than a 'human rights' issue. This is not to say that such an approach may be necessarily objectionable because the issues do overlap but there is the risk that one can collapse into the other to the detriment of both.[8]

Whither in Europe?

In relation to both Eastern Europe and the world economy the EU faces a choice of directions. In one direction lies Fortress Europe: in another direction Fragmented Europe and the protectionism that goes with it and in yet another is a Wider Europe. Along with this goes the admission into Europe of countries with political and economic crises who have recently emerged (somewhat hesitantly) out of traditional authoritarian regimes. Their records of human rights, at least from the standpoint of the western countries is poor, their infrastructures for assessing claims to those seeking asylum in a satisfactory way is less developed than those of western countries (and often as yet is non existent). Even some of the methods in the EU are not always regarded by others as guaranteeing adequate safety (in a 'safe first country' context).[9]

Repatriation?

JHA have agreed to operate under the European Convention for the Protection of Human Rights and Fundamental Freedoms and many writers have emphasised the need for taking Human Rights as the cornerstone for the development of immigration and asylum policy.[10] Madam Ogata in her Public Lecture[11] and again recently and many others stress the need to work towards voluntary repatriation; but this of course calls for an amelioration

of the very internal situation which caused flight in the first place - misgovernment, disintegration and so on.

In his study of *Nations and States* Seton-Watson concluded "that there must be a balance between national cultures and international cooperation if destructive civil wars and nuclear holocausts are to be avoided". The development of such a balance is one of the critical tasks in the construction of a new European order. Extension of membership to East European states may be desirable and may be inevitable but the effect on immigration policy and particularly claims to asylum and the approach to resolution of disputes are of considerable concern.[12]

View of the developing asylum legislation.

Europe, faced with larger numbers of refugees than they can readily absorb in the labour market compounded by shrinking economies has introduced legislation, which tightened up on immigration.

The approach of the United Kingdom as an island, has a different immigration control system from those in Europe where every country has at least one land boundary. Traditionally in this country control has been at the ports of entry but with the collapse of the frontiers in the European Union and the pressures of numbers the United Kingdom has in a mixture of panic and political opportunism, changed its approach to claims for refugee status.

What Rabbi Magonet once said, "the way we treat the outsider (in the application of the Convention) is an ultimate measure of the nature and quality of our own society", is worth recalling.

I now wish to turn to the issues and problems arising out of the judicial remedies on the merits in the current UK system. It is useful first to take a short look at its history and what is now in place.

UNITED KINGDOM LEGISLATION

History

The first substantive legislation for the control of immigration, The Aliens Act, was in 1906. This was followed by further Acts in 1914, 1938 and 1952. The Commonwealth Immigrants Act 1952 enacted controls from fear that the coming of independence in countries in the Commonwealth, with potential of some 300,000,000 people entitled to claim United Kingdom Citizenship, would give rise to a flood of immigrants. This Act was followed in 1968 by another restricting Act and in 1971, by the Immigration Act which rationalised immigration control and also set up a two tier appeal system first to adjudicators (immigration judges) and then to an Immigration Appeal Tribunal of three for those disappointed in their applications to enter or remain in the United Kingdom. The appeal system at least from within the country was conditioned on the right to enter - no right to enter, no in-country right of appeal.

The British Nationality Act of 1981 removed any right to remain by reason solely of birth in the country. In 1988, a further Act restricted the right of appeal against deportation to a challenge being made to a decision where asylum was claimed. In order to attempt to cut off immigrants at source, the Carriers Liability Act of 1987 imposed penalties upon carriers who brought into this country passengers whose documentation proved to be such that they were not entitled to entry.

Exceptional leave to remain

In the case of asylum seekers generally speaking however, this was more honoured in the breach than the observance. This was coupled with a fairly relaxed approach by the Home Office and the liberal use of a 'half-way house' system called 'exceptional leave to remain', which is difficult readily to distinguish from Temporary Protected Status (TPS) in operation for those fleeing the Balkan Conflict.

Rights of Appeal

An in-country right to appeal from a refusal to recognise an applicant as a refugee was granted as of right in all cases by the Asylum &_Immigration Appeals Act 1993. By the same Act a further right of appeal on a matter of law was given, again with leave, to the Court of Appeal from a final determination of the Immigration Appeal Tribunal. From the Court of Appeal there does lie a final appeal with leave, on a point of law of exceptional public importance, to the House of Lords.

The appeal from the decision of the Secretary of State for the Home Department refusing asylum lies initially to a Special Adjudicator and thereafter with leave to the Immigration Appeal Tribunal (IAT). A Special Adjudicator is simply an experienced adjudicator who has been selected and designated to act as such by the Lord Chancellor and has received special training.

The hearing

Appellants may demand a hearing which is in public (unless he wishes otherwise); he can call oral evidence both his own and of any witnesses, which is tested by cross-examination. He can also adduce documentary evidence.

The normal and relatively strict rules of evidence which apply in the Courts do not apply in immigration appeals.

If the appellant so requires he may have an interpreter into whatever language he claims to understand provided and paid for by the Immigration Appellate Authority (IAA).

UNHCR's involvement is achieved by being served with all the papers. She may seek to be joined as a party to the appeal and call evidence and/or make submissions. She rarely does so.

Representation

Appellants are entitled to be represented at the hearing of their appeals. Free representation is available from the Refugee Legal Centre,[13] and the Immigration Advisory Service but Legal Aid is not available except before the regular courts.

The adjudicator may and indeed it seems must rely on his own accumulated knowledge and that of his colleagues and documents in the public domain of which he is aware. He must ensure the parties are informed and have the opportunity to address him upon anything material he does rely on.[14]

The IAT may hear evidence on appeal from an adjudicator but does not generally do so. It will rarely disturb an adjudicator's finding of fact unless it cannot be justified upon the evidence (if it is perverse). Frequently the IAT will simply remit the appeal for a rehearing before the same or a different adjudicator. This may happen particularly where fairness so requires or there is an error of law as well as a need to hear new facts.

The appellant may be detained throughout the time he is in the UK unless and until he obtains a favourable decision.

Suspensive effects.

From the date of a notice of appeal within time until final disposal of the appeal procedures the appellant has a right to remain in the UK.[15] Any proceedings which may only be taken by way of Judicial Review are not suspensive unless the Judge so orders. He not infrequently does so and at short notice even at home or over the telephone. Furthermore it does not address the facts since it is a supervisory jurisdiction. It matters little where the issues involve a static situation, but it is of little use if the asylum applicant has, long before the decision is made been returned to the country where he fears persecution. Indeed it was such a situation which occurred in Sivakumaran and which in Vilvarajah the ECHR took the startling (majority) decision that Judicial Review was an adequate judicial remedy.[19]

Burden/Standard of proof

Except in fast track appeals it is for the appellant to show that his removal from the country may put the UK in breach of its obligations under the Convention.[17]

The claimant must show, on the balance of probabilities actual fear (so it seems) and a reasonable likelihood or a serious possibility of persecution for a Convention reason if he is returned to his country.[11&18]

The decision must give sufficient information and reasons so it is clear how and upon what facts the Adjudicator reached his decision.

In the United Kingdom the approach is first to ask the asylum seeker to prove his story is true and only thereafter look to see if that story brings him within the Convention whereas I discern that Canada looks at the story and first asks itself whether, assuming it is true it could lead to recognition as a refugee, only then is an assessment made of which facts can be accepted. I suggest that there is a subtle difference and the former approach is likely to produce fewer successful appeals even if the supposed criteria, or standard of proof, is the same.

Fact finding - Oral & documentary

In Abdi and Gawe[20] the House of Lords upheld the decision of the Court of Appeal which overturned Mr Justice Sedley's decision. The Secretary of State for the Home Department is not required to give discovery of the facts upon which he made the decision. The special adjudicator may however, in the individual case in which he is in doubt seek particulars or call a witness to attend and produce documents.

Present developments[21] seem to spell the final death of an adversarially based approach commencing with what appears too frequently to be interrogations by the Secretary of State for the Home Department verging on the antagonistic followed by an inquiry which gives primacy to findings of fact on oral testimony presented by or on behalf of the appellant with perhaps deficient documentation from both sides and challenged by the

Home Office. A closer look for example at the Canadian process may be valuable.

Witness demeanour and its importance as a factor in assessing oral testimony has received relatively little attention or research but is becoming increasingly recognised as a possible source of bias. "Demeanour" excludes the actual content of evidence, but includes every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary of involuntary, simple or complex. The subject is crucial when considering that most claims turn upon fact and the 'credibility' of the claimant governs the outcome.

On documentary evidence the Lawyer's Committee for Human Rights in the United States writing in "Uncertain Haven" in 1991 (page 141) remarked upon a:-

> "disturbing note that [documentation] has not played a major role in the hearings ... that the greatest weight is placed on oral testimony and that members are unlikely to be swayed by documentary evidence if oral testimony is unconvincing. It may be worth while following the Canadian innovation in the Immigration Refugee Board Documentation Centre (IRBDC) which plays a significant role at each level of inquiry in providing the Country condition context for the applicant's claim on the basis that there is a belief that maximum of knowledge both of the claimant's country of origin and of pertinent law will greatly facilitate reaching fair decisions."

Harmonisation

It is to the disadvantage of the development of a valuable jurisprudence and some accord over factual backgrounds that decision makers in one country rarely reach their decisions in the light of a clear knowledge of decisions in other countries.[22] The background information against which an asylum applicant's claim is to be judged not only varies from country to country we often do not know anything of how another country's decision makers apply those facts.[23] It seems reasonable to expect that at least the interpretation of common terms be similar given that we are operating the

same Conventions even if our perception of the relevance of the facts cannot be.

The outcome of an application for asylum should not be a lottery depending on which country the asylum seeker lands up in and who the asylum Judge is. The least he can expect is that a decision will be made on the merits of his case and not the demerits of the system making the decision.

NOTES

1. Based on a paper delivered at the 8th Bi-Annual Conference of the International Bar Association, Section on General Practice, Edinburgh, 13th June Committee 14/7 available from IBA by R G Care SC (Zam) LL.M (Lond) formerly Judge of the High Court Zambia, presently Deputy Chief Adjudicator, Immigration Appellate Authority.
2. Loescher and Scanlan 1986
3. 1951 Convention Relating to the Status of Refugees UN Treaty Series Vol. 189 Page 137 and 1967 Protocol relating to the status of refugees UN Treaty Series Vol. 606 Page 267
4. OAU Convention governing the specific aspects of Refugee problems in Africa. Entry into force 20.6.74. UNTS No.14 691. "The term 'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing Public Order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality". A similarly broad refugee definition appears in the OAS Cartagena Declaration see Annual Report IASHR 1984/5 OEA/ser. L/11.66, Doc 10, Rev.1 Page 190 - 3.
5. Except in the case of group determinations. See Paragraph 44 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.
6. Although these figures were taken from comparative claims in OECD countries there is very little agreement or co-relation between precise statistics and they are cited only for comparative purposes.
7. See sub Committee E House of Lords Select Committee on the European Communities 5.4.95. The resolutions of 21-22 November have still not been published, at least in English.
8. See Philip Rudge ECRE 1992 102.
9. See also Title 6 v 1 of the European Union Treaty of Cooperation (JHA) Asylum Policy and Immigration Policy regarding Nationals of Third Countries to be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedom 1950 and the Refugee Convention of 1951. No doubt much further work is to be done prior to the inter-Governmental Conference in 1996.
10. See eg Hugo Storey 'Strangers and Citizens' Cap 4, Jim Gillespie 'Report on Immigration and Asylum Procedures and Appeal Rights in Member States of the EEC' London 1993.
11. 'Challenge to the United Nations: the Humanitarian Prospective The Centre of Global Governance LSE page 8.

12. For much of paragraph I am indebted to Hugh Miah in 'Shaping New Europe'.
13. Funded under s.26 Immigration Act 1971 by the Government and UNHCR.
14. See R v SSHD ex parte Ravichandran and others Court of Appeal 11 Oct 1995 FC3 95/5923/D
15. This could involve four separate hearings at least over a period of several years. More usually the appeal procedures finish at the Tribunal and if consistently unsuccessful, which 95% are, take from 84 days upwards. The appellant in an in-country appeal will not be able to rely on public funds from January 1996 and there are proposals to remove in-country rights of appeal in safe third country and other appeals where the Home Office considers no issue as to the United Kingdom obligation under the Convention arises.
16. Also see the criticism of the approach to assessment of a well-founded fear of in Joseph Adjei v Minister of Employment and Immigration Canada Federal Court of Appeal 27.1.89 "Despite the terminology sanctioned by the House of Lords for interpreting the British Legislation, we are nevertheless of the opinion that the phrase 'substantial grounds for thinking' is too ambiguous to be accepted in a Canadian context. It seems to go beyond the "good grounds" of Pratte J. A. and even to suggest probability. The alternative phrase "serious possibility" would raise the same problem except for the fact that it clearly remains as a possibility short of a probability ...
17. Schedule 2 Paragraph 5 3(a) Asylum and Immigration Act 1993 UK. These relate to safe first (or third, or host) countries and frivolous appeals.
18. R v SSHD ex p. Sivakumaran 1998 Imm AR p 147: see also cases referred to therein: Also see Kaja (11038)
19. 45/1990/236/302-306 Series A215
20. The Times 17.2.96. But how he knows what may not have been disclosed and which is relevant escapes the writer, but did not escape Lord Slynn in his minority judgment.
21 R v IAT and SSHD ex p. Ravichandran and others CA at p 22
11.10.95
FC3 95/5923/D
FC3 95/0644/D
22. R v SSHD ex parte Avci 1994 Imm AR p 35
23. R v SSHD ex parte Stefan 1995 Imm AR p 140

Chapter 11

THE ASYLUM LAW IN THE SLOVAK REPUBLIC

Dr. Igor Belko
Judge of the Supreme Court of Slovak Republic

Political and economic changes that occurred during the recent years in Central and Middle Europe have caused Slovakia to change from a migration-producing country to a transit land and, in last four years, even to an immigration country.

The Slovak Republic has started to deal with issues of refugees in 1991 when the Secretariat of the Slovak Government Attorney for Refugees was established.

At that time the refugee issue was codified by the Law N.498/1990 on Refugees which respected the 1951 Geneva Convention relating to the Refugee Status and the 1967 New York Protocol.

On the other hand Slovakia has never fully acceded to these international instruments by the legislative after the split of the Czech and Slovak Federal Republic in 1993. Although the Slovak Republic signed the 1951 Convention and the 1967 Protocol, the treaty itself has not been published in Collection of Laws. According to the Slovak Constitution, international "human rights" treaties must be signed, ratified and published in the Collection of Laws before they have greater legal effect than domestic law.

In respect of new conditions since separation, the Migration Office at the Ministry of Interior was established in September 1993 and the competent authorities prepared a new refugee law which was approved by the Slovak Parliament just three weeks ago. One of the goals in the preparation of this law, which has not been published yet in the Collection of Laws, was to bring this legal regulation into agreement with valid international legal standards in the field of human rights as well as into agreement with the obligations of the Slovak Republic in relation to the European Convention of Human Rights 1950, the Universal Declaration of Human Rights 1948, the International Convention on Civil and Political Rights 1966 and its

Optional Protocol., the UN Convention Against Torture, Cruel and Inhuman Treatment or Punishment from 1984 and, of course, the 1951 Geneva Convention relating to the status of Refugees and the 1967 New York Protocol.

In consultation with the local UNHCR Office in Bratislava some Recommendations of the Parliamentary Assembly of the Council of Europe on the right for asylum, refugees, de facto refugees and asylum procedure were taken into account.

The newly adopted Refugee Law and its asylum procedure is thus comparable to the practice of other European countries.

The refugee status determination is performed in two instances. The procedure commences when the alien declares his/her intention to apply for refugee status. He/she must do it at the border at the time of entry into the Slovak Republic or within the period of permitted stay on the territory of the Slovak republic or within 24 hours after crossing the border at the Police Department. Within the next 24 hours he/she has to submit to the Ministry a written application for granting refugee status.

The Ministry takes a decision under this procedure within 90 days from the day of commencement of the procedure. If the application is manifestly unfounded, the accelerated procedure will be used, when the Ministry makes a decision within 7 days.

In the case of a negative decision, the applicant may enjoy the right of appeal to the Minister of the Interior. This appeal has to be completed generally within 60 days.

The decision on granting refugee status is issued for an indefinite period and then the refugee is granted permanent residence permit.

If an alien has not been granted refugee status, the competent police authority decides on any further category of residence on the territory of the Slovak Republic pursuant to the Law on Stay of Foreigners on the Territory of Slovak Republic N.73 from 5th April 1995.

An alien who received a negative decision in both instances has the right to file a suit with the court to review the administrative procedure.

Following the relevant provisions of the Civil Procedure Code and its special part related to the Administrative Judiciary the action has to be filed before the Supreme Court of Slovak Republic within 2 months since the delivery of the final administrative decision. Although the action has no dilatory effect on the enforceability of the administrative decision, upon the request of the litigant the presiding judge of the three member panel can postpone it.

If the court comes to the conclusion that the administrative decision is in accordance with the law, it will state in the declaratory judgement that the action is dismissed. If the court comes to the conclusion that the administrative decision was not from the legal point of view correct or that the finding of the facts on which the decision was based is in contradiction with the content of document, or that the finding of the fact is insufficient for the judgment of the matter, the court will state that the contested decision is invalidated and will return the matter to the Ministry for further procedure.

There is no legal remedy against the decision of the court. The Ministry is bound by the legal opinion of the court.

The judicial review of Ministry decision has existed only from 1992. Till now the Supreme Court of Slovak Republic has decided more than 50 cases, approximately one half of all actions were dismissed from various reasons.

In Slovakia, the population of concern to UNHCR was estimated at 2306 persons at the end of October 1995:

Refugees	183
de factor refugees	1873
Asylum seekers	53
Stateless persons	184
Mandate refugees	13

The Slovak Parliament

The Slovak Government's proposal
of the Slovak Parliament's **?
of..... 1995

Refugee Act

The Slovak Parliament codified into the law the following

PART ONE

INTRODUCTORY PROVISIONS

Article 1

Purpose of the Act

(1) The purpose of the Act is to set down procedures of state authorities on the process of determination of refugee status in the Slovak Republic and to define the rights and the duties of the aliens who applied for refugee status or who were granted refugee status at the territory of the Slovak Republic.

(2) The Act covers the aliens who were granted temporary protection on the territory of the Slovak Republic.

Article 2

Definitions of terms

For the purpose of interpretation and implementation the Act.

a) the term "refugee" refers to an alien to whom the Ministry of Interior of the Slovak Republic (hereinafter referred to as "the Ministry") granted refugee status.

b) the term "de-facto refugee" refers to an alien who was granted, by the Slovak Government, temporary protection for the purpose of the protection against the war consequences in the country of his origin, or in the country of his former habitual residence,

c) the term "the country of his nationality" means every country of which he has acquired a nationality. If an alien is a stateless person, this country is the country of his former habitual residence,

d) the term "reception centre for refugees" means a special facility of the Ministry provided for the temporary stay of aliens who applied for refugee status on the territory of the Slovak Republic, for their stay during the quarantine period, and for de-facto refugees before they are located in a humanitarian center,

e) the term "quarantine measures" means a temporary isolation of those aliens, who applied for granting of refugee status on the territory of the Slovak Republic, in the reception center for the period no longer than one month in order to carry out the basic medical examinations and to prevent a possible spread of infectious disease.

f) the term "refugee center" means a special facility of the Ministry where the stay of aliens is secured for the period from the end of the quarantine until a decision on their application for refugee status is issued, and for the necessary period of time for stay of aliens granted refugee status on the territory of the Slovak Republic,

g) the term "humanitarian center" means special facilities for the stay of the de-facto refugees granted temporary protection on the territory of the Slovak Republic by the Slovak Government, is ensured.

h) the term "safe country of origin" refers to alien's country of origin which is a legal state with a democratic system, where there is no persecution on the basis of political opinion or no inhuman, degrading punishment or treatment.

I) the term "safe third country" refers to such country from which the alien arrives where to he/she can be refouled.

j) the term "manifestly unfounded application" refers to applications which manifestly do not contain facts which can give rise to the grant of refugee status are conditional for granting the refugee status.

PART TWO

PROCEDURES FOR THE DETERMINATION OF REFUGEE STATUS

Article 3

Participants in Procedure

(1) Participants in the Procedure for the determination of refugee status are aliens who have applied for recognition of refugee status on the territory of the Slovak Republic.

(2) In the case of an alien younger than 15 and an alien under a disability or whose ability for legal acts was restricted, his legal representative or guardian acts on his behalf.

Article 4

Commencement of the Procedures

(1) The procedure for the determination of refugee status on the territory of the Slovak Republic is under the competency of the Ministry. The procedure commences when the alien declares his/her intention to apply for refugee status.

(2) An alien (further only "applicant") who intends to apply for refugee status in the Slovak Republic will declare, in writing or orally, into the protocol (record) that he is applying for granting refugee status (hereinafter referred to as "the written declaration")

a) at the border at the time of entry into the Slovak Republic at the Police Department of the frontier crossing,

b) within 24 hours after crossing the border of the Slovak Republic

c) within the period of permitted stay on the territory of the Slovak Republic, at the Police Department at the place of his stay, in the case that in the country of his last permanent residence a situation originated which does not allow his return to the country, if in the country of his last residence such a situation occurs that he cannot or does not want to return.

(3) The Police Department where an alien expressed orally or in writing his intention to apply for granting refugee status, is obliged to prepare a written record of the intention and send it to the Ministry.

(4) After the written declaration of the alien that he intends to apply for the granting of refugee status, the Police Department will deposit his passport or another document which certifies his identity and will provide him with certificate of the deposit of such document.

(5) The Police Department will provide the alien, referred to in section 2, with a card, which will replace his identity paper. The card is valid for 24 hours.

(6) If it is of public interest, the transport of an alien to the reception center for refugees will be carried out under the supervision of a member of the Police Department.

(7) The Ministry, upon the request of an applicant, who applies in writing for the granting of refugee status during his short-term stay, long-term stay or permanent residence at the territory of the Slovak Republic, shall decide if he will be accommodated in the reception center for refugees.

(8) The expulsion or return of an applicant who applied for granting refugee status to the frontiers of the territory where he would be threatened by risk of torture, inhuman treatment or death penalty for reasons of race, nationality and religion or for his political opinion, is not allowed. The benefit of the present provision may not, however, be claimed by a refugee, about whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convinced by final judgement of a particularly serious crime, constitutes a danger to the community of that country.*

Article 5

(1) An alien who declared his/her intention to apply for the granting of refugee status, shall submit within 7 days to the Ministry a written application for granting of refugees status if there are no serious obstacles to do so. In his/her application the alien is obliged to state truly and completely all required data.

(2) An applicant who is illiterate will communicate his application for granting refugee status orally into a protocol (record) in the presence of a third person. If the applicant's capacity is limited and he has no legal representative and it is necessary to have a legal representative to defend the alien's rights, the Ministry will appoint him with a legal representative.*

(3) Whenever an applicant is not able to communicate in the official language of the Slovak Republic, the Ministry calls for an interpreter.

(4) If the Ministry does not decide otherwise, the applicant is obliged to remain in the reception centre until the decision on granting a refugee status becomes valid, to undergo medical examination, quarantine, taking a photograph, finger-prints and to observe the internal order.

(5) Paragraph 17, Section 2, adequately applies to an alien who applied for granting of refugee status.

Article 6

Refugee identification card

After submitting the application for granting refugee status the police department will provide the alien with a refugee identification card. Such care replaces the identify paper of the alien during the whole refugee status determination procedure.

Article 7

Granting refugee status to aliens

(1) The Ministry will grant refugee status to an alien who, in the country of his nationality, has a well-founded fear of being persecuted for reasons of race, religion, nationality, for his political opinion or membership of a particular social group and he is unable or, owing to such fear, is unwilling to go back to the country of his origin. The same applies to a stateless person who is outside the country of his former habitual residence.

(2) The Ministry can grant refugee status on the territory of the Slovak Republic to an alien also for humanitarian reasons.

Article 8

Refusal of refugee status to aliens

(1) The Ministry will deny refugee status to an alien if the applicant:

a) does not meet the conditions mentioned in Art. 4, Par. 1,
b) has committed a crime against peace, a war crime or a crime against humanity.,
c) he/she is coming from a safe third country to which he/she can be effectively readmitted or from a safe country of origin. This does not apply if an alien provides facts which would imply that despite the general situation in these countries he is in danger of persecution.
d) has been finally sentenced for committing of a serious intentional crime.
e) has been sentenced for acts against the UN Character objectives and principles.

Article 9

Cancellation of the Refugee Status

(1) Ministry will cancel the refugee status if the recognized refugees committed serious intentional crime for which he/she was finally sentenced.

(2) Ministry can cancel the refugee status if the decision on recognition of refugee status was based on false or incomplete fact or false documents.

Article 10

Accelerated Procedure

(1) If an alien, whose claim is manifestly unfounded, has applied for the granting of refugee status on the territory of the Slovak Republic, the Ministry will make a decision within 7 days from the commencement of the procedure.

(2) The decision of the Ministry according to section (1) can be appealed with a suspensive effect within 3 working days since it has been delivered.

(3) Article 6 of this law may be used adequately in the accelerated procedure.

Article 11

Suspension of the Procedure

(1) The Ministry can suspend the procedure upon the request of an applicant for serious reasons for not more than 30 days.

(2) It is possible to appeal the decision on the suspension of the procedure.

Article 12

Termination of the Procedure

(1) The Ministry shall terminate the procedure for the determination of refugee status when the applicant within the duration of the procedure.

a) cancelled his application;
b) has left voluntarily the territory of the Slovak Republic;
c) died within the duration of the procedure.

(2) Decision in cases referred to in Section 1, letter c) will not be issued.

(3) If the procedure has been legally terminated, new asylum application can be lodged only if new fundamental changes decisive for lodging of such application arisen.

Article 13

Decision on the Granting of the Refugee Status

(1) The Ministry shall take a decision in the procedure for the determination of refugee status within 90 days from the day commencement of the procedure. This time limit can be, in justifiable cases, extended by the Minister of Interior of the Slovak Republic (further only "the Minister"). The extension of the time limit shall be announced to the applicant in writing.

(2) The decision on granting refugee status on the territory of the Slovak Republic is issued for an indefinite period.

(3) The decision in the procedure for the determination of refugee status is delivered to the applicant, to his/her legal representative or to a guardian, to the Refugee Center and to the Office of the United Nations High Commissioner for Refugees, upon request.

Article 14

Cessation of the Refugee Status

The refugee status of an alien will cease if:

a) he voluntarily avails himself of protection which has been provided for him/her by the country of his nationality.
b) after the prior loss of his nationality he will re-acquire his original nationality,
c) he has acquired a new nationality and he has accepted protection of the country of his new nationality,
d) he refuses without justification to avail himself of the protection of the country of his nationality even through the circumstances on the basis of which he has been granted refugee status have ceased to exist. This shall not apply to a refugee who is able to evoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.
e) even though he does not have the citizenship he is able to return to the country of his former habitual residence because the circumstances on the basis of which he has been granted refugee status have ceased to exist. This shall not apply to a refugee who is able to evoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.
f) When he has voluntarily re-established himself in the country which he left or outside, which he remained owing to fear of persecution.

(2) If an alien's refugee status ceases according to the section (1) the Ministry will secure his departure from the territory of the Slovak Republic, while co-operating with United National High Commissioner for Refugees.

Article 15

Appeal

(1) Decision of the Ministry on the procedure for the determination of refugee status can be appealed to the authority which issued the decision within the time period of 15 days from the delivery of the decision.

(2) The Minister will take a decision with 60 days.

(3) The decision taken by the Minister can be reviewed by the Court.*

Article 16

Costs of the Procedures

(1) The Ministry shall cover expenses related to the administrative procedure, including expenses for interpretation services.

(2) The Ministry shall cover, on behalf of the applicant travel expenses related to his transport of the reception center.

(3) The Ministry shall cover costs related to the stay of the applicant for granting refugee status in the reception center and refugee center.

PART THREE

STATUS OF REFUGEES AND DE-FACTO REFUGEES

Article 17

Stay of Refugee on the Territory of the Slovak Republic

(1) Permanent residence permit will be granted to an alien who has been granted refugee status.*

(2) If an alien has been granted refugee status, the competent police authority shall decide on his further type of residence on the territory of the Slovak Republic.*

(3) The competent police authority shall issue the alien, who has been granted a refugee status, a permanent residence card marked "*UTECENEC*" (REFUGEE) containing personal data of the refugee.

(4) The holders of the cards marked as *UTECENEC* are obliged to secure that the data specified in the cards reflect reality. The holders of the cards are obliged to notify of any change of name, surname, nationality and address to the competent police authority within three working days from the day when the change occurred.

(5) The Ministry shall issued the alien who has been granted refugee status, upon his written request, an international travel document if no serious reason concerning security of the state or public order prevent so.

RIGHTS AND DUTIES OF REFUGEES

Article 18

(1) By decision on granting of refugee status in the Slovak Republic the alien acquires same status as a citizen of the Slovak Republic if special provisions do not provide otherwise.

(2) The refugee is obliged :

a) to observe law and other generally binding legal regulations valid on the territory of the Slovak Republic,
b) to notify the Ministry of all changes related to the Article 16, section (4).
(c) to notify the Ministry, without delay, of cases when his refugee card has been lost or stolen,
d) during the stay in the reception center and in the refugee center observe the internal order.

(3) The refugee and applicant can, during his stay in the reception and refugee center, take part in the Slovak language courses free of charge.

(4) Special regulations apply to the obligatory school attendance.*

Article 19

Employment of refugees on the territory of the Slovak Republic is governed by special regulations.*

Article 20

Entitlement to a social welfare for refugees on the territory of the Slovak Republic is governed by a special regulation.*

De-Facto Refugees

Article 21

(1) If an alien intends to apply for granting of the temporary protection in the Slovak Republic, he applies so in writing or orally into a protocol at the Police department located at the border crossing when entering the territory of the Slovak Republic.

(2) When an alien meets the conditions for granting temporary protection, the Police department will remove his travel document or other identification card and will provide him with a document, valid for 24 hours, which replaces his identification card. This document also serves as an identification document during his transportation to the reception center.

(3) The Police department where the alien stated orally or in writing that he applies for the temporary protection is obliged to prepare a record and send it to the Ministry.

(4) The competent police authority will provide an alien with a de-facto refugee card upon his arrival to the reception center for refugees.

Article 22

Rights and Duties of De-Facto Refugees

(1) Special regulations govern the entitlement of de-facto refugee to the social benefits.*

(2) The same special regulations for employment of refugees govern the employment of the de-facto refugee during their stay in the Slovak Republic.*

(3) de-facto refugees are obliged :

a) to remain in the reception center during the quarantine period upon arrival to the Slovak Republic.

b) to undergo medical examination, taking photograph, and finger-prints,

c) to observe the law and other generally binding legal regulations valid on the territory of the Slovak Republic.

d) to notify the Police department, without delay, of loss of the identification card of the de-facto refugee or if the identification card has been stolen

e) to observe during their stay in reception center and in the humanitarian the internal order.

PART FOUR

COMMON ,INTERIM, AND FINAL PROVISIONS

Article 23

Reception Center for Refugees

(1) Applicants who have applied for granting refugee status and de-facto refugees to whom temporary protection has been granted are for the time of the quarantine accommodated in the reception centre for refugees, unless the Ministry decides otherwise.

(2) Applicants for granting refugee status and de-facto refugees are provided free of charge accommodation, food, medical care and he is allocated pocket money during their stay in the reception centre.

Article 24

Refugee Centre

(1) At the end of the end of the quarantine period and before the decision on the determination of the refugee status the applicant is accommodated in the refugee centre, where he is provided accommodation, food, basic medical care and is allocated a pocket money.

(2) Refugees can be accommodated in the refugee centre only for necessary period of time, where he is obliged if employed or self-employed, to contribute appropriately to cover the expenses related to his stay.

(3) The Ministry can place an alien who has not been granted refugee status in the refugee centre for a necessary period of time and

a) this alien cannot be deported or refouled according to the Article 4, section 8 of this Law.
b) for the time necessary to obtain documents for his departure from the territory of the Slovak Republic.

Article 25

Humanitarian Centers

(1) The Ministry shall secure, after the completion of quarantine period, accommodation for de-facto refugees who have been granted temporary protection on the territory of the Slovak Republic.

(2) De-facto refugees are provided with free of charge accommodation, food, basic medical care and they are allocated pocket money during their stay in humanitarian centers.

(3) De-facto refugees who are employed and who are housed in a humanitarian center are obliged to contribute appropriately to cover the expenses related to their stay in the center.

(4) Ministry will allow, upon request of the de-facto refugees to be accommodated outside of the humanitarian center.

Article 26

Co-operation with the
Office of the United Nation a High Commissioner for Refugees

(1) The Ministry co-operates with the United Nations High Commissioner for Refugee during the determination of refugee status procedure.

(2) The representative of the office of the United Nations High Commissioner for Refugees can at any time participate in the determination procedure.

Article 27

Decisions on granting of the refugee status issued by the state authorities in accordance with the previous regulations are considered to be decisions taken in accordance with this Act.

Article 28

Unless this Act provides otherwise, general regulations on administrative proceedings apply in the refugee status determination procedure.*

Article 29

The Government of the Slovak Republic will issue the list of safe third countries and safe countries of origin.

Article 30

Refugee Act No. 498/1990Zb. is cancelled.

Article 31

This Act comes into force on 1 January 1996.

NOTES

1. Slovak National Council Law No. 171/1993 on Police Corps in wording of the Slovak National Council Law No 254/1994.
2. Article 41, Section 2 of the Criminal Code.
3. Articles 16 & 17 of the Law No 71/1967 on administrative proceedings (Administrative Code
4. Articles 244 to 250s Civil Court Code
5. Article 7 of the Slovak National Council Law No. 73/1995 on the stay of aliens on the territory of the Slovak Republic.
6. Slovak National Council Law No. 73/1995.
7. .Resolution of the Ministry of Education of the Slovak Socialist Republic No. 143/1984 on elementary schools in the wording of later regulations.
8. Law No. 1/1991 on employment in the wording of later regulations.
9. E.g. Law No. 100/1988 on social security in the wording of later regulations.
10. Law No. 71/1967 on administrative proceedings (Administrative Order)

Chapter 12

REFUGEE and ASYLUM PROCEDURES IN POLAND

Jacek Chlebny, Ph.D.
Judge of the Supreme Administrative Court, Poland

I must admit that I find myself in a very difficult situation in speaking, as a judge, about the refugee asylum procedures in Poland.

Polish judges have tried very few cases concerning refugee status and persons being granted asylum. I am only aware of two cases which have already been tried and of two appeals which are waiting to be listed in the Supreme Administrative Courts but I do not have any doubts that we will have more such cases in my court soon.

Nevertheless refugee problems are becoming increasingly significant for judges in Poland. We must bear in mind that judicial review of the administrative decisions in refugee and asylum cases is provided in Poland and judges have to apply the Geneva Convention and the New York Protocol. We should also remember the limits of the Supreme Administrative Court in Poland. The task of the Court is to consider only if the administrative decision is in accordance with the substantial law and procedure provided by the Code of Administrative Procedure. Such factors like the socio-political function of a decision, or moral values are not taken into consideration.

There are two separated procedures in Poland: asylum and refugee procedure. The first one is regulated only by the domestic law and the latter one by the Convention.

I cannot share with you our experiences in the "refugee cases" and therefore I would like to give you just general information about the relevant legal procedures.

I. Introduction.

After the deep socio-political changes in Central and Eastern Europe in 1989 the problems of refugees, economic emigrants, asylum seekers became identified in Poland. Previously Poland was not a target country for the asylum seekers. However it also happened in the past, that Poland was a place of shelter for foreigners escaping political, religious persecution. For example in Medieval times Poland was the country of settlement of Jews expelled from Western Europe, and from more recent history it was a group of over 15,000 political refugees from Greece who were offered shelter in Poland between 1948 and 1975.

Contemporarily, Poland is mainly a transit country or a country of forced temporary stay on the way to the countries of the European Union. Only few of the transit migrants going through Poland decide to use the refugee-asylum procedures available in Poland. However, the increase in the number of foreigners who decide to apply for awarding the status of a refugee can be observed in Poland. On the other hand it is a very characteristic feature that most of them still are looking for the opportunities to leave for one of the Western countries. Over 50% in 1993 and 40% in 1994 applications for awarding the status of a refugee ended in dismissal for a reason of a departure or disappearance of the applicant. Approximately there are less than 1000 foreigners applying for awarding the status of refugees per year.

Geographically, a map of refugees looks as follows:-

-During the years 1989 - 1991 the majority of refugees came from Arab countries and Northern - Eastern Africa.
-During the years 1992 - 1993 the majority came from Bosnia and Yugoslavia.
-Since 1994 the increase in the number of applications placed by citizens of the former Soviet Union, mainly from Armenia has been observed.and additionally nowadays (1995) the increase in the number of applicants from Asian countries (mainly from India) is noticed.

Due to the above described situation the following legal and institutional developments took place:

-**September 1991,** Polish Parliament amends the Law on Foreigners, introducing in the Article 10 the procedure concerning granting the status of a refugee.
-**October 1991,** Parliament amends the Constitution of the Republic of Poland changing the right of asylum.
-**February 1992,** the UNHCR Liaison Office is opened in Warsaw.
-**February 1993,** the Ministries of Interior of the Republic of Poland and the Federal Republic of Germany signed the Agreement which directly refers to the changes in German asylum Law and application of the agreement on re-admission signed between Poland and Schengen group countries.
-**In 1995,** a draft of the new Alien's Law is sent to Polish Parliament. It was drafted by the Ministry of Interior.

II. Current Legal situation

Together with the Geneva Convention of 1951 and a Protocol relating to the status of refugees drawn up in New York in 1967, the main act of law in Poland is an Act on Foreigners of 29 March 1963 (*Ustawa o cudzoziemcach*) published in Journals of Laws No. 7 of 1992, item 30.

The procedure is of the Administrative character and it is governed by the Code of Administrative Procedure of 1960. Generally speaking, any decisions concerning refugees are under judicial review carried out by the Supreme Administrative Court in Warsaw.

Provisions of the Law on Foreigners relating to the refugee procedure are limited to one Article and are far from being perfect. It was one of the reasons for preparing and presenting to the Parliament a draft of the new Alien's Law.

III. Asylum

According to the Article 88 of the Constitution of the Republic of Poland a foreigner may enjoy a right of asylum. Nothing more is said in the Constitution. Under Article 10 para. 1 of the Law on Foreigners, a foreigner may be granted asylum in the territory of the Republic of Poland. The decisions in matters of granting and withdrawing asylum in the territory of the Republic of Poland shall be made by the Minister of Internal Affairs in consultation with the Minister of Foreign Affairs. Nothing is said about the reasons for which asylum may be granted. A party may complain to the Supreme Administrative Court against such decision.

IV. Refugee status.

Under Article 10 para. 3 - 5 of the Law on Foreigners a foreigner may be granted the status of a refugee in the understanding of the Geneva Convention and the New York Protocol. The decisions in matters of the status of a refugee shall be made by the Minister of Internal Affairs in consultation with the Minister of Foreign Affairs. Any decision made by the Minister of Internal Affairs concerning refugee status can be appealed to the Supreme Administrative Court in Warsaw within 30 days of delivery of the decision. The Geneva Convention and the New York Protocol are applied to those foreigners who were granted the status of a refugee. The principle of non-refoulement applies to refugees also.

V. Draft of a new Alien's Law.

A proposed new law on foreigners was raised in Parliament and was debated once (first reading). It has not been debated yet. It regulates the situation of foreigners in a very comprehensive way. Chapters 5 and 6 (Articles 32 - 48) refer to the refugee status and asylum.

Main points of the draft are as follows:-

1. It uses a notion "refugee" within the meaning of the Geneva Convention and the New York protocol (Article 32). A foreigner shall be refused refugee status:-

- if he does not meet the requirements specified in the Convention and the Protocol,

- or an organ of a third state which is a safe third state has requested his extradition as a person suspected of having committed an offence (Article 40).

2. It makes clear what kind of information should be provided by a foreigner in the request for granting the status of a refugee and impose certain obligations upon a foreigner, like external bodily examination, taking of fingerprints, etc. (Articles 33, 36).

3. The Minister of Internal Affairs alone (without a consultation which the Minister of Foreign Affairs) makes decisions in matters of granting or withdrawing the status of a refugee (Article 74).

4. It provides certain benefits (accommodation, meals, medical care, etc.) for a foreigner during the period necessary to make a final decision (Article 38).

5. As a rule in any proceedings formal decisions are required (Article 34), and final decision to grant or to refuse the granting of the refugee status shall be made not later than within 3 months from the date of the institution of the proceedings (Article 39).

6. The asylum may be granted only when it helps (it furthers) an important interest of the Republic of Poland. The decisions in matters of granting and withdrawing asylum shall be made by the Minister of Internal Affairs in consultation with the Minister of Foreign Affairs (Articles 47, 75).

Chapter 13

JUDICIAL REMEDIES ON THE MERITS

J.J. de Bresson
Member of the French Conseil d'Etat

La juridiction française chargée de se prononcer sur le recours d'un demandeur d'asile dont la demande a été rejetée par l'autorité administrative, est la Commission des recours des réfugiés (CRR) instituée par une loi du 25 juillet 1952. C'est une juridiction spécialisée.

Je ne traiterai le sujet proposé qu'à travers des exemples tirés de la jurisprudence française et notamment des décisions des Sections réunies (SR) de la CRR qui est la formation plénière de cette juridiction.

Je laisse le soin à nos collègues des autres pays de bien vouloir nous informer des solutions juridictionnelles qu'ils ont adoptées. Ils sont beaucoup plus compétents que moi pour le faire.

Le juge français, que ce soit la CRR ou le Conseil d'Etat qui contrôle en cassation les décisions de la CRR, considère que la Convention de Genève pose deux conditions pour qu'un demandeur d'asile puisse être reconnu réfugié.

L'une de ces conditions repose sur les cinq motifs de persécutions qui sont énumérés par l'article 1er, A, 2 de la Convention de Genève, lesquels ne présentent pas trop de difficultés d'application, excepté peut-être la notion d'appartenance à un certain groupe social qui réserve quelques incertitudes.

L'autre condition résulte de la combinaison des paragraphes A, 2 et C, 1 de l'article 1er de la Convention de Genève et consiste à exiger que les persécutions émanent - au moins indirectement - des autorités publiques du pays dont le demandeur du statut de réfugié a la nationalité. En effet,

l'article 1er, A, 2 exige que le réfugié, en raison des craintes de persécutions qu'il éprouve, ne puisse ou ne veuille se réclamer de la protection des

autorités du pays dont il a la nationalité et l'article 1er, C, 1 stipule que la Convention de Genève cessera d'être applicable aux personnes qui se sont volontairement réclamées à nouveau de la protection du pays dont elles ont la nationalité. Cette dernière clause serait privée de son sens si l'on admettait que l'article 1er, A, 2 puisse s'appliquer à des personnes dont les craintes se rattachent exclusivement à des agissements de particuliers ou de groupes organisés que les autorités de leur pays sont dans l'incapacité de faire cesser pour une raison indépendante de leur volonté. Pourquoi, en effet, les personnes placées dans une telle situation seraient-elles privées du bénéfice de la protection, à l'étranger, des autorités de leur pays, et notamment de se faire délivrer un passeport ou des actes d'état civil ?

C'est la question de la détermination de l'agent de persécutions que je voudrais évoquer devant vous car elle a placé le juge, surtout ces dernières années, en face de situations souvent délicates à appréhender. En effet, certains Etats, tourmentés par un conflit armé, voient des zones de leur territoire échapper à leur contrôle au profit de forces rebelles ou occupantes qui établissent sur ces zones de véritables autorités de fait ; d'autres Etats sont en proie au terrorisme qui menace leur stabilité et leur unité ; d'autres Etats encore se débattent dans une situation d'anarchie ou de guerre civile. L'agent de persécutions dans ces diverses situations troublées n'est pas nécessairement l'autorité publique de l'Etat dont le demandeur d'asile est ressortissant. Dès lors, l'identification et la qualification juridique - au sens de la Convention de Genève - des auteurs de persécutions n'est pas toujours aisée.
La solution adoptée par le juge pour traiter de ces difficultés a été d'étendre la notion d'agent de persécution. Le juge a étendu la notion d'agent de persécution en admettant que des persécutions puissent émaner *indirectement* des autorités publiques (I) et en admettant que des *autorités de fait* puissent être des agents de persécutions (II).

Les persécutions peuvent indirectement émaner des autorités légales.
La CRR a, depuis ses origines, exigé que les persécutions émanent directement des autorités publiques du pays dont le demandeur est ressortissant.

> Le Conseil d'Etat par une décision du 27 mai 1983 Dankha a précisé que *"des persécutions exercées par des particuliers, organisés ou non, peuvent être retenues, dès lors qu'elles sont en fait encouragées ou tolérées volontairement par l'autorité publique, de*

sorte que l'intéressé n'est pas effectivement en mesure de se réclamer de la protection de celle-ci."

Par cette décision le Conseil d'Etat a confirmé que la persécution au sens de la Convention de Genève doit émaner de l'autorité publique mais il a admis que cette persécution puisse être indirectement imputable à l'autorité publique.

La jurisprudence de la CRR va adopter une conception large des notions d'encouragement et surtout de tolérance volontaire.

Les persécutions sont regardées comme encouragées par les autorités publiques lorsqu'elles émanent de groupes qui soutiennent le pouvoir en place (police parallèle, parti politique...). Par exemple CRR, SR, 240429, 10 novembre 1993, Thevarajah, pour un Sri Lankais persécuté par le PLOTE. En revanche ne peuvent être regardés comme encouragés par les autorités les agissements émanant d'organisations à l'encontre desquelles les autorités mènent une lutte déterminée comme le Sentier lumineux au Pérou ou les Tigres libérateurs de l'Eelam tamoul au Sri-Lanka.

La notion de tolérance volontaire est plus complexe à cerner.

Lorsque les persécutions alléguées ont été exercées par des particuliers, la CRR vérifie si le demandeur d'asile était en mesure de se réclamer de la protection des autorités publiques de son pays.

Deux situations peuvent se présenter.

Soit l'intéressé a demandé la protection des autorités, soit il n'a pas fait appel à cette protection. Dans le premier cas la CRR apprécie l'attitude des autorités et notamment les conditions dans lesquelles elles ont, le cas échéant, refusé d'accorder leur protection. Cela signifie que la CRR prend en compte :la nature de l'autorité sollicitée: commissariat de quartier, autorités politiques, autorités judiciaires... ; le nombre de démarches entreprises par l'intéressé auprès des autorités ; les conditions et les termes dans lesquelles le refus a été formulé qui peuvent par exemple être des refus explicites et répétés de protection de la part des autorités de police (CRR, SR, 176198, 18 mars 1994, Oukolova, pour une Ouzbèke d'origine russe victime de persécutions de la part de nationalistes ouzbeks). Les termes de ce refus ouvrent droit au statut quand ils excluent que des recherches soient menées

par les autorités à l'encontre des auteurs de persécutions (CRR, SR, 254554, 25 février 1995, Terahi, pour un Algérien d'origine kabyle persécuté par des islamistes en raison de ses convictions chrétiennes et CRR, SR, 256062, 1er juin 1994, Gaborova ép. Slepcik, pour une Slovaque d'origine tzigane victime de violences de la part d'activistes d'extrême droite) ;

la qualité du demandeur : son origine ethnique, ses activités politiques...

Par ce faisceau d'indices, la CRR vérifie l'aspect *systématique* du refus de protection des autorités et fait, ainsi, une appréciation globale de l'attitude des autorités à l'égard de l'intéressé (CRR, SR, 267467, 17 février 1995, Méziane, pour une avocate algérienne opposée aux autorités et victime, en raison de ses positions féministes, de multiples agressions de la part d'islamistes dont une tentative de meurtre, qui a eu les plus grandes difficultés à faire enregistrer ses plaintes et dont l'agresseur a été libéré au terme de la procédure judiciaire).

La tolérance volontaire des autorités ne sera pas admise si celles-ci ont manifesté la volonté de protéger l'intéressé ; par exemple, si le demandeur a reçu des conseils de la part de ces autorités en vue de préserver sa sécurité (CRR, SR, 240036, 19 avril 1994, Ccarhuarupay, pour un Péruvien victime de persécutions de la part du Sentier lumineux) ou si les autorités ont promis de le protéger (CRR, SR, 258992, 5 mai 1995, Benarmas, pour un Algérien, témoin de l'assassinat d'un policier par des islamistes, qui, malgré la promesse de protection qui lui a été faite s'il acceptait de témoigner, a préféré fuir après avoir reçu des menaces de mort du FIS).

Si le requérant ne s'est pas heurté à un refus systématique de protection de la part des autorités publiques ou s'il n'a pas réellement sollicité la

protection de celles-ci, la CRR ne retient pas la tolérance volontaire. (Par ex. CRR, SR, 244601, 7 juillet 1995, Rizh, pour un Egyptien de confession chrétienne alléguant être persécuté par des islamistes ou CRR, SR, 240773, 10 novembre 1993, Soto Huamani, pour un Péruvien victime des agissements du Sentier lumineux).

Il est nécessaire que le requérant ait demandé la protection des autorités pour que la CRR puisse apprécier si les autorités ont toléré volontairement ou non les persécutions émanant de particuliers. Mais, sous certaines

conditions, la CRR a admis qu'en l'absence d'une telle demande de protection aux autorités il pouvait y avoir tolérance volontaire des persécutions de leur part. Dans le cas, par exemple, où les autorités se sont délibérément abstenues d'intervenir alors qu'elles avaient connaissance des persécutions dont était victime le demandeur. La CRR dans un tel cas prend en compte l'environnement de l'intéressé qui explique les raisons pour lesquelles il n'a pas demandé de protection (âge, sexe, contexte familial et local...) et l'attitude du demandeur qui a conduit à l'abstention délibérée des autorités d'intervenir (CRR, SR, 237939, 22 juillet 1994, Elkebir, pour une jeune Algérienne qui a vécu en France et qui de retour dans son pays a été victime de persécutions de la part d'éléments islamistes pour s'être opposée par son mode de vie à leur idéologie).

De même la CRR a admis, mais sans en faire d'application positive, que dans certains cas très particuliers les démarches de l'intéressé auprès des autorités pouvaient n'avoir aucune utilité, être vaines (CRR, SR, 241313, 25 février 1994, Ameur, pour un Algérien persécuté par des islamistes pour s'être converti au christianisme). La CRR a indiqué que la vanité d'une telle demande de protection n'était pas justifiée dans le cas d'espèce. Par cette précision, qu'elle n'était pas tenue de formuler dans sa décision, la CRR a ainsi implicitement admis que les personnes converties au christianisme en Algérie peuvent être l'objet d'une certaine indifférence de la part des autorités. Cette jurisprudence vise donc des cas extrêmement particuliers.

La notion de tolérance volontaire a donc été entendue par la CRR dans son acception la plus large possible.

Je tiens à souligner que la notion de tolérance volontaire se distingue de la notion d'inefficacité de la protection des autorités ou d'incapacité des autorités à protéger leurs ressortissants. La CRR, suivant en cela la décision du Conseil d'Etat Dankha de 1983 précitée, n'admet pas qu'une insuffisance ***involontaire*** de protection puisse ouvrir droit au statut de réfugié. Cela résulte, je le rappelle, de la combinaison des paragraphes A, 2 et C, 1 du I^er^ article de la Convention de Genève (CRR, SR, 232939, 10 novembre 1993, Morales Cossio, pour un Péruvien victime des agissements du Mouvement révolutionnaire Tupac Amaru qui estimait que la protection des autorités à son égard n'était pas suffisamment efficace et CRR, 271021, 11 avril 1995, Redouane, pour un policier algérien victime de persécutions de la part d'islamistes qui estimait que les autorités n'étaient pas en mesure d'assurer sa protection).

Outre l'extension de la notion de tolérance volontaire, la CRR a également admis que des craintes de persécutions à l'égard, non d'autorités légales, mais d'autorités de fait peuvent ouvrir droit au statut de réfugié.

Les persécutions peuvent émaner d'autorités de fait

Lorsqu'un conflit éclate sur un territoire qu'il s'agisse d'une agression extérieure ou qu'il ait une origine endogène à caractère ethnique, politique, confessionnel..., ce conflit a pour conséquence de fragiliser le pouvoir en place et parfois de limiter l'étendue de sa juridiction. Les forces rebelles ou occupantes peuvent organiser la vie administrative et politique sur les territoires conquis. Ces forces qui combattent les autorités légales et qui "administrent" une partie du territoire d'un pays peuvent constituer ce qu'on appelle une autorité de fait. Ce ne sont évidemment pas des autorités légales ou publiques au sens où l'entend la Convention de Genève. Pourtant, la CRR a décidé de regarder ces autorités, qui assurent un pouvoir de fait, comme un agent de persécutions au sens de la Convention de Genève. Dès lors, des personnes placées sous la juridiction ou la dépendance de ces autorités de fait peuvent se voir reconnaître la qualité de réfugiées en alléguant des persécutions de la part des forces qui servent ces autorités de fait mais à condition qu'elles ne soient pas en mesure de se réclamer de la protection des autorités publiques de leur pays sur une autre partie du territoire de ce pays.

Le problème de la reconnaissance par la CRR de l'existence d'autorités de fait, agents de persécutions au sens de la Convention de Genève, s'est posé avec force s'agissant de la situation qui régnait dans certains Etats issus de l'ex-Yougoslavie. De nombreux demandeurs d'asile provenant de Bosnie, et même de Croatie invoquaient des persécutions de la part de milices qui sévissaient dans ces pays. Or ces milices, loin d'être tolérées ou encouragées par les autorités bosniaques et croates, étaient et sont encore en lutte armée contre elles. Ces milices ont été regardées par la CRR comme dépendantes d'autorités de fait établies sur ces territoires et qui sont en Bosnie, la République serbe autoproclamée de Bosnie et le Conseil de défense croate (HVO) et en Croatie, la République serbe autoproclamée de Krajina.

Ces autorités de fait ne couvraient pas l'intégralité du territoire de l'Etat dont le requérant était ressortissant. Se posait donc la question de l'éventualité de l'asile intérieur dans une autre partie du territoire du pays du demandeur.

La CRR a considéré qu'un ressortissant bosniaque provenant d'une région placée sous la dépendance d'une autorité de fait ne pouvait se prévaloir utilement de la protection du gouvernement bosniaque dont la juridiction ne s'étendait pas à la région placée sous la dépendance de l'autorité de fait et qui ne pouvait assurer cette protection à l'intéressé en un autre endroit du territoire national (CRR, SR, 216617, 12 février 1993, Dzebric, pour la République serbe autoproclamée de Bosnie et CRR, 227460, 2 mars 1993, Miric, pour le Conseil de défense croate (H.V.O)).

La même solution a été adoptée pour la Croatie qui à l'époque devait faire face à un afflux très important de réfugiés et qui ne pouvait, de ce fait, admettre sur son territoire toutes les personnes fuyant le territoire placé sous la dépendance de l'autorité de fait dite République serbe autoproclamée de Krajina (CRR, SR, 230571, 12 février 1993, Dujic).

La reconnaissance de la présence d'autorités de fait sur un territoire ne s'est pas limitée aux Etats issus de l'ex-Yougoslavie.

La CRR a également considéré que des autorités de fait occupaient le Sud-Liban (CRR, 247551, 14 septembre 1993, Hanna) et qu'un ressortissant libanais pouvait également avoir des craintes fondées au sens de la Convention de Genève à l'égard des forces syriennes qui occupent le Liban (CRR, 250358, 10 mai 1994, Amine El Rami). Dans ces décisions la CRR a par ailleurs vérifié la situation du requérant par rapport aux autorités libanaises.

De même, la CRR a admis la présence d'autorités de fait sur le territoire afghan (CRR, SR, 253902, 26 octobre 1994, Mme Khairzad). La situation de ce pays est complexe et évolutive ce qui rend plus délicate la désignation d'autorités de fait bien établies. Il y a une partition de ce pays entre des autorités publiques et des autorités de fait qui sont plus ou moins stables, mais cette partition est fondée sur des critères relevant de la Convention de Genève (motifs ethniques et lutte pour la conquête du pouvoir).

Cette reconnaissance de l'existence d'autorités de fait en Afghanistan a pour conséquence d'exiger du demandeur d'asile des craintes de persécutions à l'égard de toutes les autorités en présence pour se voir reconnaître la qualité de réfugié. Ces craintes peuvent être présumées en fonction de son appartenance ethnique.

Dans les exemples précédents, une autorité publique coexiste avec des autorités de fait mais il existe des pays où les autorités étatiques se sont complètement effondrées.

En Somalie par exemple, la CRR considère que la situation est tout à fait différente de celles précédemment évoquées.
Ce pays est en proie à une situation d'insécurité généralisée où n'apparaît aucun pouvoir organisé à l'exception, peut-être, du Somaliland. Il n'y a que des clans ou sous-clans qui appartiennent à la même ethnie et qui luttent les uns contre les autres. Leur organisation et l'étendue de leur influence ne permetent pas de les regarder comme des autorités de fait.

Cette situation ne permet pas, selon la CRR, de considérer que la crainte d'un ressortissant somalien à l'égard de ces bandes relève des stipulations de la Convention de Genève (CRR, SR, 229619, 26 novembre 1993, Ahmed Abdullahi, jurisprudence confirmée en 1994 et 1995).

Ce bref exposé de la prise en compte par le juge de l'évolution de la situation politique de certains pays pourrait être complété par l'évocation d'autres situations complexes au regard de l'identification des agents de persécutions comme le Libéria, l'Angola, le Zaïre...

En conclusion, je souhaiterais dire que si le travail du juge est d'adapter la Convention de Genève à des situations qui n'ont pas été envisagées par ses rédacteurs, ce travail d'interprétation trouve sa limite dans le respect des règles que pose ce texte international. Cela signifie que des populations échappent au champ d'application de la Convention. Je pense notamment aux victimes du terrorisme organisé mais également aux 25 millions de personnes victimes des catastrophes écologiques que l'on appelle des "réfugiés de l'environnement" et qui représentent un des problèmes majeurs des prochaines années.

.....

Chapter 14

THE RIGHT OF ASYLUM IN THE CZECH REPUBLIC

Dr. Jan Vyklicky
President of The Association of Judges
Czech Republic

Since November 1989, the Czech Republic has once again become a country in which people choose to settle, rather than choosing to leave it.

Some compatriots, who have been living as immigrants abroad from 1948 to 1989 because of the political situation, are returning home. The 1,497 Czechs from Volyn living in the area severely affected by the catastrophic nuclear accident at Chernobyl in the Ukraine, have transferred back to their homeland. Some compatriots from other areas in the former Soviet Union and from Romania are also working very hard to return home. After the split of the Federal Republic of Czechoslovakia on 1st January 1993, the number of Slovaks showing an interest in moving to the check Republic and in obtaining Czech citizenship, has increased rapidly.

For many foreigners however, the Czech Republic is not their final destination. For some it is merely a stopover on their way to the Western European countries. Many citizens from: Eastern European countries, from the former Soviet Union, from some Asian countries, and since the outbreak of civil war in the former Yugoslavia also war refugees, all pass through the Czech Republic, on their way to a better life.

In August 1990, when the registration of refugees began, up until 30th June 1993, 5,626 people passed through the refugee centres provided by the Ministry of the Interior, of which 4,700 people applied for refugee status. This status was given to 1,090 people, up until the date mentioned above.

The facts quoted above have led to the legal modification of the right of asylum in the former Federal Republic of Czechoslovakia and from 1st January 1993 that of the Czech Republic.

According to the terms of the Charter of Fundamental Rights and Liberties which is part of the constitutional order of the Czech Republic (article no.

112 of the Constitution of the Czech Republic), our country provides asylum for foreigners who are persecuted for exercising their political rights and liberties. Asylum can be refused those who contravene their rights and fundamental liberties.

The conduct of the State in cases concerning refugee status, the rights and duties of foreigners making an application or to whom refugee status has already been awarded in the Czech Republic, has now been amended by law number 498/1990 of the portfolio of laws concerning refugees. According to this law, refugee status is awarded to foreigners who fear being pursued in their country of citizenship, because of their race, religion, nationality, for belonging to a certain social group or because of their political opinions. Refugee status can also be awarded to a foreigner in order to protect human rights, or for humanitarian reasons.

Cases where refugee status is not given to a foreigner are enumerated in detail in the law. Examples are: when someone has committed a crime against peace, against humanity or a war crime, or another particularly serious misdemeanour committed deliberately, or when they have committed acts which seriously contradict either the aims and Principle's of the UN organisation, or the aims and principles of international agreements signed by the Czech Republic.

Every foreigner intending to apply for refugee status must communicate this in writing to the passport control authorities the moment they cross the border in the Czech Republic. They must present themselves at the prescribed refugee camp immediately, where they must, within twenty-four hours of arriving there, hand in their application for refugee status written on the official form. If the foreigner is under fifteen years of age, the request is made by their legal representative or by a guardian named in the administrative proceedings.

The decision regarding the request for refugee status is given by the Ministry of the Interior of the Czech Republic within ninety days of its submission. If the decision has not been reached within this timescale, depending on the nature of the case, it can be prolonged as required by the Ministry of the Interior. The applicant must be informed in writing of this extension. The Ministry of the Interior then decides whether to award refugee status or to refuse the request. If the request is refused, other necessary measures are adopted by the State authorities. The Ministry of the Interior of the Czech

Republic will withdraw refugee status in the cases enumerated in detail in the law, and also in cases where the refugee has committed a deliberate misdemeanour, or where he is deliberately endangering public order, and also cases where the application was based on false or incomplete information.

The proceedings for a refugee status application can be stopped by the Ministry of the Interior of the Czech Republic in cases where: the applicant withdraws his request, or when he does not co-operate adequately with the case concerning the request, or when he intentionally violates the duties set down by law, or if he dies.

The applicant or refugee can appeal against the decision made by the Ministry of the Interior in the Czech Republic within fifteen days of the date of notification. Such an appeal suspends the case. The appeal is decided by the Ministry of the Interior and the decision is reviewed by the Court based on the action of the person in question.

An applicant or refugee cannot be extradited to a country where their life or freedom would be endangered because of their race, religion, nationality, belonging to a social group or for their political convictions, except cases where the person could endanger the security of the country or where they have been convicted of a particularly serious and deliberate act of misdemeanour. However, even in these cases, before this extradition or sending back, the refugee can attempt to gain admission to another country.

Refugee status is given for five years. After this time, the most recent stay in the Czech Republic is reviewed according to law number 123/1992 of the portfolio of laws concerning the time spent by foreigners in the former Federal Republic of Czechoslovakia (from 1st January 1993 in the Czech Republic).

The refugee has equal standing with citizens of the Czech Republic, except for the right to vote and military service. He can undertake paid employment, as well as buying property, but only under certain conditions determined by the special modification which applies to foreigners.

In cases where the applicant or the refugee would like help, he can always apply to the UNHCR.

The Convention concerning the legal status of refugees accepted on 28th July 1951 in Geneva, and the Protocol regarding the legal status of refugees accepted on 31st January 1967 in New York, are part of the Czech Republic's jurisprudence. The Czech translation of the Convention, as well as the Protocol, were published in the portfolio of laws of the Czech Republic under number 208/1993. This is extremely important also in the interpretation of our internal laws, because article 10 of the Constitution of the Czech Republic says that international conventions concerning human rights and fundamental liberties, which are ratified and published, and with which the Czech Republic has agreed, must be implemented in our country, and must take priority over the law.

The civil division of the High Court in Prague is the administrative court with the jurisdiction to verify valid decisions made by the administrative department concerned with asylum. From the arbitration given by this court, it is clear that the administrative department concerned with asylum does not pay sufficient care and attention to the acquisition of the necessary information for judging the justification provided by applicants for asylum. This is the most common reason for the launch of appeals against these administrative decisions. The court expresses an opinion on the particular case only, when there is also a need to establish the legal status of the guarantee of citizens' rights and liberties in the country from which the refugee has come. It is also necessary to establish the degree to which the country's authorities recognise and respect this legal status.

At the same time, an amendment to law number 498/1990 from the portfolio of laws regarding refugees has been made. The essential import of this amendment is the creation of more stringent conditions and a considerable speeding up of the asylum application process. When this amendment was being developed the increased strictness in the asylum policy of its neighbouring country - the Federal Republic of Germany - should have been taken into consideration, as well as the creation of a wider international system of agreements on the sending back of refugees. The agreements are made between neighbouring countries at the level of the Ministries of the Interior, and they prescribe the conduct of the relevant departments in the countries involved during the sending back of the refugees. Up until now, the Czech Republic has signed agreements with Slovakia, Poland and Austria, and it is possible that more will be signed with other countries

Chapter 15

HIGHER JUDICIAL REMEDIES

Lord Cameron of Lochbroom PC
Senator of the College of Justice in Scotland.

The intervention of the Courts in the United Kingdom in matters of immigration law arises in two separate ways. In the first place, as a consequence of statutory provision: in the second place, by reason of the inherent jurisdiction of the Courts to supervise exercises of administrative discretion to ensure that they are executed in accordance with law, a process known as judicial review. This latter jurisdiction has been described as "a remedy invented by judges to restrain the excess or abuse of power". Lord Templeman in Reg. v. Home Secretary, ex p. Brind 1991 1 A.C. at 751.

Until the enactment by Parliament of the Asylum and Immigration Appeals Act 1993, the intervention of the Courts was limited to the second of the two ways. It is therefore convenient to consider this supervisory jurisdiction of the Courts first.

Judicial Review

In his Principles of Equity (3rd edn. 1776) Lord Kames wrote:

> "In Scotland, as well as in other civilized countries, the King's council was originally the only court that had power to remedy defects or redress injustice in common law. To this extraordinary power the Court of Session naturally succeeded, as being the supreme court in civil matters; for in every well-regulated society, some one court must be trusted with this power, and no court more properly than that which is supreme."

In both jurisdictions within the United Kingdom, the process whereby this supervisory jurisdiction of the supreme courts is carried out, is known as judicial review. It enables a person to challenge the validity of a decision of a body exercising public law administrative functions. This area of the supreme courts' powers has attracted much debate. In R. v. Panel on Takeovers and Mergers ex parte Datafin 1987 Q.B. 815 the Court of Appeal

in England considered that it was within its supervisory jurisdiction to give relief in relation to a decision of a body which, while not set up by statute or by executive act of government, nevertheless operated as an integral part of a regulatory system which had a public law character, was supported by public law in that public law sanctions were applied if the body's edicts were ignored and performed what might be discribed as public law functions. A very respected academic lawyer, Professor Wade has commented:

> " Familiar as we are with the principle that the remedies of administrative law are discretionary, we may wonder what the future may hold....it amounts to saying that the courts will take an extraordinarily wide discretion to create a new system for the legal regulation of non-legal activity. How the judges will navigate this uncharted sea remains to be seen. One thing that does appear already is that the enforcement of the code of rules like that of the takeover panel produces curious constitutional consequences. If the court will compel the panel to abide by its own rules and to interpret them correctly, that amounts to giving them legislative force. So here is a variety of legislation which is generated privately and entirely independently of Parliament. This is a new phenomenon in a democratic constitution where as a matter of principle all legislation must be passed by or at least authorised by Parliament. Will the court review the panel's rules for unreasonableness as they do byelaws of local authorities...To extend the law into spheres which hitherto lain beyond it is more like the rule of free discretion than the rule of law."

Lord Kames might have been echoing the same doubts in 1778 in his Historical Law Tracts (4th edn.) when he wrote:

> "Under the cognisance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the Court of Session have with reluctance been obliged to listen to complaints of various kinds that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the Court of Session, which daily increasing by new matter will probably in time produce a new maxim, That it is the province of this court to redress all wrongs for which no other remedy is provided. The utility of it is indeed perceived, but perceived too obscurely to have any steady influence on

the practice of the court; and for that reason their proceedings in such matters are far from being uniform."

That said the jurisdiction exists and has in recent years been increasingly applied to and relief granted by the courts in the United Kingdom upon principles which are recognised as common to each of the jurisdictions within the United Kingdom. In West v. Secretary for State for Scotland 1992 S.C.385 the supervisory jurisdiction of the Court of Session in Scotland was defined thus:

"1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.
2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.
3. The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review.....as a public law remedy.
By way of explanation we would emphasise these important points:
(a) Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.
(b) The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of th court. It is used here as meaning simply "power to decide", and it can be applied to acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to

understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.
(c) There is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires.
(d) Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a tri-partite relationship, between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised."

It will be noted that in the United Kingdom there are two supreme courts who exercise such supervisory jurisdiction, the High Court in England and the Court of Session in Scotland. What might be termed a "cross-border" question can arise. Thus an entrant to the United Kingdom arrived in England He was given temporary admission in 1986. He thereafter remained as an illegal entrant. He lived in rented accommodation in England. He was found in February 1991 and was detained in prison in England under certain statutory powers. However his relatives who themselves lived in England, instructed a solicitor in Scotland on his behalf and his solicitor wished to use Scottish counsel. A petition for judicial review was raised in Scotland, it being competent to do so since the Minister was in law subject to the jurisdiction of the Scottish as well as the English courts. The applicant sought reduction of the decision to detain him on the ground that it was unreasonable. The applicant, as the judge remarked, had no link with Scotland but every connection with England. It appeared however that he had been advised that he had good hope of success in Scotland and no hope of success in England in securing interim liberation pending determination of his appeal. The court in the end of the day refused the application being satisfied that the Scottish courts were a wholly inappropriate forum, and the English courts the obvious and natural forum,

for any scrutiny of either the original decision to detain the applicant, or any subsequent decision to keep him in detention rather than release him on conditions. (Sokha v. Secretary of State for the Home Department 1992 S.L.T. 1049)

Until 1993, therefore, most decisions taken within the framework of the statutory procedures governing immigration were at least potentially subject to judicial review. The potential for review was limited by two considerations. In the first place, having regard to the extent of and the limits upon the supreme court's powers to interfere with administrative discretion, there was need to have suitable grounds upon which the relief sought might be granted. In the second place, unless there were exceptional reasons or circumstances militating against the requirement, alternative remedies had first to be exhausted. But the court might intervene where because of delays in the statutory appeal procedure the applicant would suffer substantial prejudice if the matter proceeded upon its normal course by way of such procedure, for instance, if the delay to be expected in the course of the statutory appeal procedure could deprive him or her of any advantage arising from success in the appeal. Conversely relief could be refused on the ground that the order sought to remedy the excess of power by the administrative body of which complaint is made, would not secure the original object for which application to the administrative body was made.In such an event even if the appellant were to be successful, he or she would be unable to take advantage of his or her success. In such an event the court would be answering what was in effect a hypothetical question. In general the courts are reluctant to do so unless some difficult issue of general importance is raised by the appeal with which it is appropriate that the court should deal, as was said by Lord Keith of Kinkel in Lord Advocate v. Dumbarton District Council 1990 S.C.(H.L.), 1. In that case the House of Lords determined an issue of principle notwithstanding that the factual matters giving rise to the appeal had already been settled so that the whole dispute had in a sense become academic. Again, relief could be refused because the appeal for relief by way of judicial review had come too late, whether within the Court's own rules or more generally on the basis that the delay in seeking the relief has been inordinate and unjustified. But it might be that the statutory appeal process was itself incapable of providing relief in the event that the appeal through that procedure were to be successful. If that were to be the case, then the court through the medium of judicial review, would be entitled in the exercise of its supervisory powers to provide such relief as it thought appropriate to grant in the circumstances in

order to redress the wrong for which no remedy was provided otherwise. Equally the court could decide that the initial decision was so flawed by the impropriety of the procedure adopted by the decision-maker in reaching it, that the applicant had been obstructed in going to an appeal upon the merits and was entitled to direct equitable remedies.

In Zia v. Secretary of State for the Home Department 1994 S.L.T. 292 the court held that the immigration appeals adjudicator who refused an appeal against a refusal to grant entry to the United Kingdom, had failed in a duty to give reasons such as to make clear what the reasons were and what were the material considerations giving rise to the reasons. The court went on to decide that the errors were so fundamental that notwithstanding that further leave to appeal had been refused, it would have been unnecessary to proceed to seek leave to appeal in such a case and that the applicant might have had recourse to judicial review of the adjudicator 's decision without proceeding to the next appeal step under the statutory procedure for immigration appeals.

Grounds for Judicial Review

The underlying principle which pervades this area of law as in many others, for instance appeals against criminal conviction, is the test of the fairness, both legal and procedural, of the decision-making process. At the same time the court will not generally enter into the realm of the merits, that is to say the facts within the decision under challenge as such.

> "It is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question."
> Lord Hailsham L.C. in Chief Constable of the North Wales Police v. Evans 1982 W.L.R. at p.1160.

Illegality

The first substantial ground is that of illegality, since to take a decision assuming an authority which is without legal warrant, must be regarded as fundamentally flawed. So the court is entitled to examine the basis for the

authority upon which the decision-making body purports to act where this is challenged. The challenge may be on the ground that the body has acted in want of authority or, again, in excess of the authority given to it. Thus, for example, upon this principle the court was able to strike down a provision of the Immigration Rules which were promulgated as a consequence of statutory powers given to the Home Secretary by Parliament, on the ground that the provision was so unreasonable that it was beyond the powers given to the minister by Parliament in enabling him to make the Rules (Ex parte Manshoora Begum 1986 Imm A.R.385)

Furthermore the legality of the decision may require to be determined by reference to the question whether the decision-maker has properly understood the construction and meaning of the rules which he is authorised to apply. (Ex parte Singh 1986 Imm AR 352 Ex parte Kharrazi 1980 1 WLR 1396)

On the other hand matters which might be seen to go to excess of jurisdiction, for instance, determination of refugee status, are questions which have been held to be matters within the discretion of the decision-maker to determine as matters of fact and not for the court upon judicial review. (Khawaja v. Home Secretary 1984 A.C.74)

Irrationality

Here the principle has been stated thus in a leading case :

> "..a person who is entrusted with a discretion must...direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truely be said to be acting "unreasonably". Similarily, there may be something so absurd that no sensible person would ever dream that it lay within the powers of the authority." (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation 1948 1 K.B. 223 per Lord Greene M.R.)

Or again thus:

> "A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the discretion confided in

him. In particular it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarily it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it...."
(Wordie Property Company Limited v. Secretary of State for Scotland 1984 S.L.T. 345)

An interesting issue arises in regard to the Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (the European Convention of Human Rights) in the United Kingdom. The courts are not required to take cognisance of the Convention, since it is not part of the domestic law of the United Kingdom. Accordingly the provisions of the Convention do not as a matter of law form part of the considerations which the decision-maker must take into account when the exercise of a discretionary power is contemplated. But it is well settled that the Convention may be deployed for the purpose of the resolution of an ambiguity in primary or subordinate legislation and if there be such, the courts will look to the Convention in determining whether that discretion has been exercised in accordance with law. (Reg. v. Secretary of State for the Home Department, ex parte Brind 1991 1 A.C.696)

In Lord Advocate v. Scotsman Publications 1989 S.C.(H.L) 122 it was observed in the House of Lords, in determining a matter upon which Article 10 of the Convention relating to Freedom to the Right of Expression bore, that it was for Parliament to determine the restraints on freedom of expression which are necessary in a democratic society. Accordingly the courts in the United Kingdom should follow any guidance contained in a statute. If that guidance was inconsistent with the requirements of the Convention then that would be a matter for the Convention authorities and for the United Kingdom Government, and not for the courts. Nevertheless the courts in this country have had regard to its provisions in certain cases in a general sense. In Reg. v. Secretary of State for Defence, ex parte Smith (The Times Law Report 6 November 1995). Sir Thomas Bingham, M.R.,in relation to argument submitted about the irrationality of a ban upon homo-sexuals serving in the defence forces of the United Kingdom, accepted the test adumbrated by counsel appearing for the petitioners that the court

would not interfere with the exercise of an administrative decision on substantive grounds save where it was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker: but in judging whether the decision-maker had exceeded that margin of appreciation, the human rights context was important: the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.

Procedural Impropriety

It is sometimes said that any person seeking entry to the United Kingdom has a "legitimate expectation" of being dealt with fairly by the relevant authorities. It may be that this is to confuse the issue which in the end of the day revolves about concepts of fairness and natural justice.

In an Australian case (Attorney Gen for New South Wales v. Quin 170 C.L.R.1) Mr. Justice Dawson said this:

> "It is when the expectation is of a fair procedure itself that the concept of a legitimate expectation is superfluous and confusing. That is not to say that where the legitimate expectation is of an ultimate benefit the concept is not a useful one to assist in establishing whether a particular procedure is in fairness required. But whenever a duty is imposed to accord a particular procedure, it is because the circumstances make it fair to do so and for no other reason. No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well-founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted."

The manner in which this arm of the grounds for judicial review is employed by the courts will depend upon the circumstances under which the decision under challenge came to be taken and any procedural rules that fall to be applied. At base it will depend upon the principle that the decision-maker will act honestly and fairly, and where that is called for, give the party

appearing what has been termed a "real opportunity" to make his or her case and to answer any doubts harboured by the decision-maker as to the substance of the representations being made.

Where the appropriate procedural rules require it, failure to allow someone to call witnesses or to ask questions may well be challenged successfully on the grounds of fairness. The duty to act fairly on the part of the decision-maker may well be enhanced where serious consequences may be involved to the party applying for the decision. Just as where a decision-maker is acting in a judicial capacity he is under a duty to have regard to the principles of natural justice, equally so is the decision-maker acting in an administrative capacity equally bound to observe them in the duty to act fairly.

Thus in Errington v. Wilson 1995 S.L.T. 1193, where a justice refused to allow cross examination for one party of witnesses led for another in proceedings which might be regarded as administrative in character, it was observed that it was a misconception to regard the two duties as separable. Of the two, the duty to act fairly was more broadly expressed, but as the principles of natural justice were designed to achieve fairness of procedure, the concept which underlay both expressions of duty was the same.

In refugee cases the courts have made clear that it is necessary that the highest standards of procedural fairness should obtain. In Secretary of State for the Home Department v. Thirukumar 1989 Imm. AR 402, the court made reference to the opportunity to make representations and to attend interview. In the course of his judgment, Bingham L.J. said that he was persuaded "(i) that if an opportunity to make representations is to be meaningful the mind of the applicant must be directed to the considerations which will, as matters stand, defeat his application; and (ii) that if an opportunity to supplement previous answers is to be meaningful the applicant must be reminded of or (preferably) shown the answers which he gave before; this is most obviously so where ...a year has elapsed since the previous interview, but given the difficulties which can occur when questions are asked through an interpreter and the strain to which the applicant may well be subject at the time of the first interview I think it necessary even where the interval has been much shorter." In part as a response to the judicial criticisms voiced in that case, there were revisions made to the immigration rules spelling out the respective roles of the immigration officer at the port of entry and of the Secretary of State.

Further subsequent Home Office practice was to give the applicant a copy of the completed interview notes submitted to the Refugee Unit to remind him of what he said on a previous occasion.

In the normal case the burden of proof will lie with an applicant to establish the right of entry which he seeks. But in Reg. v. Home Secretary, ex parte Khawaja 1984 1 A.C.74 the House of Lords were concerned to consider the matter in relation to an order detaining the appellant pending summary removal. In dealing with the function of the courts and of House of Lords in its judicial capacity when dealing with such applications, Lord Fraser of Tullybelton said this:

> "Is their function limited to deciding whether there was evidence on which the immigration officer or other appropriate official in the Home Office could reasonably come to his decision (provided he acted fairly and not in breach of the rules of natural justice), or does it extend to deciding whether the decision was justified and in accordance with the evidence? On this question I agree...that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of an ex facie valid permission if the person is an illegal immigrant. That is a "precedent fact" which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly the duty of the court must go beyond inquiring only whether he has reasonable grounds for his belief.....With regard to the standard of proof, I agree.....that....the appropriate standard is that which applies generally in civil proceedings, namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As cases such as those in the present appeal involve grave issues of personal liberty, the degree of probability will be high."

The limitation of judicial review as a remedy is clear in that the court cannot substitute its own view of the facts and hence its own decision on the merits for that of the decision-maker, albeit it may quash the decision and at the same time remit back to the decision-maker to reconsider the matter afresh. It is also open to the court to set out the proper conclusion in law as to the facts by way of declarator and leave it open to the decision-maker to act upon the declaration. It may in quashing the decision give the decision-

maker an opportunity to reconsider the matter in the light of facts which were not available to him at the time when the original decision was taken, and which constitutes factual material, e.g. compassionate grounds, which he has previously indicated that he would have regard to in reaching his decision.

But having no place in the administrative machinery itself, the court cannot then *substitute itself for the decision-maker.*

Notwithstanding these limitations and also having regard to the delays which were inherent in the administrative appeal machinery, the use of judicial review in immigration cases in the course of the 1980s grew significantly not least because of the speedy decisions which could be looked to from recourse to judicial review. Indeed in their 1990/1991 Annual Report the Council or Tribunals expressed deep concern at the unacceptable delays in the appeal process and advocated the provision of access to the courts. The problem was illustrated by one case in which it took 12 months after the removal of five Tamils to Sri Lanka in February 1988 for an appeal to the adjudicator to be successful, compared with 3 months for their case to reach the House of Lords for judicial review of the refusal to grant entry as refugees. It was against that background and no doubt with an eye to limiting applications to the courts by way of judicial review, that the provision of direct access to the courts was designed.

The Asylum and Immigration Appeals Act 1993

Until the passing of this Act the Courts had no direct place in the appeal mechanism established under statute and secondary legislation. While the United Kingdom was among the first to ratify the Convention and Protocol relating to the Status of Refugees, and in so doing it assumed the obligations they imposed, ratification did not have the effect of embodying these obligation in domestic law. It was considered that they could be discharged by administrative action and that it was not necessary to incorporate the Convention in primary legislation. (Background Paper No. 303 House of Commons Library Research 1992) Section 2 of the 1993 Act provided that nothing the statutory rules governing immigration should

"lay down any practice which would be contrary to the Convention", thereby making clear the primacy of the Convention. Under the 1993 Act where an Immigration Appeal Tribunal has made a final determination of

an appeal, and leave to appeal has been granted by the Appeal Tribunal or if such leave has been refused, has beeb granted by the appropriate appeal court, either the Court of Appeal or in Scotland, the Court of Session, it is competent to bring a further appeal to that appropriate appeal court "on any question of law material to that determination."

The effect has thus been to interpose "an entire appellate machinery....between the Secretary of State and the court" and "regard has ...to be had to the workings of that machinery. The eye of the court shifts to ensure that the appellate process has been lawfully and properly conducted". Reg. v. Immigration Appeal Tribunal ex p. Omar Mohammed Ali 1995 Imm AR per Sedley J. In that case Mr Justice Sedley emphasised that the court was not however the appropriate forum in which to carry out an exercise in recanvassing the facts. The determination of the facts was to be carried out within the administrative machinery over which the courts were interposed between that machinery and the Secretary of State. Nevertheless in Reg. v. Immigration Appeal Tribunal, ex parte Sandralingam (The Times Law Report - judgment 11 October 1995) Lord Justice Simon Brown pointed out that while in respect of immigration appeals generally there was no doubt that in terms of the relevant statutory provision appeals had to be dealt with on the basis of the factual situation existing at the time of the original decision against which the appeal was brought, the position as regards asylum appeals was different. The appellate structure provided by the 1993 Act was to be regarded as an extension of the decision-making process. Not only did this arise as a matter of statutory construction, but when it came to policy considerations, there were clearly good reasons for adopting a different approach in asylum cases. Whereas all ordinary immigration cases were entirely specific to the individual applicant and asked simply whether he or she qualified under the rules, asylum cases were necessarily concerned at least in part with the situation prevailing in a particular foreign country. Accordingly changes in that situation between the initial refusal of asylum and the date when their appeals were finally dismissed were material to the assessment of the present level of risk.

It must be expected that in carrying out that this new appellate function the courts will have regard to the matters which would otherwise have grounded a successful challenge by way of judicial review to the decision-making process which has preceded the appeal to the court against the final

determination of the Immigration Appeal Tribunal, since application to these grounds would constitute a question of law material to that determination.

In M.v. Secretary of State for the Home Department (The Times Law Report 12 November 1995) the Court of Appeal found that the Immigration Appeal Tribunal had applied wrong principles in refusing an application for asylum in the United Kingdom by M., a citizen of Zaire, but then proceed to dismiss the appeal. The court was concerned to address the issue whether, despite a bogus claim, the applicant nevertheless came within the requirement of the Convention on the basis of making the asylum application. It was asserted before the court that by making the application to the court the applicant had proved to the requisite standard that he would be at risk of persecution if he was returned to Zaire as a failed asylum seeker. The Court approved as a correct statement of law a *dictum* of Mr. Justice Laws that it was "erroneous as a matter of law to hold that there can never be a case in which, by the very act of claiming asylum, an applicant puts himself at risk of persecution." The Court went on to observe that in a fraudulent application based on false facts in which the applicant's story was disbelieved, his credibility would be called into question, and even if he could establish he did not set up the application for asylum to create a danger of persecution, he would be likely to find it extremely difficult to demonstrate to the required standard a genuine subjective fear coming within the definition of the Convention. An unsuccessful claim for asylum might be seen within a spectrum ranging from a truthful but over-optimistic account through various degrees of inaccuracy to a totally false and fraudulent story. The making of a false claim could not act as a total barrier to reconsideration of the applicant's status as a possible refugee, but the farther along the spectrum of falsehood and bogus claims, the infinitely more difficult it would be to prove to the requisite standard the requirements of the Convention.

Furthermore in an appropriate case the court may find itself in the position of declaring that the procedure adopted was unlawful notwithstanding that it had been laid down under the authority of Parliament. In his dissenting judgment in Secretary of State for the Home Department v. Abdi 1994 Imm AR 402, (a judicial review case) Lord Justice Steyn considered that the procedure laid down to ensure the speedy determination of immigration appeals in relation to asylum seekers was so unfair as to be unlawful as it rendered ineffective fundamental rights of asylum seekers. In that case the court was concerned with the effect of various provisions of the immigration

rules whereby when a person arrived in the United Kingdom and claimed asylum, the Secretary of State was entitled to refuse his application without substantive consideration of his claim to refugee status if the minister was satisfied that the person had not arrived in the United Kingdom directly from the country in which he claimed to fear persecution, that the country from which he arrived was a safe country and that the person had had an opportunity to apply to the authorities of the latter country to seek their protection. In the event of such a certificate being issued, a special appeal procedure was then provided and it was in relation to fairness of that procedure that the decision was directed.

As part of the decision-making process it will now be possible for the courts, in appropriate cases, to substitute its own decision for that of the immigration appeal tribunal, e.g. where there being no dispute upon the facts, the sole issue is the inference to be drawn from them upon proper application of the law. More difficult matters may arise in relation to a determination of the tribunal not to remit back to an adjudicator or special adjudicator to hear further evidence. It has been questioned whether such a decision is a final determination and accordingly whether the challenge to it be by way of the statutory appeal route to the courts or by way of judicial review. (See Macdonald & Blake- Immigration Law and Practice in the United Kingdom 4th ed) It is clear that whatever may have been the motive for introducing the appellate step to the courts into the statutory scheme there has been no ouster of the courts' supervisory jurisdiction and there remains the opportunity to seek judicial review in a variety of situations. It has been suggested that this could arise where, the tribunal decisions are not final determinations, such as a decision to remit to an adjudicator, where the decision to remit is in itself flawed, where there has been a refusal of leave to appeal to the tribunal from an adjudicator or special adjudicator, where the adjudicator has made an interlocutory decision without power to do so, for instance making an order for discovery, or decisions of a special adjudicator agreeing that an asylum claim is "without foundation".(Macdonald & Blake *supra*).

Emergence of an European Immigration Policy

Commentators have pointed to the development of policies to deal with immigration and free movement within the European Union and have suggested that Europe is now a focus for immigration and that coherent policies need to be elaborated which must respect international human

rights standards and the Conventions to which the member states are party. The Court of Justice has declared that the Union is based on the rule of law. (See for instance Professor O'Keefe- "The Emergence of a European Immigration Policy" - ELR 1995 20(1) 20-36). That being so it may be expected that there will be moves within the Union to harmonise the structures whereby the individual member states regulate immigration to their country and that this will require judicial bodies to look further than their own borders in enunciating the principles upon which adminstrative decisions in relation to immigration are supervised. It may well be that the principle of proportionality and with it the need for consistency in decision-making will be developed in this area of the law to an extent which is at present unrealised in the United Kingdom. What is certain is that the significance of judicial intervention in this area of law, the remedies which should be available, the principles upon which they should be founded and which judicial bodies should be the supervisors of administrative action in this area, will be important issues in the debate concerning such developments.

.....

Chapter 16

HIGHER JUDICIAL REMEDIES FOR ASYLUM SEEKERS - AN INTERNATIONAL LEGAL PERSPECTIVE -

Thomas Spijkerboer[1]

1. The Resolution on Minimum guarantees for asylum procedures

On 20 and 21 June 1995, the Council of Ministers of Justice and Home Affairs adopted a Resolution on Minimum Guarantees for Asylum Procedures.[2] In par. 8, 16 and 17, the Resolution reqiires a right to an appeal, to a court or an independent review body, from a negative decision, with suspensive effect of such an appeal as a general rule. However, the Resolution makes these rules ineffective when it comes to manifestly unfounded applications. (Applicants from citizens from Member-States are declared not to be refugees anyhow; their applications will always be considered as manifestly unfounded (par. 20). This is remarkable in the light of, e.g., the Basque separatists' cases in Belgium, and of the effects for Dutch case law for Greek conscientious objectors.)

In such cases, appeal can be excluded if the negative decision has been affirmed before it was taken by an "independent body", that is independent from the deciding authority (par. 19). This takes away the guarantee of a judicial or semi-judicial authority, given earlier. For manifestly unfounded applications, the requirement of suspensive effect is also waived (par. 21). Suspensive effect likewise is unnecessary - as a rule, that is - for applications dealt with under third country rules (par. 22).

This in effect means that, if *the administration* finds an application manifestly unfounded, on its merits or because of a third country, procedural guarantees are lacking: That is risky. At least in The Netherlands, but I presume in other countries as well, the procedures on applications deemed manifestly unfounded are the crucial part of asylum law. If an asylum seeker passes that sieve, s/he has a very reasonable chance to be

admitted in the end. If s/he doesn't, chances of getting admission are extremely low.

In the first six months of 1995, 5.831 summary procedures in immigration cases (non-asylum included) were decided in The Netherlands which were considered as manifestly unfounded. Of these cases, 1.440 were won by the administration, and 484 by immigrants (succes rate for the administration 66,3%). In 611 cases, the applicant (i.e. the immigrant) was declared non-admissible (if we count these as lost by the applicant: succes rate for the administration 77%). In 3.296 cases, the procedure was withdrawn. This can happen either because the administration gives in, or because the asylum seeker (or his lawyer) concludes that he has no chance of winning. Let us say that in one quarter of these cases (i.e. 824), the administration gave in, and in three quarters of the cases (i.e. 2472) it was the immigrant who had second thoughts. This would mean that in total 22,4% of the applications (1308 out of 5.831) deemed manifestly unfounded turned out not to be that unfounded during a procedure before a court of law that had suspensive effect.[3]

The results of not having such procedures, or of deporting asylum seekers pending such procedures, would be disastrous, both in human and legal terms. The Resolution on minimum guarantees thus is minimal indeed, but does not contain many guarantees to speak of. However, such minima are contained in international law.

I will shortly go into the implications of Art. 13 European Convention on Human Rights (ECHR) for asylum procedures, but will devote most attention to Art. 16 Refugee Convention.

2. Effective remedy

Art. 13 ECHR lays down that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. The Court has held that everyone who has an ***arguable claim*** to that effect has the right to an effective remedy.[4] As in asylum cases Art. 3 ECHR can always be invoked, as a rule any arguable asylum claim will be an arguable claim under Art. 3 ECHR as well, and will therefore make Art. 13 applicable.[5]

Does Art. 13 require that the national authority to which the applicant can turn in order to get an effective remedy, be a tribunal or a court? Not necessarily[6], but the Court in its case law has made clear that it is normal for the authority to be a tribunal or a court.[7] Where it is not, it is required that the decision of the authority is binding upon the administration, and that the authority can deal with the substance of the claim.[8] The authority also should be sufficiently independent.[9]

To put it shortly and informally, we can summarise our conclusions up to here as follows: the national authority should either be a tribunal or court, or something very much like it.

In asylum cases it is of great importance what the scope of the judicial scrutiny is. It makes quite a difference whether the national authority can only apply a marginal test (e.g. "could a reasonable person have taken this decision"), or whether it can apply a full test (e.g. "is this decision, in the light of the facts and circumstances of the case and the rules applicable, lawful and equitable"). On this point, the Court doesn't require much. In the cases of Soering[10] and Vilvarajah[11], the Court found the UK judicial review procedure an effective remedy, not withstanding the limitations to the powers of the courts in this procedure. To my (Dutch) ears, the Wednesbury principles (the grounds for review are illegality, irrationality and procedural impropriety[12]) sound like a very limited framework. But for the Court, that is enough.[13]

In The Netherlands - I will give you some exotic information on the points I raise in this paper - the normal system in immigration cases is that after a first rejection of an application by the administration, the immigrant can request the administration for review.[14] Against a decision taken in review, an appeal can be lodged to the court.[15] Grounds for quashing a decision are that it is contrary to international law (provided that the specific rule of international law has direct effect), domestic law or general principles of proper governance (such as proper enquiry, proper motivation, a fair balance of interests, taking into account the relevant and the correct facts, equality, etc.). This is a full review.

3. Suspensive effect

In immigration cases generally, but especially in asylum cases, it is of utmost importance that a remedy, and more particularly a first remedy,

should have suspensive effect. The most wonderful remedies may be useless if, to give an example, the applicant has already been deported before a national authority has been able to review the case. The facts in Vilvarajah ironically, are a case in point: three of the five applicants were allegedly tortured upon their return to Sri Lanka. Therefore, it seems commonsense that a remedy, in order to be effective, should have suspensive effect. The Court strongly suggests this by its *obiter dictum* in Vilvarajah, where it restates that "the practice is that an asylum seeker will not be removed from the United Kingdom until procedures are complete once he has obtained leave to apply for judicial review".[16]

In The Netherlands, the system of administrative law is that remedies do not have suspensive effect. In order to get suspensive effect for a procedure, the applicant will have to ask for an interim injunction in a summary procedure.[17] A very limited number of exceptions apart, immigrants can await the result of this summary procedure in the Netherlands.[18] I would think it arguable under Dutch law that, in asylum cases, this summary procedure must have suspensive effect in any and every case if the alternative would be deportation to the country of origin. This argument is based on the fundamental character of the prohibitions of réfoulement.[19]

It is noteworthy that the Dutch Secretary of State for the Department of Justice has recently stated several times, with respect to asylum procedures, that a summary procedure which would not have suspensive effect would be contrary to Art. 13 ECHR.[20]

4. Equality provisions, with special regard to appeal to a second judicial instance

Art. 13 ECHR only gives a right to *one* instance. As in the Dutch case, this one remedy with suspensive effect may even be a summary procedure. Is there a right to appeal to a second instance, to higher remedies?

The short answer is: no. Luckily, there is a longer answer, that can be summarised as: it depends. International law contains many clauses entailing obligations of equal treatment or prohibitions of discrimination.[21] These norms can give immigrants a right to a second judicial instance if nationals have it.

I will deal here only with Article 16 par. 2 of the Refugee Convention, which reads:

> A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

In interpreting this clause, I will go into its history to some extent. I will deal *in concreto* with the implications of Art. 16 for a right to a second judicial review. But of course, Art. 16 is worded generally and may have far wider implications.

What is the meaning of 'matters pertaining to access to the courts'? Rumour has it that this provision does not apply to procedures on immigration, but only to 'normal' legal problems such as divorce, labour relations, contracts, etc. However, the draftsmen[22] do not indicate in any way that the *travaux prepatoires* had the intention to restrict the applicability of the provision in this way. Indeed, the text points the other way. 'Access to the courts' is already a general wording that does not indicate any restriction; the words 'matters pertaining to' indicates that the provision goes even beyond access to the courts in the strict sense of the term. Therefore, the term 'matters pertaining to access to the courts' must be interpreted without any restriction, and so covers the asylum procedure.

What is the category of persons covered by this provision? Grahl-Madsen categorises Art. 16 in a group of provisions that refer to refugees without any qualification.[23] This is an overstatement, as par. 2 qualifies the term refugees in the sense that a refugee only enjoys free access to the courts in the country of his habitual residence. But it is relevant to note that Art. 16 par. 2 does not require lawful residence (Art. 18, 26 and 32), nor a lawful stay (Arts. 15, 17, 19, 21, 23, 24 and 28 par. 1).

What, then, does 'habitual residence' mean? From the fact that lawfulness of the presence of the refugee is not required, we can conclude that it is not necessary that the authorities of the country concerned have consented to his presence. A residence permit is not required. Also, it is noteworthy that the drafters originally had in mind the word 'domicile', but changed this into 'habitual residence' in order to expand the scope of the provision.[24] This

indicates that, for example, it is not required that the person concerned is inscribed in the municipal register.

'Habitual residence' does require sojourn of some duration. The term was first introduced in what finally became Article 14 of the Convention. To the requirement initially used there, 'residence' (that is used in Art. 25), the term 'habitual' was added in order to exclude a refugee who "only stayed in the country for a few days", in order "to specify in the text that a refugee must be more than a temporary visitor."[25] The draftsmen on the other hand were clear in their view that, although 'habitual residence' requires more than 'residence', it requires less than 'domicile'.[26] In the end, the Conference of Plenipotentiaries opted for 'habitual residence'. "While it was true that it might lack legal precision, it should be remembered that refugees found themselves in a de facto position before they enjoyed a de jure position."[27] One can say that the term 'habitual residence' is contextual. One must find the country (other than the country of origin) with which the refugee has most bonds. Only if he has been in that country for just a few days, he has no 'habitual residence' in any country. But when he is "more than a temporary visitor" (and asylum seekers can hardly be qualified as such), he enjoys the same access to courts as nationals of that state.[28]

A question then is: what does the same treatment as nationals mean? This question is particularly hard to answer when the procedure one has in mind is not applicable to nationals, as in immigration law. During a parliamentary debate on the abolition of the second appeal in immigration cases, the Dutch Minister of Justice argued that, as in some cases Dutch people have only one instance, also refugees should be treated equal to *some* nationals.[29] This is not a sound argument. When applying the equality principle, the reference group may not be an exotic category. The general rule in Dutch administrative law is that there are two judicial tiers. Therefore, 'the same treatment as a national' means two judicial tiers for asylum seekers as well.[30]

This does not mean however that it would be impossible to adapt the asylum procedure to the specific characteristics of asylum law. When such a discrimination is made, the normal test for assessing the lawfulness of discrimination should be applied: does the measure have a legitimate aim, and is the measure proportional to that aim?[31] So, the treatment of asylum seekers may (and in some respects of course must) be special, but it may not be worse. One may look for guidance on this point to the Dzodzi decision of the European Court of Justice.[32] In interpreting the term 'the

same legal remedies as are avaiable to nationals' in Article 8 of EC Directive 64/221, the Court decided that the legal remedies must not be less favourable than those available to nationals, both in respect to the instance where an appeal can be filed, and in respect to its jurisidiction.

Dutch case law up to now has followed this line. Under the old Aliens Act, immigrants could only appeal to the Judicial Department of the Council of State if they had their habitual residence in the Netherlands for more than one year at the moment the decision concerned was taken. Problems occurred when asylum seekers who had been in The Netherlands for less than a year appealed to the Judicial Department. After changing motivations,[33] the Judicial Department opted for the following reasoning.[34] Art. 16 has direct effect. On the point of 'habitual residence' the Department says: "As the appellants have lived in this country continuously since their aforementioned entry, the aforementioned Convention provision is applicable." The term 'habitual residence' is applied in a factual way. In another case, the Department concluded that an asylum seeker had 'habitual residence' in The Netherlands, although suspensive effect had been denied to his appeal, and therefore his presence was irregular.[35]

The conclusion of the Department is that, as the one year-limitation "is not applicable to persons who, on the basis of the Act on Legal Remedies against Administrative Decisions, appeal against other decisions than" the particular kind of decisions the asylum seeker had appealed against, "the Department finds this limitation not reconcilable with Art. 16, second paragraph, of the Refugee Convention." The funny situation came about, that in order to decide whether the appeal of an asylum seeker was admissible, the Department decided whether the appellant was a refugee. If so, he could invoke Art. 16 and his appeal was admissible - and for the same reasons successful. If not, then the appeal was not admissible - and would have been of no use to the appellant anyway.

In a later decision, the Judicial Department did not find fault with the fact that for asylum seekers it is impossible to accelerate the procedure at the Judicial Department.[36] This is a justifiable position. The aim of this discrimination, one can argue, is to make possible the thorough kind of factual enquiries that the evaluation of an asylum claim requires. This legitimate aim would be frustrated by accelerated procedures, and so the discrimination is proportional.

The impossibility to appeal to a court above the court of first instance in the Aliens Act as it is since 1 January 1994 is being challenged at the Council of State presently. If the Council sticks to its case law, it will rule that this limitation is inadmissible.

Let me shortly refer to a pragmatic aspect of all this. Art. 16 Refugee Convention in this interpretation makes it impossible to give refugees less legal remedies than nationals. But can one give less legal remedies to other immigrants than asylum seekers? This would result in an extremely complicated appeal system, because there are other provisions as well. To name a few: Art. 8 of Directive 64/221 stipulates that Union citizens shall have the same administrative procedures as nationals. In the Pecastaing case,[37] the Court has given an interpretation to this provision that makes it implausible that it would not be applicable to immigration procedures. Art. 13 of Decision 1/80 of the Association Council EEC/Turkey contains a stand-still clause.[38] As a result, legal remedies may not be limited after the date of the conclusion of the Decision.[39]

In short: if we take stock of all rules of international law that limit the possibilities to restrict the procedural possibilities of immigrants, we get a colourful patchwork. A system that would try to minimise the legal remedies available to immigrants, is only just reconcilable with international law, and is unworkable.

5. Some conclusions

The ECHR guarantees asylum seekers access to a court or a court-like authority before they are deported. One procedure, minimally a summary one, must have suspensive effect in order to be effective. The Court has found the Wednesbury-principles sufficient; I would say that they are a minimum. A procedure in which the court has to take an even more marginal position than under the Wednesbury-rules would, in my opinion, not be an effective remedy.

Refugees have the right to substantively equal procedural possibilities in their asylum procedure as nationals of the state of their habitual residence. In effect, this means that asylum seekers will have access to a normal kind of procedure.

The minimalist tendencies, as exemplified by the Resolution of the Council on the asylum procedure, are understandable, but they stand in a very tense relation to the Refugee Convention. Also, a more wholehearted application of international law might be wiser from a pragmatic point of view. As my fellow-countryman Hugo de Groot, who had to flee The Netherlands as a result of persecution by other fellow-countrymen of mine, said: always with the mind, but never without the heart. Maybe, in some cases, there is no contradiction between the two.

NOTES

1. Lecturer on Migration Law at the University of Nijmegen, The Netherlands, and partcipates in the Centre for Migration Law at that University.
2. Number 5585, Annex I.
3. The absolute numbers are from Timke Visser and Ger Homburg: *Evaluatie herziene Vreemdelingenwet* [Evaluation Revised Aliens Act], Amsterdam, October 1995, Appendix 2, statistics concerning 'voorlopige voorzieningen asiel en regulier'. I have only counted the categories 'afwijzing' [injunction refused], 'toewijzing' [injunction granted], 'niet ontvankelijk' [non-admissible], 'intrekkingen' [procedure withdrawn]; and not 'overige' [diverse] (634 cases) and 'opengebroken vervallen' (259 cases), a category that is wholly unclear (and therefore untranslatable) for me.
4. Silver, A. 61, par. 113; Boyle and Rice, A. 131, par. 52. In this paper I rely heavily on Pieter Boeles: *Eerlijke immigratieprocedures in Europa* [Fair immigration procedures in Europe], Utrecht 1995. An English translation of this encyclopaedic book on international rules concerning fair immigration procedures will appear in 1996 with Kluwer Law International, Den Haag. As the translation is not yet available, I will reproduce many of his references.
5. See for the standard the Court sets for arguability Powell and Rayner, A. 172, par. 33. Boeles, following the concurring opinion of Martens in Salerno, A. 245D, par. 3.3, and the concurring opinion of Bernhardt in Abdulaziz, A.94, p. 47-48, finds this standard too high and proposes instead the test that is applicable under Art. 6 ECHR, being that the claim must be sufficiently tenable; Boeles par. 12.6 a.
6. Golder, A. 18, par. 33; Klass, A. 28, par. 67; Silver, A. 61, par. 113.
7. Boeles, par. 12.6, b.
8. Soering, A. 161, par. 120; Vilvarajah, A. 215, par. 122.
9. Silver, A. 61, par. 116.
10. 161, par. 121 and 124.
11. 215, par. 123-126.
12. See the paper of Lard Cameron of Lochbroom for this conference.
13. See however the partly dissenting opinion of Walsh, joined by Russo in Vilvarajah, A. 215. They argue that the exclusion of the competence to make a decision on the merits makes judicial review not an effective remedy.

14. Art. 6:4 Algemene Wet Bestuursrecht [General Act on Administrative Law].
15. Art. 7:1 Algemene Wet Bestuursrecht [General Act on Administrative Law] jo. Art. 33a Vreemdelingenwet [Aliens Act].
16. 215, par. 125.
17. Art. 8:81 et seq. Algemene Wet Bestuursrecht [General Act on Administrative Law]
18. Vreemdelingencirculaire 1994 [Aliens Circular 1994], A6, 4.12; see more generally A. Kuijer: *De nieuwe procedure ingevolge de Vreemdelingenwet* [The new procedure on the basis of the Aliens Act], Utrecht 1994, p. 218-220.
19. See T.P. Spijkerboer and B.P. Vermeulen: *Vluchtelingenrecht* [Refugee Law], Utrecht 1995, p. 338-341, where it is argued that, as a basic principle, the asylum procedure should exclude in absolute terms the possibility that someone who later turns out to be entitled to invoke a réfoulement-prohibition, is deported to the country of origin.
20. Hand. TK 1994-1995 [Acts of the Second Chamber 1994-1995], p. 30-1998; EK 1994-1995 [Documents of the First Chamber 1994-1995], 23 807, nr. 126b, p. 2; EK 1994-1995 [Documents of the First Chamber 1994-1995], 23 807, nr. 126d, p. 3.
21. Boeles, par. 18.11 mentions Art. 16 Refugee Convention; Art. 16 Convention on Stateless Persons; Art. 7 European Convention on Establishment; Art. 19 par. 7 European Social Charter; Art. 26 European Convention on Migrant Workers; Art. 6 ILO-Convention no. 97 (all clauses obliging to grant the same treatment as nationals); and Art. 14 ECHR; art. 14 par. 1 and Art. 26 Covenant on Civil and Political Rights; art. 5 under a Convention against Racial Discrimination (all prohibitions of discrimination).
22. Published separately as Alex Takkenberg and Christopher C. Tabhaz (eds.): *The Collected Travaux Preparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (3 Vols.), Amsterdam 1989.
23. Atle Grahl-Madsen: *The Status of Refugees in International Law, Vol. II: Asylum, Entry and Sojourn*, Leyden 1972, p. 332.
24. "(T)he aim was to give refugees the right to sue and be sued in the country of their residence whether it was the country of their domicile or not", Sir Leslie Brass (the UK representative in the Ad Hoc Committee on Statelessness and Related Problems) said, UN Doc. E/AC.32/SR.11, p. 9.
25. UN Doc. A/CONF.2/SR.7, p. 19.
26. UN Doc. A/CONF.2/SR.7, p. 19-20; UN Doc. A/CONF.2/SR. 8, p. 7-8.
27. Mr. Rocheford, the French delegate at the Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.8, p. 8.
28. Boeles argues that, even when someone is a 'refugee in orbit' and has been shuttled from one country to another since his flight and so has no 'habitual residence', the country where the person concerned is in fact should be considered as the country of 'habitual residence'. In his view, the country that, on the basis of a treaty, is responsible for the asylum application should be considered as the country of 'habitual residence' in any case. Boeles, par. 4.4, a.
29. TK 1992-1993 [Documents of the Second Chamber 1992-1993], 22 735, nr. 5, p. 20, 23; Hand. TK 1992-1993 [Acts of the Second Chamber 1992-1993], p. 89-6642 and 89-6643.
30. The same Minister of Justice later suggested in newspaper interviews to abolish the second instance for Dutchmen as well, as equally bad is equal as well.
31. On this point I follow Boeles, par. 4.11, 12.15 and 18.12.
32. Case C-297/88 and 197/89, Jur. 1990, p. I-3802.
33. See on the development of this case law R. Fernhout: *Erkenning en toelating als vluchteling in Nederland* [Recognition and admission as a refugee in The Netherlands], Deventer 1990, p. 234-237

34. Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 10 April 1979, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1979, 3; *Gids Vreemdelingenrecht (oud)* [Guide Immigration Law (old edition)], D12-18.
35. Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 24 November 1983, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1983, 5; *Administratiefrechtelijke Beslissingen* [Administrative Law Decisions] 1984, 408; *Gids Vreemdelingenrecht (oud)* [Guide Immigration Law (old edition)], D12-91
36. Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 6 March 1986, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1986, 6; *Gids Vreemdelingenrecht (oud)* [Guide Immigration Law (old edition)], D12-127. The reasoning in this decision however is irreconcilable with that in the earlier decisions, and has been criticised on this ground by Fernhout p. 239-240.
37. Court of Justice 5 March 1980, Case 98/79, Jur. 1980, p. 713. See on this Directive Boeles par. 16.7, b.
38. The stand-still clause has direct effect, Court of Justice 20 September 1990, Case C-192/89, Jur 1990, p. I-3461(Sevince)
39. The stand-still clause concerns access to labour; by restricting procedural possibilities, access to labour is restricted in effect.