The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary

Les réalités de la détermination du statut de réfugié à l'aube du nouveau millénaire : Rôle du système judiciaire

INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES

ASSOCIATION INTERNATIONALE DES JUGES AUX AFFAIRES DES RÉFUGIÉS

3rd CONFERENCE / 3e CONFÉRENCE

October 1998 octobre
Ottawa, Canada

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First Report to the International Association of Refugee Law Judges

AIMS

The Association is committed to promoting a worldwide understanding of refugee law principles, to employing fair practices in the refugee-determination process and in appeals, and to ensuring that the determination of all claims for recognition of refugee status is governed by the *Rule of Law.*

It is both as an aim and as a method that we set out to encourage individual exchanges of information and attempt to bring decision makers together to compare notes and discuss matters of common interest.

We did not set out to *train* other decision makers, but very soon we became involved in this activity in one form or another. We will have to decide the extent to which we can and should continue with this activity given the constraints of time and money.

Talk of constraints brings me to another aspect, which is the co-operation that we have enjoyed with United Nations High Commission for Refugees (UNHCR) from the earliest days. UNHCR first called us to help with training judges in Eastern and Central Europe. They contributed substantially to our conferences and the updated and revised *Guidelines on Refugee Determination Process in the EU.*

We have drafted a *Memorandum of Understanding* which, when the final wording has been agreed, will be signed at Ottawa by UNHCR and the Association. Its terms have been carefully designed to follow the Constitution and, at the same time, demonstrate a commitment to maintaining the principles of the Refugee Convention as a living instrument.

ACHIEVEMENTS

Following upon meetings held in Glasgow in 1993 between myself; Lord Clyde, then a Senator of the Outer House of the Court of Session in Scotland; and Judith Davidson, then Regional Adjudicator for Glasgow Immigration Appellate Authority, funds and support were sought to hold a conference of all those who were concerned with, and interested in, meeting to discuss issues of asylum and refugee law.

Funds were obtained from the Council of Europe, UNHCR and The Joseph Rowntree Charitable Trust. Active support and encouragement came from Lord Hope of Craighead (the then Lord President in Scotland) and a number of Judges in the UK and Eire, Continental Europe, the USA, Canada and Australia. The first conference was held in London under the Chairmanship of The Hon. Mr Justice (John) Laws, a High Court Judge in England. After the conference, it was decided to repeat the initiative, and The Netherlands offered to host the next one. They not only did so in Nijmegen, but they provided the bulk of the finance — together once again with generous support and funding from UNHCR.

The papers from both these conferences have been published and are available.

Twelve of us met in Poland on September 15, 1997, at the kind invitation of The President of the Polish Administrative Court, Professor Roman Hauser, and the Association was formally born. The Resolution passed there is attached (Appendix 1). A provisional Constitution was approved and will be adopted in its final form at Ottawa. It is attached also (Appendix 2).

We held a very well received half-day seminar in Cape Town in November last year as part of the Commonwealth Magistrates and Judges Association Triennial Conference. This event was attended by many judges and magistrates from all parts of the world — many not hitherto reached — and, in particular, judges from a number of African countries who are present at this Ottawa Conference. The Lord Chief Justice of England was there, and Lord Hope and Mr Justice Niyerenda from Malawi sat on a panel.

A number of individual members have participated in seminars in several Commonwealth of Independent States (CIS) countries and Central and Eastern European Countries at the invitation of UNHCR. There have also been highly successful visits by judges from eastern countries to colleagues and tribunals and courts in western countries to study the latter's asylum-determination and appeals systems. On the initiative of the Association, this co-operation is now being rationalized under a *Judges Support Programme*, for which funding for a pilot project has been provided under the PHARE Scheme in the EU.

In June of this year, five members were delegates to the Annual Conference of the US Immigration Judges in Anaheim, Los Angeles. Myself, Judge David Pearl, Judge Jacek Chlebny and Chairman Allan Mackey were invited by Chief Judge Michael Creppy to present papers. Together with Richard Jackson, from the Immigration and Refugee Board in Vancouver, Canada, who also presented a paper, we sat with the US contingent on the Panel, which was lively and could have run on a great deal longer than we had time for.

All these examples of international exchanges and co-operation still only reach comparatively small numbers of those who have responsibility for refugee-determination decisions — particularly at appeal levels — and, therefore, we believe that more use should be made of opportunities given by other international organizations at their own conferences to add on our own section meetings or to hold a regional conference contemporaneously. Indeed a regional conference may well be a better opportunity to reach more people at less cost than the major worldwide conference.

Administrative and Funding

The Netherlands has been most generous in funding the costs of administration of the Association, and without their help we could not have achieved even the little that we have. They provided a most efficient and helpful member of their staff — Sandra Beijer — to do most of the work. We were sorry to lose her but glad she was promoted to a new job. Sharon van Rossum has replaced her, and I hope we will meet her in Ottawa. Netherlands is willing — so we understand — to continue to assist. I want to record our gratitude to everyone in Holland who has made this possible. There is also another proposal from the Department of Continuing Education at Oxford on the table, which has some most interesting possibilities.

We still need to raise some capital, however, and have a regular income. UNHCR is willing to make some annual and regular commitment to the training aspect of our activities, which will, I hope, include our seminars and regional and international meetings and conferences.

Generous and encouraging though this is, it is not enough. I have myself tried the Ford Foundation. I am still hopeful that its Regional Offices may assist in seminar activities especially in Africa, but the Foundation will not provide other funding. The Oxford Proposal contemplates fund-raising assistance. This will be discussed further at Ottawa, but anyone who has any suggestions or ideas is invited to come forward at any time so they can be discussed.

The Future

We are hoping to hold a regional conference in France or Belgium in the spring of next year. There is also the possibility of adding our own programme at the Commonwealth Law Conference in Malaysia in September 1999.

There are opportunities to add to the next Commonwealth Magistrates and Judges and the International Bar Association Conferences to be held in September 2000 — the former in Edinburgh, and the latter in Amsterdam. Such a meeting would also provide the opportunity to hold council meeting at intervals without involving the Association in additional costs.

It is proposed that there be regional seminars in Africa next year. We have been invited to mount a seminar in Uganda, and it is only the absence of money which has prevented us from holding it earlier. We want to hold it in January 1999. There has also been a tentative invitation to hold one in Maputo, and UNHCR wants to have a careful look at maximizing coverage on the Continent next year.

I hope that a Web site for the Association will be launched at or just following Ottawa, and this will give us the opportunity to share some of the information which hitherto has tended to lie "fallow".

Particularly in the absence of substantial funds, the continuation of our activities between conferences calls for the input of substantial time by members. At present this tends to have fallen on a very few people. I propose that we appoint a number of Standing Committees to keep the work of the Association going and involve as many members as may wish to be involved. This way the fundamental and original purpose of the Association — providing a forum for an ongoing exchange of information and ideas — will be achieved. It will also enable us to be better informed of decisions which colleagues are taking in other parts of the world.

I attach (as Appendix 3) an organization chart showing how I see this idea on the ground. I envisage that each Standing Committee shall have a Convenor and a core of members who are willing to serve on it. The Committees will have the power to co-opt to it, on a permanent or ad hoc basis, others who can help in achieving their aims. Ideally each Standing Committee should be able to have a small budget to cover the essential running costs where the domestic court or tribunal with whom the members work is unable to help. The Standing Committees would be responsible to the Executive and report to them briefly as necessary, but at least every quarter in advance of a quarterly Executive (Telecom or video) meeting, which I hope will become an established practice for the future.

Conclusion

It has been a very stimulating period since we first met as a Steering Committee in 1994 in the Conference Room for the Judges in the Royal Courts of Justice in the Strand one Saturday morning. Only Italy has dropped out, which we hope will soon be remedied. We have attracted many judges from all parts of the world and made many friends. It is not only refugee law which binds us I suspect. As judicial and quasi-judicial officers — mostly but not all lawyers — we know full well that the bulwark that lies between the tyrannies, and which we are able with modern science to witness every day, is thin and can break through into our own area with sudden and cataclysmic effect. That bulwark comprises a truly strong and independent judiciary. However overworked the expression *Rule of Law* may be in the eyes of some people, it is that which sustains us.

A *Strategy Paper on Immigration and Asylum Policy* from the (Austrian) Presidency to the K4 Committee in the Council of the European Union causes some concern in its suggestion that there be "... reform of the asylum application procedure and transition from protection concepts based *only on the rule of law* to include politically oriented concepts". That is not the only astonishing suggestion, but it struck me as being of particular concern to an Association such as ours.

There have been other "alarums" (one may also call them "Grabgesang") heard on the rising tide of numbers of refugees in some quarters, which seem to suggest a return to pre-Protocol days and re-imposition of a Geographic Limitation.

On a happier note, I want to thank all those concerned with the growth of the Association and the quite formidable dedication, energy and generosity of our Canadian friends in mobilizing this Conference. It has been a singular honour and an unforgettable experience to have been in at the beginning of the Association and to have seen it grow so rapidly that we have had to turn people away from Ottawa. I am grateful for that privilege, and I look forward to a wider membership and more effective involvement for the future under the Executive and Council elected to take us forward into the next 1000 years!

Geoffrey Care
President

October 1998

APPENDIX 1

INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES

RESOLUTION #1

RESOLUTION OF ASSOCIATION

We, the undersigned:

1. Adopt the Provisional Constitution attached to this resolution as the constitution of the International Association of Refugee Law Judges, to have effect in accordance with its terms.

2. Associate ourselves as members of the Association.

3. Waiving any further or other notice than that actually received by us, constitute ourselves the first General Meeting of the Association in accordance with article 14.2 of the Constitution.

In witness of which we sign this Resolution at Warsaw, in the Republic of Poland, this 18th day of September, 1997:

Walter Stöcklin

DAVID POWELL

SEBASTIAAN DE GROOT

JACEK CHLEBNY

R.G. CARE

Dr. Joachim HENKEL

ALLAN MACKEY

Michael J. Kluppy

GÖRAN HÄGGANDER

LOWELL GOODWIN

G. de MOFFARTS

HUGO STOREY

NURJEHAN MAWANI

ILKKA PERE

Paul W. Schmidt

APPENDIX 2

International Association of Refugee Law Judges

PROVISIONAL CONSTITUTION

Whereas the rights of persons seeking protection against persecution are protected by international law and practice, in particular by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, by other international and regional instruments, and by jurisprudence;

Whereas the numbers of persons seeking protection outside of their countries of origin are significant and pose challenges that transcend national boundaries;

Whereas judges and quasi-judicial decision makers in all regions of the world have a special role to play in ensuring that persons seeking protection outside their country of origin find the 1951 Convention and its 1967 Protocol as well as other international and regional instruments applied fairly, consistently, and in accordance with the rule of law;

Whereas it would be desirable for judges and quasi-judicial decision makers in all parts of the world to associate so as to further exchanges and the dissemination of information on international law and practice as it relates to the status of refugees;

Whereas the formation of such an association would continue the work of the Steering Committee of the Judicial Conference on Asylum Law created in London, England, in December 1995;

Therefore it is agreed that an association is formed as follows:

PART 1: OBJECTS OF THE ASSOCIATION

1. Name

The name of the association is the International Association of Refugee Law Judges.

2. Objects

The International Association of Refugee Law Judges seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership in a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law.

To these ends the Association commits itself:

1. To promote within the judiciary and quasi-judicial decision makers world-wide a common understanding of refugee law principles and to encourage the use of fair practices and procedures to determine refugee law issues;

2. To foster judicial independence and to facilitate the development within national legal systems of independent institutions applying judicial principles to refugee law issues;

3. To encourage the sharing of information and databases relating to conditions in countries of origin and countries of transit of asylum seekers;

4. To encourage the development of norms of access by asylum seekers to judicial systems that are compatible with international law standards;

5. To promote or undertake research initiatives, publications and projects that further the attainment of the objects of the Association; and,

6. While keeping in mind the independence of the members of the Association in their judicial functions, to co-operate with the United Nations High Commissioner for Refugees and other agencies, both international and national, that are concerned with the promotion of an understanding of refugee law issues.

3. Interpretation

In this Constitution: "judge or quasi-judicial decision maker" includes any person who:

i) exercises judicial authority in making decisions of law or law and fact in relation to claims to refugee status, whether at first instance, on appeal or on judicial review; or

ii) not exercising judicial authority, applies legal principles in making findings of law or fact in relation to claims to refugee status;

and who enjoys, or ought to enjoy, independence from the executive arm of government in the exercise of the authority to make such decisions or findings;

"Council" means the Council created under article 5.1;

"Officer" means the occupant of a position named in article 9.1.1;

"Participant" means a person authorized to participate in the work of the Association under article 4.3; and,

words connoting one gender shall include the other gender, and the use of the singular shall include the plural and *vice versa.*

PART 2: MEMBERSHIP

4. Membership

4.1 Eligibility

4.1.1 Membership in the Association is open to any judge or quasi-judicial decision maker who:

i) supports the objects of the Association;
ii) tenders payment of any membership dues for the then current year established by, or determined in accordance with a resolution of Council; and,
iii) is approved by the Secretary as being qualified to be a member.

4.1.2 The Secretary may make such inquiries as are considered necessary to confirm that an applicant for membership is qualified to become a member.

4.1.3 A person whom the Secretary has found not to be qualified to be a member may appeal that decision to Council by written notice setting forth the grounds on which it is believed the applicant is qualified, and the matter shall be considered by Council at its next meeting.

4.2 Cessation of Membership

4.2.1 A member may resign at any time by giving notice in writing to the Secretary.

4.2.2 A member may be suspended or expelled by resolution of Council where the member is two years in arrears of payment of dues.

4.2.3 A member suspended or expelled for non-payment of dues may be reinstated by the Secretary upon payment of all arrears of dues together with payment of dues for the then current year.

4.3 Participants

Persons who are not eligible to become members of the Association but who support its objects may, with the leave of, or at the invitation of, Council, participate in the work of the Association, including participation in meetings of committees and of Council, but no such person shall be entitled to vote in any meeting or committee of the Association.

4.4 Liabilities

No member shall by reason of membership in the Association and no Participant shall by reason of their participation in the Association be liable for any debt or obligation of the Association in the absence of any express promise or agreement in writing to accept such liability.

4.5 Representation of the Association

No member, group of members, participant, committee or forum may organize any conference, seminar or other meeting using the name of the Association without the prior authorization of the President.

PART 3: GOVERNANCE

5. Council

5.1 Establishment

The Council consists of:

i) the Officers;
ii) not more than twelve members representative of the membership elected by the General Meeting;
iii) and any members appointed by Council pursuant to subparagraph 5.5 i) and ii).

5.2 Limitation

Apart from the Officers, no more than two members of Council may be elected from any one country.

5.3 Tenure

Elected members of Council, apart from the Officers, shall hold office for a term to expire at the end of the third General Meeting following their election, except that, at the first General Meeting, one third of the members of Council shall be elected for a term expiring at the end of the first General Meeting therefollowing, and one third shall be elected for a term to expire at the end of the second General Meeting therefollowing.

5.4 General Authority of Council

Subject to the authority and direction of the General Meeting, and to any power and responsibility delegated to any committee of the Association, the Council is the decision-making body of the Association and, between General Meetings, may act on behalf of the Association with respect to all matters not specifically reserved for the General Meeting in article 8.3.

5.5 Specific Authorities

Without limiting the generality of Article 5.4, and subject to the provisions of the Constitution and to any directions of the General Meeting, Council has the general supervision and control of the Association and:

i) may appoint a Conference Chairperson who shall perform such duties as may be agreed upon and shall hold office as a member of Council until the close of the subject conference;
ii) may co-opt not more than three members as members of Council;
iii) may authorize or invite any person who supports the objects of the Association to participate in the work of committees and of Council and to attend meetings thereof on a non-voting basis;
iv) determines the need for support for the operations and activities of the Association and to the hiring or procurement of services necessary to carry out the objectives of the Association;
v) appoints and prescribes the duties of and has the power to dismiss an Executive Director, provided that: the President may, between meetings of Council, and after consultation with the other Officers, appoint or dismiss an Executive Director;
vi) determines the program for each Conference and prepares rules governing the procedures for Conferences, General Meetings, and meetings of Council;
vii) determines the place or places of the principal office and other offices, if any, of the Association;

viii) may, subject to the provisions of this Constitution, procure the incorporation of the Association and approve the establishment or incorporation of national branches of the Association or may register it in such jurisdictions as it may consider expedient, provided always that the Association or branch is incorporated or registered as a not-for-profit and non-political entity;
ix) may, subject to the approval of the General Meeting, create classes of Associate Members and prescribe who may become an Associate Member and which rights and privileges, apart from the right to vote or hold office, may be conferred on the members of any such class;
x) may confer non-voting honorary membership on any person;
xi) may authorize the establishment of bank accounts of the Association and any borrowing by the Association;
xii) determines the financial year of the Association; and,
xiii) at the first meeting of Council in each year:
a) fixes the dues of individual members for the following year;
b) determines the budget for the then current year;
c) gives preliminary approval to the budget for the next following year;
d) approves the accounts of the Association for the previous year; and,
e) appoints the auditors for that year.

5.6 Meetings of Council

5.6.1 Council shall meet at least once during each year, and shall hold such other meetings as it may consider necessary.

5.6.2 The Secretary shall call meetings at such times and in such places as the President may direct, or as may be requested in writing by a majority of the members of Council.

5.6.3 The President may invite persons who are not members of Council to attend council meetings.

5.6.4 The President shall preside at meetings of Council, and, in the absence of the President, the Vice-President or, in the absence of both, another Officer or member of Council chosen by the meeting shall preside.

5.6.5 Council may meet by telephone conference or by any other means of telecommunications by which all persons participating in the meeting can hear all other participants.

5.6.6 Where circumstances prevent a meeting in person or by telecommunication, Council may meet by way of written resolution mailed or otherwise communicated to each member of Council, and each member signifying their acceptance or rejection of such resolution shall have participated in the meeting as if present in person.

5.6.7 A majority of the members of Council shall constitute a quorum.

5.7 Voting

5.7.1 Decisions of Council shall be by simple majority of those present or participating.

5.7.2 In the event of an equality of votes, the President may cast a decisive vote, otherwise the resolution is defeated.

6. Executive Director and Staff

6.1 The Executive Director appointed pursuant to Article 5.5 v) reports to the President.

6.2 Subject to resolutions of Council or of the General Meeting, the Executive Director has direction and charge of all staff of the Association and sees to the orderly administration of the activities of the Association and of Council.

6.3 The functions of the Executive Director may be exercised by an employee of the Association, or by any person or entity contracted to see to the orderly administration of the activities of the Association and of Council.

6.4 The Officers may delegate to the Executive Director or other staff any of the administrative functions of the Officers of the Association.

6.5 The Executive Director may, except where the subject matter of discussion is one in which the Executive Director has a material interest, attend and be heard at all meetings of the Executive.

7. Committees

7.1 Establishment of Committees

Council may establish Committees of the Association, including an Executive Committee having, subject to this Constitution and any direction of the General Meeting, such powers, procedures and functions as Council may determine.

7.2 Membership and Functioning of Committees

7.2.1 The members and Chairperson of any Committee of the Association, apart from the Executive Committee, shall be appointed by the President.

7.2.2 All appointments to Committees are subject to confirmation by Council at its next meeting, but pending confirmation, the Committee is, unless Council in establishing the Committee has otherwise directed, competent upon appointment to carry out the mandate assigned to it.

7.2.3 All appointments to Committees expire at the end of the second General Meeting of the Association following the appointment.

7.2.4 Members of a Committee are eligible to be reappointed.

7.3 Representation of the Association

No Committee, its Chairperson or officers or other representatives shall purport to represent the Association in any respect, or to take any action in the name of the Association, except as authorized by the General Meeting, Council, or the President.

8. General Meetings

8.1 Control
Control of the Association is vested in the General Meeting of the Association.

8.2 Voting at General Meetings
Each member may be present, participate and vote at a General Meeting.

8.3 Business of General Meetings
The following business is on the agenda of a General Meeting of the Association:

i) the election of the Officers and members of Council of the Association;
ii) the receipt of the annual accounts;
iii) the adoption, subject to the provisions of this Constitution, of such rules for the transactions of its business as it deems desirable;
iv) subject to article 12, the Amendment the Constitution; and
v) the consideration of such other business as may properly come before it.

8.4 Notice and Conduct of General Meetings

8.4.1 General Meetings shall be held in conjunction with conferences of the Association and at such other times and places as a General Meeting or Council may determine.

8.4.2 Written notice of meetings shall be mailed or otherwise communicated to all members not less than 45 days before the date of a General Meeting, and shall specify the business of the meeting; however, other business may be introduced by direction of Council or with the approval of the meeting.

8.4.3 The President, or, in the absence of the President, the Vice-President shall preside at a General Meeting.

8.5 Meetings by Resolution
Where circumstances prevent a General Meeting of the Association being held by way of the personal attendance of members, Council may authorize the holding of General Meeting by way of written resolution mailed or otherwise communicated to each member of the Association, and each member signifying his or her acceptance or rejection of such resolution shall have participated in the meeting as if present in person.

8.6 Voting

8.6.1 Each member is entitled to one vote at a General Meeting.

8.6.2 Except as otherwise provided for in this Constitution, all decisions of a General Meeting are taken by a simple majority of votes cast in person.

8.6.3 In the case of an equality of votes on any resolution requiring a simple majority, the President may cast a decisive vote, otherwise the resolution is defeated.

9. Officers

9.1 Officers

9.1.1 The Officers of the Association consist of a President, a Treasurer, a Secretary, and a Vice-President, to be elected at the General Meeting, the immediate Past-President, and the Chairperson of the next conference of the Association, and such other Officers as the Council may from time to time determine.

9.1.2 Each Officer holds office for a term beginning at the close of the General Meeting at which the Officer is elected, and ending with the close of the next General Meeting.

9.1.3 An Officer is eligible to be re-elected.

9.2 Elections

9.2.1 The Officers are elected by each General Meeting.

9.2.2 If any office is not filled at the General Meeting, the previous holder of the office shall continue in office until a successor is elected by the General Meeting or appointed by the Council pursuant to article 9.3 of this constitution.

9.3 Casual Vacancies

The Council may fill any casual vacancy among the Officers for a term to end at the close of the General Meeting at which the term of the incumbent was to have expired.

9.4 President

The President is the chief executive officer of the Association and shall have supervision over and direction of the work and staff of the Association and:

i) presides at all General Meetings and meetings of Council;
ii) oversees all activities of the Association and of its office;
iii) has direction and control of the work of the Executive Director; and,
iv) appoints the members and chairpersons of committees of the Association.

9.5 Vice-President

The Vice-President:

i) performs the duties of, and exercises the authority of, the President when the President is absent, incapacitated, or the office of President is vacant; and,
ii) performs such other duties as may be requested by the President or Council.

9.6 Secretary

The Secretary:

i) supervises applications for membership and is responsible for the membership records of the Association; and,
ii) performs such other duties as may be requested by the President or Council.

9.7 Treasurer

The Treasurer:

i) is responsible for the supervision and administration of the funds of the Association;
ii) supervises the maintenance of the books of account of the Association; and,
iii) supervises the receipt of dues and other income and authorizes disbursements in accordance with budgets approved by Council.

PART 4: GENERAL PROVISIONS

10. General Provisions

10.1 The Association shall be governed by the laws of the country in which the Council, pursuant to subparagraph 5.5 viii), incorporates or registers the Association, and any disputes as to the interpretation of this Constitution shall be determined by the courts of that country.

10.2 Any licence, contract or engagement made on behalf of the Association shall be signed by either the President or the Vice-President and one other Officer.

10.3 Any two of the President, the Vice-President, the Secretary or the Treasurer, the Executive Director or any other persons authorised by the Council may:

i) enter into contracts made in the ordinary course of the Association's operations;
ii) vote or transfer any and all shares, bonds or other securities from time to time standing to the name of the Association, and may accept on behalf of the Association transfers of shares, bonds or other securities to the Association and make, execute and deliver all instruments in writing necessary or proper for such purpose, including the appointment of powers of attorney to make or accept such transfers.

10.4 The Council may by resolution direct the manner in which, and the person or persons by whom, any particular instrument, contract or obligation of the Association shall be executed.

10.5 The Council may, by resolution, appoint trustees to hold the property of the Association in trust for the Association; may determine the terms of any such trust; and authorize any person to execute any such trust agreement on behalf of the Association.

10.6 Any notice required to be given by the Association is effective upon receipt when delivered personally, by confirmed facsimile transmission, or by confirmed electronic transmission, and, if mailed by air mail, shall be deemed to have been delivered fourteen days after posting.

10.7 Any person entitled to receive notice of a meeting may waive the requirement of notice either before or after the meeting to which the notice refers.

10.8 Indemnification and Defence of Officers

10.8.1 The Association shall indemnify and save harmless any Officer or member of Council against whom any suit, action or proceeding, whether of an administrative or legal nature, that is brought or threatened to be brought arising from any act or omission made in the

course of conducting the affairs of the Association and that was undertaken in good faith and in the reasonable belief that the act or omission was in the best interests of the Association.

10.8.2 An indemnity given pursuant to article 10.8.1 shall include the payment of any judgment and fine and interest thereon or any amount reasonably paid in settlement of any suit, action or proceeding, including the reasonable legal expenses and costs incurred in defense of any suit, action or proceeding.

10.8.3 An indemnification made under this article shall be approved, in each case:

i) by a majority vote of those members of Council who were not parties to, and not involved in, such suit, action or proceeding; or,
ii) by the membership at a General Meeting.

11. Conferences

Council is charged with organizing conferences of the Association as frequently as possible and practical, to facilitate the objects of the Association.

PART 5: AMENDMENT OR DISSOLUTION

12. Amendment of the Constitution

12.1.1 This Constitution may be amended by a resolution approved by two thirds of the votes cast on that resolution at a General Meeting.

12.1.2 A proposal to amend the Constitution shall be in the form of a written resolution and be:

i) endorsed by at least 10 members of the Association; or,
ii) recommended by Council; and,
iii) filed with the Secretary at least 90 days in advance of the General Meeting of the Association at which the proposal is to be considered.

12.1.3 Any proposed amendments to the Constitution shall be included with the notice of the General Meeting at which the proposal is to be considered.

12.1.4 An amendment to the Constitution of the Association shall take effect on a date fixed by the General Meeting or on the fulfilment of any condition or conditions determined by the General Meeting.

13. Dissolution

13.1 Method

The provisions respecting amendments of the Constitution set out in Article 12 apply *mutatis mutandis* to a proposal to dissolve the Association.

13.2 Distribution of Assets

Upon the dissolution of the Association, its net assets, if any, shall, upon the direction of a General Meeting, be given to one or more non-political and non-profit-making international judicial or legal organizations which promote international legal co-operation and the Rule of Law with respect to claims to refugee status.

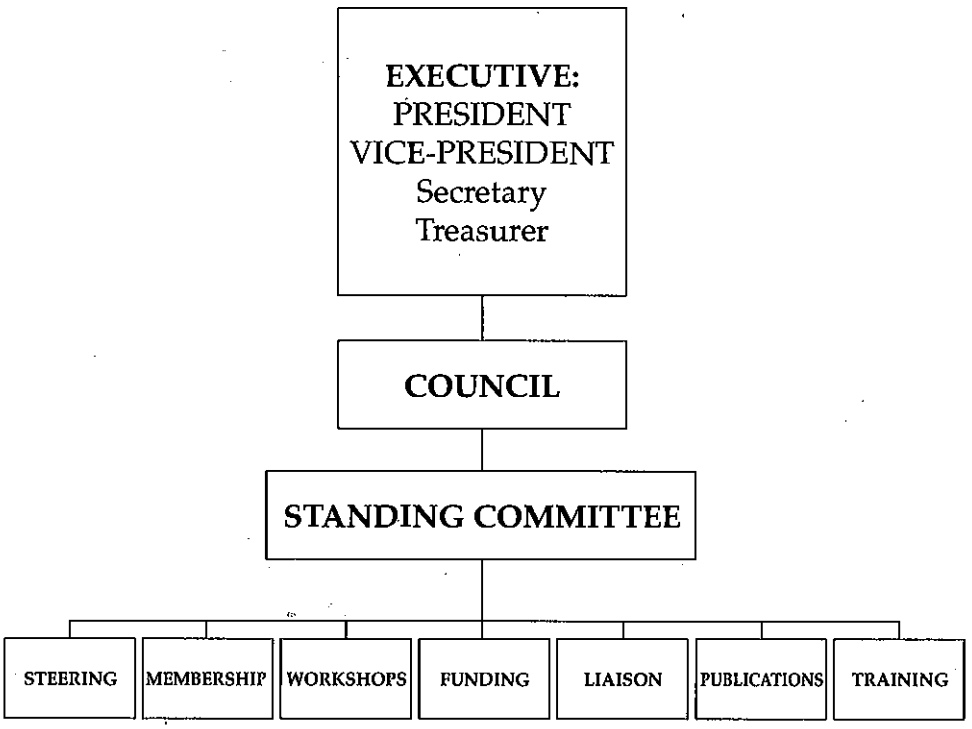
PART 6: TRANSITIONAL PROVISIONS

14. Transitional Provisions

14.1 Provisional Nature of Constitution
This Constitution is provisional and shall cease to have operation at the close of business of the next General Meeting of the Association unless a resolution to ratify this Constitution is approved, with or without amendments, by two thirds the votes cast on that resolution.

14.2 First General Meeting
Notwithstanding the notice requirements contained in article 8.4.2, the first General Meeting of the Association shall be held immediately following the adoption of this Constitution.

14.3 First Officers and Members of Council
Notwithstanding articles 5.3 and 9.1.2, the Officers and members of Council elected at the first General Meeting shall hold office until the end of the next General Meeting of the Association.


EXECUTIVE:
PRESIDENT
VICE-PRESIDENT
Secretary
Treasurer
COUNCIL
STANDING COMMITTEE
STEERING
MEMBERSHIP
WORKSHOPS
FUNDING
LIAISON
PUBLICATIONS
TRAINING
Conferences Annual and Regional
Keeping W/s afloat and publicizing development
All matters relating to raising money
Dealing with other organizations, media, etc.
Production Marketing review
All Programmes seminars, etc.
Member of Executive Member of Council Another
Member of Council Another
Member of Council +2
Executive + Member of Council
President IPP Vice-President
Secretary + Members from training and Steering
President Vice-President Members of Council (2)

Programme

Programme

Mercredi 14 octobre

18 h 30	Réception d'accueil
19 h	Allocution de *Louise Fréchette,* vice-secrétaire générale des Nations Unies
19 h 30 - 22 h	Dîner d'accueil

Jeudi 15 octobre

7 h	Ouverture des bureaux d'inscription et de renseignements
7 h - 8 h 30	Petit-déjeuner rencontre — Groupes de travail en interconférence
8 h 45 - 9 h 15	Cérémonie d'ouverture *Julius A. Isaac,* juge en chef, Cour fédérale du Canada *Nurjehan Mawani,* présidente, Commission de l'immigration et du statut de réfugié, Canada *Geoffrey Care,* président, AIJAR **Thème du matin :** L'indépendance judiciaire
9 h 15 -9 h 45	L'indépendance judiciaire : pierre angulaire de la protection des droits de la personne *Antonio Lamer,* juge en chef du Canada Président : *Lord Cameron of Lochbroom*
9 h 45 - 10 h 30	Photographie de groupe et pause
10 h 30 - 12 h	Examen des questions d'indépendance judiciaire sur la scène internationale *W. David Baragwanath,* président de la Commission du droit et juge de la Haute Cour, Nouvelle-Zélande *Göran Hakansson,* Directeur général, Commission des appels du statut de réfugié, Suède Président : *Allen Linden*
12 h - 13 h 30	Déjeuner **Thème de l'après-midi :** Droits de la personne et droits des réfugiés

Programme

Wednesday, October 14

18:30	Welcome Reception
19:00	Address by *Louise Fréchette*, Deputy Secretary-General, United Nations
19:30 - 22:00	Welcome Dinner

Thursday, October 15

7:00	Registration and information desks open
7:00 - 8:30	Working Breakfast Interconference Working Parties
8:45 - 9:15	Opening Ceremonies *Julius A. Isaac*, Chief Justice, Federal Court of Canada *Nurjehan Mawani*, Chairperson, Immigration and Refugee Board, Canada *Geoffrey Care*, President, IARLJ **Morning's Theme:** Judicial Independence
9:15 - 9:45	Judicial Independence: Cornerstone of the Protection of Human Rights *Antonio Lamer*, Chief Justice of Canada Chairman: *Lord Cameron of Lochbroom*
9:45 - 10:30	Group photograph and coffee break
10:30 - 12:00	International Survey of Judicial Independence *W. David Baragwanath*, President of the New Zealand Law Commission and Judge of the High Court, New Zealand *Göran Hakansson*, Director General, Aliens Appeal Board, Sweden Chairman: *Allen Linden*
12:00 - 13:30	Luncheon **Afternoon's Theme:** Human Rights and Refugee Law

13 h 30 - 14 h 45	Droits de la personne et Convention relative au statut des réfugiés : bilan au 50e anniversaire de la Déclaration universelle *James C. Hathaway*, professeur de droit, Université du Michigan, É.-U. d'A. *Arthur C. Helton*, Directeur, Projets sur la migration forcée, Open Society Institute, É.-U. d'A. Président : *Michel Combarnous*
14 h 45 - 15 h 15	Pause et visite des expositions
15 h 15 - 17 h	Groupe social : conjoncture favorable ou défavorable? *Deborah Anker*, Professeur, Université Harvard, É.-U. d'A. *Sir John Laws*, Cour du Banc de la Reine, Angleterre *John S. Lockhart*, juge, Cour fédérale de l'Australie *Pierre Duquette*, vice-président adjoint, Commission de l'immigration et du statut de réfugié, Canada Président : *Rodger Haines*
18 h - 19 h	Réception donnée par le juge en chef du Canada, le très honorable *Antonio Lamer*
19 h 30 - 20 h 15	Allocution prononcée par la ministre de la Citoyenneté et de l'Immigration, l'honorable *Lucienne Robillard*
20 h 15 - 23 h	Dîner donné par la ministre de la Citoyenneté et de l'Immigration, l'honorable *Lucienne Robillard*

Vendredi 16 octobre

7 h - 8 h 30	Petit-déjeuner rencontre - Groupes de travail en interconférence **Thème du matin :** Revendicateurs qui ne méritent pas de protection : intégrité du processus de détermination du statut de réfugié en jeu
9 h - 10 h 30	Détection et exclusion des auteurs d'actes criminels graves, de crimes de guerre et de crimes contre l'humanité *Bruce Einhorn*, juge de l'immigration, Bureau administratif de révision en immigration, É.-U. d'A. *Paul W. Virtue*, Avocat général, Services d'immigration et de naturalisation, É.-U. d'A. Président : *Michael John Creppy*
10 h 30 - 10 h 45	Pause et visite des expositions

13:30 - 14:45	Human Rights and the Refugee Convention: Stocktaking on the 50th Anniversary of the Universal Declaration *James C. Hathaway,* Professor of Law, University of Michigan, U.S.A. *Arthur C. Helton,* Director, Forced Migration Projects, Open Society Institute, U.S.A. Chairman: *Michel Combarnous*
14:45 - 15:15	Coffee break and viewing of exhibits
15:15 - 17:00	Particular Social Group: Window of Opportunity or a Particularly Slippery Slope? *Deborah Anker,* Professor, Harvard University, U.S.A. *Sir John Laws,* Lord Justice of Appeal, England *John S. Lockhart,* Judge, Federal Court of Australia *Pierre Duquette,* Assistant Deputy Chairperson, Immigration and Refugee Board, Canada Chairman: *Rodger Haines*
18:00 - 19:00	Reception given by the Chief Justice of Canada, the Right Honourable *Antonio Lamer*
19:30 - 20:15	Speech given by the Minister of Citizenship and Immigration, the Honourable *Lucienne Robillard*
20:15 - 23:00	Dinner given by the Minister of Citizenship and Immigration, the Honourable *Lucienne Robillard*

Friday, October 16

7:00 - 8:30	Working Breakfast Interconference Working Parties
	Morning's Theme: Undeserving Claimants: The Integrity of Refugee Determination on the Line
9:00 - 10:30	Detection and Exclusion of Perpetrators of Serious Crimes, War Crimes and Crimes against Humanity *Bruce Einhorn,* Immigration Judge, Executive Office for Immigration Review, U.S.A. *Paul W. Virtue,* General Counsel, Immigration and Naturalization Services, U.S.A. Chairman: *Michael John Creppy*
10:30 - 10:45	Coffee break and viewing of exhibits

10 h 45 - 12 h	Évaluation de la crédibilité dans le processus de détermination du statut de réfugié *Noel Ferris*, juge, Cour d'immigration, É.-U. d'A. *Audrey Macklin*, professeur, Faculté de droit, Université de Dalhousie, Canada Président : *Paul W. Schmidt*
12 h - 13 h 30	Déjeuner
	Thème de l'après-midi : Perspectives d'avenir
13 h 30 - 14 h 45	Activité simultanée : Revendication du statut de réfugié pour les enfants *Göran Hakansson*, Directeur général, Commission des appels du statut de réfugié, Suède *Ninette Kelley*, commissaire, Commission de l'immigration et du statut de réfugié, Canada Présidente : *Anne Bayefsky* Activité simultanée - Changement dans les conditions du pays *Joachim Henkel*, juge, Cour fédérale administrative, Allemagne *Marc Nadon* (Section de première instance) Cour fédérale du Canada Président : *Lord Justice Kanyaihamba*
14 h 45 - 15 h 15	Pause et visite des expositions
15 h 15 - 16 h 45	Perspective d'avenir du droit des réfugiés pour protéger les droits de la personne *Dennis McNamara*, directeur, Division de la protection internationale, HCR, Genève *Andrew Shacknove*, Université Oxford, Royaume-Uni Président : *Geoffrey Care*
16 h 45 - 17 h	Mot de la fin *Geoffrey Care*, président, AIJAR *Julius A. Isaac*, juge en chef, Cour fédérale du Canada *Nurjehan Mawani*, présidente, Commission de l'immigration et du statut de réfugié, Canada
Soirée	Dîners en l'honneur des délégués chez des hôtes canadiens

Samedi 17 octobre

9 h - 12 h	Assemblée générale - AIJAR Président : *Geoffrey Care*

10:45 - 12:00	Credibility Assessment in Refugee Determination *Noel Ferris,* Judge, Immigration Court, U.S.A. *Audrey Macklin,* Professor, Faculty of Law, Dalhousie University, Canada Chairman: *Paul W. Schmidt*
12:00 - 13:30	Luncheon **Afternoon's Theme:** The Way Ahead
13:30 - 14:45	Concurrent Session - Refugee Children *Göran Hakansson,* Director General, Aliens Appeal Board, Sweden *Ninette Kelley,* Member, Immigration and Refugee Board, Canada Chairman: *Anne Bayefsky* Concurrent Session - Change in Country Conditions *Joachim Henkel,* Judge, Supreme Administrative Court, Germany *Marc Nadon* (Trial Division) Federal Court of Canada Chairman: *Lord Justice Kanyaihamba*
14:45 - 15:15	Coffee Break and viewing of Exhibits
15:15 - 16:45	The Way Ahead: The Future of Refugee Law for the Protection of Human Rights *Dennis McNamara,* Director, Division of International Protection, UNHCR, Geneva *Andrew Shacknove,* University of Oxford, United Kingdom Chairman: *Geoffrey Care*
16:45 - 17:00	Closing Remarks *Geoffrey Care,* President, IARLJ *Julius A. Isaac,* Chief Justice, Federal Court of Canada *Nurjehan Mawani,* Chairperson, Immigration and Refugee Board, Canada
Evening	"At Home" dinners for visiting delegates at homes of Canadians hosts

Saturday, October 17

9:00 - 12:00	IARLJ General Meeting Chairman: *Geoffrey Care*

Addresses
Allocutions

Louise Fréchette

Deputy Secretary-General, United Nations

Allow me first to say how honoured I am to be among you, and to emphasize how delighted I was to be invited to speak here today, in Canada, my own country.

There are times when the simple fact of being at home assumes a particular significance. Such is the case for me today, bearing in mind the theme of this Conference. We are gathered here because for millions of human beings, scattered throughout the world, what I have called a "simple fact" has become an impossibility — staying at home is no longer an option.

Persecuted on account of their race, their religion, their opinions or their membership in a particular social or ethnic group, men, women and children are forced to flee their homes, their villages and their countries. It was in order to secure for these uprooted and vulnerable beings the exercise of human rights and fundamental freedoms that the Convention relating to the Status of Refugees was adopted in 1951. It is because you mean to promote a better understanding of the obligations created by this Convention that you belong to or support the International Association of Refugee Law Judges.

Your participation in this Conference bears witness to this fact. You, who represent some 50 countries of the world, have recognized both the international character of the problem and the need to share the heavy burdens which ensue. It is precisely from this angle that the United Nations views the question of refugees. It is why it is keen to associate itself with your work and why it strives, by myriad other means, to find international solutions to a problem which it knows can be settled only through co-operation and solidarity.

Ladies and gentlemen, we are in search of solutions, and I am sure all of us can agree that by far the best solution to refugee problems is to prevent them from arising in the first place. This means that we must attack the root causes of refugee flows — oppression and conflict.

The classic refugee, the person whom the framers of the 1951 Convention had in mind, is an individual victim of oppression — someone whose individual rights have been directly violated. But the typical refugee or displaced person of today may not fall into that category. The massive flows that we witness in so many parts of the world contain millions whose names may not even be known to the people they are fleeing from. You do not need to know someone's name in order to bomb his home or burn his village. In fact, it is probably easier to do that if you don't know his name.

That is one reason why the twin themes of human rights and conflict prevention have moved constantly up the agenda of the United Nations during the course of this decade. I say "twin themes" because our experience has made us evermore aware of the intimate connection between the two.

The vast majority of refugee flows in the world today arise from intra-state conflict. I would defy you to find me an example of intra-state conflict anywhere which is not caused, at least in part, by human rights violations — especially when you remember that human rights, as defined in the *Universal Declaration*, include the right to education and to an adequate standard of living.

Of course, there are many other sources of tension and disagreement between people of different ethnic or religious identity, economic interest or political ideology. However such tension and disagreements do not necessarily result in violent conflict. There are other ways of dealing with them. When they do lead to violent conflict, it is almost always because people cease to treat each other as human beings and to respect each other's human rights.

So, human rights violations are both direct and, through their role in generating conflict, indirect producers of refugees. In other words, if human rights has become the cross-cutting theme of all United Nations activities, that has not happened so much because of some ideological *parti pris*, or because of the triumph of one camp over another in the cold war, but for a very practical reason.

We have found in practice that human rights are not a purely internal affair, to be left to the discretion of individual Member States, but an issue of international concern. Where human rights violations occur on a large scale, you can be sure that not far behind will come problems which the international community is forced to address, often at enormous cost. Among those problems, the flow of refugees is often the most immediate and the most acute.

I do not need to tell you where to look for those problems, any more than I had to tell the Security Council a few days ago, when I presented to them the Secretary-General's report on "The Protection of Humanitarian Assistance to Refugees and Others in Conflict Situations". Just look at the conflicts which have figured on the Council's agenda in recent weeks — Afghanistan, Kosovo, the Democratic Republic of the Congo, to name but a few. These are places where the pitiless slaughter of civilians and the destruction of their means of survival have become almost banal. It follows, as night follows day, that they are places where the United Nations is struggling to provide food and shelter for thousands upon thousands of miserable, uprooted people.

Humanitarian action has been the great growth industry of our organization during the decade. Yet, I fear that we have not kept pace with the growth of human misery. We know, all too well, that humanitarian action is called on to fill the gaps where political action has failed. And we are acutely conscious of its limitations.

How can humanitarian action be an adequate response, when the killing, maiming and displacement of civilians are not incidental elements in the political or military strategy of warring parties, but its major objective? Humanitarian action is neither designed nor equipped to stop the slaughter and deliberate displacement of civilians. This is why we in the United Nations Secretariat are now working with the Security Council to rethink what is meant by "humanitarian action" in today's war zones and to reformulate our understanding of what it requires.

Increasingly, relief agencies have to confront not only violence directed against those they are trying to help, but deliberate obstruction of their work and even violence against relief workers themselves. As the number of civilian casualties rises, so too does the number of workers who have been killed, wounded, kidnapped and assaulted while trying to carry out their humanitarian task.

It is important to remember that the great majority of refugees and displaced persons in the world remain in their regions of origin. Only a small number reach the countries of Western Europe and North America, which are most heavily represented in your Association.

Understandably perhaps, governments in industrialized countries would, on the whole, prefer to keep things that way, and there are some good arguments for trying to do that.

Many refugees prefer to remain as close to their homes as possible. In some ways it may be easier to care for them in climatic or socio-economic conditions similar to those they are used to, and they may then be more easily reintegrated into their countries of origin, if and when political conditions permit their safe return.

However, we should be under no illusion that countries adjoining zones of conflict — many of which are themselves struggling with acute problems of economic development or transition — find it easier to accommodate large inflows of refugees than do wealthier or more highly developed societies. On the contrary, the latter are, in most respects, much better placed to handle the problem.

At the very least, therefore, industrialized countries are under an obligation to assist those countries that have to handle much larger refugee flows with far fewer resources. However, that assistance does not exhaust, and cannot replace, the direct legal and moral obligation of the industrialized countries to protect those refugees who seek asylum on their territory.

We all know, of course, that not all of those who seek asylum are entitled to it. There are people who are not *bona fide* refugees, but who have other reasons for wishing to enter or settle in industrialized countries and who seek to abuse the asylum system for that purpose. States have the right to fix their own immigration policies and to ensure, as best they can, that asylum procedures are not so abused as to make nonsense of those policies. However, they should also be careful to ensure that the measures they take to prevent such abuse do not cause them to default on their obligation, both moral and legal, to protect genuine refugees.

When I spoke earlier about the importance of preventing refugee problems, I did not mean that people in fear of their lives should be prevented from either leaving their countries or from reaching another country in which they could feel safe. Unhappily, that is the effect of measures taken by some states to reduce the number of asylum seekers reaching their territory, ostensibly in order to prevent abuse of the asylum system.

The United Nations High Commissioner for Refugees, and indeed the United Nations system as a whole, is deeply worried by the trend we notice in some states to move away from a law-based approach to refugee protection. It is not as though existing refugee law was static or entrenched. On the contrary it has shown, over half a century, a remarkable ability to develop and respond to new situations, and it has always contained important safeguards and exceptions to protect state interests.

Yet, increasingly, we hear calls for less-binding options to deal with new influxes. Sometimes these even extend to proposals that states should have unfettered political and administrative discretion to refuse admission, or to expel new arrivals without due process. I am sure I do not have to tell this audience that such proposals constitute a direct attack on the very essence of refugee law.

We are also deeply concerned both at continued reports of *refoulement* or expulsion of asylum seekers to dangerous situations in various regions, and at the trend in many western countries to use detention of asylum seekers as part of a standard, almost routine response. Although

this policy is presented to the public as a way of ensuring that "bogus" refugees do not abscond before they can be removed, it is clear that the real objective is often to deter misuse of the system, and even to deter *bona fide* asylum seekers from approaching the country in question at all.

That is certainly a breach of the spirit, if not the letter, of the 1951 Convention. It cannot be too often repeated that asylum seekers have the same right to liberty as anyone else. No one should be detained against his or her will without due judicial process.

A related point is that asylum seekers are entitled to due process, with review, before being removed from any state. That should not mean prolonged delays or endless legal appeals for undeserving cases. There should be a trade-off between the fairness and transparency of the determination process and the speed and efficacy with which those found not to be entitled to protection are actually removed.

Speaking here in Canada, and as a Canadian, I am glad to be able to add that Canada gives us less concern on these points than do many other countries. Indeed, the Canadian refugee-determination system is seen by the United Nations High Commissioner for Refugees — and, I understand, by officials of your Association — as a model of fairness and thoroughness.

What is clear in any case is that all of you, as judges and other quasi-judicial decision makers called upon to operate the immigration and asylum laws of your respective countries, have a very grave responsibility. There can be few tasks more challenging, or more important, than that of deciding whether an individual asylum seeker is a *bona fide* refugee, entitled to protection or not.

I note with satisfaction that you take this responsibility very seriously and that you have understood the usefulness of pooling your knowledge and experience. It is why, before concluding, I should like to reiterate how much the United Nations values your efforts. Aware of the limitations of large international institutions and the difficulties which concerted action by the international community often entails, the United Nations welcomes the constantly growing number of voluntary associations, such as yours, where the specialized knowledge and skills of eminent experts go hand in hand with the will to make a difference.

It can only applaud those individuals who, like you, have joined forces in order to serve more effectively and to seek together answers to the major questions of our time. Like the United Nations, your vocation is to promote progress in developing international co-operation, and you, undeniably, have the power to do so.

You have the power to share information, disseminate better practices and publicize the most innovative initiatives adopted in your field of expertise. The power is yours to help your respective countries determine the status of refugee candidates in the fairest and most efficient way possible. Above all, you have the power to improve the lot of individuals in distress whom you refuse to see deprived of their dignity and their fundamental rights and their last remaining possessions.

On behalf of all those to whom you devote your time, your energy and your talent, thank you from the bottom of our hearts. I thank you for your attention and wish you every success in your work.

Louise Fréchette

Vice-secrétaire générale aux Nations Unies

Permettez-moi d'abord de vous dire combien je suis honorée d'être des vôtres. Il m'importe aussi de souligner le plaisir que vous me faites en m'invitant à prendre la parole ici, au Canada, dans ce pays qui est le mien.

Il est des occasions où le simple fait d'être chez soi prend une signification toute particulière : c'est le cas pour moi aujourd'hui compte tenu du sujet de cette conférence. Car si nous sommes réunis ici, c'est parce que pour des millions d'êtres humains, un peu partout dans le monde, ce que j'ai appelé un « simple fait » est devenu une impossibilité : rester chez soi n'est plus envisageable.

Persécutés en raison de leur race, de leur religion, de leurs opinions ou de leur appartenance à un groupe ethnique ou social, des hommes, des femmes et des enfants sont contraints de fuir leur domicile, leur village, leur pays. C'est pour que l'exercice des droits humains et des libertés fondamentales puisse être assuré à ces êtres déracinés et vulnérables que la Convention relative au statut des réfugiés a été adoptée en 1951. Et c'est parce que vous entendez favoriser une meilleure compréhension des obligations créées par cette convention que vous appartenez à l'Association internationale des juges aux affaires des réfugiés ou que vous la soutenez.

Votre participation à cette conférence l'atteste : vous qui représentez quelque 50 pays du monde, vous avez reconnu à la fois le caractère international du problème et la nécessité de partager les lourdes charges qui en découlent. C'est exactement sous cet angle que l'Organisation des Nations Unies envisage la question des réfugiés. C'est pourquoi elle tient à s'associer à vos travaux et qu'elle s'efforce, par bien d'autres moyens, de trouver des solutions internationales à un problème qu'elle sait ne pouvoir être réglé que grâce à la coopération. À la coopération et à la solidarité.

Mesdames et messieurs, nous sommes à la recherche de solutions. Je suis sûre que nous serons tous et toutes d'accord pour dire que la meilleure solution, et de loin, c'est d'empêcher qu'il ne se crée des problèmes de réfugiés. Autrement dit, nous devons nous attaquer aux racines du problème, c'est-à-dire l'oppression et les conflits armés.

Le réfugié classique, celui auquel pensaient les rédacteurs de la Convention de 1951, est une victime de l'oppression — c'est un homme ou une femme dont les droits individuels ont été directement violés. Mais le réfugié ou la personne déplacée d'aujourd'hui n'entrent pas toujours dans cette catégorie. Car les millions de malheureux qui déferlent massivement aujourd'hui sur tant de régions du globe ont été jetés sur les routes de l'exode par des gens qui ne savaient peut-être même pas leur nom. Il n'est pas indispensable de savoir qui vit là avant de bombarder une maison ou d'incendier un village. En fait, on a sans doute la tâche plus facile si on ne sait pas.

C'est l'une des raisons pour lesquelles les thèmes jumeaux des droits de l'homme et de la prévention des conflits occupent une place de plus en plus prioritaire dans les travaux de l'ONU depuis le début des années 90. Si je parle de thèmes jumeaux, c'est que l'expérience nous a confirmé qu'ils étaient intimement liés.

La plupart des exodes massifs auxquels nous assistons aujourd'hui sont causés par des guerres civiles. Et je défie quiconque de me citer un seul exemple de guerre civile qui n'ait pas été provoquée, en partie du moins, par des violations des droits de l'homme, surtout quand on se souvient que les droits de l'homme, tels qu'ils sont définis dans la *Déclaration universelle*, incluent le droit à l'éducation et à un niveau de vie adéquat.

Il y a certes beaucoup d'autres sources de tensions et de désaccords — l'appartenance ethnique, la religion, les intérêts économiques, les opinions politiques. Toutefois, ces antagonismes ne s'expriment pas nécessairement par la violence. Ils peuvent être traités autrement. Lorsqu'ils dégénèrent en affrontements meurtriers, c'est presque toujours parce que les gens ont cessé de se traiter comme des êtres humains et de respecter les droits d'autrui.

Ainsi, les violations des droits de l'homme produisent des réfugiés, directement mais aussi indirectement du fait de leur rôle dans le déclenchement des conflits. Autrement dit, si les droits de l'homme sont devenus le thème transversal de toutes les activités de l'ONU, c'est moins à cause d'un quelconque parti pris idéologique ou du triomphe d'un camp sur l'autre après la guerre froide que pour une raison tout à fait pragmatique.

Nous avons découvert dans la pratique que la question des droits de l'homme n'était pas une affaire purement intérieure pouvant être laissée à la discrétion des États Membres, mais qu'elle concernait en fait tout le monde. Car là où les droits de l'homme sont massivement violés, vous pouvez être sûrs qu'il va bientôt y avoir des problèmes qui forceront la communauté internationale à intervenir, et que cela coûtera très cher. L'afflux de réfugiés est souvent le problème le plus immédiat et le plus aigu.

Je n'ai pas besoin de vous dire où se situent ces problèmes, pas plus que je n'ai eu à le préciser il y a quelques jours au Conseil de sécurité quand je lui ai présenté le rapport du Secrétaire général sur la protection de l'aide humanitaire aux réfugiés et aux autres personnes dans les situations de conflit. Songez aux conflits qui préoccupent le Conseil de sécurité depuis quelques semaines — Afghanistan, Kosovo, République démocratique du Congo, pour ne citer que quelques exemples. Autant de pays où les massacres impitoyables de civils et la destruction des moyens de subsistance des populations sont devenus des réalités presque banales. Autant de pays où, autant sûrement que la nuit succède au jour, l'ONU va devoir s'efforcer de fournir de la nourriture et un toit à des milliers et des milliers de déracinés misérables.

L'action humanitaire est un important pôle de croissance dans notre organisation depuis le début des années 90. Et pourtant, j'ai bien peur que nous ne soyons pas parvenus à rattraper l'escalade de la misère humaine. Nous savons tous trop bien que l'action humanitaire est faite pour colmater les brèches là où l'action politique a échoué, et nous sommes tous très conscients de ses limites. Comment l'action humanitaire peut-elle être une réponse adéquate quand les massacres, les mutilations et les déportations de civils ne sont pas des éléments accessoires de la stratégie politique ou militaire des belligérants, mais l'objectif principal à atteindre? L'action humanitaire n'est ni conçue, ni préparée pour arrêter les massacres et les déplacements forcés de populations civiles. C'est pourquoi au Secrétariat de l'ONU nous travaillons maintenant avec le Conseil de sécurité pour repenser le sens de « l'action humanitaire » aujourd'hui dans les zones de conflit, et pour reformuler ses exigences telles que nous les percevons.

Les organisations humanitaires sont confrontées aux violences qui visent directement les populations qu'elles essaient d'aider, à des manoeuvres d'obstruction systématiques qui les empêchent de travailler, voire à des actes de violence contre leur personnel. Le nombre de victimes civiles augmente, tout comme celui des humanitaires tués, blessés, kidnappés et agressés dans l'exercice de leur mission.

N'oublions pas que la plupart des réfugiés et des déplacés du monde restent dans leur région d'origine. Ils sont très peu nombreux à arriver jusqu'aux pays d'Europe occidentale et d'Amérique du Nord, qui sont très majoritairement représentés dans votre association. Les gouvernements des pays industrialisés trouvent en définitive que c'est une bonne chose. On peut peut-être les comprendre, et citer à l'appui un certain nombre d'arguments.

Beaucoup de réfugiés préfèrent en effet rester près de chez eux. À certains égards il est plus facile de s'occuper d'eux si les conditions climatiques et le contexte socioéconomique leur sont familiers, et ils se réintégreront ensuite plus facilement dans leur pays d'origine quand la situation politique leur permettra éventuellement de retourner chez eux sans danger.

Mais ne croyons surtout pas qu'accueillir de forts contingents de réfugiés est chose plus facile pour les pays voisins des zones de conflit — dont beaucoup sont eux-mêmes aux prises avec de graves problèmes de développement ou de transition économique — que pour les pays plus riches ou plus développés. Au contraire, les pays développés sont beaucoup mieux placés à tous points de vue, ou presque, pour s'occuper de cette question.

Les pays industrialisés sont donc à tout le moins tenus de venir en aide à ceux qui doivent accueillir beaucoup plus de réfugiés qu'eux, et avec des moyens infiniment plus modestes. Mais cela n'exonère pas les pays industrialisés de leur obligation juridique et morale directe, qui est de protéger les réfugiés demandeurs d'asile sur leur territoire.

Nous savons évidemment que tous les demandeurs d'asile ne peuvent pas prétendre au statut de réfugié. Certains, qui veulent séjourner ou s'installer dans un pays industrialisé pour toutes sortes d'autres raisons, essaient de se prévaloir abusivement du droit d'asile. Les États ont le droit de fixer leurs politiques en matière d'immigration et de s'assurer qu'elles ne sont pas réduites à néant par des détournements systématiques de la procédure d'asile. Nous devons toutefois nous assurer que les mesures que prennent les États pour prévenir les abus ne les amènent pas à faillir à leurs engagements, à la fois moraux et juridiques, qui les obligent à protéger les authentiques réfugiés.

Quand j'ai dit tout à l'heure qu'il ne fallait pas laisser se créer des problèmes de réfugiés, je ne voulais pas dire par là qu'il fallait empêcher les individus qui craignent pour leur vie de quitter leur pays ou de se rendre dans un pays tiers où ils se sentiront en sécurité. Malheureusement, c'est l'effet que produisent les mesures prises par certains pays pour réduire le nombre de réfugiés qui se présentent à leurs frontières, officiellement pour lutter contre le recours abusif à la procédure d'asile.

Le Haut Commissariat des Nations Unies pour les réfugiés, et même l'ensemble du système des Nations Unies, jugent extrêmement préoccupante la tendance qu'ont certains États à s'écarter de l'approche juridique en matière de protection des réfugiés. Ce n'est pas que le droit des réfugiés soit statique ou rigide. Au contraire, en un demi-siècle, il s'est développé, s'est adapté, a suivi l'évolution des réalités. En outre, des garde-fous et des exceptions ont toujours existé pour protéger les intérêts des États.

Et pourtant, face à l'afflux de réfugiés, de plus en plus de voix s'élèvent pour réclamer des règles moins contraignantes. Elles vont jusqu'à proposer que les États aient l'entière liberté politique et administrative de refuser aux réfugiés l'entrée sur leur territoire, de refouler les nouveaux arrivés sans aucune forme de procédure judiciaire. Point n'est besoin de vous dire que ces propositions s'attaquent à l'essence même du droit des réfugiés.

Le refoulement et l'expulsion de demandeurs d'asile vers diverses zones de danger, dont il continue d'être fait état régulièrement, sont aussi des phénomènes profondément inquiétants, de même que l'habitude qu'ont prise bon nombre de pays occidentaux de mettre les candidats réfugiés en détention de façon quasi systématique. Cette pratique a beau être présentée au public comme un moyen de s'assurer que les « faux » réfugiés ne s'évanouissent pas dans la nature avant que l'on puisse les renvoyer chez eux, il est clair que le véritable objectif est dissuasif et qu'il s'agit souvent d'inciter les véritables demandeurs d'asile à aller frapper à d'autres portes.

Il s'agit là d'une violation patente de l'esprit, sinon de la lettre, de la Convention de 1951. On ne peut assez souligner que les demandeurs d'asile ont droit à la liberté comme tous les autres êtres humains. Nul ne peut être détenu contre sa volonté sans avoir bénéficié d'une procédure régulière.

Si tous les demandeurs d'asile ont droit à une procédure régulière, avec possibilité de recours, avant d'être contraints de quitter un État, cette garantie ne doit toutefois pas se traduire par de longs délais et d'interminables pourvois infondés devant les tribunaux. Il importe de trouver un équilibre entre, d'une part, la nécessité d'assurer l'équité et la transparence du processus de détermination du statut de réfugié et, de l'autre, celle de veiller à ce que ceux dont la demande de protection n'est pas justifiée quittent rapidement le territoire.

En tant que Canadienne, je tiens à souligner que les pratiques du Canada suscitent, sur ce point, moins de préoccupations que celles de bien d'autres pays. J'ajouterai que le Haut Commissariat des Nations Unies pour les réfugiés — et, je crois pouvoir le dire, votre Association — considèrent le système canadien de détermination du statut de réfugié comme un modèle de justice et d'efficacité.

Quoi qu'il en soit, il est clair qu'en votre qualité de juges et autres responsables quasi judiciaires appelés à appliquer les lois relatives à l'immigration et au droit d'asile dans vos pays respectifs, vous avez d'immenses responsabilités. Je ne connais guère de tâche plus difficile et plus importante que celle qui consiste à décider si un demandeur d'asile est ou non un authentique réfugié pouvant bénéficier d'une protection.

Je constate avec satisfaction que vous prenez cette responsabilité très au sérieux et que vous avez compris l'utilité de mettre en commun votre science et votre expérience. C'est pourquoi je tiens, avant de conclure, à vous redire combien l'Organisation des Nations Unies attache de prix à vos efforts. Consciente des limitations des grandes institutions internationales et des difficultés qu'a souvent la communauté internationale à agir de façon concertée, elle ne peut que se féliciter du nombre sans cesse croissant d'associations bénévoles comme la vôtre, où se conjuguent les connaissances les plus pointues, les compétences d'experts éminents et la volonté de faire vraiment la différence.

L'ONU ne peut qu'applaudir les individus qui, comme vous, ont su s'associer pour mieux servir et pour chercher, ensemble, des réponses aux grandes questions de notre temps. Comme elle, vous avez pour vocation de favoriser le progrès en développant la coopération internationale. Et vous en avez indéniablement le pouvoir.

Vous avez le pouvoir de partager l'information, de diffuser les meilleures pratiques, de faire connaître les initiatives les plus novatrices adoptées dans votre domaine d'expertise. Votre pouvoir est celui d'aider vos pays respectifs à déterminer le statut des candidats réfugiés de la façon la plus équitable et la plus efficace possible. Celui, surtout, d'améliorer le sort d'individus en détresse que vous refusez de voir privés de leur dignité et de leurs droits fondamentaux, fussent-ils leurs derniers bagages.

Au nom de tous ceux-là à qui vous consacrez votre temps, votre énergie et votre talent, merci du fond du coeur. Je vous remercie de votre attention et vous souhaite de très fructueux travaux.

The Honourable Lucienne Robillard

Minister of Citizenship and Immigration, Canada

Good evening. On behalf of the Government of Canada, I would like to say what an honour it is for our country to play host to this gathering. Conferences such as this one are an important opportunity to promote productive and rewarding dialogue, and the need for this dialogue is only growing. We are seeing increasing numbers of people on the move, both voluntarily and involuntarily. As a result, the demands being placed on our respective refugee determination systems are growing.

This evening I would like to discuss these demands, and what we can and must do to start addressing them.

First, I would like to touch on the bigger picture, and on certain elements of Canada's foreign policy. I believe that we must begin, as a community of nations, to make migration issues an international priority.

I then intend to look at the different trends that have emerged in refugee determination and to discuss some of the common challenges that all of our systems face.

Finally, I would like to discuss the need for change — and share some of my thoughts on where the responsibility for positive change lies. What role must you play as judges and what role must the state step in and fill?

I hope that this will prove informative.

The Need for Durable Solutions and Burden Sharing

When the Berlin Wall fell nearly a decade ago, there was a sense that the international community had reached a crossroads. Behind us lay 50 years of Cold War polarization, which had impeded efforts to find lasting solutions to many global issues. Ahead lay an uncertain but clearly brighter future. Many spoke about "the end of history" and the end of ideology. There was optimism that co-operation, stability, prosperity and humanitarianism would become the cornerstones of the New World Order. This vision, though seductive, has proved to be an illusion. As ideological certainties receded, people increasingly reverted to earlier sources of group identification and political organization. We have seen an increase in group identity along ethnic, religious and linguistic lines. The result has been catastrophic. The 1990s have witnessed the proliferation of confused and violent internal conflicts. The nightly news is now filled with images of violence and barbarism. Too often the victims are women and children.

Globalization has transformed modern international relations into a complex latticework of overlapping jurisdictions and concerns. The international system is now like a spider's web: disrupt one corner, and the repercussions will be felt through the entire structure. No country is immune to the destabilizing forces emerging in different global hot spots. As responsible members of the community of nations, we must act to promote peace and international order. As individual human beings, we must not simply turn away when confronted by tyranny, violence and outright evil.

This is why Canada has made conflict prevention and peace building key elements of its foreign policy strategy. In our view, more attention must be devoted to sources of conflicts, promotion and protection of human rights and confidence-building measures. We need to address demographic pressures, environmental degradation and economic stagnation. In short, we must mitigate the root causes of involuntary migration.

However, finding durable solutions to these challenges will take time. Creating effective mechanisms to stop violence may, in fact, take generations. Stability and peace are elusive goals. In the meanwhile, there are those who need our protection now — those who cannot wait patiently for eventual change.

We must continue to keep our doors open to these legitimate asylum seekers. As a community of nations, we must reaffirm our commitment to uphold the spirit and principle of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

Canada recognizes that each state has a different capacity to handle refugee challenges. We face varying domestic pressures as well as different financial and socio-political realities. At the same time, however, there must be a greater will toward burden sharing. Every member of the international community must be willing to offer some sort of assistance when circumstance demands it.

Co-ordinated action can be effective. We have seen this demonstrated in places like South East Asia. Lessons learned from the Comprehensive Plan of Action demonstrate that management of refugee flows is greatly enhanced by bringing together the leadership of the United Nations High Commission for Refugees, the source countries, countries of first asylum and resettlement countries. A global response to a multi-dimensional regional issue does work.

We must learn from these experiences and work to develop a framework to better guide our international responses to refugee crises. The tools and resources currently available to states and the UNHCR provide the means for international solidarity. With the principles of the Convention as a guide, we must forge new international responses which will allow us to meet crises head on.

In order for such international co-operation to continue to work, certain conditions must be met. There must be a will to co-operate. There must be resources, both human and financial. And each state must have a functioning refugee-determination system in place at the national level.

Different Models of Protection and Common Challenges

Each of our countries has developed refugee-determination systems tailored to our unique institutional and legal frameworks. There are obviously differing trends in refugee determination in North America, Asia and Europe. Our responses to refugee challenges have been shaped by differing geographic and socio-political realities. In many respects, we view the same problems through different lenses.

As we are all aware, there has been a move in Europe toward temporary protection as a flexible and solution-oriented tool for refugee policy. This approach allows countries to deal with large volumes of needy people who require short-term immediate protection, but

who will likely return to their country at the earliest opportunity. Integration is not viewed as a preferred option for the great majority. This is a pragmatic approach, but it is one that raises many questions. Most important of these is how "temporary" is temporary protection? Ideally, it is for a limited time, but successful repatriation is often easier to talk about than to carry out. The result is often that those in need of protection are left in a state of limbo, unable to return home and yet unable to fully participate in society.

As we all know, the Canadian approach is different. Given our current realities and our history as an immigrant-receiving country, I believe that temporary protection is not something that we would ever consider. We view the granting of asylum as part of a permanent solution. Our refugee-determination system is the first step on a continuum ultimately ending in the granting of citizenship and full participation in Canadian society.

Whatever approach we decide to take, there are certain common challenges that all of our systems must address. There are large numbers of people on the move in search of better lives. Men and women view countries like Canada as prosperous, liberal and tolerant. As a result there is an increasing demand for migration opportunities. Given current realities, however, states simply cannot adequately accommodate this demand. As a result, people are looking for alternatives to regular immigration mechanisms. Increasingly, many economic migrants are misusing the asylum process as a means to obtain permanent resettlement.

The result has been predictable. Public discourse on refugee issues has been infused with a sense of creeping cynicism. In many cases, the focus of discussion is shifting away from the legitimate asylum seeker. The image of the refugee is gradually being superseded in the minds of many by the picture of the irregular migrant illegally gaining access to Canada, irrespective of the need for protection. There is a risk that the refugee-determination system may come to be seen as the vehicle for those who would abuse our generosity. This mistrust undermines the credibility of the system and, ultimately, affects societal attitudes to newcomers and the ability of those newcomers to integrate at the community level.

We must do everything that we can to protect the integrity of our systems in order to maintain public confidence and support for our humanitarian programs. If we do not, we risk losing control of our systems and, in turn, our ability to help those genuinely in need.

An important first step in protecting this integrity is finding ways to differentiate illegal migrants from those who have a legitimate need of protection. This will require managing the international flow of people more effectively. We must work with our international partners to combat the insidious practice of migrant trafficking. The last decade has seen the rise of migrant trafficking across the globe. A recent International Organization for Migration paper calculated that traffickers move as many as four million illegal immigrants each year, earning as much as $7 billion. These individuals trade in human misery and must be dealt with in a swift and unequivocal fashion.

This does not mean simply erecting barriers to entry. Closing the door is not the answer. Such action goes against the spirit of the Convention and betrays a lack of compassion. Border control is a necessary and legitimate function of a sovereign state, but it should not become a deterrent to legitimate claimants. Achieving this control requires a delicate balance, and it is something that we are all struggling with at the moment.

We must be vigilant to remember the exploited and the vulnerable — those who often get overlooked. There are people in the flow of migrants who are genuinely in need of our protection.

This is perhaps the greatest challenge we face: how do we maintain a refugee system that people have access to, while fighting large-scale people smuggling — particularly when the line between these two often blurs? There are no easy solutions. Any effective approach will need to be multi-faceted. It will need to address the "push factors" I mentioned before — the root causes of migration. It will also need to address several "pull factors" — particularly those that are built into our current systems themselves.

The Responsibility of the Judiciary and that of the State

It is often the nature of the refugee-determination system itself that makes it so attractive to non-genuine claimants. Refugee determination, by definition, is a cautious and methodical process with little margin for error. An effective system needs to have the flexibility to give claimants the benefit of the doubt. This is often problematic. One feature of our system in Canada is a non-adversarial hearing process, based on the assumption that clients would be truthful in their claims. We have found that this is not always the case. Non-genuine claimants often are willing to gamble that they will get the benefit of the doubt or, failing that, at least use every opportunity to delay removal.

We need to introduce measures that deter non-genuine claimants. We need to make our systems less attractive to those who would abuse them. I believe the responsibility for doing so lies both with those who administer the system — the judges and legal professionals — and with governments, which make refugee policy.
As judges or administrators, you are called upon to render decisions that balance compassion with fairness and justice. Yours is an essential, if sometimes unenviable position. You must be vigilant. You must ensure that your generosity is linked to the protection needs of the individual and not simply to a personal sympathy for someone in a difficult situation. The integrity of the system depends on judicial independence, but it relies equally on your ability to perform your tasks in compliance with the laws and regulations of the system. If you allow false generosity to colour your judgment, the entire system suffers.

You shoulder a serious burden. So too do the governments that formulate refugee policy. The state has a responsibility to ensure that the rules you are asked to enforce are clearly defined, effective and ultimately workable.

This requires periodic realignment of policy and programs in order to respond to an ever-changing international reality. That is why in Canada we are currently in the process of reviewing our legislation and programs. The current system has worked well over the years and has helped us to continually meet our international obligations. There have, however, been valid criticisms. A recent report to Parliament by the Auditor General of Canada identified a need for changes to a system which it characterized as slow, inefficient and inconsistent.

It was with this type of criticism in mind that I initiated a legislative review, asking an independent panel to examine and make recommendations about potential changes to our legislative base. This was then followed up by nation-wide consultations.

While it is too early to discuss specific changes, I can say that whatever decisions we take will ultimately focus on balancing two principles: fairness and efficiency. These two principles are sometimes at odds with each other. Reconciling them is not easy. But I am confident that we can and will achieve an appropriate balance that will allow Canada to continue to offer traditional levels of support to those in need.

Ladies and gentlemen, I have spoken about increasing public skepticism about refugee determination. I do not want to leave you with the wrong impression. I do not believe that concerns about the system are indicative of a general cooling of the commitment to refugee protection. Wide spread support remains for the concept and practice of refugee assistance. I fervently hope that our societies never become so mired in economic pessimism or become so self-centred that we lose sight of the values which are truly important. I do not think we will. Certainly this government will not diminish its commitment to offering protection.

I cannot stress enough the importance of international co-operation as well as the enduring role of the UNHCR. This type of international dialogue must become the foundation for positive change.

This year we celebrate the 50th anniversary of the International Declaration of Human Rights, an historic text that, in giving universal expression to inalienable human rights, recognized "the right to seek and enjoy asylum from persecution". Fifty years ago, the framers of that document proposed an idealistic and optimistic vision of the future. It was a bold vision of a better world. Five decades later, we have come up short of realizing their goals. Progress has been made, but more remains to be done. We must struggle on, undaunted and determined, striving ever closer to the day when the principles of equality, compassion and freedom are shared by all around the world. It is a dream from which we cannot and must not turn away.

Thank you.

L'honorable Lucienne Robillard

Ministre de la Citoyenneté et de l'Immigration, Canada

Bonsoir. Au nom du gouvernement du Canada, je tiens à dire que c'est un honneur pour notre pays d'accueillir cette conférence. Les conférences comme celle-ci nous fournissent une excellente occasion de promouvoir un dialogue productif et enrichissant, dialogue qui devient de plus en plus nécessaire. Les mouvements de population s'accroissent, qu'ils soient volontaires ou non, et les pressions que subissent nos systèmes respectifs de détermination du statut de réfugié vont s'accentuant.

Ce soir, j'aimerais examiner avec vous ces pressions et voir ce que nous pouvons et ce que nous devons faire pour trouver une solution.

Tout d'abord, j'aimerais parler du contexte général de ces mouvements de population et de certains éléments de la politique étrangère du Canada. Je pense qu'en tant que communauté des nations, nous devons faire des mouvements migratoires une priorité internationale.

Je parlerai ensuite des différentes tendances en matière de détermination du statut de réfugié et je discuterai des difficultés auxquelles se heurtent tous nos systèmes à cet égard.

Enfin, j'aimerais parler de la nécessité d'apporter des changements, et vous faire part de certaines de mes idées sur qui doit assumer les responsabilités de ces changements. Quel est le rôle que vous, en votre qualité de juges, devez jouer et quel est le rôle que l'État doit assumer ?

J'espère contribuer ainsi à faire de cette rencontre une expérience enrichissante pour tous.

Besoin de solutions durables et de partage du fardeau

Au moment de la chute du Mur de Berlin il y a près d'une décennie, nous avons eu le sentiment que la communauté internationale se trouvait à un carrefour. Nous laissions derrière nous 50 années de polarisation alimentée par la guerre froide, ce qui avait paralysé nos efforts en vue de trouver des solutions durables à bon nombre de problèmes mondiaux. L'avenir, quoique incertain, était manifestement plus prometteur. Beaucoup ont parlé de la « fin de l'Histoire » et de la fin des idéologies. On croyait avec optimisme que la coopération, la stabilité, la prospérité et l'humanitarisme deviendraient les clés de voûte du nouvel ordre mondial. Bien qu'attrayante, cette vision s'est révélée être une illusion. À mesure que les certitudes idéologiques ont perdu du terrain, les gens ont commencé à revenir à d'anciennes sources d'identification collective et d'organisation politique. Nous avons assisté à une résurgence des identités collectives fondées sur l'origine ethnique, la religion et la langue. Les résultats ont été catastrophiques. Les années 1990 ont été marquées par de nombreux conflits internes caractérisés par la confusion et la violence. Les bulletins de nouvelles quotidiens regorgent maintenant d'images de violence et de barbarie. Trop souvent, les victimes de ces conflits sont des femmes et des enfants.

La mondialisation a transformé les relations internationales modernes; elles sont devenues un enchevêtrement complexe de champs de compétence et d'intérêts se chevauchant les uns les autres. Le système international ressemble maintenant à une toile d'araignée : toute

agitation à un point de la toile est ressentie dans l'ensemble de la structure. Aucun pays ne peut se prémunir contre les forces déstabilisatrices qui se manifestent à différents points chauds de la planète. En tant que membres responsables de la communauté des nations, nous devons agir pour promouvoir la paix et l'ordre international. En tant qu'individus, nous ne pouvons simplement fermer les yeux lorsque nous sommes témoins de tyrannie, de violence ou d'actes odieux.

Pour ces raisons, le Canada a fait de la prévention des conflits et de l'instauration de la paix des éléments clés de sa politique étrangère. Selon nous, il importe de se préoccuper davantage des sources des conflits, de la promotion et de la protection des droits de la personne ainsi que des mesures visant à créer un climat de confiance. Nous devons aussi agir pour remédier aux pressions démographiques, à la dégradation de l'environnement et à la stagnation économique. En bref, nous devons nous attaquer aux causes fondamentales des migrations involontaires.

Il faudra toutefois du temps pour trouver des solutions durables à ces difficultés. En fait, la mise en place de mécanismes efficaces pour contrer la violence pourrait s'échelonner sur plusieurs générations. La stabilité et la paix demeurent des objectifs insaisissables. Dans l'intervalle, il ne faut pas oublier les personnes qui ont besoin de notre protection maintenant, les personnes qui ne peuvent attendre patiemment que des changements se produisent un jour.

Nous ne devons pas fermer nos portes aux demandeurs d'asile de bonne foi. En tant que communauté des nations, nous devons réaffirmer notre engagement à respecter l'esprit de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés, et les principes qui les sous-tendent.

Le Canada reconnaît que chaque État a des capacités différentes pour ce qui est de relever les défis concernant les réfugiés. Nous subissons tous diverses pressions intérieures et sommes confrontés à diverses réalités financières et socio-politiques. Par ailleurs, il devrait exister une volonté plus forte de partager le fardeau. Chaque membre de la communauté internationale devrait se montrer disposé à offrir une certaine forme d'aide lorsque les circonstances l'exigent.

Une action concertée peut se révéler efficace. Nous en avons eu la preuve en Asie du Sud-Est, par exemple. À cet endroit, la mise en oeuvre du Plan d'action global nous a permis d'apprendre que la gestion des mouvements de réfugiés est grandement facilitée lorsque, sous la direction du Haut Commissariat des Nations Unies pour les réfugiés, les pays sources, les premiers pays d'asile et les pays de réétablissement unissent leurs efforts. Une réponse mondiale à un problème régional multidimensionnel donne effectivement des résultats.

Nous devons tirer des leçons de ces expériences et nous employer à élaborer un cadre apte à mieux orienter notre action internationale dans les situations de crise engendrées par les mouvements de réfugiés. Les instruments et les ressources dont disposent actuellement les États et le HCNUR ouvrent la voie à la solidarité internationale. En nous fondant sur les principes de la Convention, nous devons concevoir de nouvelles mesures internationales qui nous permettront de nous attaquer de front aux situations de crise.

Pour qu'une telle coopération internationale continue de fonctionner, il s'agit de respecter certaines conditions. La volonté de coopérer doit être présente, et il faut disposer de ressources humaines et financières. Et chaque État doit déjà disposer à l'échelon national d'un système fonctionnel de détermination du statut de réfugié.

Différents modèles de protection et défis communs

Chacun de nos pays s'est doté d'un système de détermination du statut de réfugié adapté au cadre particulier de ses institutions et de sa législation. Nous observons en ce domaine des tendances manifestement différentes en Amérique du Nord, en Asie et en Europe. Notre façon de relever les défis par rapport aux réfugiés a été influencée par notre situation géographique et sociopolitique. À de nombreux égards, nous abordons les mêmes problèmes sous des angles différents.

Comme vous le savez tous, l'Europe a commencé à recourir à la protection temporaire en tant qu'élément de solution et instrument souple dans le cadre de la politique à l'égard des réfugiés. Cela permet aux pays européens d'aider un grand nombre de personnes qui ont besoin de protection à court terme, mais qui retourneront probablement dans leur pays dès que l'occasion s'en présentera. L'intégration n'est pas considérée comme la meilleure option dans la grande majorité des cas. Il s'agit là d'une optique pragmatique, qui soulève toutefois un certain nombre de questions. La plus importante consiste à savoir dans quelle mesure est « temporaire » cette protection temporaire. Idéalement, elle devrait être fournie pendant une période limitée, mais bien souvent, lorsqu'il est question de rapatriement, il est plus facile de parler que d'agir. De ce fait, bon nombre de personnes ayant besoin de protection se retrouvent dans une situation impossible, incapables aussi bien de rentrer chez elles que de participer activement à la vie de la société.

Comme nous le savons tous, la manière canadienne d'aborder la question est différente. Compte tenu de notre situation actuelle et de notre passé de pays d'accueil d'immigrants, je crois que la protection temporaire est une solution que nous n'envisagerons jamais. Nous considérons l'octroi de l'asile comme une des composantes d'une solution permanente. Notre système de détermination du statut de réfugié constitue le premier élément d'un continuum qui mène à l'octroi de la citoyenneté et à la pleine intégration à la société canadienne.

Quelle que soit la méthode pour laquelle nous optons, il y a certains défis communs que tous nos systèmes sont appelés à relever. Un très grand nombre de gens partent de chez eux à la recherche d'une vie meilleure. Ces hommes et ces femmes voient dans les pays comme le Canada des terres de prospérité, de liberté et de tolérance. Il en résulte que de plus en plus de personnes cherchent à émigrer vers ces pays pour améliorer leur sort. Toutefois, compte tenu des conditions actuelles, les pays en question ne peuvent simplement pas satisfaire à la demande. Alors les gens cherchent des solutions de rechange aux mécanismes officiels d'immigration, ce qui fait que de plus en plus de migrants économiques profitent du processus d'asile pour obtenir le droit d'établissement de façon détournée.

Cela a eu des résultats dont il ne faudrait pas s'étonner. Le débat public sur les questions relatives aux réfugiés s'est entaché d'un cynisme croissant. Dans bien des cas, le débat se déplace et se détourne des demandeurs d'asile de bonne foi. L'image du réfugié est graduellement remplacée dans l'esprit de bien des gens par celle du migrant clandestin qui s'introduit en fraude au Canada, indépendamment du besoin de protection. Il y a là un

risque que le système de détermination du statut de réfugié soit perçu comme un moyen d'abuser de notre générosité. Cette méfiance mine la crédibilité du système et finit par se répercuter sur les attitudes de la société à l'égard des nouveaux arrivants et sur la capacité de ces derniers de s'intégrer à la collectivité.

Nous devons faire tout notre possible pour protéger l'intégrité de nos systèmes afin de conserver la confiance et l'appui du public à l'égard de nos programmes humanitaires. À défaut de cela, nous risquons de perdre la maîtrise de nos systèmes et, partant, notre capacité de venir en aide à ceux qui en ont véritablement besoin.

Dans notre recherche de protection de l'intégrité, une première étape importante consiste à trouver comment faire la distinction entre les migrants clandestins et ceux qui ont réellement besoin de protection. Cela supposera de gérer les mouvements internationaux de personnes avec plus d'efficacité. Nous devons travailler de concert avec nos partenaires internationaux pour combattre la pratique insidieuse que constitue le trafic de migrants, phénomène qui s'est accru à l'échelle mondiale au cours de la dernière décennie. Selon un récent document de l'Organisation internationale pour les migrations, les passeurs acheminent jusqu'à quatre millions de migrants clandestins chaque année, ce qui leur procure des revenus pouvant atteindre 7 milliards de dollars. Ces passeurs font commerce de la misère humaine, et il faut les traiter de façon rapide et sans équivoque.

Il ne s'agit pas simplement d'ériger des obstacles à l'admission. Ce n'est pas une solution que de fermer nos portes. Une telle mesure serait contraire à l'esprit de la Convention et dénoterait un manque de compassion. Les contrôles aux frontières constituent une fonction nécessaire et légitime d'un État souverain, mais ils ne doivent pas devenir un facteur de dissuasion pour les demandeurs de bonne foi. Cela suppose de respecter un équilibre délicat, objectif que nous poursuivons tous activement à l'heure actuelle.

Nous devons veiller à ne pas négliger les personnes exploitées et les personnes vulnérables, celles que l'on oublie trop souvent. On trouve dans les mouvements de migrants des personnes qui ont véritablement besoin de notre protection.

Il s'agit peut-être là du plus grand défi que nous soyons appelés à relever. Comment maintenir un système de détermination du statut de réfugié qui soit accessible tout en combattant le trafic de personnes à grande échelle, surtout dans un contexte où il est bien souvent difficile de faire la distinction entre les réfugiés de bonne foi et les autres ? Il n'y a pas de solutions faciles. Toute façon de s'y prendre, pour être efficace, doit être multidimensionnelle.

Comme je l'ai déjà mentionné, la méthode que nous retiendrons devra tenir compte des « facteurs d'incitation », qui constituent les causes premières des mouvements migratoires. Elle devra aussi tenir compte de plusieurs « facteurs d'attraction », et notamment de ceux qui sont enchâssés dans nos systèmes mêmes.

Responsabilité du système judiciaire et celle de l'État

Bien souvent, c'est la nature même du système de détermination du statut de réfugié qui le rend si attrayant pour les personnes de mauvaise foi. Par définition, la détermination du statut de réfugié est un processus prudent et méthodique qui s'accompagne d'une marge d'erreur faible. Pour qu'un système soit efficace, il doit être suffisamment souple pour

permettre d'accorder le bénéfice du doute aux demandeurs. Cela cause souvent des problèmes. L'une des caractéristiques du système canadien est le processus d'audience non accusatoire, qui repose sur l'hypothèse que les clients disent la vérité lorsqu'ils soumettent une revendication. Nous avons constaté que ce n'est pas toujours le cas. Bon nombre de demandeurs de mauvaise foi n'hésitent pas à faire le pari qu'ils obtiendront le bénéfice du doute ou, à défaut de cela, qu'ils pourront mettre à profit toutes les possibilités de différer leur renvoi.

Nous devons adopter des mesures qui dissuaderont les demandeurs de mauvaise foi. Nous devons rendre nos systèmes moins attrayants pour les personnes susceptibles d'en abuser. À cet égard, je crois que la responsabilité doit être partagée entre les administrateurs du système (je parle ici des juges et des professionnels du domaine juridique) et les gouvernements, qui définissent la politique à l'égard des réfugiés.

En tant que juges ou administrateurs, vous êtes appelés à rendre des décisions qui respectent l'équilibre entre les objectifs de compassion et les impératifs de justice et d'équité. Vous occupez un poste crucial, quoique parfois peu enviable. Vous devez faire preuve de vigilance. Il faut vous assurer que votre générosité est en fonction des besoins de protection de l'individu, et non simplement d'un sentiment personnel de sympathie envers une personne qui se trouve dans une situation difficile. L'intégrité du système repose non seulement sur l'indépendance judiciaire, mais aussi sur votre capacité de vous acquitter de vos fonctions conformément aux lois et aux règlements qui régissent le système. Si vous permettez qu'un sentiment de générosité mal placé influe sur votre jugement, c'est tout le système qui en souffrira.

Vous portez une lourde responsabilité, tout comme les gouvernements qui élaborent la politique concernant les réfugiés. L'État doit veiller à ce que les règles que vous devez faire respecter soient clairement définies, efficaces et vraiment applicables.

Cela suppose de remanier périodiquement la politique et les programmes afin de tenir compte d'une réalité internationale en constante évolution. Cela explique pourquoi nous nous sommes engagés, au Canada, dans un processus de révision de notre loi et de nos programmes. Le système actuel a bien fonctionné pendant des années; il nous a aidés à nous acquitter avec constance de nos obligations internationales. Il a toutefois fait l'objet de critiques fondées. Selon un rapport récent déposé au Parlement par le vérificateur général du Canada, il est évident qu'il faut effectuer la refonte d'un système caractérisé par la lenteur, le manque d'efficience et le manque d'uniformité.

C'est après avoir pris connaissance de critiques de ce genre que j'ai amorcé une révision de la loi, en demandant à un groupe indépendant de procéder à un examen et de faire des recommandations quant aux modifications qui pourraient être apportées à notre assise législative. Cet examen a été suivi de consultations à l'échelle nationale.

Bien qu'il soit trop tôt pour parler de changements précis, je peux affirmer qu'en fin de compte, toute décision que nous prendrons mettra l'accent sur l'équilibre entre deux principes, soit l'équité et l'efficience. Ces deux principes entrent parfois en conflit, et il n'est pas facile de les concilier. J'ai toutefois bon espoir que nous pourrons trouver un équilibre satisfaisant qui permettra au Canada de continuer à offrir le même niveau de soutien que par le passé aux personnes qui sont dans le besoin.

Mesdames et messieurs, j'ai parlé du scepticisme croissant de la part du public en ce qui concerne le statut de réfugié. Je ne voudrais pas conclure en vous laissant sur une fausse impression. Je ne crois pas que les préoccupations au sujet du système soient l'indice d'une désaffection pour la volonté de protéger les réfugiés. Le principe et la pratique associés à l'aide aux réfugiés continuent de bénéficier d'un large appui. J'espère sincèrement que nos sociétés ne se laisseront pas obnubiler par le pessimisme économique ou qu'elles ne deviendront pas égocentriques au point de perdre de vue les valeurs véritablement importantes. Je ne crois pas que cela se produira. Chose certaine, ce gouvernement ne reniera pas son engagement à offrir une protection.

Je ne saurais exagérer l'importance de la coopération internationale et du rôle primordial du Haut Commissariat des Nations Unies pour les réfugiés. Ce type de dialogue international doit devenir le moteur d'un processus de changement positif.

Nous célébrons cette année le 50e anniversaire de la Déclaration universelle des droits de l'homme, instrument historique qui, en permettant l'expression universelle des droits humains inaliénables, reconnaît le droit de demander et de trouver l'asile loin de la persécution. Les auteurs de ce document ont proposé il y a 50 ans une vision idéaliste et optimiste de l'avenir. C'était une vision audacieuse d'un monde meilleur. Un demi-siècle plus tard, nous constatons que nous n'avons pas atteint les objectifs visés. Des progrès ont été accomplis, mais il reste du pain sur la planche. Nous devons poursuivre le combat, sans nous laisser démonter et en conservant notre détermination. Nous devons nous efforcer de faire triompher les principes d'égalité, de compassion et de liberté partout dans le monde. C'est là un rêve auquel nous ne pouvons pas et ne devons pas renoncer.

Merci.

Opening Remarks
Mot de bienvenue

L'honorable Julius A. Isaac

Juge en chef, Cour fédérale du Canada

Invités de marque, collègues, mesdames, messieurs,

C'est un grand plaisir et un honneur pour moi de souhaiter la bienvenue à tous au nom de la Cour fédérale du Canada. Il me fait très plaisir de présider à la présente conférence, en collaboration avec la Commission de l'immigration et du statut de réfugié.

Comme certains d'entre vous le savent déjà, la compétence de la Cour comprend notamment le pouvoir de contrôler des décisions de la Commission de l'immigration et du statut de réfugié. Par conséquent, la Cour fédérale entend de nombreuses affaires traitant de réfugiés, dont certaines établissent un précédent. Bien que nos décisions témoignent des systèmes juridiques de nos États respectifs, nous ne devons pas négliger de tenir compte du contexte international dans lequel elles sont rendues.

C'est pourquoi j'estime qu'il est important que nous soyons au courant des affaires des réfugiés dans le monde entier ainsi que du travail de nos homologues dans d'autres pays et des enjeux auxquels ils font face. La connaissance des affaires internationales des réfugiés nous permet de rendre des décisions qui contribuent à l'affermissement des normes internationales.

Pour ces raisons, et parce qu'une telle occasion permet de rencontrer des collègues du monde entier, la Cour fédérale est ravie d'accueillir la présente conférence et d'y participer.

Et maintenant, j'ai l'honneur et le plaisir de vous présenter la présidente de la Commission de l'immigration et du statut de réfugié, M^me^ Nurjehan Mawani.

The Honourable Julius A. Isaac

Chief Justice, Federal Court of Canada

Distinguished guests, Colleagues, Ladies and Gentlemen

It is a great pleasure and an honour for me to welcome you all on behalf of the Federal Court of Canada. I am very pleased to co-chair this conference with the Immigration and Refugee Board.

As some of you may know, the jurisdiction of the Court includes the authority to review decisions of the Immigration and Refugee Board, among others. As such, the Federal Court hears a large number of refugee cases, some of which are precedential. Although our decisions reflect the legal regimes of our respective nation states, one ought not to overlook the international context in which they are made.

That is why, in my opinion, it is important for us to be informed of refugee issues worldwide and to be aware of the work of our counterparts in other countries and the challenges they face. Knowledge of international refugee issues equips us to render decisions which contribute to the strengthening of international standards.

For these reasons, and because this kind of occasion enables us to meet colleagues from around the world, the Federal Court is delighted to host and participate in this Conference.

And now, it is my honour and pleasure to introduce to you the Chairperson of the Immigration and Refugee Board, Mrs. Nurjehan Mawani.

Nurjehan Mawani

Présidente, Commision de l'immigration et du statut de réfugié, Canada

Bonjour, c'est pour moi un honneur de vous accueillir au Canada ainsi qu'à cette conférence.

Ce fut un grand privilège que de travailler avec la Cour fédérale du Canada et les dirigeants de l'Association pour accueillir cette conférence. Je tiens également à remercier les promoteurs de la conférence pour leur inestimable appui, soit le Haut commissaire des Nations Unies pour les réfugiés, l'Agence canadienne de développement international, le Centre for Refugee Studies de l'Université York, le Programme de bourse Eltsine pour la démocratie et les Fondations de sociétés ouvertes en Bulgarie et en Roumanie, sans lesquels il aurait été impossible d'attirer des délégués d'un aussi grand nombre d'organisations.

La CISR est un tribunal administratif indépendant quasi judiciaire dont la mission consiste à rendre, avec efficacité et équité et au nom des Canadiens, des décisions éclairées sur des questions touchant les immigrants et les réfugiés, conformément à la loi. Il s'agit du plus grand tribunal administratif au Canada, qui célébrera bientôt son 10e anniversaire.

Par l'entremise de la CISR, le Canada tente de perpétuer une tradition empreinte de compassion envers ceux et celles qui ont dû quitter leur pays d'origine en quête de protection. Nos commissaires jouent un rôle de premier plan dans la détermination du statut de réfugié au Canada, mais leur contexte de travail est à l'échelle du globe. Ainsi, en plus d'être un tribunal administratif d'avant-garde au Canada, nous voulons également contribuer à l'atteinte d'un solide consensus international en matière de traitement des réfugiés et être un partenaire innovateur à cet égard.

Les directives que nous avons établies pour notre organisation en vue de traiter les questions difficiles concernant les réfugiés, telles que la persécution fondée sur le sexe et les enfants qui revendiquent le statut de réfugié, sont le fruit de consultations auprès de nos collègues de partout dans le monde. En outre, nous avons diffusé ces directives au plus grand nombre possible de membres de la communauté internationale afin de contribuer plus largement à l'orientation des démarches internationales liées au droit des réfugiés. Nous croyons également à l'importance de disposer de renseignements fiables, pertinents et objectifs concernant les pays du monde et les affaires internationales.

Nous sommes heureux de constater que l'ordre du jour de la conférence témoigne bien de l'importance qu'accorde la CISR à la recherche, et notamment à la formation.

Notre travail, peut-être plus que tout autre, reflète la réalité du village planétaire dans lequel nous vivons actuellement, et l'importance déterminante d'une vue globale des questions relatives aux droits des réfugiés. Nous sommes depuis longtemps convaincus que, pour parvenir à améliorer la situation des réfugiés dans le monde entier, la communauté internationale doit déployer des efforts plus grands et plus coordonnés. C'est pourquoi la CISR estime que c'est un honneur pour elle d'avoir participé à la création de cette association internationale et c'est aussi un privilège de coprésider cette conférence internationale avec la Cour fédérale.

Je suis heureuse de constater que de très nombreux pays sont représentés ici aujourd'hui. Je tiens donc à féliciter les organisateurs de la conférence de cette réussite. Bienvenue dans notre ville et dans notre pays. Je vous souhaite, au nom de la CISR, tout le succès possible pendant les travaux de la conférence.

Nurjehan Mawani

Chairperson, Immigration and Refugee Board, Canada

Good morning.

It is an honour to welcome you to this conference and to welcome you to Canada.

It has been a great privilege to work with the Federal Court of Canada and the executive of the Association in hosting this Conference. I also want to acknowledge its sponsors, without whose invaluable support we could not have attracted delegates from such a wide range of organizations: the United Nations High Commissioner for Refugees, the Canadian International Development Agency, the Centre for Refugee Studies at York University, the Yeltsin Democracy Fellowship Program and the Open Society Foundation in Bulgaria and Romania.

The Immigration and Refugee Board (IRB) is an independent administrative tribunal with quasi-judicial functions, whose mission on behalf of Canadians is to make well-reasoned decisions on immigration and refugee matters efficiently, fairly and in accordance with the law. It is Canada's largest administrative tribunal, approaching the tenth anniversary of its founding. Through the IRB, Canada seeks to maintain a tradition of compassion for those who have been uprooted from their countries of origin and seek protection. Our members work on the front lines of refugee decision making in Canada, but the context of their work is global. Thus, in addition to being a leading-edge administrative tribunal at home, we seek also to contribute to, and be a creative partner in building, a strong international consensus on refugee matters.

The guidelines that we have issued for our own use in dealing with difficult refugee issues, such as Gender-related Persecution and Child Refugee Claimants, are the result of consultation with our colleagues around the world. Moreover, we have disseminated these guidelines as widely as possible throughout the international community to contribute more broadly to international approaches in refugee law. Further, we believe in the importance of having reliable, timely and objective information concerning the nations of the world and global affairs. We are pleased to see that the emphasis the IRB places on research, and especially training, are reflected in the agenda of this Conference.

Perhaps no other work than ours exposes one to the reality of the global village in which we now live, and the central importance of a global perspective on refugee-related human rights issues. It has long been our conviction at the IRB that progress in dealing with the world's refugees requires stronger and more co-ordinated international efforts. That is why it has been an honour for the IRB to participate in the founding of this international association.
That is why it has been a privilege to collaborate with the Federal Court in chairing this international meeting.

I am pleased to see the large number of countries represented here today, and I want to congratulate the co-ordinators of the conference for this achievement. I welcome you to this city and this country and, on behalf of the IRB, I wish you every success in these proceedings.

Geoffrey Care

President, International Association of Refugee Law Judges

Honourable Chief Justices, judges, members of the Association and our distinguished guests and observers.

Although, in effect, well into our conference, this is the point at which we restring the tape and, with dramatic gesture, I cut it and declare the Conference open.

You are indeed most welcome. Many of us have already had a chance to meet, talk and compare notes. This is much of the purpose in having such a gathering and lies at the root of this Association.

A most useful meeting has already been held between delegates from the 13 countries in Africa and a small co-ordinating group appointed. We are greatly indebted to Chief Justice Julius Isaac and the judges of the Federal Court of Canada, and to Nurjehan Mawani and the Immigration and Refugee Board for the stupendous achievement which they have made in mounting this Conference and the workshops which preceded it. Few know the courage, determination and sheer dedication which underpin the Conference.

In particular, I want to pay a very special tribute to the Federal Court of Canada for the influential jurisprudence of its decisions in refugee law. The Federal Court has, in my view, done as much in the world in producing valuable guidance for all of us in this field as Nurjehan Mawani's Board has in the Guidelines on Gender, Civil War Situations, and Refugee Children. The two represent the essential interaction in decision making in the refugee field.

The Supreme Court of Canada has effectively capped this important process. Both the Federal Court and the Supreme Court of Canada have information skills and knowledge to share with the other. To deny it is to diminish the depth and the durability of the jurisprudence they have achieved. Indeed, with great respect, I would urge superior courts everywhere responsible for making binding or highly persuasive pronouncements not to do so without having careful regard for their possible worldwide impact. It is for such reasons that I say no judicial decision maker at whatever level can afford to consider himself or herself an island. In turn, a solid jurisprudence in one country can provide thought-provoking interaction with the more than 134 other countries which have either signed or apply the same Convention and Protocol.

The IARLJ seeks to harness resources and provide a medium in which we can explore among ourselves possible ways to minimize the lottery which potential refugees (85% of whom are women and children) face when they are able to flee both from unfair procedural barriers to obtaining recognition of their claim, and from widely diverging decisions on the interpretation of the Refugee Convention itself.

I hope those concerned with policy making in every country will pause to remember that, as Thurgood Marshall said in 1972: "the judges are likely to be the first to know when the system is working inequitably since they are the ones to send innocent defendants to prison or deny legal claims."

There are deep ethical, moral and legal challenges involved in our jurisdiction. They are relatively unexplored because we rarely have time at the "coal face" to worry about them. However, at some time and somewhere, they must be explored if we are going to be able to confront misguided procedures, which unfairly weaken and erode the discharge of a responsibility the state has freely agreed to in signing to the Convention and the Protocol.

Judicial independence calls not only for physical courage, it calls for constant vigilance. Simon Bolivar said, paraphrased, that "democracy obtained is not democracy retained."

I approach with caution my friend Professor David Martin's admonition to us (in 1991) to "resist the temptation to expand legal standards" made in the context of fear of what the policy makers may do if we do not.

Allowing ourselves as judges to be unduly influenced by the "numbers crunch" and the "floodgates" arguments puts at risk the achievement of harmonization up to the highest common factor rather than down to the lowest common denominator. In refugee-status-determination procedures, we consider that the determinations should be subject to the Rule of Law and based in a human rights culture.

It is with great satisfaction that we welcome judges from as far afield as New Zealand and Australia, Georgia (in the CIS) and countries in Africa, and delegates from Iran, South America, the Philippines and Japan. If I have missed anyone, please forgive me. But this appeal demonstrates and confirms the value of the Association. In 1995, 17 countries met in London, 19 in Nijmegen in early 1996, and now 50 countries are represented by you, our delegates, and at least two more by companions who are with us in spirit.

With sadness I must record that Martine Mondt Schouten from The Netherlands lost her daughter in a motor car accident and could not come, and that the wife of Joachim Henkel, from Berlin, is severely ill with cancer. Therefore his paper will be read.

Mr. Justice Allen Linden is chairing a small committee charged with producing outlines for a Conference Declaration, which will be laid before you before we all depart, and a form of Memorandum of Understanding with the UNHCR will also be laid before you.

Finally, my observation so far is that many of you are keen to be involved in the ongoing activities of the Association. Fear not, there is room for all to share in such activities and in the workshops, of which Hugo Storey will talk later.

I hope that you enjoy the Conference and will continue to support it and will encourage others to do likewise. Thank you.

Geoffrey Care
President

Geoffrey Care

Président, Association internationale des juges aux affaires des réfugiés

Messieurs et Mesdames les juges en chef, juges, membres de l'Association et distingués invités et observateurs,

Même si la conférence est commencée depuis un certain temps, j'aimerais maintenant pour ainsi dire couper le ruban et déclarer la conférence ouverte.

Nous vous souhaitons la bienvenue. Un grand nombre d'entre nous ont déjà eu l'occasion de se rencontrer, de se parler et d'échanger des idées. Tel est en bonne partie l'objectif de pareille rencontre, et c'est ce qui est à la base de notre Association.

Une rencontre fort utile a déjà eu lieu entre les délégués des 13 pays africains, et un petit groupe de coordination a été formé. Nous sommes redevables au juge en chef Julius Isaac, aux juges de la Cour fédérale du Canada, à Nurjehan Mawani et à la Commission de l'immigration et du statut de réfugié des efforts incroyables qui ont été déployés pour organiser la conférence et les ateliers qui l'ont précédée. Fort peu de personnes sont conscientes du courage, de la détermination et du dévouement qui sont la base de ces réalisations.

Je tiens en particulier à rendre hommage à la Cour fédérale du Canada qui, grâce aux décisions qu'elle a rendues dans le domaine du droit des réfugiés, a su exercer une grande influence. À mon avis, la Cour fédérale a fait autant pour nous guider dans ce domaine, que la Commission présidée par Nurjehan Mawani qui a établi des lignes de conduite concernant le sexe, l'état de guerre civile et les enfants réfugiés. Ces deux organismes ont engendré une interaction essentielle en ce qui concerne le processus décisionnel applicable au droit des réfugiés.

La Cour suprême du Canada a parachevé d'une façon efficace ce processus important. La Cour fédérale et la Cour suprême possèdent l'une et l'autre des compétences et des connaissances cruciales à partager avec les autres. Le nier minerait la portée et la durabilité des décisions qu'elles ont prises.

De fait, avec égards, je prierais instamment toutes les cours supérieures qui sont chargées de rendre des décisions exécutoires ou dont les déclarations ont un grand pouvoir de persuasion, de toujours tenir minutieusement compte des répercussions possibles de leurs actions à l'échelle mondiale. C'est pourquoi, à mon avis, aucun décideur judiciaire à quelque palier que ce soit ne peut se permettre de s'isoler. Par ailleurs, une jurisprudence solide dans un pays peut entraîner une interaction qui donnera matière à réflexion dans les quelque 134 autres pays qui ont signé ou qui appliquent la Convention et le Protocole.

L'AIJAR cherche à exploiter les ressources et à favoriser l'examen de moyens pour minimiser le risque auquel font face les demandeurs du statut de réfugié (dont 85 p. 100 sont des femmes et des enfants) lorsqu'ils réussissent à surmonter des obstacles procéduraux inéquitables pour faire reconnaître leur revendication et à affronter les décisions fort divergentes qui sont rendues lorsqu'il s'agit d'interpréter la Convention relative aux réfugiés.

J'espère que les responsables des politiques de chaque pays s'arrêteront aux paroles que Thurgood Marshall a prononcées en 1972 :

> Les juges sont probablement les premiers à se rendre compte des inéquités du système puisque ce sont eux qui condamnent des défendeurs innocents à la prison ou qui rejettent des demandes fondées en droit. [TRADUCTION]

Dans notre sphère de compétence, il existe des défis éthiques, moraux et juridiques de taille, mais ils sont relativement peu connus car nous avons rarement le temps de nous en préoccuper quand nous rencontrons, pris que nous sommes alors dans le feu de l'action. Cependant, il faut tôt ou tard le faire si nous voulons être en mesure de modifier des procédures peu judicieuses qui minent inutilement la capacité de l'État de s'acquitter des responsabilités qu'il a volontiers consenti à assumer en signant la Convention et le Protocole.

L'indépendance judiciaire exige non seulement le courage physique, mais aussi une vigilance constante. Comme Simon Bolivar l'a dit, la démocratie que l'on obtient n'est pas la démocratie que l'on conserve.

C'est avec respect que je me répète les paroles de mon ami, le professeur David Martin, qui nous exhortait (en 1991) à résister à la tentation d'étendre les normes juridiques. Ses paroles ont été prononcées dans le contexte de la crainte de ce que les responsables chargés d'établir les politiques risquent de faire si nous ne restons pas vigilants.

Si, en notre qualité de juges, nous nous laissons influencer indûment par les arguments fondés sur l'escalade des demandes et l'urgence « d'ouvrir les vannes », nous mettons en péril notre capacité d'établir une harmonie optimale pour nous contenter du plus bas dénominateur commun. En matière de reconnaissance du statut de réfugié, nous considérons que les décisions devraient être assujetties à la règle de droit et fondées sur le respect des droits de la personne.

C'est avec énormément de satisfaction que nous accueillons des juges de la Nouvelle-Zélande et de l'Australie, de la Géorgie (de la CEI) et de pays de l'Afrique ainsi que des délégués de l'Iran, des pays de l'Amérique du Sud, des Philippines et du Japon. J'espère n'avoir oublié personne. Cependant, cela démontre et confirme la valeur de l'Association. En 1995, des représentants de 17 pays se sont rencontrés à Londres, au début de 1996, des représentants de 19 pays se sont rencontrés à Nijmegen, et maintenant 50 pays sont ici représentés par vous, les délégués, et au moins deux autres pays sont représentés par des collègues qui sont avec nous par la pensée.

Je suis fort désolé d'avoir à vous apprendre que Martine Mondt Schouten, des Pays-Bas, vient de perdre sa fille dans un accident de la route et qu'il lui est donc impossible d'assister à la conférence; Joachim Henkel, de Berlin, n'a pas pu venir non plus, sa conjointe étant atteinte d'un grave cancer, mais nous lirons néanmoins sa communication.

Monsieur le juge Allen Linden préside un petit comité chargé de préparer une ébauche de déclaration qui vous sera présentée avant la fin de la conférence; un protocole d'entente avec le HCNUR vous sera également présenté.

Enfin, j'ai remarqué qu'un grand nombre d'entre vous désirent ardemment participer aux activités continues de l'Association. Ne craignez rien, tous auront la chance de participer aux activités et notamment aux ateliers. Hugo Storey vous en parlera plus tard.

J'espère que la conférence vous plaît et que vous continuerez à l'appuyer et à encourager vos collègues à faire de même. Merci.

Le président,

Geoffrey Care

A

Judicial Independence
L'indépendance judiciaire

Judicial Independence: Cornerstone of the Protection of Human Rights

The Right Honourable Antonio Lamer, P.C.
Chief Justice of Canada

It is a pleasure for me to be addressing a gathering of those judges who are responsible in such a direct and practical way with the protection of human rights. It is to you that falls the fate of so many who have fled intolerable conditions in all too many places of the world. The recognition of the rights of those seeking refuge is a basic and important form of human rights protection.

The theme I would like to address this morning is one that I consider basic to the function you are exercising, indeed one that is fundamental to the protection of all human rights in the law. That theme is the independence of the judiciary. To my mind, this principle is of superordinate importance in the protection of human rights. Let me begin with some general observations about the observance of human rights standards. I will then return to the subject of judicial independence and explain the connection between the two.

The history of the modern international human rights movement begins with the reference to human rights in Article 1(3) of the *U.N. Charter* of 1945, an international treaty which has been referred to by some as an embryonic constitution for the global legal order. From the *U.N. Charter*, the course of this movement can be traced, through the adoption fifty years ago of the *Universal Declaration of Human Rights* by the General Assembly, to the various international human rights treaties that form the backbone of not only the United Nations human rights system, but of other regional human rights systems that can now be found throughout the world.

You will permit me, I hope, to say that as a Canadian jurist, I feel a special affinity for the international human rights movement. I say that in part because of the involvement of a great many Canadians in it, beginning, of course, with former Professor John Humphrey of McGill University, who was so important to the drafting of the *Universal Declaration of Human Rights*. But I say it also because that *Declaration*, and the treaties which followed it, provided much of the inspiration for the adoption of the legal instruments which protect human rights in Canada — our federal and provincial human rights statutes, the federal statutory *Bill of Rights* of 1960 and finally, and most importantly, the *Canadian Charter of Rights and Freedoms*. The history of the legal protection of human rights within Canada, in an important sense, can be understood as part of the larger history of the struggle for human rights worldwide. This is no doubt true in many other countries as well.

To my mind, real recognition of human rights is a product of a *culture* of human rights. By this, I mean a legal and social commitment in a given jurisdiction to the institutions and structures on which the protection of human rights depends. In particular, the effectiveness of international human rights law ultimately depends, in my view, not only on the existence and operation of effective institutions, but also on the willingness of all of the actors within the system — the persons who hold rights, the states that are obliged to respect those rights and the bodies that enforce those rights — to regard the norms laid down in human rights

instruments as being authoritative and worthy of respect. For international human rights law to be effective, therefore, it must be supported by a culture in which there is a firm and deep-seated commitment to the importance of human rights in our world.

The development of such a culture worldwide is, of course, an exceedingly challenging task, and one that is likely to take a great many years — if not decades — to achieve, if in fact it ever is achieved. We all know that there are many countries in which, for historical, social and political reasons, the development and entrenchment of a human rights culture will be very difficult. However, from my vantage point at least, there are reasons for some optimism now on this front. Within the last five to ten years, a great many countries have committed themselves — some for the first time, others anew — to democratic forms of self governance and to the rule of law, both of which are integral to any coherent system for protecting individual human rights.

If these countries are to succeed in these endeavours, they will, of course, require assistance from others, including various international organizations and entities. I believe that judges too can play a role in this regard, particularly judges from countries in which a human rights culture already exists. In fact, members of the judiciary from some of these countries are already playing such a role. In this regard, it may be of interest to you to hear about some recent developments in this area involving the Canadian judiciary.

In my capacity as Chief Justice of Canada, I have been receiving a growing number of requests from the kinds of countries of which I have been speaking to provide assistance to the judges and judicial systems of those countries in their efforts to enhance the rule of law and the protection of human rights there. Some of the requests that I have received — for example, for bibliographies of Canadian materials on such topics — can easily be met on the basis of the resources of my own Chambers. However, the majority of these requests cannot be so easily accommodated. They entail the expenditure of considerable amounts of money and require not only a pool of volunteers from within the Canadian judiciary to provide the requested assistance, but also an administrative infrastructure to plan and carry out the assistance programs.

In order for us to be able to accede to these more substantial requests, I have therefore been obliged to enlist the support of others. For example, I have generated a list of some 75 to 80 Canadian judges who have indicated a willingness to participate in foreign judicial-assistance programs. Most of these judges, I should note, come from a special category of judges that we call "supernumerary". Judges in this category have satisfied the requirements for retirement on full pension but, rather than retiring, have opted to remain on the bench, drawing full salary but sitting approximately half-time. The time that the volunteers from this category give to these programs is drawn from their non-sitting periods — in other words, from their free time (with the result, I note, that their involvement will not have any adverse effect on the administration of justice in Canada, particularly insofar as the right of litigants to have their cases heard in a timely manner is concerned). Moreover, as true volunteers, they do not receive any remuneration for their efforts. I might add that it gives me considerable pride to be able to tell people that so many Canadian judges have stepped forward in this manner to contribute to what I consider to be the fulfilment of one of this country's many moral responsibilities in the international sphere.

Finally, I have designated the Office of the Commissioner for Federal Judicial Affairs as the body with primary responsibility for co-ordinating the participation of the Canadian judiciary in foreign support programs. It is through that Office that requests for support which I receive are now processed. That Office has also become involved on its own initiative in several projects, most notably a major one relating to Ukraine.

To my mind, one of the principal contributions that the judiciary can make to the development of a human rights culture in their own or in other states is to defend and promote the independence of the judiciary. I do not suggest that it should fall only to the judiciary to protect this fundamental principle. As I said before, a human rights culture requires a widespread societal commitment to a legal order founded on the rule of law. Integral to that commitment must be a willingness to accept and respect the independence of the judiciary.

In Canada, I think it is fair to say that this widespread commitment exists, although it is subject to occasional reconsideration and spirited debate on the part of some. The principle of judicial independence has formed an integral part of Canada's *Constitution* from the country's birth in 1867. Our *Constitution Act, 1867* provides for both the security of tenure and financial security of federally appointed judges in terms that mirror very closely those used in the *Act of Settlement* of 1701, the legislation by which the British Parliament firmly entrenched the principle of judicial independence in the British Constitution. It also stipulates that the judges of the Superior Courts are to hold office during good behaviour and are to be removable only by the Governor General and, then, only on address of the Senate and House of Commons. Finally, section 100 of the Act provides that the "Salaries, Allowances and Pensions" of these judges are to be "fixed and provided" by the Parliament of Canada.

To reinforce these commitments to the principle of judicial independence, the Preamble to the *Constitution Act, 1867* noted the desire of the constituent provinces to have "a constitution similar in principle to that of the United Kingdom". That reference to the constitution of the United Kingdom has been understood to introduce into our own Constitution a number of the principles that had established themselves in the United Kingdom by 1867. These principles include the rule of law, parliamentary supremacy, democratic self-governance, freedom of speech and of the press and, of course, the independence of the judiciary.

With the entrenchment in 1982 of the *Canadian Charter of Rights and Freedoms*, the principle of judicial independence was given explicit constitutional recognition. According to s. 11(d) of the *Charter*, persons charged with an offence have the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The concluding phrase of this provision has generated a good deal of litigation over the last several years, one of the results of which has been the development by our courts of a definition or understanding of what the term "judicial independence" comprises. Three distinct elements of judicial independence have been identified, each of which must be present to the requisite degree before a court will be regarded as constitutionally adequate. The first two of these elements derive directly from sections 99 and 100 of the *Constitution Act, 1867* — security of tenure and financial security. The third element, which concerns the relationship between the judiciary and the other branches of government, has been termed "Institutional Independence". I should also point out, as a Chief Justice, that judges are independent as against their chief justices. I have no authority to tell a judge how he or she should decide a case.

Without digressing too far into the jurisprudence that has evolved in connection with s. 11(d) of the *Charter*, I should point out that an important feature of it is that not all of these three elements must be reflected to precisely the same degree in all courts. Hence, there are "independent and impartial tribunals" in which the judges do not have precisely the same form of security of tenure and financial security as the courts that are governed by sections 99 and 100 of the *Constitution Act, 1867*. In effect, a sliding scale has been created, one that permits courts to pass constitutional muster on the basis of somewhat lesser guarantees of security of tenure, financial security and institutional independence than superior courts must have.

For those adjudicative bodies that are not, strictly speaking, courts, other legal principles and standards may come into play. But the basic obligation to act fairly in determining the issues and interests before the tribunal, and the need to respect principles of fundamental justice, demand that a certain degree of independence in the adjudicative process be provided to all such tribunals. I hesitate to say anything more specific about this because it is a matter that may well present itself before my Court on some future case. But I think I can safely say that independence is an important principle in respect of all adjudicative tribunals, although the degree and manner of its protection may well differ from that which governs the courts.

In the course of developing our understanding of judicial independence in Canadian law, the courts have been mindful of the purposes underlying our commitment to that principle. One of those purposes is the maintenance of public confidence in the impartiality of the judiciary. As my former colleague Justice LeDain said in one of the leading authorities in this area, "without that confidence the system cannot command the respect and acceptance that are essential to its effective operation".

Another, perhaps even more fundamental purpose served by judicial independence, is the maintenance of the rule of law. It was, of course, to permit the judges of England to apply the law rationally and evenly that the idea of judicial independence was originally conceived and protected. In the words of John Locke, the purpose of judicial independence was to ensure that the law would not "be varied in particular cases, but [be the same] for rich and poor, for the favourite at court and the countryman at plough".

There is an unfortunate tendency on the part of some to characterize judicial independence as a principle that enures primarily if not exclusively to the benefit of the judges themselves. Of course, one cannot deny that the judiciary benefits from security of tenure and financial security. But it must be emphasized that the primary beneficiary of the principle of judicial independence is society as a whole. The reality is that the rule of law cannot endure over time, if it can exist at all, unless those who have the responsibility of interpreting and applying the law are guaranteed their independence from government. How much confidence could the public really have in their legal system if the judges who interpret and apply the law, who define the human rights and freedoms of individuals, were subject to influence on the part of the executive? The fact of that guarantee of independence must in turn be known to, and acknowledged by, the citizens if they are to have the confidence to seek recourse in the courts for the adjudication of their rights, particularly those that they may claim against the government.

In summary, we can have societies in which true respect for human rights can be realized only if those societies accept and respect the principles and institutions necessary for the protection of those rights. In other words, a culture of human rights is required. The cornerstone of the protection of human rights and, therefore, of any society in which a human rights culture can take hold, is an independent judiciary. Without it, no individual can be secure in the knowledge that his or her legal entitlements will be respected or enforced. Without it, arbitrariness and caprice will inevitably supercede basic human rights.

I believe the judiciary can do much to help preserve its own independence and reinforce a culture of human rights. Further, judges from countries like Canada, where a culture of human rights is well entrenched, can have a direct influence on the legal culture of other states. They can assist the judiciary and the legal systems of those states in protecting judicial independence and giving primacy to the rule of law which, I think you will agree, are essential to the recognition of human rights in the law.

Thank you very much.

L'indépendance judiciaire : pierre angulaire de la protection des droits de la personne

Le très honorable Antonio Lamer, c.p.
Juge en chef du Canada

Je suis heureux de m'adresser à vous aujourd'hui, vous qui êtes directement et concrètement chargés des questions de protection des droits de la personne. C'est entre vos mains que repose le sort de bon nombre des personnes qui ont fui les conditions intolérables qui sévissent dans beaucoup trop d'endroits dans le monde. La reconnaissance des droits des demandeurs d'asile est un aspect fondamental et important de la protection des droits de la personne.

Le thème que je souhaite aborder ce matin est, à mon sens, essentiel aux fonctions que vous exercez et essentiel à la protection juridique de tous les droits de la personne. Il s'agit du thème de l'indépendance judiciaire. J'estime que ce principe revêt une importance primordiale dans la protection des droits de la personne. Permettez-moi d'abord de faire quelques observations générales sur le respect des normes relatives aux droits de la personne. Je reviendrai ensuite au sujet de l'indépendance judiciaire et j'expliquerai le lien entre les deux.

Le début du mouvement contemporain de protection des droits de la personne remonte à la mention qui est faite des droits de la personne au paragraphe 1(3) de la *Charte des Nations Unies* de 1945, un traité international qualifié par certains de constitution embryonnaire de l'ordre juridique mondial. Après la *Charte des Nations Unies*, il y a eu l'adoption, il y a cinquante ans, de la *Déclaration universelle des droits de l'homme* par l'Assemblée générale, puis les divers traités internationaux des droits de la personne sur lesquels reposent non seulement le système des droits de la personne des Nations Unies, mais aussi tous les systèmes régionaux des droits de la personne qui existent dans le monde.

J'aimerais vous dire qu'en tant que juriste canadien, je ressens une affinité particulière avec le mouvement international de protection des droits de la personne. Je me sens ainsi d'une part parce qu'un grand nombre de Canadiens se sont associés à ce mouvement, dont bien entendu John Humphrey, ancien professeur à l'université McGill, qui a fait une contribution importante à la rédaction de la *Déclaration universelle des droits de l'homme*. D'autre part, j'estime que cette déclaration, et les traités adoptés à sa suite, ont servi d'inspiration pour l'adoption des textes juridiques qui protègent les droits de la personne au Canada, à savoir les lois fédérales et provinciales telles que la *Déclaration canadienne des droits* de 1960 et, le texte le plus important, la *Charte canadienne des droits et libertés*. Dans une large mesure, on peut dire que la protection juridique des droits de la personne au Canada s'inscrit dans le cadre plus général de la lutte pour la protection des droits de la personne à l'échelle internationale. C'est sans doute aussi le cas pour de nombreux autres pays.

Je crois que la reconnaissance réelle des droits de la personne découle d'une *culture* des droits de la personne. Autrement dit, dans tout territoire donné, il faut qu'il y ait un engagement juridique et social envers les institutions et les structures chargées de la protection des droits de la personne. L'efficacité du droit international en matière de droits de la personne dépend certes, en dernière analyse, de l'existence et du fonctionnement

d'institutions efficaces, mais aussi de la volonté des intervenants dans le système — c'est-à-dire ceux qui doivent affirmer leurs droits, les États qui ont l'obligation de respecter ces droits et les organismes qui sont chargés de les faire valoir — de considérer les normes énoncées dans les instruments internationaux comme faisant autorité et étant dignes de respect. Ainsi, le droit international en matière des droits de la personne ne peut être efficace qu'au sein d'une culture qui valorise les droits de la personne et qui a pris l'engagement ferme et bien ancré de les respecter. La création d'une telle culture à l'échelle mondiale constitue, bien sûr, un objectif des plus ambitieux, dont la réalisation pourrait prendre de nombreuses années sinon des décennies et pourrait même ne jamais se réaliser. Nous savons tous que, dans de nombreux pays, il sera très difficile de créer et d'établir une culture de protection des droits de la personne pour des raisons historiques, sociales et politiques. Or, je suis d'avis qu'on peut se permettre un certain optimisme à cet égard. En effet, au cours des cinq à dix dernières années, bon nombre de pays, dont certains pour la première fois, ont pris un engagement envers les principes démocratiques de gouvernement et la primauté du droit, deux éléments essentiels de tout système cohérent de protection des droits de la personne.

Pour réussir un tel projet, ces pays auront évidemment besoin d'aide, notamment de la part de diverses organisations et autres groupes internationaux. J'estime que les juges peuvent, eux aussi, jouer un rôle à cet égard, notamment les juges des pays où il existe déjà une culture de protection des droits de la personne. D'ailleurs, les membres de la magistrature de certains de ces pays jouent déjà ce rôle. À cet égard, permettez-moi de vous donner quelques exemples récents de la participation de juges canadiens qui pourraient vous intéresser.

En ma qualité de juge en chef du Canada, je reçois un nombre toujours croissant de demandes provenant de ces pays dont je vous parle. Ils cherchent des moyens de seconder leurs juges et leurs systèmes judiciaires dans les efforts qu'ils font en vue d'accroître le respect de la primauté du droit et la protection des droits de la personne sur leur territoire. Avec les ressources dont je dispose, je peux facilement répondre à certaines de ces demandes, comme les demandes de bibliographies d'ouvrages canadiens sur ces sujets. Toutefois, dans la majorité des cas, ce n'est pas aussi simple. En effet, pour fournir l'aide demandée dans de tels cas, il faudrait des sommes considérables et un nombre élevé de bénévoles au sein du système judiciaire canadien ainsi qu'une infrastructure administrative pour planifier les programmes d'aide et les mettre à exécution.

Afin de répondre à ces demandes plus considérables, j'ai dû me faire seconder par d'autres personnes, ce qui m'a permis, par exemple, de dresser une liste de quelque 75 à 80 juges canadiens disposés à participer à des programmes d'aide juridique à l'étranger. Je signale que la plupart de ces juges font partie d'une catégorie particulière appelée « juges surnuméraires ». Ce sont des juges qui remplissent les conditions nécessaires à la retraite avec pleine pension, mais qui ont plutôt choisi de continuer à siéger; ils touchent leur salaire complet, mais ne siègent qu'à temps partiel. Pendant qu'ils ne siègent pas, ces bénévoles consacrent du temps à ces programmes, soit leur moments libres. (En conséquence, ferais-je remarquer, leur participation à ces programmes ne nuit pas à l'administration de la justice au Canada, notamment en ce qui concerne le droit des parties à une audience tenue en temps opportun.) En outre, ils participent aux programmes bénévolement et ne sont donc pas rémunérés pour leur travail. J'aimerais ajouter que je suis très fier de pouvoir dire

qu'un si grand nombre de juges canadiens se sont portés volontaires pour contribuer à ce que j'estime être une des nombreuses responsabilités morales du Canada sur la scène internationale.

Enfin, j'ai confié au Bureau du Commissaire à la magistrature fédérale la responsabilité première de coordonner la participation de juges canadiens aux programmes d'aide à l'étranger. Les demandes d'aide que je reçois sont désormais traitées par cet organisme. Le Bureau du Commissaire participe également de sa propre initiative à plusieurs projets, notamment à un important projet avec l'Ukraine.

Je crois que c'est par la défense et la promotion de l'indépendance du système judiciaire que les juges peuvent contribuer le plus à la création d'une culture des droits de la personne dans leur État ou dans d'autres États. Je ne veux pas laisser entendre qu'il appartient uniquement aux juges de protéger ce principe fondamental. Comme je l'ai déjà dit, la création d'une culture des droits de la personne nécessite un ferme engagement d'ordre social envers un ordre juridique reposant sur la primauté du droit. Une partie intégrante de cet engagement est la volonté d'accepter et de respecter l'indépendance du système judiciaire.

Au Canada, il ne fait aucun doute que ce ferme engagement existe, même s'il fait parfois l'objet de remises en question et de vives discussions de la part de certains. Le principe de l'indépendance judiciaire fait partie intégrante de la constitution du Canada depuis la fondation du pays en 1867. Notre *Loi constitutionnelle de 1867* prévoit l'inamovibilité et la sécurité financière des juges nommés par le fédéral en des termes très semblables à ceux utilisés dans l'*Acte d'établissement de 1701*, la loi par laquelle le Parlement anglais a inscrit le principe de l'indépendance judiciaire dans la constitution britannique. Elle prévoit également que les juges des cours supérieures demeurent en fonctions à titre inamovible, à condition d'un comportement impeccable, mais qu'ils peuvent être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des communes. Finalement, l'article 100 de la Loi dispose que les « traitements, allocations et pensions » de ces juges sont « fixés et assurés » par le Parlement du Canada.

Pour renforcer ces engagements envers le principe de l'indépendance judiciaire, le préambule de la *Loi constitutionnelle de 1867* fait état du désir des provinces d'avoir « une constitution semblable dans son principe à celle du Royaume-Uni ». C'est ainsi que notre propre constitution contient un certain nombre des principes déjà bien établis au Royaume-Uni en 1867. Au nombre de ces principes figurent notamment la primauté du droit, la suprématie du Parlement, le gouvernement démocratique, la liberté d'expression, la liberté de la presse et, bien entendu, l'indépendance du pouvoir judiciaire.

L'inscription dans la constitution de la *Charte canadienne des droits et libertés* en 1982 a permis la reconnaissance constitutionnelle explicite du principe de l'indépendance judiciaire. Suivant l'alinéa 11*d*) de la Charte, tout inculpé a le droit « d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable ». La dernière partie de cette disposition a donné lieu à de nombreux litiges au cours des dernières années. Il en est notamment résulté l'élaboration par nos tribunaux d'une définition ou d'une vision commune du sens de l'expression « indépendance judiciaire ». Trois éléments distincts de l'indépendance judiciaire doivent être réunis, chacun selon le degré exigé, avant qu'un tribunal judiciaire soit reconnu du point de vue constitutionnel. Les deux premiers éléments découlent directement des articles 99 et 100 de la *Loi constitutionnelle de 1867*; il s'agit de l'inamovibilité

et de la sécurité financière. Le troisième élément, soit la relation entre le judiciaire et les deux autres pouvoirs, s'appelle « indépendance institutionnelle ». Je devrais également souligner, en tant que juge en chef, que les juges sont indépendants même au regard de leur juge en chef. Je n'ai pas le pouvoir de dire à un juge quelle décision il ou elle devrait rendre dans un cas.

Je ne veux pas m'attarder à la jurisprudence sur l'alinéa 11*d*) de la Charte, mais je dois souligner qu'un des aspects importants de cette disposition est qu'il n'est pas nécessaire que ces trois éléments soient présents au même degré. Ainsi, il existe des tribunaux indépendants et impartiaux dont les juges ne jouissent pas de la même inamovibilité et de la même sécurité financière que ceux des tribunaux régis par les articles 99 et 100 de la *Loi constitutionnelle de 1867*. En effet, il existe une gradation suivant laquelle des tribunaux peuvent respecter les exigences constitutionnelles sans les mêmes garanties en matière d'inamovibilité, de sécurité financière et d'indépendance institutionnelle que les cours supérieures.

Quant aux organismes décisionnels qui ne sont pas, à proprement parler, des tribunaux, d'autres principes et normes s'appliquent. Toutefois, l'obligation fondamentale des tribunaux de procéder avec équité à la détermination des questions et des intérêts dont ils sont saisis ainsi que leur obligation de respecter les principes de justice fondamentale, nécessitent que ces tribunaux disposent d'un certain degré d'indépendance dans leur prise de décisions. J'hésite à parler davantage de cette question parce qu'il se pourrait bien qu'elle soit soulevée devant la Cour suprême dans une cause future. Or, je peux certainement dire que l'indépendance est un principe important pour tous les tribunaux, judiciaires et autres, quoique à des degrés différents.

Dans l'élaboration de notre vision de l'indépendance judiciaire en droit canadien, les tribunaux judiciaires ont bien tenu compte des objectifs sous-jacents de notre engagement à ce principe. La confiance du public à l'égard de l'impartialité des tribunaux figure au nombre de ces objectifs. Comme mon ancien collègue le juge LeDain l'a affirmé dans une des décisions importantes faisant jurisprudence dans ce domaine, sans cette confiance, le système ne peut inspirer le respect et l'acceptation essentiels à son bon fonctionnement.

L'indépendance judiciaire sert également un autre objet peut-être encore plus essentiel, soit le maintien de la primauté du droit. L'idée de l'indépendance judiciaire a d'abord été conçue et protégée pour permettre aux juges anglais d'appliquer la loi de manière rationnelle et équitable. Selon John Locke, l'indépendance judiciaire visait à garantir que la loi s'appliquerait également à tous, riches ou pauvres, nobles ou paysans.

Certains ont malheureusement tendance à décrire l'indépendance judiciaire comme un principe qui profite principalement, voire exclusivement, aux juges eux-mêmes. Évidemment, personne ne peut nier que les juges profitent de l'inamovibilité et de la sécurité financière. Cependant, il importe de souligner que c'est la société tout entière qui bénéficie au premier chef du principe de l'indépendance judiciaire. En fait, la primauté du droit ne peut subsister au fil des temps, ni n'existera, à moins que ceux qui ont la responsabilité d'interpréter le droit et d'appliquer les lois jouissent d'une indépendance par rapport au gouvernement. Quelle confiance le public aurait-il réellement en son système judiciaire si les juges qui interprètent le droit et appliquent les lois, qui définissent les droits de la personne

et les libertés individuelles étaient assujettis à l'influence du pouvoir exécutif? La garantie de l'indépendance doit de même être connue des citoyens et reconnues par eux pour qu'ils aient la confiance nécessaire pour faire valoir leurs droits, notamment dans le cas d'un litige avec le gouvernement.

En somme, il ne peut y avoir de sociétés qui respectent réellement les droits de la personne à moins que ces sociétés acceptent et respectent les principes et les organismes nécessaires à la protection de ces droits. Autrement dit, il faut une culture de protection des droits de la personne. L'indépendance judiciaire est la pierre angulaire de la protection des droits de la personne et, partant, de toute société dans laquelle une culture de protection des droits de la personne peut être enracinée. Sans cette indépendance, nul ne peut être certain que ses droits juridiques seront respectés et garantis. Sans cette indépendance, l'arbitraire l'emportera inévitablement sur les droits fondamentaux de la personne.

À mon avis, le système judiciaire peut contribuer grandement à conserver son indépendance et à renforcer une culture de protection des droits de la personne. De plus, les juges de pays comme le Canada, où il existe une culture bien établie de protection des droits de la personne, peuvent influer directement sur la culture juridique d'autres pays. Ils peuvent aider les juges et les systèmes judiciaires de ces pays à protéger l'indépendance judiciaire et à reconnaître la primauté du droit qui, vous en conviendrez, sont essentiels à la reconnaissance juridique des droits de la personne.

Je vous remercie de votre attention.

Independence of the Judiciary and the Refugee Convention: New Zealand

David Baragwanath
President of the New Zealand Law Commission and Judge of the High Court of New Zealand

Introduction

Until recently, New Zealand's insulation by the Pacific Ocean made refugee issues largely a matter of determining our quota as an aspect of future planning. The recent rapid growth in international air traffic, projected to double from 1996 to 2015, has resulted in our exposure to the problem long-experienced by states with territorial boundaries or within short distance by sea from other states. *Benipal* v. *Ministers of Foreign Affairs and Immigration* (High Court Auckland A878/83 judgment 29 November 1985) (on appeal [1988] 2 NZLR 222) was a watershed, bringing sharply to public attention that New Zealand's accession in 1960 to the 1951 Convention relating to the Status of Refugees, supplemented by its 1967 Protocol to which we acceded in 1973, entails acceptance by the state of a responsibility of a high order in relation to whom I will call "unplanned", and whom others describe as "spontaneous", refugees.

To understand the nature of a state's obligations in respect of unplanned refugees requires a fair degree of education in the issues, as well as sophistication. The fact that the common law does not recognize treaties as part of domestic law has the potential for creating a shortfall between the treaty obligation and its enforcement; it is easy to see these issues as simply another aspect of general immigration policy. Yet, in sharp contrast to the case of other immigrants, including planned or "resettlement" refugees[1], the Convention limits the right of the executive government in relation to bona fide refugees who advance a claim under it.

We are still working on our arrangements; there is at present before the House of Representatives a Bill[2] which responds to repeated calls by the judiciary to have our refugee procedures firmly rooted by statute in our domestic law. This address is a snapshot of where we are at the moment.

The Superior Courts

Sir Ninian Stephen's classic definition of an independent judiciary is one "... which dispenses justice according to law without regard to the policies and inclinations of the government of the day."[3]

1. New Zealand's annual quota is 750.
2. The *Immigration Amendment Bill* 1998.
3. Judicial Independence - a Fragile Bastion in Judicial Independence: the Contemporary Debate, ed. Shetreet and Deschenes, Martinus Nijhoff Publishers, Dordrecht, 1985, cited by MacGuigan J. in The Independence of the Judiciary in Asylum Cases in Refugee and Asylum Law: Assessing the Scope for Judicial Protection, International Association of Refugee Law Judges, page 23.

It is an expression of a fundamental element of the Rule of Law, which it is the function of New Zealand's superior courts of general jurisdiction — the High Court and the Court of Appeal — to enforce.[4]

No serious doubt has ever been cast upon the independence of our superior courts. The judges of those courts are appointed in middle age not from the government but from private practice, normally[5] from the limited number of barristers sole[6] whose seniority and ability have led to the grant of the honorific Crown patent as Queen's Counsel. That grant, like the appointment of such judges, is on the recommendation of the Attorney-General[7] who, while a Cabinet Minister, by settled convention acts without regard to political considerations. While some counsel appointed to the High Court have represented the Crown, most have spent all or most of their career acting against it. With the constitutional protection from dismissal resulting from the *Act of Settlement* 1701 (effectively re-enacted by the *Constitution Act* 1990), it is an axiom of the New Zealand judiciary that they must, and do, apply the law to all, including the government and the judiciary itself. Its track record is illustrated by such judgments as *Reade* v. *Smith* [1959] NZLR 996, *Fitzgerald and Muldoon* [1976] 2 NZLR 615, *New Zealand Maori Council* v. *Attorney-General* [1987] 1 NZLR 687 and, in the case of refugees, *Benipal.*

Subject to the development of the "jurisprudence" that is a natural consequence of an appellate system, courts of the states of the Civil Law maintain Article 5 of the *Code Napoléon* of 1804 : "Il est défendu aux juges de prononcer, par voie de disposition générale et réglementaire, sur les causes qui leur sont soumises".

The courts of New Zealand, by contrast, have developed and exercise in refugee matters, as in other spheres, the procedure which the judges in developing the common law devised to consider and to enforce the legality of the conduct of inferior tribunals and of what Montesquieu called the executive limb of government.[8] The nature of review will alter in different classes of case. Where the decision involves an issue in which the court should generally defer to the decision of elected representatives, it will be slow to intervene. The scale of local body rates is an example. However, where questions of personal liberty and human rights are involved, the courts will intervene more readily, as by issuing the historic writ of *habeas corpus* or the prerogative orders of *certiorari or mandamus.*[9] The amendment to the *Immigration Act* will confer on the Refugee Status Appeals Authority (RSAA), with its membership continued by that measure, the function of hearing appeals brought by persons whose claim to refugee status has been declined. As a result, the High Court's jurisdiction to review the exercise of statutory powers of decision under the *Judicature Amendment Act* 1972 will engage where necessary.

While at present the whole process for dealing with refugee claims, including the establishment of the RSAA and the right of appeal to it has been created pursuant to the Crown prerogative, the New Zealand courts have not been deterred from the exercise of their own prerogative jurisdiction to review: *Benipal; Singh* v. *Refugee Status Appeals Authority* [1994] NZAR 193, 274.

4. See *Referendum re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.
5. A minority of judges have been appointed from practice as solicitors and two from a university background.
6. Advocates who practise exclusively in the courts on instructions from solicitors.
7. In the former case with the consent of the Chief Justice.
8. De l'Esprit des Lois, Livre XI, Chapitre V.
9. See *Ports of Auckland Limited* v. *Auckland Regional Authority,* High Court Auckland CP 306/98, judgment 19 September 1998, pages 22-23.

In *Butler* v. *Attorney-General* (CA 181/97, 13 October 1997) the Court of Appeal, having dealt with the case on the merits in the light of the Convention and Protocol, referred[10] to the difficulty presented by "... the basic principle that the executive cannot change the law by entering into treaties in the absence of securing any necessary legislative change", citing *Attorney-General for Canada* v. *Attorney-General for Ontario* [1937] AC 326, 347. Their call for legislative intervention recorded:

> Refugees continue to come to New Zealand under ... resettlement programmes ... Since The UNHCR recognises their status no New Zealand procedure is needed to deal with them. But so far as refugee applications being made from within New Zealand are concerned, the situation has changed markedly since 1960 with, first, the removal (in 1973) of the temporal limit on those who might claim refugee status, second, the large increases in the numbers of refugees including many from countries much closer to New Zealand, third, the much greater availability of means of travel, especially by air, to New Zealand, and, fourth, the great increase in visitors to New Zealand (for many applicants for refugee status arrived earlier on regular permits as visitors or students). Issues about refugee status now arise frequently within New Zealand. The two years may not be typical, but in 1991 when [the appellant] arrived and in 1992 when his application was considered and appeal heard, 1977 refugee status applications were made in New Zealand, RPG Haines *The Legal Condition of Refugees in New Zealand (1995)* 4. A Cabinet paper of December 1991 recorded that about 100 applications were being lodged each month (about a fifty-fold increase since 1987 when only 27 had been made in the whole year) and that nearly all the fifty percent which were declined went to The RSAA on appeal. "For the foreseeable future the Authority will need to process some 60 cases each month...".

Legislation would not only clarify and regularize the position in respect of review or appeal. It would also (as with the statutory immigration tribunals) provide rules relating to the appointment, status, tenure and protection of the members of the tribunal — their powers, for instance, in respect of the calling of evidence, the protection of parties and witnesses, the status of the RSS within the process, the public or private nature of its procedure, time limits and other aspects of the tribunal's procedure and its independent servicing.

It may be noted that the *Immigration Amendment Bill* responding to the Court of Appeal's call recognizes the propriety of recourse to the Courts on judicial review, although limiting the time within which such claims may be made.[11] Clause 146A(1) provides:

> Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced within 28 days after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed.

10. At page 21.
11. Compare the *Illegal Immigration Reform and Immigrant Responsibility Act* 1996 (US) discussed 98 Colombia L Rev 695ff (1998) and the *Migration Reform Act* 1992 (Australia) discussed (1998) 20 Sydney Law Review 457.

It may be concluded that the independence of the superior courts is both asserted by the judges of those courts, protected by the permanent tenure of their members, and accepted by the executive responsible for the drafting and introduction of the *Amendment Act*.

The Refugee Status Appeals Authority

In his address last year at Nijmegen, Mr. Justice MacGuigan focussed on another part of New Zealand's judicial system relating to refugee matters. He cited the observation of Lamer C.J. in *Québec Inc* v. *Quebec (Régie des permis d'alcool)* [1996] 3 SCR 919 para 67 that "the removal of adjudicators must not simply be at the pleasure of the executive", and said: "This is . . . very much a problem in countries like the United States and New Zealand, where refugee judges of first instance appear to have no guarantee of term of office."

The precise position is that, pending enactment of the *Immigration Amendment Bill*, New Zealand's implementation of our obligations under the Convention is performed in exercise of the prerogative, without legislation. The Refugee Status Appeals Authority was established in 1990, in response to the lessons of *Benipal*. Particulars of the current arrangements are contained in Appendix 1.

There has been a series of Rules adopted by the government stipulating the procedures for determining applications for refugee status by the Refugee Status Branch of the New Zealand Government's Immigration Service and the RSAA, which conducts *de novo* appeals from decisions of the Refugee Status Board (RSB). These appear in Appendix 2.

The lack of statutory implementation of the obligations assumed by New Zealand has been said to present a source of potential concern that the RSAA is not an autonomous decision maker on the basis that:

(1) at common law treaties do not become part of the domestic law;
(2) the Minister, while agreeing to be bound by the RSAA's decision (Rule 5(4)), could promote a change of government policy;
(3) the Court of Appeal had expressed the doubts as to the legal position expressed in *Butler*.

A former Minister of Immigration was reported as stating that an intake of 50 to 60 asylum seekers per year would be acceptable. In the last calendar year, 1580 refugee applications were received by the Refugee Status Branch. In 1997-98 financial year, of the 438 appeals determined by the RSAA, only 37 were allowed.[12] The same essay draws attention to the withdrawal of legal aid from the initial Refugee Status Branch determination upon the enactment of the *Legal Services Act* 1991, restricts legal aid to the appeal hearing. The essay concludes that:

> A superficial (and mistaken) analysis might suggest that there is a correlation between the Minister's expressed desires concerning the preferred level of intake of asylum seekers and the RSAA's declining approval rate. The independence issue is a very real one.

12. Haines *International Law and Refugees in New Zealand*, Address to the International Law Association, Auckland, 10 September, 1998.

The points referred to by Mr. Justice MacGuigan are, however, addressed by the *Amendment Bill*, which introduces a four-year term of appointment for RSAA members, aligning their term with that of the other (statutory) Immigration Appeal Authorities, the Residence Appeal Authority and the Removal Review Authority.

There are other measures of the independence of the RSAA. These are the quality of the appointees and their performance.

A notable feature was the appointment to the RSAA at an early stage of one of its present Deputy Chairmen, RPG Haines. He was leading counsel for the applicant in *Benipal* and is the author of most of the leading decisions to which I will refer. His independence is beyond dispute. So is that of Priestley QC, the other Deputy Chairman. The same is the case with the present Chairman of the RSAA, Allan Mackey. New Zealand remains of a size where the appointment of such counsel as judges provides comfort as to the independence of the RSAA.

That conclusion is borne out by its judgments. These are of high quality, as is seen in the decision of the House of Lords in *Adan* v. *Home Secretary* [1998] 2 WLR 702 in which a decision of the RSAA, which had declined to follow the Court of Appeal of England's decision in *Adan*, was preferred to that of the Court of Appeal.

The jurisprudence has attained a remarkable degree of erudition across a wide range of issues, including:

- the nature of the hearing *Refugee Appeal 523/92 re RS* 17 March 1995;
- the issues to be considered under Article 1A(2) *Refugee Appeal 70074/96 ELLM* 17 September 1996 and *Refugee Appeal 70366/96 Re C* 22 September 1997 (applied by the House of Lords in *Adan*);
- the nature of persecution and the standard of its proof *Refugee Appeal 2039/93 re MN* 12 February 1996;
- the China "one-child family" policy and its implications under the Convention *Refugee Appeal 3/91 re ZWD* 20 October 1992;
- whether homosexual appellants are a "social group" *Refugee Appeal 1312/93 re GJ* 30 August 1995;
- the exercise of the discretion to interview and dealing with abuse of the system *Refugee Appeal 70951/985* August 1998; and
- refugees *sur place* and good faith *Refugee Appeal 2254/94 re HB* 21 September 1994.

It may be expected that the statutory recognition of the RSAA will further strengthen its independence.

It may be concluded that the independence of the judiciary in New Zealand in relation to refugee issues is guaranteed at the level of the superior courts, and that upon enactment of the pending legislation it will compare favourably with that of other jurisdictions in respect of the work of the RSAA.

APPENDIX 1

Arrangements as to Refugee Status Appeals Authority

The Authority constitutes the Refugee Status Appeals Authority Chair, a community representative, a female Authority Member, the manager of the New Zealand Immigration Service Appeals Branch and a senior government official with experience in judicial tribunal appointments.

Shortlisted candidates are interviewed by the selection panel. The representative in New Zealand of the United Nations High Commissioner for Refugees is invited to observe. Each candidate is asked standard questions, previously agreed by the panel. Responses are rated, and candidates are then ranked according to the criteria specified in the ideal-person specification.

The Authority registrar takes notes of the interviews. Referee checks are made.

A write up of the interviews is circulated for comment/amendment by all selection panel members. The Authority Chair or the Appeals Branch Manager will then contact selected candidates. The candidates will be advised of the intention to recommend their appointment and given the opportunity to clarify any issues regarding conditions of appointment.

Remuneration is based on the scale set by the State Services Commission under the *Fees and Travelling Allowances Act*. The Minister of State Services has concurred with this practice despite the Refugee Status Appeals Authority not having a statutory basis which incorporates it. In effect payment is $96,000 per annum for a full-time member and $500 per day for a part timer. Some appointments are made on a pro rata percentage of the annual payment.

A proposal is then made to the Minister of Immigration that the selected candidates be recommended to the Appointments and Honours Cabinet Committee for appointment. If the Minister agrees to the selection (and no nomination has been rejected since the introduction of the advertising and interview process) the recommendation to the Appointments and Honours Cabinet Committee must first be approved by the State Services Commission.

The practice of the Appointment and Honours Cabinet Committee is that the concurrence of the Government Caucus is obtained before agreeing that recommendations be referred to Cabinet for final approval.

Appointments to the Refugee Status Appeals Authority are formalized by a letter from the Minister of Immigration, unlike the other authorities, where the Governor General signs a Warrant of Appointment, which is published by Gazette Notice.

An induction programme is then arranged, usually before the commencement date of any appointment.

APPENDIX 2

Procedural Rules

The current Rules[13] provide inter alia that:

Composition

1. Subject to paragraph 3 below, the Authority shall comprise members appointed by the Minister of Immigration from time to time, consisting of a Chairperson from outside Government and such other independent members as the Minister considers necessary.

2. The Authority may sit in divisions to hear and determine matters before it. A division of the Authority shall consist of a minimum of one member. All divisions shall consist of one member unless the Chairperson directs that, because of the exceptional circumstance of the case, more than one member should sit in a division. Where more than one member is sitting in a division the Chairperson shall appoint one member to act as Chairperson for the hearing.

3. A representative of the UNHCR is ex officio a member of the Authority with decision-making powers and may sit, in association with other member(s) of the Authority, in any division of the Authority notwithstanding paragraph 2 of this Part of these Rules.

4. Administrative support shall be provided to the Authority by employees of the New Zealand Immigration Service of the Department of Labour, not being employees who are also currently employed to consider applications for refugee status, and the Immigration Service shall provide such other resources as the Minister of Immigration, having consulted with the Chairperson, considers necessary to enable the Authority to carry out its functions pursuant to these Rules.

Function and Jurisdiction

5. (1) The Authority's functions shall be:

   (a) To make a determination on appeal from decisions of the RSB of the New Zealand Immigration Service as to whether persons are refugees within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

   (b) To make a determination on appeal from decisions of the RSB as to whether a person who meets the definition of a refugee in Article 1A(2) of the Convention should nevertheless be excluded from the protection of the Convention, pursuant to Article 1D, 1E or 1F of the Convention.

13. Rules Governing Refugee Status Determination Procedures in New Zealand (in force from 30 April 1998).

(c) To make a determination, on application by the RSB or on appeal from a decision of the RSB, as to whether the Convention has ceased to apply to a person who has previously been recognized as a Convention refugee by the RSB or the Authority in terms of Article 1C of the Convention.

. . .

(3) It shall not be a function of the Authority to consider any immigration matters relating to an appellant's case or to consider whether, in respect of claimants who are not refugees within the meaning of Article 1A(2) there exist any humanitarian or other circumstances which could lead to the grant of a residence or other permit to remain in New Zealand.

(4) The Authority's decision on any matter properly before it shall be final and there shall be no right of appeal or rehearing on the matter, and the Minister of Immigration agrees to be bound by the decision . . ."

The terms of appointment of members are in similar terms to those for membership of the (statutory) Removal Review Authority and Residence Appeal Authority; the 1996 conditions and guidelines provide that:

"1 **Appointments**

Appointments are made by a recommendation from the Minister of Immigration to Cabinet. In the case of the RSAA, an appointment is then formalised by the Minister. For the RAA/RRA, an appointment under warrant is made by the Government General.

2 **Term**

The term of appointment is also included in the approvals given by Cabinet. Usually, appointments are initially made for one year. If they then prove satisfactory, terms of two or three years thereafter are given . . .

. . .

5 **Cross-appointments**

Of recent times, the Minister has favoured full-time or near full-time appointments, as these allow people to make a significant contribution to the work of the various Authorities, and it is considered that there are cost savings in this approach. It is for this reason also that several cross appointments have been made between the various Authorities."

B

Human Rights and Refugee Law

Droits de la personne et droits des réfugiés

The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute

James C. Hathaway[1]

In a document released during the summer of 1998, the Austrian Presidency of the European Union formally questioned the continuing value of the United Nations Refugee Convention, and called for the adoption of a new "instrument of speedy assistance in the framework of the political possibilities."[2]

The Austrian proposal would deny most refugees arriving in Europe the legal right to be protected. For the majority, protection would instead become a matter of political discretion. The proposal erroneously asserts that only a small minority of contemporary asylum seekers is entitled to Convention refugee status, in consequence of which a "new approach" should be devised to respond to ensure that other victims of human rights abuse, war, and other threats to human dignity do not come to Europe to seek protection. The new approach would be premised on intensified and carefully orchestrated deterrence, with purely discretionary and regionally exclusive responses as complementary policies. The Austrian Presidency's proposal argues that the Refugee Convention's commitment to both the rule of law and global solidarity is "not at all geared" to contemporary refugee flows.

Happily, virtually all of Austria's EU colleagues voted to reject this extremist view of the future — or non-future — of refugee law. This is, however, no cause for complacency. At least two lessons should be learned from this failed policy initiative.

First, the Austrian proposal makes clear that there is a pervasive failure to understand the real purposes and value of international refugee law. Specifically, it does not recognize that the Refugee Convention is capable of being implemented in a way that reconciles the need of refugees to secure access to protection to the legitimate concerns and aspirations of receiving states.

Second, and most directly related to your daily work as refugee law judges, the Austrian proposal's extraordinarily conservative reading of the Convention refugee definition suggests that there is an urgent need to reinvigorate the substantive content of refugee law, in order to prove that it remains absolutely relevant to the needs of contemporary asylum seekers.

To achieve both these goals, I believe that we need to embrace a vision of refugee law as human rights protection.

1. Professor of Law and Director, Program in Refugee and Asylum Law, The University of Michigan; Senior Visiting Research Associate, Refugee Studies Programme, Oxford University.
2. Memorandum from the Presidency of the Council of the European Union to the K4 Committee, Doc. 9809/98, July 1, 1998, at para. 102. "Such an approach would allow potential reception and protection States to come up with their offers in a much more flexible and speedy way. It would also release a considerable volume of personnel and material resources... which could be much better used in direct assistance to the persons taken in and to be afforded protection... A new direction of this kind can only be implemented on the basis of a Convention supplementing, amending or replacing the Geneva Convention": *id.*

The Medium-Term Perspective: It is Time for Reformulation of the Mechanisms of Refugee Protection

How can the community of refugee law judges help to ensure that the real value and practicality of international refugee law are clearly understood?

As a medium-term objective, I strongly encourage the International Association of Refugee Law Judges to stimulate governments and the United Nations High Commissioner for Refugees (UNHCR) to embark upon reform of the mechanisms of international refugee law. You are uniquely placed as experts committed to the rule of law to argue authoritatively both that the fundamentals of refugee protection are sound, and simultaneously that the *precise ways* in which we have tended to go about the business of protection — arbitrarily assigned responsibilities among states, the confusion of refugee protection with immigration, the trend to push more and more refugees into discretionary categories where internationally guaranteed rights are not respected — are the logical objects of our concern and efforts. I believe that the objective should be reform of the modalities of protection, *without abandoning the current Refugee Convention*, and without compromising in any way the critical value of a rule-based, rights-defined, and fully accountable system of protection.

International refugee protection is in crisis. As armed conflict and human rights abuse continue to force individuals and groups to flee their home countries, many governments feel unable to receive all refugees who seek their protection. States are increasingly withdrawing from the duty to provide refugees with the protection they require.

Despite the fact that the North protects only about 20% of the world's refugee population, its governments have adopted sophisticated policies of *non-entrée*, designed to keep refugees from ever reaching their territories. Visa requirements for nationals of refugee-producing countries, backed up by carrier sanctions, make it difficult for most refugees to even contemplate travelling to the North. Refugees who circumvent the visa barrier are increasingly deflected back to the countries transited during their escapes, even when these intermediate states are unable to offer them meaningful protection. Others have faced interdiction on the high seas or in artificially designated "international zones." The risk of genuine refugees being turned away continues even for those refugees who manage to reach northern states of asylum. Summary exclusion procedures and restrictive application of the Convention refugee definition frequently result in the failure to recognize the claims of persons entitled to international protection.

The quality of protection provided to even recognized refugees is also weakening. Many recently adopted "temporary protection" policies, for example, abridge basic rights guaranteed to refugees under international law, including rights to internal freedom of movement, employment, and family unity.

The protection picture is similarly bleak in the South. Southern states are struggling to cope with the overwhelming majority of the world's refugees. Particularly when faced with a mass influx, they have often found it impossible to provide for refugees' basic economic needs, or even to guarantee their physical security. In the result, they have increasingly sought to emulate northern efforts to avoid responsibility towards refugees by resorting to border closures and the forcible expulsion of refugees. Patterns of abuse of the rights of refugees are often so serious as to be tantamount to *refoulement*, including the denial of even basic subsistence rights, such as food rations. Refugees may be effectively forced to return home, even when it is not yet safe to do so.

As fewer and fewer states see the reception of refugees to be reconcilable to their own national interests, the focus of international attention has shifted away from the provision of asylum to refugees, and toward the eradication of the "root causes" of refugee migrations. The rhetoric of commitment has not, however, been matched by official action to put down human rights abuse and violence in other than the small minority of countries of origin of strategic importance to powerful governments. Yet under the guise of the so-called "right to remain," refugees are increasingly forced to remain within the boundaries of their own countries in unsafe conditions, as was the case in Bosnia, Kurdistan and Rwanda. Underprotected in defined areas, these concentrations of would-be refugees have provided an irresistible target to enemies.

Because there is as yet no practical commitment on the part of governments universally and immediately to address all risks of violence and other human rights abuse, desperate people will continue to migrate in search of protection. Nor should they be prevented from seeking refuge. Until and unless effective and timely intervention is a dependable reality, the right to solicit safety abroad remains a critical moral imperative, the only truly autonomous response to the violation of basic human rights.

Yet because the economic, political, and strategic reasons that induced an historical openness to the arrival of refugees have largely withered away, there is no longer a guarantee that any state will be prepared to receive those involuntary migrants. The challenge is to reconceive the mechanisms of refugee protection in a way that is reconcilable to the legitimate concerns of modern states, yet which does not sacrifice the critical right of at-risk people to seek asylum.

While largely in agreement with this analysis, contributors to a series of consultations which I organized between 1991 and 1996 urged that the time is not yet right to propose the fundamental renegotiation of the United Nations Refugee Convention itself. Simply put, the risk of a downward spiral in the quality of protection formally guaranteed by international law is too great. This advice convinced me that the welfare of refugees is best served by promoting a new operational framework for the implementation of traditional legal obligations. Two specific concerns appear paramount: problems associated with reliance on individuated state responsibility, and the absence of a meaningful solution orientation.

First and most fundamentally, there is a desperate need meaningfully to share burdens and responsibilities towards refugees. Under the current regime, when refugees arrive in an asylum state, that state is, as a matter of international law, solely responsible for their protection. As such, the distribution of state responsibility towards refugees is based primarily upon accidents of geography and the relative ability of states to control their borders. Any assistance received from other countries or the UNHCR is a matter of charity, not of obligation. The present system of unilateral, undifferentiated state obligations is unfair, inadequate and, ultimately, unsustainable. As states have no reliable means of looking to their neighbours or the international community at large for assistance and solidarity, there is a perverse logic to the option of simply closing borders and pre-emptively avoiding any responsibility for providing protection.

Closely related to this problem of atomized responsibility is the failure to allocate the fiscal resources available for refugee protection to greatest advantage. Specifically, to the extent that the relatively recent breakdown of refugee protection within southern regions of origin

derives from a scarcity of funds, it is potentially remediable. The amount of money spent in the North to evaluate and process the claims of the 20% minority of refugees it receives dramatically dwarfs the resources available to protect the 80% of the refugee population located in the South. Under a more collaborative approach to refugee protection, the same resources presently spent to receive refugees could be reassigned to where they are most likely to benefit the greatest number of refugees.

In an ideal world, a system to share the burdens and responsibilities of refugee protection would be immediately established at the global level. A universal system could spread the costs of providing asylum among the largest number of states, thereby minimizing the risk of an unacceptably high cost being imposed on any particular government. Most contributors to our consultations, however, recognized with regret that there is presently an insufficient sense of "connectedness" among states at the universal level to generate a formal, binding commitment to collectivize the responsibilities and costs of refugee protection. While not ruling out the potential for a more universal system to evolve incrementally, I have been persuaded that a dependable regime of shared responsibility towards refugees is presently most viable within associations of states at the sub-global level, linked together in a global network by UNHCR's participation in all such groups.

Organizations that already allow states to work effectively together, and to which governments are prepared to make binding commitments (for example, by reason of economic and trading relationships, shared religion or language, common political or legal traditions, or similar security objectives) are logical sites in which to fashion a collectivized approach to refugee protection. Associations that link North and South, and which have a broadly based membership, are best positioned to facilitate a workable regime for sharing the burden of, and responsibility for, refugees.

Enhanced solidarity among states at the sub-global level is, I believe, a practical yet principled means to implement the universal commitment to refugee protection undertaken by state parties to the Refugee Convention. The reformulated approach I propose includes a key role for UNHCR in establishing and implementing sub-global refugee protection systems, and in orchestrating a global network of such regimes.

The decision to look primarily to functional interstate associations as the bedrock for a reconceived approach to the implementation of refugee law may appear less committed to universal co-operation than the present approach. In fact, this may not be so. The present global system of co-operation in refugee protection has relied on vague promises of co-operation among governments, accompanied by often undependable funding. It has proved unable to answer the concerns of front-line receiving states, which have become increasingly and understandably loathe to rely on purely discretionary support. The quality of refugee protection has suffered accordingly.

Because governments have traditionally been prepared to make more dependable commitments at the sub-global level where their influence is greatest and their interests are more directly implicated, the model I propose is positioned to give substance to the rhetoric of interstate co-operation. Security, economic, and other concerns should be invoked to motivate states outside the various sub-global organizations to support the organizations' refugee-protection efforts, albeit generally by a combination of fiscal commitments and guarantees of residual and special-needs resettlement opportunities. To the extent that UNHCR plays an effective role in co-ordinating the work of the sub-global organizations

that undertake refugee-protection responsibilities, a universal protection system can emerge in practice. While my primary objective in promoting sub-global co-operation is clearly to find a way to make refugee protection feasible, this strategy will lay the groundwork for a more reliable form of global co-operation.

Second, refugee protection needs to become seriously solution-oriented. Lip service is paid to the importance of identifying "solutions" to refugeehood. As normally understood, this means ending the violence or other human rights abuse that induced refugee flight, so that refugees can go home in safety. Yet even as states and the United Nations are increasingly aware of the need to intervene against the phenomena that force refugees from their homes, little has been done to re-tool the mechanisms of refugee protection itself to complement this solution-oriented vision.

In particular, even when it becomes objectively safe for refugees to return to their countries of origin, the potential for repatriation is often frustrated by the failure to take effective steps to ensure that the eventuality of return home remains viable. Repatriation will often be unsuccessful where family and collective social structures of refugees have not been sustained during the period of protection abroad, or if refugees have been denied opportunities to develop their skills and personalities in the asylum state, or when the place of origin sees the return of refugees as a threat. In such circumstances, repatriation efforts may lead only to poverty, violence, and even to further flight. To develop the potential for repatriation continually to regenerate asylum capacity, I have proposed a model of dignified temporary protection, coupled with an effective system of repatriation aid and development assistance.

The proposal is intended to encourage a transition away from traditional ways of thinking about refugee flows and solutions. It is premised on an understanding of refugee law, not as a mode of immigration, but rather as a mechanism of human rights protection for the duration of risk. If we can implement our legal obligations on the basis of a more equitable understanding of responsibility sharing and burden sharing, and if we focus our efforts on achieving a functional system of collectivized and solution-oriented temporary protection, I believe that it will prove possible regularly to replenish at least a substantial part of the world's asylum capacity.

No approach to refugee protection, standing on its own, can eradicate the need for persons to flee from serious harm. My proposed model of protecting refugees neither aspires to be, nor in any sense contradicts, a solid program of timely, meaningful, and apolitical action to bring an end to the causes of refugee flight. My goal, and the goal of refugee protection as conceived in international law, is instead to ensure the availability of solid and rights-regarding protection to refugees until and unless it is safe for them to return.[3]

3. The details of the proposed reformulation of the mechanisms of international refugee law are set out in J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," (1997) 10 Harvard Human Rights Journal 115-211. The social science background studies which underpin the recommended approach are collected in J. Hathaway, *Reconceiving International Refugee Law* (Kluwer, 1997).

The Immediate Perspective: Injecting Human Rights Law into the Interpretation of the Convention Refugee Definition

Though enduring solutions to the refugee law crisis will, in my view, come only from reform of the modalities of international refugee protection, we must all do what we can to keep refugee law alive during this transition. Governments should be shown that refugee law is worth saving, that it can assist them to make difficult decisions about when exemption from the ordinary rules of border control is warranted in the face of claims of necessity. You as decision makers are uniquely empowered to show in your daily work the inaccuracy of the Austrian EU Presidency's assertion that the Refugee Convention "is not at all geared" to the job of differentiating refugees from other migrants in today's world.

I will focus my comments today on the rationale for a human-rights-based construction of the Refugee Convention's core construct — a well-founded fear of *persecution*. The literal sense of the word "persecution" does not, of course, require consideration of human rights norms by decision-makers.[4] My conviction that "persecution" is most logically defined in relation to core norms of international human rights law derives instead from a determination to work within accepted rules of treaty interpretation in order to ensure the capacity of the Convention to evolve without sacrificing either universality or accountability. It is for this reason that I proposed several years ago that persecution be defined as a sustained or systemic risk to core human rights, demonstrative of a failure of state protection.[5] I believe that reliance on core norms of international human rights law to define forms of "serious harm" within the scope of persecution is not only compelled as a matter of law, but makes good practical sense, for at least three reasons.

First, despite the pontification of many wishful legal thinkers, it remains the case that international law today is, quite simply, whatever states can agree that it is. No more, no less. If our goal is to advance the objects and purposes of the Refugee Convention through a sensitive interpretation of its more ambiguous terms, then intellectual honesty surely compels us to look to *how states themselves* have defined unacceptable infringements of human dignity if we want to know which harms they are truly committed to defining as impermissible. Human rights law is precisely the means by which states have undertaken that task.

Second, beyond being an intellectually honest approach, reliance on clearly accepted international human rights standards is strategically wise. It holds states to a dynamic "dialogue of justification" in which refugee decision makers who use human rights law to define harms within the scope of "persecution" are not combatting the views of governments, but rather relying on the very standards which governments have said to be minimum standards.

4. While some commentators take a rigidly hierarchical approach to the interpretation of treaties, with a consequent fixation on so-called "literal meaning," I believe the approach of Brennan C.J. of the Australian High Court in *Applicant A & Anor* v. *Minister for Immigration and Ethnic Affairs*, Feb. 24, 1997, is a more accurate interpretation of the approach codified in the Vienna Convention on the Law of Treaties: "In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules... Although the text of a treaty may reveal its object and purpose, or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text."
5. J. Hathaway, *The Law of Refugee Status*, 1991, at 104-105. This approach has been embraced by senior courts in several influential asylum states. *See* James Simeon, "International Association of Refugee Law Judges Human Rights Nexus Working Party, Rapporteur's Report" (1998).

Third, international human rights law provides refugee law judges with an automatic means — within the framework of legal positivism and continuing accountability — to contextualize and update standards in order to take new problems into account. Because international human rights law is constantly being authoritatively interpreted through a combination of general comments, decisions on individual petitions, and declarations of UN plenary bodies, there is a wealth of wisdom upon which refugee decision makers can draw to keep the Convention refugee definition alive in changing circumstances. This malleability or flexibility of international human rights law makes it possible for you to address new threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of "what's right, and what's wrong."

If a risk to core, internationally recognized human rights is the kind of risk that is sufficiently serious to amount to persecution, which international human rights instruments ought to inform this assessment? My answer in *The Law of Refugee Status* was the International Bill of Rights, that is, the trio of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[6] The centrality of the International Bill of Rights derives from a combination of its substantive inclusiveness, the extraordinary consensus achieved on the principled soundness of it standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords.

With the benefit of nearly eight years of progress on human rights law, I would not restrict myself today to the norms set out in the International Bill of Rights. But neither would I rush to embrace every new convention on human rights, much less mere declarations or statements of principle, as legally relevant to defining harms within the scope of "persecution." If we believe that the standards relied on should *really* be agreed by states to be authoritative, if we believe in the importance of genuine accountability through a dialogue of justification with governments, in short, if we want refugee status determination to be taken seriously as *law-based* rather than as an exercise in humanitarian "do-goodism," then we have to exercise some responsible constraint on the impulse to embrace every new human rights idea that comes along.

Drawing that bright-line is not a simple task. At a minimum, though, it seems to me that a commitment to legal positivism requires, first, that we focus on *legal* standards — primarily treaties — not on so-called "soft law", which simply doesn't yet bespeak a sufficient normative consensus. While we can logically resort to these evolving standards as a means to contextualize and elaborate the substantive content of genuine legal standards, they should not, in my view, be treated as authoritative in and of themselves.

Second, as among authoritative legal standards, it is important not to rely on treaties that remain short on serious support from states. Until and unless we are able honestly to say that a given treaty enjoys general support, it ought not to be used to interpret a term in what is meant to be a *universal* treaty on refugee protection. In practical terms, one might reasonably consider looking for ratification of a given treaty by a respectable super-majority

6. *Supra* note 5, at 108-112.

— for example, two thirds of the United Nations membership,[7] including some support in all major geo-political groupings. Applying this litmus test, one could today interpret "persecution" by reference to not only the International Bill of Rights, but also by consideration of the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child.

A number of critiques have been advanced against my approach to define harms within the realm of persecution by reference to core norms of international human rights law.

An early concern was voiced by David Martin, who argued against reliance on "the full range of rights listed in the Covenants."[8] Martin sees the logic of reference to risks to the civil and political rights set out in the International Bill, but expresses scepticism that governments will agree to rely on even core socio-economic rights in assessing the existence of a risk of persecution. While it is true that courts in developed countries have more readily relied on civil and political rights norms, there has been clear evidence in recent years of a more expansive understanding of the scope of relevant human rights. For example, the Canadian Federal Court of Appeal in *Cheung* considered the claim to protection of a young child born in contravention of China's one-child policy in these terms:

> ... [I]f Karen Lee were sent back to China, she would, in her own right, experience such concerted and severe discrimination, including deprivation of medical care, education and employment, and even food, so as to amount to persecution. She was poignantly described as a 'black market person,' denied the ordinary rights of Chinese children.[9]

Not only is this approach intuitively compelling, but more importantly it corresponds to the nature of the legal obligations set by the International Covenant on Economic, Social and Cultural Rights. Not every failure to deliver core socio-economic rights is a violation of international law. Specifically, there is no violation so long as the failure to guarantee the right derives from a genuine absence of resources, and there is no discrimination in the allocation of whatever resources are in fact available. By framing the nature of state obligations in this way, the drafters of the Covenant explicitly took account of the legitimate concerns of states regarding the feasibility of implementing guarantees of socio-economic rights.

If anything, the present trend is to strengthen the place of socio-economic rights in our understanding of basic human entitlements. The General Assembly regularly endorses the indivisibility of all categories of human rights — civil, political, economic, social, and cultural.[10] Moreover, the states represented on the committee charged with supervision of the Covenant on Economic, Social and Cultural Rights have endorsed an understanding of core socio-economic rights at a heightened level of obligation:

7. This standard of assent mirrors that codified in the United Nations Charter for votes on "important questions": *Charter of the United Nations*, 1 UNTS XVI, at Art. 18(2).
8. David Martin, *Book Review: The Law of Refugee Status*, (1993) 87 AJIL 348, at 349-350.
9. *Cheung* v. *Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, at 325.
10. *See e.g.* UNGA Res. 32/130.

> An obligation... to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the Covenant is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, or basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.[11]

Not every person who faces even a risk of this gravity will, of course, qualify for Convention refugee status. The other components of the refugee definition — in particular, the need successfully to leave one's own country, and the existence of a nexus between the harm feared and one's civil or political status — necessarily limit the class of beneficiaries. But if we are committed to anchoring our understanding of unacceptable harms in the very standards set by states, it seems indisputable to me that equal attention must be given by refugee judges to risks to core socio-economic rights, as to threats to civil and political rights. While socio-economic rights are not yet codified at the same level of exigency as are civil and political rights, they should be taken on their own terms as legally authoritative standards of the minimum responsibility of states to ensure human dignity.

In contrast to the view that my human rights framework for interpreting "persecution" is unduly liberal, I have more recently been accused of unwarranted conservatism on this issue.

First, Hugo Storey argues against the central place I afford the International Bill of Rights on the grounds that it is an hierarchical standard, and therefore runs counter to a commitment to all human rights as interdependent and indivisible.[12] This is not right, in my view. The interdependence and indivisibility of rights does not mean their legal equivalency. Some rights are defined to grant states operational flexibility in their definition and implementation, while others are not. In a positivist legal system, we simply have to learn to accept the imperfection of the global human rights project.

The specific concern — sometimes short-handed as a problem of hierarchy — is that some rights in the International Bill of Rights (such as the prohibition of torture) are absolutely binding and never subject to legitimate exception of any kind for any reason; others (such as freedom of speech and association) are immediately binding, but subject to non-discriminatory suspension in time of genuine and officially declared national emergencies; and other rights, including most socio-economic rights, are enforceable only at the level of a duty of progressive, non-discriminatory implementation, to the maximum of a state's capabilities.

My point was, and is, that a refugee claimant cannot be said to face the risk of a legally unacceptable harm if all that she would encounter upon return is conduct that is within the realm of what is legally defined to be acceptable. Thus, for example, the risk of torture will always be sufficiently serious (because it is a non-derogable right); denial of the right of free speech will usually be sufficiently serious, unless there is evidence that speech is denied non-discriminatorily, and only in the context of a genuine national emergency; and denial of a right to education *may* amount to a sufficiently serious harm, but only if that risk exists

11. Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1990/8 (1991).
12. "The central problem with any hierarchical standard is that it closhes with another contemporary doctrine of human rights law and practice, that of the indivisibility of human rights": Hugo Storey, "Human Rights Nexus – A Critique," Dec. 30, 1997, at 16.

in the context of resource adequacy, or discriminatory implementation (e.g., resource deficiencies prompt the state to grant whites the right to a primary education, but blacks are not allowed to access public schools).

While we may wish that human rights law gave all things to all people on an all-inclusive basis, we're not there yet. I do not believe that it is the role of a refugee judge, charged with the application of an international refugee convention, to decide independently that rights defined internationally can be reconstrued at will — even if that desire stems from a noble inclination.

Second, Jane Coker, Heaven Crawley and Alison Stanley have recently argued that the International Bill of Rights is anachronistic — specifically, that the rights it guarantees do not embody a socially inclusive understanding of human dignity that is equally applicable to all persons.[13] I do not share this view. While I indicated earlier that I see no legal impediment today to a refugee law judge relying on the additional human rights standards set out in widely subscribed treaties, I do not see that these specialized accords are in any sense normatively radical. In virtually every case, the rights guaranteed in the specialized human rights treaties of recent years merely contextualize and add "meat" to the "bones" of the very human rights already declared in the International Bill of Rights. This is not to say that the specialized treaties are not helpful to refugee law judges — to the contrary, I think that they are valuable, especially as interpretive aids. But I have yet to see a single decision that grounds its understanding of unacceptably serious harm in one of the specialized treaties, that could not equally have invoked the International Bill of Rights to achieve the same outcome. Important concerns such as rape, forcible abortion or sterilization and female genital mutilation are all — and appropriately — understood to be within the ambit of the Civil and Political Covenant's non-derogable prohibition of torture, cruel, inhuman and degrading treatment.[14] No specialized conventions, declarations, or other standards are required to justify the recognition of these harms as sufficiently serious to fall within the scope of conduct adjudged persecutory.

My point here is that we should not underestimate the ability of the International Bill of Rights — of essentially unquestioned authority — to do the "human rights job" in relation to claims by traditionally disfranchised groups such as women, children and racial minorities. Second, and because of the International Bill of Rights' flexibility, it is vital that we not rush to invoke human rights standards that are of doubtful legal standing, or which do not enjoy solid support across states — in the process inadvertently undermining the universality and accountability that reliance on the International Bill of Rights provides.

13. "Human rights are not 'universal,' rather the structure and content of international human rights discourse is gendered at a number of levels, not least of which is the ordering of priorities. This criticism can equally be levelled at Hathaway's framework, and suggests the need for a re-characterization of non-discrimination rights as well as civil and political rights and economic, social and cultural rights...": Jane Coker, Heaven Crawley, and Alison Stanley, "A Gender Perspective on the Human Rights Paradigm", May 12, 1998, at 4.
14. In 1997, for example, the UN Commission on Human Rights called upon the Special Rapporteur on Torture "to continue to examine questions concerning torture directed against women and conditions conducive to such torture, to make appropriate recommendations concerning the prevention and redress of gender-specific forms of torture...": UNHRC Res. 1997/38, at para. 21.

To conclude, I believe that it is critically important that we continually reassess the ways in which refugee law and human rights can be mutually supportive, as refugee law really is one of the very few ways in which international law actually engages with the real concerns of real human beings. That is something valuable and worth saving. The refugee rights regime creates a dynamic mechanism of accountability. It enforces a practical "dialogue of justification" in which governments agree to answer for how they address the needs of involuntary migrants.

The implications of this understanding are twofold. In immediate terms, in your day-to-day work as decision makers, it is important that refugee status assessment be shown not to be the anachronism claimed by the Austrian EU Presidency. A human-rights-derived interpretive framework not only promotes accountability, but automatically evolves with new understandings of unacceptable risks to human dignity, and does so in a way that is premised on universality.

Second, at least in the medium-term, the implication of a human-rights-based understanding of refugee law is that the time is right to embark upon a determined effort to accommodate the legitimate interests of receiving states to the continuing need of refugees to be guaranteed access to safety and a dignified existence. As persons committed to rights-regarding protection, I believe that all of us share an ethical obligation to show that this goal can be achieved without sacrificing the accountability and global inclusiveness that come from responding to refugees from within the framework of international law. What is called for is flexibility and creativity in the implementation of existing obligations. By embracing this challenge, we can move beyond the rhetoric of a commitment to human rights, and toward a practical system that will deliver protection on a dependable and universal basis.

Particular Social Group

Sir John Laws
Lord Justice of Appeal, England

In February 1996, the UNHCR held a symposium on "Gender-based Persecution" at Geneva. Its proceedings are reported in a special issue of the *International Journal of Refugee Law*, published in autumn 1997. It includes what are called "Country Presentations" from Australia, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom and the USA. The reports of some States at first blush seem to suggest that their jurisdictions did or might regard women as a "particular social group" within the 1951 Convention. However, it is surely clear that membership of either sex cannot possibly of itself constitute "membership of a particular social group" within the Geneva Convention. Had that been intended, the framers would no doubt have added "sex" or "gender" as a specific category, along with race, religion and the others. I would note, if I may say so, the good sense of the Swedish national report in the special issue[1]:

> . . . the Swedish point of view is that to include women who suffer persecution or serious harassment because of their gender among the 'social groups' which are covered by the Convention would be to go too far in making a generous interpretation of the definition in Article 1A.

But if sex or gender alone does not qualify as membership of a particular social group, it is clear that ill-treatment of women in particular contexts raises important questions as to the interpretation of the Convention. In the English jurisdiction, the case of *Shah*[2] provides a good instance. The appellants were Pakistani women who had suffered violence in their home country after their husbands had falsely accused them of adultery. They fled to the UK and claimed asylum, fearing that if they were returned or had remained they would suffer (among other things) death by stoning under the Sharia law. The Secretary of State refused their claims on the grounds that they were not members of a particular social group, which was the basis of their claim. In dismissing the women's appeals the Court of Appeal referred to an earlier decision of its own, *Savchenkov*[3], in which McCowan L.J. had said:

> (1) The Convention does not entitle a person to asylum whenever he fears persecution if returned to his own country. Had the Convention so intended, it could and would have said so. Instead, asylum was confined to those who could show a well founded fear of persecution on one of a number of specific grounds, set out in Article 1A(2);
>
> (2) To give the phrase 'membership of a particular social group' too broad an interpretation would conflict with the object identified in (1) above;
>
> (3) The other 'Convention reasons' (race, religion, nationality and political opinion) reflect a civil or political status. 'Membership of a particular social group' should be interpreted ejusdem generis.

1. p. 66.
2. [1998] 1 WLR 74.
3. [1996] IAR 28.

(4) The concept of a 'particular social group' must have been intended to apply to social groups which exist independently of persecution. Otherwise the limited scope of the Convention would be defeated: there would be a social group, and so a right to asylum, whenever a number of people fear persecution for a reason common to them.

As regards proposition (4), the High Court of Australia had reached a like conclusion in *A* v. *Minister for Immigration and Ethnic Affairs*[4], as Henry L.J. noted in *Shah* at p. 88C. In fact the court in *A* split 3 to 2 on the issue of whether persecution might of itself be allowed to define a particular social group. I will set out the greater part of the passage from McHugh J.'s judgment in that case, which was cited by Henry L.J.:

> The concept of persecution can have no place in defining the term 'particular social group'. While decisions that have sought to apply the ejusdem generis principle to discern the meaning of 'particular social group' are problematic because it is difficult to identify a genus common to 'race, religion, nationality . . . [and] political opinion', one factor common to these four categories is that the fact or fear of *persecution* plays no role in understanding their content. If the drafters did not intend persecution to be relevant in defining those four categories, it would seem likely that they did not intend persecution to play any part in defining what is a 'particular social group'. Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the 'particular social group' ground to take on the character of a safety-net . . . It would . . . effectively make the other four grounds superfluous . . . The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution... Heald J.A., sifting in the Canadian Federal Court of Appeal on a claim for membership of a 'particular social group', because of a fear of compulsory sterilization under the PRC's 'One Child Policy'. . , said: 'This leads me to a fundamental objection to acceptance of the group of parents with more than one child who are faced with forced sterilization as a "particular social group". This group... is defined solely by the fact that its members face a particular form of persecutory treatment . . . the finding of membership in a particular social group is dictated by the finding of persecution. This logic completely reverses the statutory ground of Convention refugee . . .'[5]

This was determinative of the appeal in *Shah*. Staughton L.J.[6] set out the words inscribed on the Statue of Liberty in New York harbour:

> Give me your tired, your poor,
> Your huddled masses yearning to breath free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tost to me.

4. (1997) 142 ALR 331.
5. The Canadian case, as Henry L.J. noted, is *Chan* v. *Canada* (1996) 128 DLR (4th) 213. The case went to the Supreme Court: [1995] 3 SCR 593.
6. At 92E.

But he continued[7]:

> ". . . I am unable to hold that the women in the present cases are members of a particular social group. That expression does to my mind involve a number of people being joined together in a group with some degree of cohesiveness, co-operation or interdependence; the members must not be solitary individuals. By contrast a social category could be defined in almost any way; if that had been what the framers of the Convention intended, they would have said so, although they would thereby . . . have undermined the manifest intention to place some limit on the kind of persecution which was needed to make someone a refugee.

The Court had some difficulty with proposition (3) in *Savchenkov*. Counsel for the Secretary of State had submitted as follows in an endeavour to restate proposition (3):

> Because the group must be 'social' and 'particular' as well as existing independently of the persecution, there is a need for the group to be homogeneous and cohesive, with links between the members other than their fear of persecution . . . The adjective 'social' refers to persons who are interdependent or co-operative. The word does not refer to persons who simply have a shared characteristic.[8]

Staughton L.J. agreed (see above) that there was a requirement of "cohesiveness". The other two Lords Justice did not. Henry L.J. said[9]:

> Most 'particular social groups' will in the ordinary course of things have a cohesive element, involving the ordinary social concepts associated with membership such as organization, strength through association, fund-raising, publicity or protest. But there will exceptionally be those who though recognized by society as a social group lack any 'cohesion' with their homogeneous fellows and remain disparate individuals. From the hypothetical examples found in the authorities, one could take the case of witches, of aristocrats lying low in the French Revolution, of Jews wholly assimilated into German life before the Nazis came to power, and hoping to escape detection. I therefore agree with Waite L.J. that 'cohesion' is not necessary in every case . . . it is not necessary where the particular social group is recognized as such by the public, though is not organised . . ."

Waite L.J.[10] held that the concepts of 'cohesion' and 'homogeneity' were not helpful.

> They bring undesirable vagueness into an area already fraught with uncertainty because of the breadth of language adopted by the Convention.[11]

7. 93D-E.
8. 89E-F.
9. 91 G-H.
10. 86G-87B.
11. 86H.

He considered that nothing more precise could be attempted than the formulation in *A* v. *Minister of Immigration and Ethnic Affairs*, which he summarized thus:

> The Convention emphasizes that the group must be a 'particular' and 'social' group. This means that the members of the group must share something which unites them, and which sets them apart from the rest of society and is recognized as such by society generally.[12]

At first instance in *Shah*[13], Mr Justice Sedley had quashed the decision of the Immigration Appeal Tribunal, which had refused leave to appeal from the Special Adjudicator. His judgment repays attention because it exposes some of the problems that I will shortly try to articulate. He cited the judgment of La Forest J. in the Supreme Court of Canada in *Canada* v. *Ward*[14]:

> The meaning assigned to a 'particular social group' . . . should take into account the general underlying themes of the defense of human rights and anti-discrimination that form the basis of the international refugee protection initiative . . . The tests provided in *Mayers, Cheung and Matter of Acosta* . . . provide a good working rule to achieve this result. They identify three possible categories:
>
> (1) Groups defined by an innate or unchangeable characteristic;
>
> (2) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) Groups associated by a former voluntary status, unalterable due to historical permanence.

The Court of Appeal in England in the *Savchenkov* case derived particular assistance from *Ward*. Sedley J. continued[15]:

> There are obvious dangers in attempting any kind of lexicographical definition of 'particular social group'. Mr Shaw [for the Home Office], rightly in my view, accepted that the applicability of the phrase is essentially a question of fact in every case, but one which is bounded by law. One such boundary — namely where the group is defined solely by persecution — is drawn by the *Savchenkov* decision; but great care must in my view be taken not to treat the 'good working rule' summarized by La Forest J. in *Ward* as similarly definitive. Nor, it seems to me, should counsel's agreed parameters in *Savchenkov* be treated as definitive.

He proceeded to cite a passage from Professor Guy Goodwin-Gill's *The Refugee in International Law* (second edition 1996):

> In *Ward* the Supreme Court was clearly of the view that an association of people should not be characterized as a particular social group 'merely by reason of their common victimization as the objects of persecution'. The essential question,

12. 87A-B.
13. Unreported: transcript 25 October 1996.
14. [1993] 2 SCR 689.
15. Transcript p.8G-9B.

> however, is whether the persecution feared is the 'sole' distinguishing factor that results in the identification of the particular social group. Taken out of context, this question is too simple, for whenever persecution under the law is the issue, legislative provisions will be but one facet of broader policies and perspectives *all* of which contribute to identification of the group, adding to its pre-existing characteristics.
>
> Treatment amounting to persecution thus remains relevant in identifying a particular social group, where it reflects state policy towards a particular class.[16]

Sedley J. went on to cite with approval a dictum from the decision of the Immigration Appeal Tribunal in *McGregor*[17]:

> We think that a social group must have some distinguishing and recognizable characteristic which is independent of the special event which lays the basis of the claim for asylum.

Sedley J. continued[18]:

> The broad notion of a distinguishing characteristic . . . seems to me to afford a proper range of significance to the wording of the Convention and also to provide a better idea of the genus to which the *ejusdem generis* rule should be applied.
>
> ***Conclusion***
> Although Ms Webber [for the applicant] does not have an easy task in the light of current jurisprudence on the Convention, the facts established in her client's favour to the satisfaction of the Special Adjudicator are capable in law of bringing her within Article 1(A)(2) of the 1951 Convention. This does not mean that if the fact findings stand she is bound to succeed. In this highly specialized field of adjudication, a great deal depends upon the expertise of the Immigration Appeal Tribunal itself. Its adjudication is not a conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.

The decisions of the Court of Appeal in *Savchenkov* and *Shah* represent the present state of the law in England and Wales on the meaning of "particular social group". *Shah*, however, has been appealed to the House of Lords which, I understand, is due to hear the appeal in November 1998.

It must be obvious that courts at the highest levels in the states signatory to the Geneva Convention have found considerable difficulty with the concept of "particular social group". I think that the root of the problem is an old conundrum — the difference between law and

16. Pp.362-365; 9G-10C in the transcript of Sedley J's judgment.
17. 20 January 1995.
18. 14 A-G.

fact. Is the meaning of "particular social group" a question of law or fact? The phrase is not defined; indeed it is itself part of the definition of "refugee". It is worth setting out the relevant words of Article 1(A)(2) of the Convention:

> . . . the term 'refugee' shall apply to 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 . . ."

The expression "particular social group" consists of perfectly ordinary English words. The traditional common law approach to its interpretation would be to hold that whether someone fell within its scope is a matter of fact, subject to the *Wednesbury*[19] reasonableness principle. But to adopt such an approach in the present context at once offers the prospect that different tribunals will interpret "particular social group" differently. It cannot surely be doubted that a whole range of interpretations may all be perfectly reasonable.

I have the impression that in some of the jurisprudence in this field there is a tendency to leave on one side the difference between law and fact, and to treat the meaning of "particular social group" as a matter of law for the court. It is not difficult to discern the reasons for this. Unlike the European Convention on Human Rights (which in this regard is exceptional), the 1951 Convention provides no international adjudicative system for its own policing. The courts of the signatory states must therefore make their own autonomous decisions as to what cases fall within and without the definition of "refugee". This, I think, creates two pressures. One is the need of conformity: the approach to the meaning of "refugee" should broadly be the same in one country of refuge as in another. This of itself tends to translate the application of Article 1(A)(2) from fact to law. The second pressure arises because the subject matter in question is particularly acute. In the leading cases we are looking at such pits of despair as the plight of women who might be stoned to death, and people who might be forcibly sterilized. It is no surprise that some courts have sometimes strained to extend the Convention's shield to offer succour against such horrors, and thus to strain the sense of "particular social group". But where that is done, the mechanism for doing it must be to read "particular social group" widely, loose of its ordinary sense or senses and, therefore, implicitly, to treat it as a term of art. Once that is done, its metamorphosis from fact to law follows. Moreover, when the higher courts have corrected such interpretations, they have sometimes seemed tacitly to accept the unspoken premise that what the words mean is law not fact.

Such an approach inhibits our achieving a jurisprudence in this area based on principle; but there is no other kind of jurisprudence. We will be fixed with nothing but guidelines and good intentions unless we grasp the nettle (a very old nettle) of what is law and what is fact.

The first thing is to recognize and endorse the truth of the proposition that the application of the term "particular social group" in any given case must arise, if it arises at all, entirely independently of any risk of persecution which the putative group faces. This is the majority view in the existing cases. If it were otherwise, the words "well-founded fear of being persecuted for reasons of . . . membership of a particular social group" would be meaningless.

19. [1948] 1 KB 223.

They would contemplate a fear of persecution because of a fear of persecution. I see no logic that escapes this result. Accordingly I disagree with the passage from Professor Goodwin-Gill quoted by Sedley J. in *Shah,* and with Sedley J.'s own reasoning. It will not do to say persecution "remains relevant in identifying a particular social group". If persecution or its risk has any part to play in the identification of a particular social group, it must constitute either a *necessary* or a *sufficient* condition for that identification. Both are hopeless, because persecution cannot constitute a condition for the identification of a social group *at all.* There is no third possibility in which the idea that persecution may play a part "remains relevant."

Once the risk of persecution is taken out of the sense to be attributed to "particular social group", the phrase's application as a matter of *fact* ought to be freed at least of the second of the pressures to which I have referred. To confront the first, these other points remain. I think that any attempt to arrive at a sense of "particular social group" by reference to the *ejusdem generis* principle ought, *pace* proposition (3) in *Savchenkov,* to be firmly abandoned. There is no *genus.* Secondly, it seems to me to be obviously important that the class of "particular social group" should be as capable of objective identification as the other classes of potential refugees. To that end I would suggest (as has indeed been stated in the cases) that a critical requirement will be the general or substantial recognition in the society in question of the putative group as socially distinct. The approach in the tribunal case of *McGregor,* approved by Sedley J. in *Shah* at first instance — "some distinguishing and recognizable characteristic" — would prove too much; it would on the face of it allow gender on its own to count. Thirdly, and alongside what I have said already, some of the cases and learning on the topic seem to me to pay too little attention to the adjective "social". The drive of the Convention provision is towards a group recognized in and by society.

Last — may I be forgiven for stating the obvious — as judges we have no mandate to create social policy. It is a corruption of our duty to strain the Convention's words to admit hard cases. Some areas of the law are driven by judicial policy, because they are fields which the judges have sown themselves. This is not one of them. The text of the Convention is given to us to interpret. We have no voice in its policy. It clearly places limits upon the scope of the sense to be accorded to "refugees". It is no business of ours to extend it beyond the boundaries set by legal principle.

Particular Social Group – A Window of Opportunity or a Particularly Slippery Slope?

The Honourable Justice John S. Lockhart A.O.
Justice of The Federal Court of Australia

Introduction

The fact that we are discussing this question indicates its increasing importance in the troubled world in which we live, where claims of Refugee Status are becoming increasingly numerous. My country of Australia is no exception. Our geographic position, a large land mass surrounded by water, difficulties of coast line patrol and a high standard of living in a democratic society, make us a prime target for less fortunate people who leave the shores of their native lands, come to Australia and claim refugee status.

My focus will be on the judgment of Australia's highest court — the High Court of Australia — in the landmark case of *Applicant A & Anor* v. *Minister for Immigration and Ethnic Affairs & Anor*, 24 February 1997, (1997) 71 ALJR 381; 142 ALR 331.

Five Justices of the High Court sat on the appeal from the Full Court of the Federal Court of Australia, and they divided 3 to 2 on the result. There were few substantial differences of principle. The division occurred with respect to the interpretation and application to the facts of the case of the words "particular social group" as part of the definition of "Refugee" in the *Migration Act* 1958 (Cth) ("the Act").

Australian law controlling the entry into Australia of persons who are not Australian citizens is governed by the Act; the source of its constitutional validity is the Australian Constitution: s.51(xix) — external affairs and s.51(xxvii) — immigration.

The appellants were Chinese nationals who sought asylum in Australia as "refugees". They had been married in China. On arrival in Australia in 1993, the wife gave birth to a son, their first and only child, shortly thereafter. They sought recognition as "refugees" under the Act. Their applications were refused by the Department of Immigration and Ethnic Affairs. After a succession of appeals, administrative and curial, the matter came before the High Court where they were the appellants.

The term "refugee" is defined in s.4(1) of the Act as having the same meaning as it has in Article 1 of the *Convention Relating to the Status of Refugees* done at Geneva on 28 July 1952 ("the Convention") as amended by the *Protocol Relating to the Status of Refugees* done at New York on 31 January 1967. Article 1(A)(2) of the Convention in its amended form relevantly defines the term" refugee" as: "any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a "particular social group" or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

The question in the case was whether the appellants were persons who,". . . owing to well-founded fear of being persecuted for reasons of . . . membership of a 'particular social group' . . . "were outside China and unable or unwilling to avail themselves of the protection of China as their country of origin. If they were, they were refugees within the meaning of s. 4 of the Act.

The High Court dismissed the Appeal. The majority (Dawson, McHugh and Gummow J.J.) found that the appellants were not refugees in terms of the Convention, whilst the minority (Brennan C. J. and Kirby J.) found that they were. The majority held that, whilst forced sterilization may constitute persecution, the persecution feared by the appellants was not for one of the reasons stipulated in the Convention. They did not belong to a "particular social group", and hence they did not satisfy the requirements for refugee status.

The Judgments

In each of the judgments, their Honours discussed the manner in which the terms of treaties incorporated into Australian domestic law should be interpreted. Brennan C.J. observed that when the Australian Parliament transposes the text of a treaty into Australian legislation, *prima facie* the Parliament intends that the text is to be given the same meaning as it bears in the treaty. Further, given that the nation states agree to treaty terms, following an often lengthy process of negotiation and compromise, provisions of treaties incorporated into domestic law should not be construed in a narrow or strict manner. His Honour concluded that in ascertaining the meaning of a treaty provision, it may be necessary to consider both the text and the object and purpose of the treaty.

McHugh J. said that, when interpreting provisions of treaties incorporated into local law, it is necessary to start with the text of the treaty, but "the mandatory requirement that the courts look to the context, object and purpose of treaty provisions, as well as the text, is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the Court was required to construe exclusively domestic legislation."

Gummow J. agreed that the terms of treaties incorporated into domestic law should not be interpreted narrowly; but criticized the use of such terms in legislation. His Honour said that, "provisions of treaties may not be precise" and "may have been expressed in attractive but loose terms with a view to attracting the maximum number of ratifications." His Honour said that the application of those imprecise provisions "falls to administrators whose decisions in the Australian system of government are, in the absence of an excess of constitutional authority, subject to curial involvement only by the limited processes of judicial review."

The Minister did not contest that forced sterilization may amount to persecution. The issue before the High Court was whether the appellants faced persecution by reason of their membership of a particular social group.

All three judges in the majority agreed that the appellants could not demonstrate that they feared persecution for reason of membership of a particular social group.

Dawson J, said that members of a particular social group must be united by some common characteristic that makes them a "cognizable group within their society". However, the shared characteristic cannot itself be the fear of persecution. His Honour said that in this case, the only group to which the appellants claimed to belong was "the group comprising those who fear persecution pursuant to the one-child policy"; thus, the appellants did not belong to a group recognized by the Convention.

Likewise, McHugh J. did not accept that the fear of persecution itself could be one of the defining elements of the social group. The group must be capable of definition apart from the act of persecution. His Honour stated, however, that, while persecutory conduct cannot define the group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. In order to identify a particular social group, one needs to identify some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution, and which is known in fact or shared and which links a reasonably large group of individuals. His Honour noted the submission of counsel for the appellants that, in identifying the particular social group in this case, reliance had to be placed on the acts of persecution that were feared. His honour therefore found that the appellants were not members of a "particular social group" and that, although parents of one child form a social group in China, that group was not a particular social group in terms of the Convention. He said "neither appellant had a well-founded fear of persecution for reasons of membership of these groups. It was not membership of either of these groups but, the refusal or apprehended refusal to abide by the one-child policy that brought about the appellants' fear of involuntary sterilization."

McHugh J. left open the possibility that in some circumstances persons who oppose China's One-Child Policy may be members of a social group under the terms of the Convention. His Honour said:

> . . . if, for example, a large number of people with one child who wished to have another had publicly demonstrated against the government's policy, they may have gained significant notoriety in China to be perceived as a particular social group. Then the involuntary sterilization of a member of that group simply because he or she was a member of that group would be persecution for reasons of membership of a particular social group as well as persecution for political opinion.

Gummow J. also found that the appellants were not refugees for the purposes of the Convention. He said that the Refugee Review Tribunal (the administrative tribunal which hears administrative appeals on refugee matters) had erred in law by defining membership of the group by reference to acts giving rise to the well-founded fear of persecution.

Brennan C. J. in dissent said that, "to be considered a refugee pursuant to the Convention two conditions had to be met", namely: (a) a fear of official or officially tolerated, or officially uncontrollable, persecution; and (b) such persecution must be discriminatory (i.e., the applicant for refugee status is persecuted for one of the five reasons articulated in Article 1(A)(2) of the Convention).

With respect to the expression a particular social group Brennan C. J. said that it was included in the Convention to cover those groups of people not caught by the other categories of discrimination in Article 1(A)(2), i.e., race, religion, nationality or political opinion. His Honour said that a particular social group consisted of members who "possess some characteristic which distinguishes them from society at large . . . the characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguished the members from that group from society at large." The Chief Justice applied that reasoning to the situation of the appellants and held that their fear of persecution was a consequence of their membership of a particular social group. Although forced sterilization was not practised throughout China, it was tolerated in the appellants' province. The

appellants did not fear indiscriminate persecution. Rather, they feared persecution because of their membership of a particular social group. The Chief Justice said:

> . . . it is forced sterilization of those who, being the parents of one child, have not voluntarily adopted one of the birth-preventing mechanisms approved by the local officials. The characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguished the appellants as members of a social group that shares that characteristic.

Kirby J., also in dissent, said that the term particular social group was very wide, but found that it "does not provide a safety-net to cover any form of persecution." His Honour said that there was no requirement for members of the group to associate with one another or to know of other members in the group in order to fall within the description of a particular social group for the purposes of the Convention. Kirby J. held that the appellants were members of a particular social group.

Commentary

Applicant A is an important case in Australian refugee law. It offers guidance to decision makers in tribunals about to what constitutes a particular social group under the convention.

An analysis of the judgments shows that the differences of opinion of their Honours centred on the construction of the phrase membership of a particular social group. The minority adopted a freer approach to the expression, and the majority approached the construction in a more rigorous fashion. The words of the Convention and their context provide little help. Whilst the international case law on this subject is extensive, its conclusions were too various to give clear guidance to their Honours.

In the later case of *Minister for Immigration and Ethnic Affairs* v. *Guo Wie Rong*, High Court, 13 June, 1997, the High Court consisted of seven Justices (Brennan C. J., Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). Toohey and Gaudron JJ did not sit in "Applicant A". Sparse reference was made to "Applicant A", and the Court gave two judgments: the first consisting of Brennan C. J., Dawson, Toohey, Gaudron, McHugh and Gummow JJ, and the second a separate judgment of Kirby J. The appeal was decided on grounds that did not involve the High Court considering the findings made by it in *Applicant A*.

Since these two judgments of the High Court, the Full Court of the Federal Court has given judgment in the matter of *Minister of Immigration and Multicultural Affairs* v. *Zamora* (Black C.J., Branson and Finkelstein JJ), 5 August 1998, in which their Honours drew together various threads that emerged from the judgment of the High Court in *Applicant A*, and provided guidance to parties in a practical way concerning the identification of a particular social group in various factual matrices. Their Honours said that caution should be exercised by applicants for refugee status in characterizing an occupational group as a particular social group.

In certain respects it may be said that the Convention definition of a refugee is rather tight. A person cannot be granted refugee status because he or she is fleeing plague, famine, environmental devastation or civil war; the person must fear active persecution. Also that fear of persecution must be well-founded and it must be based on one of the five reasons set out in the Convention.

The appellants in "Applicant A" sought refugee status on the grounds that they faced forcible sterilization if they returned to China, and that such treatment amounted to persecution. They risked this persecution, so it was argued, because they belonged to a particular social group, namely a group of Chinese nationals who already had one child and wanted more.

It is an interesting question whether the expression a particular social group was intended to be a catch-all phrase to provide a safety net for people who did not fit into any of the other four categories. If this were so, it may be that there would be no need for those categories to be mentioned at all. But, if the expression does not describe a residual category, what does it mean? Does it have in mind a looser sense of belonging to an ethnic or linguistic group? Or could it refer broadly to a demographic category such as persons of reproductive age in China who have one child and want at least one more?

Grappling with the problem of interpreting the phrase membership of a particular social group, all judgments in the "Applicant A" case referred to the circumstances of the 1951 Convention and the literature describing that event. None of their Honours found the search particularly helpful. They also consulted a wide range of case law on refugee claims and looked for precedents in other common law countries on the question of how the phrase should be defined. The case law findings differed widely and offered no clear guidance to their Honours.

A critical point in the judgments of the majority was the finding that, for persecution on the grounds of membership of a particular social group to be the basis of a valid claim for refugee status, the group in question must have existed in some tangible sense before the persecution began. Their Honours also drew attention to the overall restrictive intent of the Convention. Their Honours said that the people who had drafted the Convention were well aware that protecting refugees might impose weighty obligations on a state, and that the drafters did not wish to impose such heavy burdens on potential signatories that they would be deterred from signing at all.

The judgments in the minority took a different approach. They drew attention to the large humanitarian purpose behind the Convention and to the broad principle of protecting human rights to which it was dedicated.

The one-child policy was conceived in the 1970s and intensified in 1979 under Deng Xiaoping. The policy reversed the previous policy espoused by Chairman Mao to boost population growth.

The ground of membership of a particular social group is a difficult aspect of the definition of a refugee. There is no definition of "social group" contained in either the Convention or the Protocol. Guidance may be gained from the *travaux préparatoires* to the Convention. (See the Swedish delegate's declaration that people have been persecuted in the past on the basis of membership of a particular social group.) Various definitions, often contradictory, have been offered by jurists and municipal courts.

Must the "members" of the category be conscious of their membership and recognize their fellow members? Some authority in the United States supports an affirmative answer to this question, in particular *Sanchez-Trujillo* v. *Immigration and Naturalization Service*. The approach favoured by the Canadian Supreme Court in *Attorney General* v. *Ward* is to look to the elements common to the other four Convention groups. According to this approach,

elements common to all the groups are either an immutable characteristic (such as race and perhaps nationality), or some other characteristic so fundamental to the personality of the individual concerned (political opinion, religious belief or nationality) that it should not be changed. A person's past history can also be considered to place him or her in a social group, since the past has an immutable character. Hence, a social group can be identified by looking to any of these elements. Red hair which is generally an immutable characteristic, could be the defining characteristic of members of a social group. If this were the characteristic that attracted persecution, it would attract persecution because of social attributes ascribed to the characteristic of red hair: the Canadian *ejusdem generis* test.

On the principles of treaty implementation, the justices of the High Court were basically in agreement. They all referred to the principles of interpretation contained in the *Vienna Convention under the Law of Treaties* as necessary or permissible in the construction of Australian legislation that implements a treaty. These principles, which are set out in Articles 31 and 32 of the Vienna Convention, place primary emphasis on the ordinary meaning of the text in light of its context and the object and purpose of the Treaty. Extrinsic sources, namely the *travaux préparatoires* may be relied on as a supplementary source of treaty interpretation.

Most of the justices adopted a holistic approach. McHugh J. expressly adopted such approach, as he said that this required that primacy be given to the text, although the context, object and purpose must be examined. Gummow J. agreed with the approach that primacy must be given to the text. However, he appears to look to the text as confirmation of the framers' desire to restrict the entry of refugees. Brennan C. J. agreed with McHugh J. on this question, although ultimately he was swayed by the object and purposes of the Refugee Convention, which he saw reflected in the Preamble as protection of human rights. Kirby J. adopted a somewhat similar approach. Dawson J. concluded that Article 31 precluded the adoption of a literal construction, which would defeat the object or purpose of the Treaty and be inconsistent with the context in which the words being construed appear. The judges agreed that for a social group to be a particular social group, there must be a social group united by some common element or characteristic, so that there is a cognizable group within and perceived by society.

The majority found that the perceptions of the persecutors were related to activities of the appellants because they violated a generally applicable policy rather than because of any belief by the appellants which distinguished them and others like them as members of a particular social group. The purpose of the policy was only to limit population growth, not to oppress a particular social group. For there to be a particular social group, it must be unified by some common characteristic which makes the group cognizable in society, a characteristic which enables its members to be set apart from society at large; a common attribute, activity, belief or goal which unites the group, a common unifying element.

By contrast, the minority held that the One-Child Policy had created a particular social group liable to forcible sterilization. The two judges in the minority reached their conclusion by slightly different paths. Brennan C.J. focussed on the reason for persecution, distinguishing the appellants and others like them from the rest of society, the reason being their refusal to adopt contraceptive measures. Kirby J. emphasized that there need not be membership of the putative group, that knowledge of the identity of other group members is not required, and that self-identification or consciousness as a member of the group is unnecessary.

An interesting and difficult question is whether a common characteristic may be transformed from a simple demographic statistic into a characteristic which unifies the group in the eyes of society. The members of the Court differed slightly on this. The majority found that the persecution feared in this case was not by virtue of a unifying characteristic, but by virtue of individual conduct which is prohibited by a general law or policy. The persecutors were not motivated by perceptions of the appellants as belonging to a group of like-minded people, but by the individual conduct of the appellants and others. This to my mind is the critical difference in the views of the majority and the minority. As Gummow J. put it, "Couples waiting to have children without governmental constraint were simply a demographic statistical group at risk of the application of a general law of conduct."

The majority judgment laid down very broad guidelines for ascertaining a social group, namely, that the group must be "cognizable by the rest of society because of some common characteristic which unites them." This depends very much on the facts of a particular case. Their Honours did not adopt the requirement of a voluntary association as suggested by United States authority in *Sanchez-Trujillo*. Nor did the High Court adopt the Canadian *ejusdem generis* approach.

I shall develop the various points raised above in my oral presentation.

L'interprétation et l'application en droit canadien de la notion de « groupe social »

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Introduction

La définition de « *réfugié au sens de la Convention* » prévoit que le demandeur doit craindre « avec raison » d'être persécuté du fait de l'un des cinq motifs énumérés, soit la race, la religion, la nationalité, l'appartenance à un groupe social et les opinions politiques. Un lien doit être établi entre la crainte de persécution et l'un de ces cinq motifs.

Quelle portée a-t-on donnée à la notion de « groupe social »[1] en droit canadien? À partir de la définition qu'en a donné la plus haute instance judiciaire canadienne, nous verrons comment la Section du statut de réfugié (ci-après la SSR) et la Cour fédérale ont effectivement appliqué l'interprétation de ce motif telle qu'élaborée par la Cour suprême du Canada.

Les pages qui suivent ne constituent d'aucune façon une analyse exhaustive de toutes les décisions ayant examiné ce concept. Nous nous limiterons aux décisions les plus éloquentes et dignes de mention, et nous examinerons les divergences que peut encore soulever l'étude de cette question.

La Cour suprême du Canada se prononce : l'arrêt Ward

Les décideurs canadiens en droit des réfugiés ont pu récemment bénéficier d'une décision du plus haut tribunal canadien dans laquelle on retrouve une étude approfondie de la notion de groupe social. Cette décision mettait en cause un membre d'un groupe paramilitaire armé craignant les représailles de son groupe pour avoir laissé s'enfuir un otage.

Dans le désormais célèbre arrêt *Ward*[2], la Cour suprême du Canada a abordé la question ainsi :

> Le sens donné à l'expression « groupe social » dans la Loi devrait tenir compte des thèmes sous-jacents généraux de la défense des droits de la personne et de la lutte contre la discrimination qui viennent justifier l'initiative internationale de protection des réfugiés[3].

1. Bien qu'au Canada la *Loi sur l'immigration* [L.R.C. 1985, ch. 28 (4e suppl.)] ait repris presque textuellement la définition de « *réfugié au sens de la Convention* » telle que définie dans la *Convention de 1951 relative au statut de réfugié* » [Nations Unies, Recueil des Traités, vol. 189, p. 137], l'expression « appartenance à **un certain** groupe social » a été remplacée dans la loi canadienne par l'expression plus simple « appartenance à **un** groupe sociol ». C'est donc l'expression que nous utiliserons.
2. *Canada (Procureur général) c. Ward*, [1993] 2 R.C.S. 689, 103 D.L.R. (4th) 1; 20 Imm. L.R. (2d) 85; infirmant [1990] 2 C.F. 667, 67 D.L.R. (4th) 1,10 Imm. L.R. (2d) 189 (C.A.).
3. *Ibidem*, à la p. 739.

La Cour suprême a essentiellement clarifié les critères proposés dans la jurisprudence existante[4] permettant d'établir une « bonne règle pratique » en vue d'atteindre le résultat susmentionné, et établi trois catégories possibles de groupes sociaux :

1) les groupes définis par une caractéristique innée ou immuable;
2) les groupes dont les membres s'associent volontairement pour des raisons si essentielles à leur dignité humaine qu'ils ne devraient pas être contraints à renoncer à cette association;
3) les groupes associés par un ancien statut volontaire immuable en raison de sa permanence historique[5].

La Cour suprême a dit en outre ce qui suit :

> La première catégorie comprendrait les personnes qui craignent d'être persécutées pour des motifs comme le sexe, les antécédents linguistiques et l'orientation sexuelle, alors que la deuxième comprendrait, par exemple, les défenseurs des droits de la personne. La troisième catégorie est incluse davantage à cause d'intentions historiques, quoiqu'elle se rattache également aux influences anti-discriminatoires, en ce sens que le passé d'une personne constitue une partie immuable de sa vie[6].

En établissant les trois catégories possibles de groupes sociaux, la Cour suprême a précisé que tous les groupes de personnes ne sont pas visés par la définition de réfugié au sens de la Convention, il existe des groupes dont le demandeur pourrait et devrait se dissocier parce que le fait d'en être membre n'est pas essentiel à sa dignité humaine[7].

Une distinction doit être établie entre le demandeur qui craint d'être persécuté à cause de ce qu'il a fait à titre individuel et le demandeur qui craint d'être persécuté du fait de son appartenance à un groupe social. C'est l'appartenance au groupe qui doit être la cause de la persécution et non les activités à titre individuel du demandeur[8], c'est-à-dire ce qu'il <u>est</u> par opposition à ce qu'il <u>fait</u>[9].

Chose certaine, un groupe social ne peut être défini comme tel seulement par le fait que certains de ses membres sont victimes de persécution. En effet, la définition de réfugié au sens de la Convention exige que la personne craigne d'être persécutée <u>du fait de</u> l'un des

4. La Cour a notamment fait référence aux décisions canadiennes en la matière, mais a aussi noté la décision américaine *Matter of Acosta*, décision provisoire 29861985 WL 56042 (BIA-États-Unis).
5. *Idem.*
6. *Idem.*
7. *Ibidem*, p. 745. Ainsi, l'association [Irish National Liberation Army - INLA] dont était membre M. Ward, qui est vouée à la réalisation d'objectifs politiques précis par n'importe quel moyen, y compris la violence, ne constituait pas un « groupe social » en droit des réfugiés, car forcer ses membres à renoncer à cet objectif n'équivaut pas à une abdication de leur dignité humaine.
8. *Idem.* La Cour a ainsi souligné que l'appartenance du demandeur à l'INLA l'a sans doute placé dans la situation à l'origine de sa crainte, mais sa crainte elle-même était fondée sur son action, et non pas sur son affiliation.
9. Cette distinction ressort plus clairement dans la décision de la Cour d'appel fédérale dans l'affaire *Chan* c. *Canada (ministre de l'Emploi et de l'immigration)*, [1993] 3 C.F. 675 (C.A.), ainsi que dans les motifs de dissidence du juge La Forest, également dans l'affaire *Chan* c. *Canada (ministre de l'Emploi et de l'immigration)*, [1995] 3 R.C.S. 593: [para 86] *La distinction entre ce qu'une personne est d'une façon fondamentale par opposition à ce qu'elle fait simplement est, comme il a été expliqué, la façon la plus simple de déterminer dans quels cas il est possible de réclamer le respect par le Canada de ses obligations envers les réfugiés. On ne procède à cet examen qu'après s'être demandé s'il existe un litige portant sur les droits fondamentaux de la personne. Cette distinction simplifiée n'a jamais eu pour objet de remplacer les catégories établies dans l'arrêt Ward. En effet, il est toujours nécessaire, relativement à la deuxième catégorie, de se demander s'il existe une association si essentielle à la dignité humaine de ses membres que ceux-ci ne devraient pas être contraints d'y renoncer.*

motifs prévus, dont l'appartenance à un groupe social. La persécution dont seraient victime les membres d'un « groupe » ne peut donc pas constituer la caractéristique qui définit le groupe en question.

Application devant la Cour fédérale et devant la SSR

Exemples de groupes reconnus.

Postérieurement à l'arrêt *Ward*, la Cour d'appel fédérale a interprété, dans l'arrêt *Chan*[10], les trois catégories possibles de groupes sociaux. Dans des jugements concourants, la majorité des juges de la Cour d'appel a statué que les expressions « association volontaire » et « statut volontaire », employées dans les deuxième et troisième catégories établies dans l'arrêt *Ward*, renvoient à une association active ou officielle. Le jugement dissident était en désaccord avec cette interprétation.

La Cour suprême du Canada a été saisie de l'affaire *Chan*[11] et a décidé, à la majorité, que le demandeur n'avait pas prouvé le fondement objectif de sa crainte de persécution (stérilisation forcée). Les juges de la majorité ont toutefois rendu leur décision en se fondant sur le fait que le demandeur n'avait pas prouvé qu'il craignait avec raison d'être persécuté, savoir qu'il risquait d'être stérilisé de force par suite de la politique chinoise de l'enfant unique. La majorité de la Cour n'a pas traité de la question de l'appartenance à un groupe social ni celle de savoir si un motif s'appliquait en l'espèce. Pour leur part, les juges dissidents ont parlé abondamment de la question du groupe social. Leurs commentaires sont très convaincants, dans la mesure où ils ne sont pas contredits par la majorité et reflètent l'opinion d'un nombre important de juges de la Cour suprême. Le juge La Forest (qui avait rédigé les motifs de l'arrêt *Ward)* a clarifié certaines des questions soulevées dans l'arrêt *Ward* :

1. L'arrêt *Ward* énonçait une règle pratique et « *non une règle absolue visant à déterminer si le demandeur du statut de réfugié peut être classé dans un groupe social donné* »[12]. Les « *thèmes sous-jacents généraux de la défense des droits de la personne et de la lutte contre la discrimination* » sont les facteurs primordiaux en ce qui concerne la détermination de l'appartenance à un groupe social[13];

2. La distinction entre ce que le demandeur fait et ce qu'il est ne visait pas à remplacer les catégories établies dans *Ward*. Il faut tenir compte du contexte dans lequel la revendication survient[14];

3. Quant à la deuxième catégorie établie dans l'arrêt *Ward* et la position adoptée par la Cour d'appel dans l'affaire *Chan* selon laquelle cette catégorie exige une association active, le juge La Forest a déclaré :

10. *Chan, supra,* note 9; il s'agissait d'une affaire mettant en cause la stérilisation forcée d'un ressortissant chinois, père de plus d'un enfant (i.e. ayant contrevenu à la politique d'un seul enfant).
11. *Idem.*
12. *Chan, supra,* note 10, à la p. 642.
13. *Idem.*
14. *Ibidem,* p. 643-644. Le juge La Forest souligne que le fait d'avoir des enfants peut être considéré autant comme ce qu'une personne fait que ce qu'une personne est. En pratique, une personne qui « fait » des enfants « est » un parent.

> Pour éviter toute confusion sur ce point, permettez-moi d'affirmer, d'une manière indéniable, que le demandeur qui dit appartenir à un groupe social n'a pas besoin d'être associé volontairement avec d'autres personnes semblables à lui[15].

Quelques exemples

Voici quelques exemples de groupes sociaux reconnus par la jurisprudence canadienne :

1. La famille[16] (e.g., les enfants de policiers partisans de l'antiterrorisme[17], les parents d'opposants politiques au régime[18], la famille d'un chef syndical persécuté par les agents du gouvernement[19], une famille mixte d'un point de vue racial[20]). La Cour fédérale a fait une distinction entre les notions d'unité familiale, de famille en tant que groupe social et de persécution indirecte. Le principe de l'unité familiale exige que les personnes à qui est accordé le statut de réfugié ne soient pas séparées des membres de leur famille proche; pour l'invoquer, il n'est pas nécessaire de prouver qu'il y a persécution. La définition de *réfugié au sens de la Convention* n'inclut pas cette notion. La famille constitue certainement un groupe social. Toutefois, pour être un réfugié au sens de la Convention d'après ce motif, la personne doit subir une persécution directe parce qu'elle est membre d'une certaine famille[21];
2. Les homosexuels[22] (e.g., « les hommes marocains souhaitant vivre ouvertement leur homosexualité »[23], les « lesbiennes au Chili »[24]);
3. Les syndicats[25];
4. Les pauvres[26], les enfants pauvres[27];

15. *Ibidem*, aux p. 644-645.
16. *Al-Busaidy, Talai Ah Said et M.E.I.* (C.A.F., nº A-46-91), Heald, Hugessen, Stone, 17 janvier 1992 (Ouganda); SSR A97-00818, Showler, 20 mai 1998 (RDC); SSR A97-00289 *et al.*, Kagedan, Harker, 24 avril 1998 (Iran).
17. *Badran, Housam* c. *M.C.I.* (C.F. 1ère inst., nº IMM-2472-95), McKeown, 29 mars 1996 (Égypte).
18. SSR T95-07396, Bubrin, Chan, 27 mai 1997 (Iraq).
19. SSR U95-01481, Maraj, Berman, 17 décembre 1996 (Guatemala).
20. SSR T95-01828, T95.01829, Ramirez, Desai (motifs dissidents), 1er octobre 1996 (Russie).
21. *Casetellanos, Amador Francisco Pena* c. *Le Solliciteur général du Canada* (C.F. 1ère inst., nº IMM-6067-93), Nadon, 15 décembre 1994 et 29 janvier 1995. Voir aussi *Vyramuthu, Sanmugarajah* c. *M.E.I.* (C.F. 1re inst., nº IMM-6277-93), Rouleau, 26 janvier 1995 (Sri Lanka) où la Cour a réaffirmé que bien qu'une famille puisse constituer un groupe social particulier, il doit exister un certain lien entre la persécution de l'un des membres de la famille et celle des autres membres. La persécution doit être dirigée contre les membres de la famille en tant que groupe social et non en tant qu'individus.
22. *Pizarro, Claudio Juan Diaz* c. *M.E.I.* (C.F. 1ère inst., nº IMM-2051-93), Gibson, 25 février 1994 (Argentine); *Dykon, Konstantin* c. *M.E.I.* (C.F. 1re inst., nº IMM-38-93), McKeown, 27 septembre 1994 (Ukraine); SSR T95-06913, Wolman, Thomas (dissident), 9 octobre 1997 (motifs favorables signés le 30 mars 1998; motifs de dissidence signés le 25 mars 1998) (Argentine); SSR T97-02905, Stanwick, 12 mars 1998 (motifs signés le 29 avril 1998)(Cuba); SSR V96-02719, Lalonde, Robles, 10 décembre 1997 (motifs signés le 12 janvier 1998) (Iran); SSR M96-09062, Moss, Kouri (dissident), 15 décembre 1997 (motifs de dissidence signés le 26 janvier 1998) (Pakistan); SSR T96-05722, Eustaquio, Evelyn, 3 novembre 1997 (motifs signés le 3 décembre 1997) (Roumanie); SSR V96-00083, Whitehead, 17 mars 1997 (Maroc); SSR T95-07390, Sims, Shotzky, 8 octobre 1996 (motifs signés le 8 janvier 1997) (Ukraine); SSR U94-03926, Chan, W.R. Jackson, 29 mai 1996 (motifs signés le 3 octobre 1996) (Malaisie); SSR T95-05832, T95-05833, T95-05834, T95-05835, Antemia, Shatzky, 24 avril 1996 (motifs signés le 12 septembre 1996) (Russie).
23. SSR V96-00083, Whitehead, 17 mars 1997 (Maroc).
24. SSR T96-04982, Wolman, Smith, 9 décembre 1997 (motifs signés le 4 février 1998) (Chili).
25. *Rodriguez, Juan Carlos Rodriguez c. M.E.I.* (C.F. 1ère inst., nº IMM-4109-93), Dubé, 25 octobre 1994 (Costa Rica).
26. *Sinora, Frensel* c. *M.E.I.* (C.F. 1ère inst., 93-A-334), Noël, 3 juillet 1993 (Haïti); voir par contre SSR M96-03585, M96-03589, M96-03587, M96-03912, M96-03913, Sordzi, Fortin, 17 février 1997 (Chili) où la SSR a conclu que *« les pauvres appartenant à la classe ouvrière ne constituent pas un groupe social »*.
27. SSR A95-00633, Showler, 28 janvier 1998 (Zaïre).

5. Les femmes (qui s'exposent à une forme particulière de persécution en raison de leur sexe, e.g., les « femmes qui ont transgressé les lois et les moeurs sociales de leur pays »[28], « les femmes seules âgées au Pakistan »[29], les femmes mariées à un conjoint violent[30], les femmes non mariées[31], les jeunes femmes[32], les femmes en âge de procréer[33], les femmes d'âge scolaire[34], les femmes « syriennes appartenant à une famille arabe traditionnelle »[35], les citoyennes de la Somalie qui ne bénéficient pas de la protection d'un homme adulte[36], les femmes tajik occidentalisées vivant dans une société s'orientant vers l'orthodoxie islamique et privées de toute protection masculine[37], les femmes iraniennes mariées à des hommes soupçonnés d'appuyer les *moudjahidin*[38], les jeunes femmes mayas non protégées par leur famille[39], les femmes « radhaswamy-sikhes » de l'Inde[40], les jeunes femmes pauvres venant de l'ex-Union Soviétique[41], les mères célibataires d'Albanie[42], d'Afghanistan[43], les femmes en Inde[44]);
6. Les personnes séropositives pour le VIH[45];
7. Les membres de sexe masculin appartenant à la famille conformément à la tradition de la guerre du sang[46];
8. Les parents[47], les mères célibataires en Chine qui ont deux enfants[48];
9. Les castes[49];

28. SSR M95-00474, M95-00475, Singer, Doray, 1er mars 1996 (Pakistan), SSR T93-11857, T93-11860, MacPherson, Colle, 18 octobre 1994 (Jordanie), SSR M94-04037, Zambelli, di Pietro, 28 février 1995 (Bangladesh).
29. SSR V95-00836, Neuenfeldt, Vanderkooy, 22 juillet 1996 (qui risquaient d'être victimes de sévices de la part de membres de leur famille) (Pakistan).
30. *Narvaez* c. *Canada (ministre de la Citoyenneté et de l'Immigration)*, [1995] 2 C.F. 55 (1ère inst.) (Équateur); *Diluna* c. *Canada (ministre de l'Emploi et de l'immigration)* (1995), 29 Imm. L.R. (2d) 156 (C.F. 1ère inst.) (Brésil); SSR A95-00154, A95-00155, Henders, Kogedan, 12 avril 1996 (Pologne), SSR U94-03497, U94-03501, U94-03502, R. Smith, Antoniou, 20 avril 1995 (Bangladesh) (victimes de violence conjugale).
31. *Vidhani* c. *Canada (ministre de la Citoyenneté et de l'Immigration)*, [1995] 3 C.F. 60 (1ère inst.) (Kenya); SSR T93-09636, T93-09638, T93-09639, Neville, MacDonald, 26 janvier 1994 (motifs signés le 9 septembre 1994) (Liban- Émirats Arabes Unis), SSR U92-06668, E.R. Smith, Daya, 19 février 1993 (Zimbabwe) (forcées au mariage sans leur consentement).
32. SSR V95-00374, Whitehead, 21 novembre 1996 (Ghana); *Annan, Faustina* c. *M.C.I.* (C.F. 1ère inst., nº IMM-215-95), Dubé, 6 juillet 1995 (Ghana) (soumises à l'excision).
33. *Cheung* c. *Canada (ministre de l'Emploi et de l'Immigration)*, [1993] 2 C.F. 314 (C.A.) (Chine) (qui risquent de subir la stérilisation forcée).
34. *Ali, Shaysta-Ameer* c. *M.C.I.* (C.F. 1ère inst., nº IMM-3404-95), McKeown, 30 octobre 1996 (Afghanistan) (privées de leur droit à l'éducation).
35. SSR T93-11934, MacPherson, Neville, 5 juillet 1994 (motifs signés le 3 octobre 1994) (Syrie).
36. SSR A95-00837, Henders, Gilad, 3 mai 1996 (motifs signés le 23 mai 1996) (Somalie).
37. SSR T93-04176, T93-04179, T93-04181, T93-04184, Desai, Koulouras (motifs dissidents), 7 décembre 1993 (Afghanistan).
38. SSR U92-08151, U92-08152, U92-08153, U92-08154, U92-08155, Jew, Sandhu, 2 septembre 1993 (Iran).
39. SSR V92-00883, V92-00884, Burdett, Paetkau, 23 mars 1993 (Guatemala).
40. SSR U92-06982, Sandhu, Jackson, 9 décembre 1992 (Inde).
41. SSR V95-02904, Neuenfeldt, 26 novembre 1997 (Ukraine) (qui risquaient d'être recrutées pour être exploitées dans le cadre du commerce international du sexe).
42. SSR T96-05483, Eustaquio, 3 novembre 1997 (Albanie).
43. SSR T96-01498, M.Y. Mouammar, D.S. Chan, 28 septembre 1997 (Afghanistan).
44. SSR U96-03318, Wakim, 9 juin 1997 (Inde) (qui risquent d'être victimes de violence familiale découlant d'une querelle au sujet de la dot).
45. SSR U96-02717, Schlanger, Silcoff, 22 juillet 1997 (motifs signés le 16 septembre 1997) (Mexique); voir aussi SSR T95-07088, Wahnan, Weed, 16 août 1996 (Roumanie); SSR T95-07647, Ramirez, Zimmer (dissident), 23 octobre 1997 (Pologne).
46. SSR A96-00824, Ali Khan, McCauley, 18 mars 1998 (Albanie).
47. SSR A93-81751, A93-81752, A93-81753, Macklin, Noseworthy, 16 août 1995 (Chine).
48. SSR V94-01287, Sochedina, Daggett, 20 février 1997 groupe aussi défini comme « femmes en Chine qui craignent d'être stérilisées contre leur gré parce qu'elles ont contrevenu à la politique chinoise de contrôle des naissonces en ayont plus d'un enfant » : SSR V95-02063, Whitehead, 22 avril 1997 (Chine).
49. SSR M95-02275, M95-02276, Michnick, ven der Buhs, 8 octobre 1996 (Inde).

10. Les membres d'une tribu[50];
11. Les transsexuels[51];
12. Les défenseurs des droits de la personne[52];
13. Les enfants issus d'un mariage mixte[53];
14. Les artistes dont l'oeuvre est considérée comme contraire aux objectifs du régime (iranien)[54];
15. Les journalistes[55].

Questions litigieuses

Certaines situations factuelles demeurent sujettes à interprétation. Comment faire la part dans ces causes entre les « groupes sociaux » qui obtiendront protection et ceux qui ne devraient pas être couverts par notre interprétation de la définition de réfugié ? Doit-on toujours encourager une interprétation libérale au bénéfice du demandeur pour la simple raison que le droit des réfugiés appartient au droit dit « humanitaire » ?

Le problème se pose de façon particulièrement aiguë dans deux situations : la persécution indirecte des membres d'une famille, et les cas de victimes de criminalité, plus particulièrement, le cas de personnes qui dénoncent la corruption ou les activités criminelles dans lesquelles seraient engagés des agents de l'État[56].

Il ne suffit pas d'être membre d'une famille dont un des membres craint avec raison d'être persécuté pour être reconnu réfugié. Les tribunaux canadiens ont explicitement rejeté la notion de persécution indirecte[57]. La Cour a soutenu que cette notion élargissait de manière injustifiée le fondement de l'admission au Canada à titre de réfugié au sens de la Convention. La *Loi sur l'immigration* protège les personnes à la charge de réfugiés au sens de la Convention grâce à des dispositions qui permettent de leur accorder le droit d'établissement[58].

Ainsi, une revendication fondée sur l'appartenance à un certain groupe social (la famille) pourrait être rejetée si les actes perpétrés contre le demandeur principal (la plupart du temps l'époux) étaient liés à sa nationalité (par exemple, ou à tout autre motif qui lui serait propre) plutôt qu'à à son appartenance à sa famille comme « groupe social »[59].

50. SSR M95-01994, Lanoue, Yassini (dissident), 19 mars 1996 (Ghana).
51. SSR T94-07129, Sachedina, MacPherson, 14 août 1995 (Venezuela).
52. SSR A97-00196 *et al.*, Noseworthy, 17 avril 1998 (Belarus).
53. SSR T96-06291, T96-06292, Seevaratnam, 2 septembre 1997 (Somalie).
54. SSR V95-03270, Whitehead, Burke, 20 octobre 1997 (Iran).
55. SSR M96-01844, M96-01845, M96-01846, M96-01847, Singer, Doray, 3 avril 1997 (motifs signés le 25 juillet 1997) (Pakistan).
56. Une autre problématique consiste à distinguer les cas de femmes qui revendiquent sur la base de leur appartenance à un groupe social, de celles qui revendiquent pour un ou l'autre des motifs de la Convention comme toute autre personne. Voir à ce sujet *DIRECTIVES DONNÉES PAR LA PRÉSIDENTE EN APPLICATION DU PARAGRAPHE 65(3) DE LA LOI SUR L'IMMIGRATION*, Commission de l'immigration et du statut de réfugié, Ottawa, Canada, mars 1993, mises à jour le 25 novembre 1996.
57. *Pour-Shariati, Dolat* c. *M.E.I.* (C.F. 1ère inst., n° IMM-654-93), Rothstein, 15 décembre 1994 (Iran).
58. *Idem.* Voir également le para. 46.04 (1) de la *Loi sur l'immigration*.
59. SSR T91-02568, T91-02569, Ariemma, Reford, 29 septembre 1992 (Bulgarie).

Pourtant, dans d'autres cas[60], la Section du statut de réfugié a conclu que les mauvais traitements infligés par des groupes criminalisés suite à la dénonciation présumée du père et ex-conjoint des revendicatrices constituait de la persécution et que cette persécution reposait sur l'appartenance à un groupe social, savoir la famille de l'ex-conjoint. Le tribunal conclut que bien que des liens conjugaux ne constituent pas une caractéristique innée ou immuable, le fait qu'il y avait des liens conjugaux est une question de permanence historique. Pour les agents persécuteurs membres de la bande, il importait peu que la revendicatrice et son mari se soient séparés. Le lien qui existait entre les filles et leur père était inné et immuable.

Dans l'affaire *Rodriguez*[61], la revendicatrice avait établi son risque de subir un préjudice parce que son mari était impliqué dans des affaires de drogue de la mafia. La Cour fédérale a néanmoins statué que la SSR n'avait commis aucune erreur en statuant que les difficultés auxquelles devaient faire face les membres de la famille des personnes persécutées pour des motifs qui ne sont pas énoncés dans la Convention ne sont pas visées par la Convention, si ces difficultés découlent uniquement de leurs liens avec la personne prise principalement pour cible.

Conclusion

La Cour suprême du Canada a, selon nous, choisi la modération dans son interprétation de l'expression « groupe social » : entre une définition très générale, selon laquelle la catégorie sert de « filet de sécurité », et celle plus stricte et étroite qu'avait formulée la Cour d'appel fédérale, la Cour a préféré une définition dont la portée est limitée par un mécanisme approprié, reconnaissant ainsi que cette catégorie n'est pas destinée à englober tous les groupes.

Cette décision aura grandement facilité le travail des décideurs en matière de droit des réfugiés : les trois catégories de « groupe social » articulées par la Cour sont facilement compréhensibles et généralement facilement applicables aux faits de chaque cause. La Cour aura ainsi démontré l'importance de l'activisme judiciaire dans la promotion des droits de la personne, peu importe le contexte national ou international, favorable ou défavorable. Malgré cette décision et celles qui l'ont suivie, il reste, comme nous l'avons vu, encore beaucoup de place à l'interprétation de cette notion dans plusieurs cas particuliers.

Reste à voir comment les autres pays d'accueil interpréteront à l'avenir cette catégorie de la définition de « réfugié au sens de la Convention », et comment les décideurs canadiens appliqueront cette décision dans des cas particuliers, lesquels nos savants juges ne pouvaient sans doute pas tous envisager.

60. SSR V95-01793, V95-01794, V95-01795, Sachedina, Vanderkooy, 25 août 1997 (Russie).
61. *Rodriguez, Ana Maria* c. *M.C.I.* (C.F. 1ère inst., IMM-4573-96), Heald, 26 septembre 1997 (Venezuela).

C

Undeserving Claimants: The Integrity of Refugee Determination on the Line

Revendicateurs qui ne méritent pas de protection : intégrité du processus de détermination du statut de réfugié en jeu

Unsuccessful Asylum Claimants - Separating the *Ineligible* from the *Undeserving*

Chief Judge Michael John Creppy[1] and Judge Bruce J. Einhorn[2]

I. INTRODUCTION

This presentation will cover grounds of statutory ineligibility for refugee status and *refoulement*[3] under the United States *Immigration and Nationality Act* (INA). The presentation will be divided between "*deserving* claimants ineligible to apply for refugee status" and "*undeserving* claimants ineligible for refugee status" — essentially a division between procedural versus substantive barriers. For a general overview of the asylum process in the United States, see the attached chart.

II. OVERVIEW OF REFUGEE DEFINITION

A. An alien is statutorily eligible for asylum if she or he meets the definition of a "refugee" under INA § 101(a)(42)[4] and meets the conditions for granting asylum under INA § 208. This definition is based on the definition found in the United Nations 1951 Convention Relating to the Status of Refugees[5], and the 1967 Protocol Relating to the Status of Refugees (UN Protocol).[6]

B. An applicant for asylum is also considered an applicant for withholding of deportation under INA § 243(h), or withholding of removal under INA § 241(b)(3) of the INA, depending on the proceedings.[7] See 8 C.F.R. § 208.3(b).[8] Withholding of deportation or removal may also be referred to as *refoulement*.

1 The Honorable Michael John Creppy is the Chief Immigration Judge for the United States, Executive Office for Immigration Review, United States Department of Justice. The views expressed are those of the authors and do not represent the official position of the Executive Office for Immigration Review or the Department of Justice. The authors extend their special thanks to Afsaneh Ashley Tabaddor, Attorney Advisor, Executive Office for Immigration Review, United States Department of Justice, Los Angeles, California, for her assistance in the preparation of this article.

2 The Honorable Bruce J. Einhorn is an Immigration Judge for the Executive Office for Immigration Review, United States Department of Justice. Judge Einhorn presides in the Los Angeles Immigration Court.

3 See discussion *infra* under section II, B.

4 The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded feor of persecution on account of race, religion, nationality, membership in a particular sociol group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person hoving no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntory sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to hove been persecuted on account of political opinion, and a person who has o well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

5 Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. (1954).

6 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1968).

7 With the passage of *Illegal Immigrant Reform and Immigrant Respansibility Act* (IIRIRA), Pub. L. No. 104-208 (1996), prior "deportation" and "exclusion" proceedings were combined into one "removal" proceedings. Thus withholding of deportation and withholding of removal merely identifies in which proceedings the respondent filed his application for relief.

8 The Code of Federal Regulations ("C.F.R.") is the set of United States Justice Department regulations meant to implement and further define the INA.

III. DESERVING CLAIMANTS INELIGIBLE TO APPLY FOR REFUGEE STATUS

A. Generally, any alien who is *physically present* in the United States may *apply* for asylum, regardless of the manner of her arrival or her immigrant status in the United States. See INA § 208(a)(1).

B. There are exceptions to the right to apply for asylum.

1. **INA § 208(a)(2)(A) — Safe third country**
An alien may not apply for asylum if — the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States. Presently, the United States does not have any bilateral or multilateral agreements regarding this matter with any country.

2. **INA § 208(a)(2)(B) — Time limit**
An alien may not apply for asylum unless — Subject to subparagraph (D), *infra* — the alien demonstrates by clear and convincing evidence that the application has been filed within one year after the date of the alien's arrival in the United States.

- **8 C.F.R. § 208.4(a)(2) — One-year filing deadline**

(i) For purposes of INA § 208(a)(2)(B), an applicant has the burden of proving:

(a) by clear and convincing evidence that he or she applied within one year of the alien's arrival in the United States, or

(b) to the satisfaction of the asylum officer, immigration judge, or Board of Immigration Appeals that he or she qualifies for an exception to the one-year deadline.

(ii) The one-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, an asylum officer or immigration judge will determine whether the applicant qualifies under one of the exceptions to the deadline.

- **INA § 208(a)(2)(D) — Changed circumstances**
An [untimely] application for asylum of an alien may be considered, if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or *extraordinary circumstances relating to the delay in filing an application within the period specified.*

- **8 C.F.R. § 208.4(a)(5) — Extraordinary circumstances**
The term extraordinary circumstances in INA § 208(a)(2)(D) shall refer to events or factors beyond the alien's control that caused the failure to meet the one-year deadline. Such circumstances shall excuse the failure to file within the one-year period, so long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer or immigration judge that the circumstances were both beyond his or her control and that, but for those circumstances, he or she would have filed within the one-year period. These circumstances may include:

(i) serious illness or mental or physical disability of significant duration, including any effects of persecution or violent harm suffered in the past, during the one-year period after arrival;

(ii) legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the first year after arrival;

(iii) ineffective assistance of counsel, provided that:

(a) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(b) the counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(c) the alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) the applicant maintained Temporary Protected Status until a reasonable period before the filing of the asylum application; and

(v) the applicant submitted an asylum application prior to the expiration of the one-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter.

3. **INA § 208(a)(2)(C) — Previous asylum applications**
An alien may not apply for asylum — Subject to subparagraph (D), *infra*, if the alien has previously applied for asylum and had such application denied.

- **INA § 208(a)(2)(D) — Changed circumstances.**
[Notwithstanding the previously denied application], an application for asylum of an alien may be considered, if the alien demonstrates to the satisfaction of the Attorney General either the existence of *changed circumstances which materially affect the applicant's eligibility for asylum*, or

extraordinary circumstances relating to the delay in filing an application within the period specified.

- **8 C.F.R. § 208.4(a)(4) — Changed circumstances**
  (i) The term "changed circumstances" in INA § 208(a)(2)(D) shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include:

    (a) changes in conditions in the applicant's country of nationality or, if the person is stateless, the country of last habitual residence; or

    (b) changes in objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum.

  (ii) The applicant shall apply for asylum within a reasonable period given those "changed circumstances".

IV. UNDESERVING CLAIMANTS INELIGIBLE FOR REFUGEE STATUS

A. Generally, the Attorney General may grant asylum to an alien who has applied for asylum and who is determined to be a "refugee" within the meaning of INA § 101(a)(42). See INA § 208(b)(1).

B. There are exceptions to the conditions for granting asylum.

An alien may not be granted asylum, if it is determined that he or she falls within one of the following class of individuals:

1. **INA § 208(b)(2)(A)(i) — Persecution of Others**
   The alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 C.F.R. § 208.13(c)(2)(E). See also INA § 243(h)(2)(A) (withholding of deportation); *cf.* INA § 241(b)(3)(B)(i) (withholding of removal).

   Sample Decisions:

   Ofosu v. *McElroy*, 933 F. Supp. 237 (S.D.N.Y. 1995) — The asylum applicant from Ghana, who worked for eight years as a senior officer of the Committee for Defense of the Revolution (which was a quasi-police force directed against political opponents of the government) was ineligible for asylum, as he was a persecutor of others; he admitted arresting political opponents of the government whom he believed would be killed, tortured, or imprisoned indefinitely without trial on account of their political actions.

   Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988) — Mere membership in an organization engaged in persecution is not sufficient to bar relief. If the alien's action or inaction furthers persecution in some way, he would then be ineligible.

Matter of McMullen, 19 I&N Dec. 90 (BIA 1984) — The respondent was found ineligible for refugee status, and therefore asylum and withholding of deportation, due to his active membership and leadership in the Provisional Irish Republican Army (PIRA), including his training of terrorists and gun-running, by which he knowingly furthered PIRA's campaign of terrorist atrocities. aff'd on other grounds, *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986).

2. **INA § 208(b)(2)(A)(ii) — Conviction of particularly serious crime**
The alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. 8 C.F.R. § 208.13(c); 8 C.F.R. § 208.16(c)(2).

   (a) **Conviction of aggravated felony under § INA101(a)(43)**
   For purposes of asylum, an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime. INA § 208(b)(2)(B)(i).

   For purposes of withholding of deportation/removal, a conviction of an aggravated felony does not, automatically, preclude a grant of withholding of deportation/removal *unless* the person was sentenced to an aggregate term of imprisonment of at least five years, in which case he or she will be considered to have been convicted of "a particularly serious crime" for purposes of barring such relief. See INA § 243(h)(2)-(3) (withholding of deportation); INA § 241(b)(3)(B) (withholding of removal). See also *Matter of Q-T-M-T-*, Interim Decision # 3300 (BIA 1996).

   (b) **"Particularly serious crime" and "danger to the community"**
   A person who has been found to have committed a particularly serious crime shall also be considered to be a danger to the community. INA § 208(b)(2)(B)(i); 8 C.F.R. § 208.16(c)(2). See also, *Ramirez -Ramos* v. *INS*, 814 F.2d 1394 (9th Cir. 1987); *Matter of K-*, 20 I&N Dec. 418 (BIA 1991).

   (c) **Conviction of a non-aggravated felony**
   In the case of an alien convicted of a non-aggravated felony, in determining whether non-aggravated felony can be considered a bar to asylum, the Immigration Court and the Board of Immigration Appeals (BIA) will consider the nature of the conviction, the underlying circumstances relating to the crime, the type of sentenced imposed, and whether the alien will be a danger to community. See Section 306(a)(3) of the Immigration Technical Correction Act.

3. **INA § 208(b)(2)(A)(iii) — Commission of serious crime outside the U.S.**
There are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States. See also INA § 243(h)(2)(C) (withholding of deportation); INA § 241(b)(3)(B)(iii) (withholding of removal); 8 C.F.R. § 208.16(c)(2).

   Note: The United Nations High Commissioner for Refugees has stated that when an alien is considered ineligible for withholding because he has

committed a serious non-political crime outside the United States, it is "necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared." *United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status*, p. 156 (Geneva 1979).

Nota Bene: In *Ramirez-Ramos* v. *INS*, 814 F.2d 1394 (9th Cir. 1987), *supra*, the Ninth Circuit held that the Handbook's standard for evaluating eligibility for withholding relief should *not* be the same in a situation of a final conviction of a serious crime in the United States, (INA § 243(h)(2)(B)), as in a situation where there is reason to believe an alien committed a crime *outside* the United States, (INA § 243(h)(2)(C)).

Sample decisions:

Aguirre-Aguirre v. *INS*, 121 F.3d 521 (9th Cir. 1997) — In determining whether alien was ineligible for withholding of deportation due to commission of serious non-political offences outside the United States, BIA improperly failed to consider whether offences were politically motivated and had close and direct causal link with alien's alleged political purpose and object, whether alien's methods were politically necessary and successful or were grossly out of proportion to alleged objective and severity of persecution alien faced as balanced against his offences.

- A conviction is not necessary to invoke this provision. See *McMullen* v. *INS*, 788 F.2d. 591, 598-99 (9th Cir. 1986). However, it should be noted, even if the alien's motivation was political in nature, the crime may be considered a serious non-political crime if the act was disproportionate to the political objective or was atrocious or barbarous. See, e.g., *Matter of Rodriguez-Palma*, 17 I&N Dec. 465, 468-69 (BIA 1980).

McMullen v. *INS*, 788 F.2d 591 (9th Cir. 1986) — Provisional Irish Republican Army's random acts of violence against ordinary citizens of Northern Ireland and elsewhere were not sufficiently linked to political objectives and were so barbarous, atrocious and disproportionate to the political objective of ridding Northern Ireland of the British that they constituted "serious non-political crimes" for purposes of withholding of deportation. For purposes of withholding of deportation, "serious non-political crime" is crime that was not committed out of genuine political motive, was not directed toward modification of political organization or structure of state, and in which there is no direct, causal link between crime committed and its alleged political purpose and object.

4. **INA § 208(b)(2)(A)(iv) — Danger to security of the U.S.**
There are reasonable grounds for regarding the alien as a danger to the security of the United States. 8 C.F.R. § 208.13(c)(2)(i)(C) (if the alien "[c]an reasonably

be regarded as a danger to the security of the United States"). See also INA § 243(h)(2)(B) (withholding of deportation); INA § 241(b)(3)(B)(ii) (withholding of removal).

- See also discussion *supra*, under section IV, B, 2 (conviction of particularly serious crime).

5. **INA § 208(b)(2)(A)(v) — Terrorist activities**
The alien is inadmissible under subclause (I), (II), (III), or (IV) of INA § 212(a)(3)(B)(i) or removable under INA § 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of INA § 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States. See also INA § 243(h)(2) (withholding of deportation); INA § 241 (b)(3)(B)(iv) (withholding of removal).

Note: INA § 208 (b)(2)(D) prohibits judicial review of Attorney General's determinations of whether an alien's asylum application must be denied on terrorist-related grounds.

(a) "Alien terrorist removal proceedings"

The *Antiterrorism and Effective Death Penalty Act* (1996) (AEDPA) established special removal procedures for individuals deportable as "alien terrorists" under INA § 241(a)(4)(B). INA § 502. The removal court consists of five district court judges from five of the U.S. judicial circuits who are appointed by the Chief Justice of the United States. INA § 502(a). The Attorney General commences removal proceedings by filing an application with the removal court establishing that removal of the alien under standard deportation procedures would pose a risk to national security. INA § 503(a)(1). Once a judge on the removal court grants the application to hold the removal proceeding, the Immigration Courts are divested of jurisdiction over the matter.

6. **INA § 208(b)(2)(A)(vi) — Firm resettlement**
The alien was firmly resettled in another country prior to arriving in the United States. 8 C.F.R. § 208.13(c)(2)(B).

Note: The question of an alien's resettlement is not relevant to an application for withholding of deportation or withholding of removal.

- **8 C.F.R. § 208.15 — Firm resettlement defined**
An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement *unless* he or she establishes:

(a) that his or her entry into that nation was a necessary consequence of his or her flight from persecution, that he or she remained in that nation only as long as was necessary to arrange onward travel, and that he or

she did not establish significant ties in that nation; or

(b) that the conditions of his or her residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the Asylum Officer or Immigration Judge shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others residents in the country.

Sample Decisions:

Rosenberg v. *Yee Chien Woo*, 402 U.S. 49 (1971) — prior to the regulatory mandates, the Supreme Court in accord with the definition of "refugee" directs that issue of firm resettlement be weighed as a relevant factor in considering an application for asylum.

Vang v. *INS*, 146 F.3d 1114 (9th Cir. 1998) — finding that the parents' status was derivatively attributed to the adult applicant who at the time of entry into the United States was a minor. The alien, an ethnic Hmong whose parents were Laotian national, was born in U.N. refugee camp in Thailand, but his parents had firmly resettled in France by 1991 when they entered the United States.

Abdalla v. *INS*, 43 F.3d 1397 (10th Cir. 1994) — Petitioner, a native and citizen of Sudan, was firmly resettled in United Arab Emirates ("UAE"), where he lived for 20 years prior to entry into the United States, possessed residence visa, and had longstanding family ties; fact that he had not been granted official permission to work in UAE did not undermine requisite firm character of resettlement there.

V. ADDITIONAL CONSIDERATIONS

A. Circumvention of refugee procedures

Fraudulent attempts to circumvent refugee procedures — i.e., the orderly process of lawful admission of refugees — may warrant a denial of asylum in the exercise of discretion. See *Matter of Shirdel*, 19 I&N Dec. 33, 38 (BIA 1984). This occurs when an alien attempts to enter the United States on a fraudulent passport and then requests asylum, rather than applying for refugee status abroad. With the passage of IIRIRA, arguably it allows such asylum seekers to establish "credible fear" of persecution upon arriving in the United States and subsequently may enable them to apply for asylum. INA § 235(b)(1)(B).

B. **Another consideration is Nazi persecution or genocide.**
An alien is ineligible for withholding of deportation/removal if she falls within the class of individuals defined under INA § 212(a)(3)(E)(i)-(ii). See INA § 243(h) (withholding of deportation); INA § 241(b)(3)(B) (withholding of removal).

- **INA § 212(a)(3)(E)(i)-(ii)**
  (i) Participation in Nazi persecutions

  Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with:

  (I) the Nazi government of Germany;
  (II) any government in any area occupied by the military forces of the Nazi government of Germany;
  (III) any government established with the assistance or co-operation of the Nazi government of Germany; or
  (IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is excludable/inadmissible.

  (ii) Participation in genocide

  Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable/inadmissible.

  Sample Decisions:

  Kalejs v. *INS*, 10 F.3d 441 (7th Cir. 1993) — holding that deportation of alien was warranted under Holtzman Act, amending the INA to include §§ 212(a)(e)(E) & 241(a)(4)(D), for persecution activities during World War II.

  Artukovic v. *INS*, 693 F.2d 894 (9th Cir. 1982) — Immigration Act provision that members of Nazi governments of Europe who had persecuted people because of their race, religion, national origin, or political opinion were deportable and were not eligible for stays was applicable retroactively to Nazi war criminals who were not deportable under earlier immigration laws and did not constitute an *ex post facto* law or bill of attainder.

  Linnas v. *INS*, 790 F.2d 1024 (2d Cir. 1986) — Statute requiring deportation of persons shown to have participated in Nazi persecution during World War II was not a bill of attainder, because deportation was not punishment. Deportation of Nazi war criminal did not violate equal protection.

VI. CONCLUSION

International migration to the United States has risen rapidly. With this rise has come another phenomenon — the attempt by ever larger numbers of people to seek residence in the United States based on the asylum or refugee process.

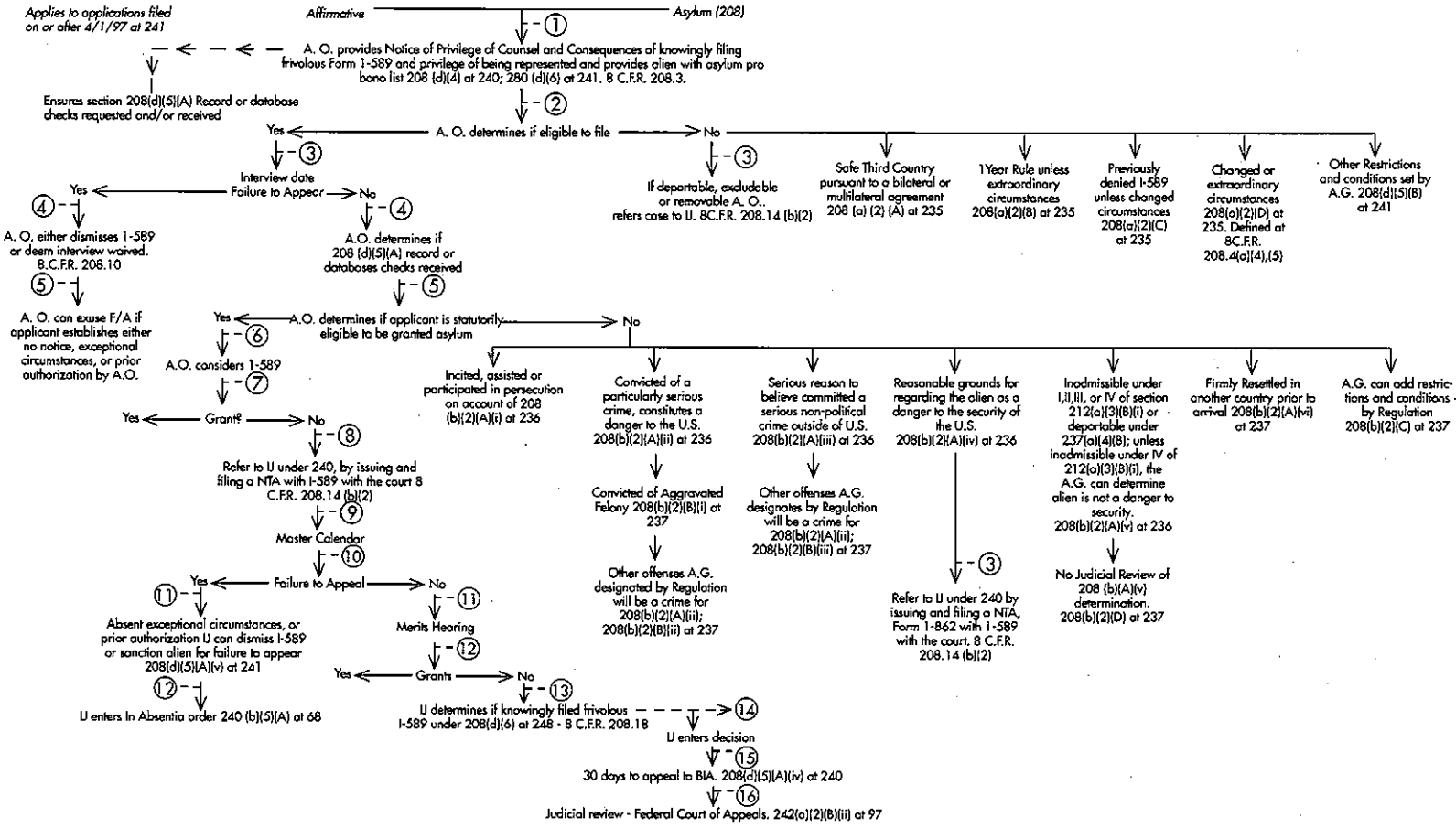
As the migration has increased, so has the pace of reform to the immigration laws of the United States. For the asylum and refugee laws, reform has involved developing barriers that mark some aliens as *ineligible* and others as *undeserving*.

Ineligible aliens, although perhaps meeting the statutory definition of a refugee, are barred from asylum for procedural reasons — failing to apply within a year of arrival, coming to the United States from a safe third country, or having applied for asylum in the past and been denied. Undeserving aliens, on the other hand, may also meet the statutory definition of a refugee, but are barred from relief because of conduct for which they are deemed unworthy of relief — participation in Nazi persecution or genocide, persecution of others, conviction of serious crimes, terrorist activity, or firm resettlement in another country of safety.

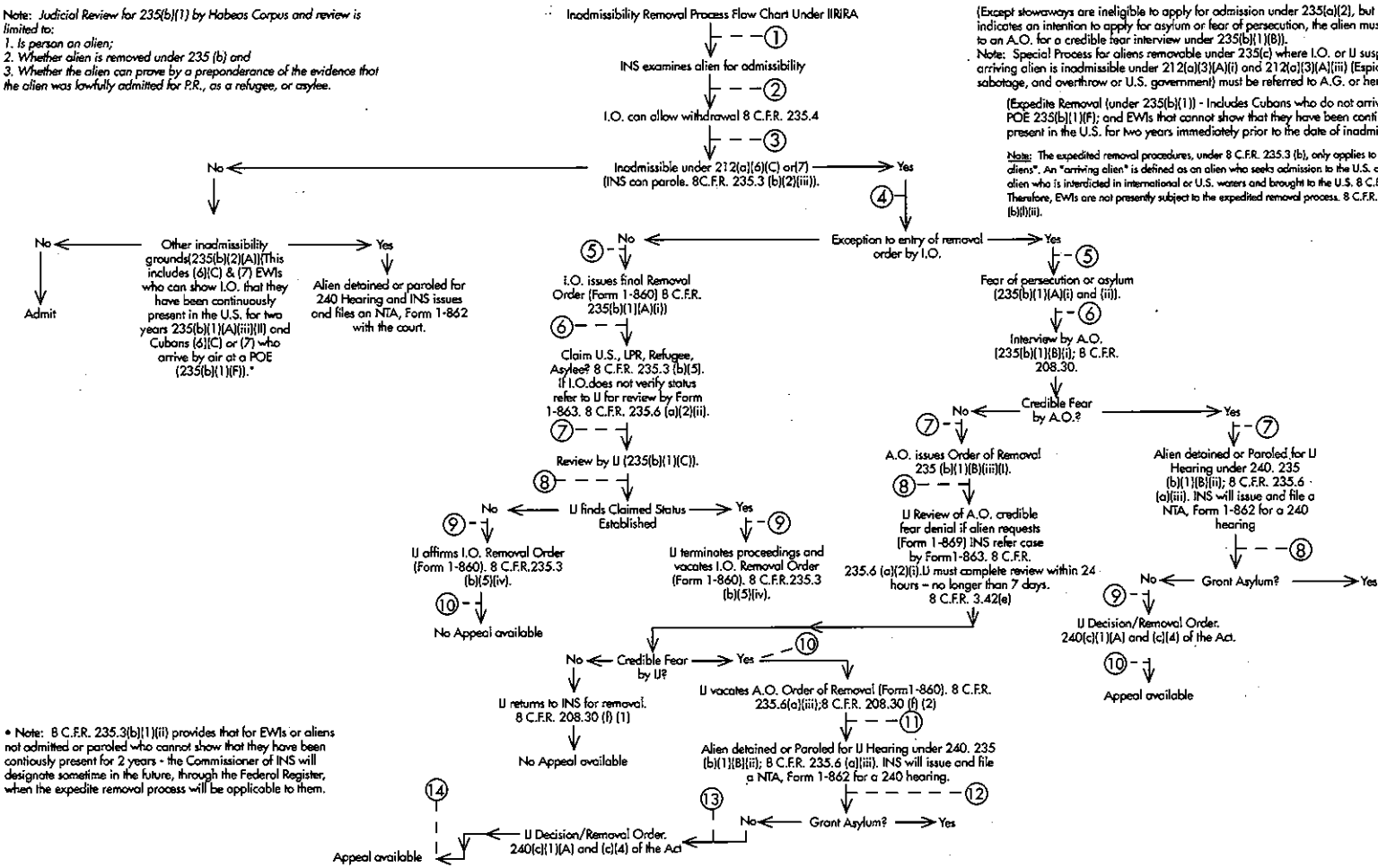
The bars to asylum status relief not only reflect the goal of rejecting criminals, terrorists, persecutors and others who might pose a danger to the citizens of the United States, but also the goal of establishing reasonable procedural requirements for the granting of this extraordinary form of relief.

It is anticipated that these measures assure not only that the welfare and safety of the people of the United States are protected, but that they also serve to preserve the tradition of America as a haven for the oppressed and a beacon of hope for those seeking a better life.

GENERAL OVERVIEW OF THE ASYLUM PROCESS IN THE UNITED STATES OF AMERICA



Note: *Judicial Review for 235(b)(1) by Habeas Corpus and review is limited to:*
1. Is person an alien;
2. Whether alien is removed under 235 (b) and
3. Whether the alien can prove by a preponderance of the evidence that the alien was lawfully admitted for P.R., as a refugee, or asylee.



• Note: 8 C.F.R. 235.3(b)(1)(ii) provides that for EWIs or aliens not admitted or paroled who cannot show that they have been contiously present for 2 years - the Commissioner of INS will designate sometime in the future, through the Federal Register, when the expedite removal process will be applicable to them.

Credibility of Asylum Applicants – The Approach of the Board of Immigration Appeals

Paul W. Schmidt[1] and Molly Kendall Clark[2]

INTRODUCTION

The credibility of asylum applicants is critical to their claims. Perhaps no other issue is more important. It often leads to the success or failure of a persecution claim. Most asylum applicants in the United States, no doubt as elsewhere, have stories of persecution to tell, often compelling ones. The challenge is determining the truthfulness of the stories.

The question of credibility is among the most significant issues at the Board of Immigration Appeals (the Board). Recognizing the particular importance of credibility in asylum cases, the Board, over the years, has provided guidance to practitioners and adjudicators regarding what is necessary to a favorable finding of credibility. It recently issued a number of decisions which refine and explain its approach to this key issue. These cases will be discussed below.

THE UNITED NATIONS HANDBOOK APPROACH

In assessing persecution claims, including the issue of credibility, the Board has long looked for guidance to the Office of the United Nations High Commissioner for Refugees *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) (Handbook). The Handbook is not binding on the Board, but has been cited by the Board with approval. See, e.g., *Matter of S-M-J-*, Interim Decision 3303 (BIA 1997); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Thus, it is appropriate to begin with a brief discussion of how the Handbook addresses the important and difficult issue of credibility.

The Handbook recognizes that the burden of proof in a persecution claim rests with the person seeking refugee status or asylum. However, the Handbook acknowledges the difficulties that asylum seekers often face in presenting their persecution claims and in providing evidence to corroborate those claims. It notes that a person fleeing persecution often may arrive without even personal documents. The lack of corroborating evidence therefore should not be too strictly held against an asylum seeker. Nevertheless, the applicant's story should be carefully considered. Any allowance made for the lack of supporting evidence "does not . . . mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant." Handbook, para. 197, at 47.

The Handbook also discusses the role of the examiner in considering a persecution claim, advising that he or she be an active participant in the process. This point is discussed at greater length below. The approach of the Handbook is a recognition that asylum seekers may often be fearful and afraid to give an accurate or detailed account of their stories. The

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examiner is therefore called upon to aid the applicant in telling his story, and to himself attempt to produce evidence to support the application. Handbook, para. 196, at 47.

The Handbook also states that where an asylum applicant has made a "genuine effort" to substantiate his claim, he may still be unable to provide evidence for certain parts of his story. In such cases, the asylum applicant may sometimes be given the benefit of the doubt. This issue is also discussed further, below.

In general, the Board uses the United Nations Handbook as a broad guide, but is not compelled to follow the guidelines set forth there in any given case. Rather, the Board has produced its own precedent decisions addressing the issue of credibility in asylum cases.

DECISIONS OF THE BOARD OF IMMIGRATION APPEALS

The Importance of Testimony

In the landmark decision, *Matter of Mogharrabi, supra,* the Board held that an alien's testimony alone can be sufficient to demonstrate eligibility for asylum in the United States. Such testimony can suffice, the Board concluded, where it is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." *Id.* at 445. The Board held that a lack of corroborating evidence would not necessarily be fatal to the asylum application, but cautioned that an applicant for asylum should make "every effort" to obtain such evidence. *Id.* at 445.

The importance of an alien's testimony was again emphasized by the Board in *Matter of Fefe,* 20 I&N Dec. 116 (BIA 1989). There, the applicant attempted to rest his entire case on his written application for asylum; he did not take the stand and testify at his exclusion hearing. The Board noted that the regulations require that an asylum applicant be examined in person and under oath. It stated that full examination of an applicant is an "essential aspect" of the asylum adjudication process. *Id.* at 118. The Board pointed out that an applicant's testimony can sometimes be the means of detecting fabricated stories, while in other cases it can establish the asylum claim where the written documents alone fail to do so.

Background Evidence and Corroboration

While adhering to the rule that an alien's testimony alone can sometimes establish an asylum claim, in *Matter of Dass,* 20 I&N Dec. 120 (BIA 1989), the Board clarified that the submission of supporting evidence is not "purely an option" for an asylum applicant. *Id.* at 124. Rather, it was held, "the general rule is that such evidence should be presented where available." The Board noted the difficulty of assessing an alien's credibility without any background evidence and pointed out that the United Nations Handbook also stresses the need for background evidence, especially regarding conditions in the applicant's country of origin.

The asylum applicant in *Matter of Dass, supra,* was an Indian who had for many years been a member of the political party Dal Khalsa. He claimed that the Indian government persecuted members of his party. The alien acknowledged that there existed "widely known" government publications regarding the treatment of Dal Khalsa members, but no evidence on this issue was provided; nor did the record indicate that any effort had been made to

obtain such evidence. The Board stated that where the basis for an asylum claim is "more directed to broad allegations regarding general conditions in the respondent's country of origin," background evidence to corroborate the claim "may well be essential." *Id.* at 125.

The Board more recently held that general background evidence regarding country conditions should be included in the record as a foundation for an asylum claim. *Matter of S-M-J-*, Interim Decision 3303 (BIA 1997). The Board then went on to address the need to provide evidence to support an alien's individual claim. "Where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim," the Board stated, "such evidence should be provided." The Board also imposed the following requirement: "[I]f the applicant does not provide such information, an explanation should be given as to why such information was not presented." *Id.* at 5.

The allocation of responsibility for providing background and other corroborative evidence was also discussed in *Matter of S-M-J-, supra.* The Board reiterated the rule that the burden of proof in an asylum case is on the asylum applicant. However, it pointed out, citing the United Nations Handbook, that both the Immigration and Naturalization Service and the Immigration Judge have roles in introducing evidence into the record. A "co-operative approach in Immigration Court" is appropriate and necessary to ensure that "refugee protection is provided where such protection is warranted." *Matter of S-M-J-, supra,* at 3.

The Immigration and Naturalization Service, whose trial counsel prosecute cases before the Immigration Judges, is expected to introduce into evidence current Department of State Country Reports, advisory opinions and other information which might be readily available from its Resource Information Center. The Immigration Judge also may be called upon to supply evidence. Where, for example, an Immigration Judge relies on his knowledge of country conditions in adjudicating a case, the source of that knowledge must be made part of the record. The regulations require the Immigration Judge to discuss the evidence presented and the reasons for the decision in an asylum case. See 8 C.F.R. § 242.18(a) (1996). The admission into evidence of any background information on which the Immigration Judge relies in reaching his decision is also necessary to a meaningful appellate review.

The Board in *Matter of S-M-J-, supra,* also quoted from the Handbook to the effect that "[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner." Handbook, para. 196, at 47. The quotation of this language is significant in that it reinforces the notion that the Immigration Judge has an obligation to take an active role in an asylum hearing.

In *Matter of S-M-J-, supra,* the Board also recognized that while the Handbook is not binding on the Board, it does provide the adjudicator with guidance in assessing an alien's credibility and in dealing with corroborating evidence, or the lack thereof. The Board quoted with approval a portion of the Handbook that states,

> [a]fter the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements . . . . [I]t is hardly possible for a refugee to "prove" every part of his case . . . It is therefore frequently necessary to give the applicant the benefit of the doubt. *Id.* para. 203, at 48.

The Handbook cautions, however, that the benefit of the doubt should be given to the alien only when "all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility." *Id.* para. 204, at 48.

Just in the last year, the Board has, in two cases, had occasion to elaborate upon the issue of corroborating evidence. *Matter of M-D-*, Interim Decision 3339 (BIA 1998) and *Matter of Y-B-*, Interim Decision 3337 (BIA 1998). Both these cases involved aliens claiming to be Mauritanians who faced persecution on account of their black race. In *Matter of M-D-, supra,* the alien had presented considerable evidence regarding the oppression of black Mauritanians on account of their race. However, he had provided no corroborating evidence regarding the specifics of his own claim and, in fact, had provided no evidence to confirm that he was actually a national of Mauritania, a central element to his claim.

The Board emphasized that this applicant had purportedly lived for 11 months in a refugee camp in Senegal and claimed that some family members remained in the camp; yet he did not provide any proof of his stay there. He was granted a seven-week continuance to obtain official verification of his presence in the camp, but was unable to obtain confirmation. Nor was the respondent able to provide any evidence of his identity, or of his or his family's forced expulsion from Mauritania. The respondent's account of his arrest, the two years he spent in detention in Mauritania, and his expulsion and stay in the Senegalese refugee camp was also lacking in detail. The Board found it reasonable to expect some corroboration of the events in question under the circumstances of the case. By failing to provide any corroboration of the specifics of his claim, the respondent failed to meet his burden of proof.

In *Matter of Y-B-, supra,* the Board again concluded that the respondent had failed to meet his burden of proof. In this case, the Immigration Judge had found that the respondent's testimony was, on the whole, internally consistent. Therefore, he did not find the testimony incredible. However, the Immigration Judge did find, and the Board agreed, that the testimony was vague regarding key elements of his claim, and generally lacking in specific detail. The Board also noted that there were "significant omissions" in the alien's written application for asylum. *Id.* at 3. Like the alien in *Matter of M-D-, supra,* this applicant was given continuances to obtain confirmation of his stay in a Senegalese refugee camp, but never provided such evidence.

The Board in *Matter of Y-B-, supra,* stated that "the weaker an alien's testimony, the greater the need for corroborative evidence." In this case, the respondent's testimony was general and vague, and that defect was not remedied by "specific and detailed corroborative evidence." *Id.* at 4. This case demonstrates that even where an alien is not found to be incredible, his persecution claim may still fall short for failure of proof.

The Board in this case also took the opportunity to distinguish the concept of "burden of proof" from the concept of "benefit of the doubt." It noted that the burden of proof relates to the "quantum of proof", whereas the benefit of the doubt comes into play where there is an "ambiguity" regarding an aspect of the asylum applicant's claim. Where such an ambiguity exists, the benefit of the doubt may be given as to the fact in issue. *Id.* at 4-5.

Unexplained False Documents

The problems an asylum applicant faces when he presents false documents was highlighted by the Board in *Matter of O-D-*, Interim Decision 3334 (BIA 1998). In this case, the alien attempted to establish his Mauritanian nationality by submitting an identity card and a birth extract from Mauritania. The Immigration and Naturalization Service Forensics Document Laboratory concluded that the identity card was a "known counterfeit" and the birth certificate was "probably counterfeit." The Immigration Judge relied on the presentation of false documents, as well as inconsistencies in the respondent's story, to find the respondent not credible.

The Board agreed with the adverse credibility finding and, in so doing, warned that adverse inferences would be drawn from the presentation of false documents. The Board distinguished this case from those where, for example, false documents are submitted either for the purpose of escaping immediate danger, or for gaining entry into the United States. Here, the Board emphasized, the alien's "fraud pertains to a central element of his asylum claim, i.e., his identity, perhaps the most critical of the elements, and thereby significantly undermines the credibility of his overall asylum claim." *Id.* at 5. Moreover, "[S]uch fraud tarnished the respondent's veracity and diminishes the reliability of his other evidence." *Id.* at 6.

The Board also noted certain inconsistencies in the respondent's claim and concluded that the inconsistencies, together with the respondent's "compromised" integrity, warranted denial of the application for asylum.

Deference to the Immigration Judge's Credibility Finding

The Board has long recognized that Immigration Judges have certain advantages in making credibility determinations. Accordingly, the Board generally will give deference to those findings. See, e.g., *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994); *Matter of Teng*, 15 I&N Dec. 516 (BIA 1975); *Matter of T-*, 7 I&N Dec. 516 (BIA 1975). However, these earlier decisions were somewhat general in nature and did not attempt to set forth what elements constitute a sound credibility finding that can be accorded deference.

The Board attempted to fill this gap recently when it decided *Matter of A-S-*, Interim Decision 3336 (BIA 1998). This case involved a native and citizen of Bangladesh who claimed that, as a member of the Jatiyo political party, he faced persecution at the hands of opposing political parties. The Immigration Judge made an adverse credibility finding based on inconsistencies and omissions regarding certain important aspects of the alien's persecution claim.

In upholding the Immigration Judge's adverse credibility finding, the Board first noted that the Immigration Judge has the advantage of observing the alien as he testifies. That is a primary reason the Immigration Judge's credibility determinations are given deference.

The Board went on to hold that in reviewing an Immigration Judge's credibility finding, the Board should consider three things. First, the Board should consider whether any omissions or inconsistencies relied upon by the Immigration Judge are actually present. Second, the Board should determine whether the discrepancies and omissions provide "specific and cogent reasons to conclude that the respondent provided incredible testimony." *Id.* at 5. Third, the Board will consider whether or not the alien has provided a convincing

explanation for the discrepancies and omissions. Where this three-pronged test has been satisfied, the Board will not substitute its judgment for that of the Immigration Judge on the issue of credibility.

In this decision, as in several others discussed above, the Board has indicated that any discrepancies between the written asylum application and the applicant's testimony, including discrepancies regarding the dates of material events, will be examined closely. An applicant is therefore well advised to complete his application carefully, to make every attempt to recall the details of his claim correctly and accurately, and to be prepared to offer reasons for any disparities that may exist in his claim.

In *Matter of A-S-, supra,* the Board also discussed the significance of an Immigration Judge's statements regarding an alien's demeanor. The Board stated that where an Immigration Judge's credibility finding is supported by an adverse inference drawn from an alien's demeanor, that finding "generally should be accorded a high degree of deference." *Id.* at 7. However, the Board cautioned that an Immigration Judge's credibility findings, including demeanor findings, should not be viewed as infallible. The Board noted that where, for example, an alien looks at the wall or a table and avoids looking at the Immigration Judge, that does not necessarily indicate deception. An adverse finding based on such actions may be subject to reversal. See *Matter of B-*, Interim Decision 3251 (BIA 1995).

CONCLUSIONS

A number of conclusions regarding the Board's overall approach to credibility can be drawn from the cases discussed above.

Credible Testimony Is Necessary

The first conclusion that may be drawn from Board precedents is that an applicant for asylum must himself testify credibly. This is essential and basic. Moreover, it is critical that the respondent's testimony set forth his claim in as much detail as possible. A vague, generalized or brief claim will often be found not credible or, if not found incredible, may fail on burden of proof. The alien's testimony must also be internally consistent, and consistent, at least, in its essentials, with the written application for asylum.

The Burden of Developing the Record Is Shared

Undoubtedly, the burden of proof to establish a persecution claim rests squarely on the applicant. The Board has repeatedly stated this. At the same time, recent Board decisions have also observed that the Immigration and Naturalization Service and, in particular, the Immigration Judge, also have important roles to play in developing the record in an asylum case. These cases recognize that both the Service and the Immigration Judge may have knowledge or expertise or more ready access to information regarding conditions in an asylum applicant's homeland. This Board approach is consistent with the admonition in the United Nations Handbook that "in some cases, it may be necessary for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application." Handbook, para. 197, at 47.

Discrepancies Must Be Explained

While the Board has recognized that minor discrepancies either in an asylum applicant's testimony, or between the testimony and the application may not be fatal to the claim, in its most recent precedent decisions, it has signalled that it will carefully scrutinize the testimony and the application for inconsistencies. An asylum applicant must therefore present his case carefully, and ensure that there are no significant omissions or inconsistencies. Moreover, if such omissions or inconsistencies do exist, the applicant must be prepared to explain them. The Board has made it clear that inconsistencies which are not convincingly accounted for will be construed against the applicant and may well result in an adverse finding of credibility.

Corroboration Is the Rule, Not the Exception

Matter of Mogharrabi, supra, held that an alien's testimony could, under some circumstances, be sufficient to establish a persecution claim, but cautioned that corroboration should be provided where possible. The Board's more recent cases clarified that, at least with respect to those cases which reach the appellate level with adverse credibility findings below, corroboration of the claim is the rule, not the exception. General background evidence regarding country conditions is virtually always required. In some cases, such background evidence may prove sufficient to establish a claim. The alien will often be called upon, however, to provide corroboration of his individual claim as well. The rule that must be borne in mind is that evidence to support an individual claim will be required where it would be "reasonable to expect" the alien to provide it. *Matter of S-M-J-, supra,* at 5.

Deference Will Be Given to the Finder of Fact

The Board's decision in *Matter of A-S-, supra,* has reaffirmed and amplified the rule that the Board properly gives deference to credibility findings made by the Immigration Judge. The Immigration Judge's credibility finding may still be overturned, but an applicant seeking such a result will be required to state in detail how each part of the three-pronged test set forth in that precedent decision has been satisfied. The decision also makes it clear that a credibility finding premised on the Immigration Judge's assessment of the applicant's demeanor will generally be accorded special deference.

Making a Good Record at Trial

A final conclusion that can be drawn for the Board decision is the importance of making a good record at the hearing before the Immigration Judge. As an appellate body, the Board can be expected to make reasonable and fair adjudications only if it has before it a complete, accurate and well-developed record of the proceedings below and a full account of the claim of persecution. Thus it is essential that an applicant for asylum present his case to the Immigration Judge in as much detail as possible, and that the Immigration Judge assist him by drawing out the details, should the applicant be hesitant in his presentation. Members of the Board sometimes find that essential points were not sufficiently explored by the parties below or that certain pertinent, important questions were not asked.

The applicant for asylum should also make every possible effort to substantiate as many parts of his claim as possible. Corroborating evidence should include information regarding recent country conditions. Any available evidence regarding the specific claim should also be offered, including such items as identification records, letters from family members, refugee documents, medical records and so forth.

As stated in the Handbook, the burden of proof in asylum claims is on the applicant. Establishing credibility is an essential element of meeting that burden. The evaluation of credibility may seem exacting. Nevertheless, positive credibility findings on appeal can be made if an applicant is well prepared, testifies truthfully, and is able to meet the evidentiary requirements outlined above.

Truth and Consequences: Credibility Determination in the Refugee Context

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INTRODUCTION

When I became a Member of the Refugee Division of the Immigration and Refugee Board in 1994, I brought with me academic knowledge of the Convention refugee definition and the principles governing the conduct of quasi-judicial hearings. I quickly realized that relatively few of the cases coming before me would raise the kind of legal questions that had preoccupied me as a scholar — the meaning of "particular social group", the application of cessation or change of circumstances, the conceptual limits of state protection, the interpretation of the exclusion provisions, and so on.

Instead, the vast majority of my time would be spent on credibility determination — did I believe the claimant's story or, more precisely, did I believe enough of the story to render a positive decision? Ultimately, I found this to be the most challenging aspect of the job, not because the legal issues (when they arose) were so simple, or because I'm so smart, but rather because credibility determination engaged me at both an intellectual and emotional level in a way that bare questions of law or procedure did not.

What I wish to do here, in a tentative way, is to begin the difficult and slippery process of theorizing credibility determination. My starting point is a description of what most of us think we are doing: A claimant/applicant comes before us, tells us a story, furnishes what particulars and corroborating evidence she can, and we ask some questions. Our goal? To "search for truth". If we just ask enough questions, get enough evidence, observe the claimant closely enough, we will be able to determine what really happened or, at least, what didn't really happen. Frequently, we find ourselves frustrated by the paucity of information: If only we could verify this; if only we could corroborate that; *then* we could know "what really happened".

But we never have all the information. In my experience, we rarely have even as much information as I would consider necessary to choose a new appliance, much less make a decision about a person's future. Nevertheless, we do formulate theories about what happened, or didn't happen, and these often take shape in accordance with inchoate ideas about the truth-telling quality of the claimant before us.

AVOIDANCE vs. HUBRIS

Credibility determination is hard. It is frequently difficult to articulate in rational terms why one does, or does not, believe another. Decision makers may put a lot of faith in their "gut feelings" about credibility, but recognize that gut feeling does not amount to a legally defensible basis for a decision. As a practical matter, this does not pose much of a problem when the decision is positive. The situation is more complicated when the decision maker is inclined toward the negative. Indeed, there is a temptation to avoid basing negative decisions on credibility, even though that is the real reason for the rejection. This avoidance usually manifests in a reliance on some other ground for turning down the application,

such as the availability of state protection, or an internal resettlement option, etc. Not only are these types of reasons easier to justify — one can typically point to country reports of one sort or another — but findings on these matters can often be made more expediently than is the case for credibility determinations. The rationale goes something like this: Even if X is telling the truth about being tortured, she can live safely in some other town, so there is no need for me to really explain why I don't, in fact, believe her. I submit that, in general, this avoidance tactic is wrong for two reasons. First, it underestimates the real impact that credibility has on our assessment of other factors. Thus it hides the actual basis of the decision. In other words, it is dishonest. Second, it leads to inconsistency and the appearance of arbitrariness in decision making.

I can illustrate my point with two Canadian cases. As you may know, refugee adjudicators in Canada sit in panels of two. The two cases in question had one Member in common. Both cases concerned Jamaican women who claimed to fear persecution in the form of domestic violence from their partners in circumstances where the state was unwilling or unable to provide effective protection. In the first case, the woman was married to a member of a civilian militia[1]. The other woman was married to a police officer.[2] Both claimed to have suffered extensive and serious abuse in the past, and further testified that the police and the judiciary were unresponsive to domestic violence. The cases were decided six months apart, and there was no evidence that anything significant had happened in Jamaica with respect to domestic violence in the interim. The first claimant was accepted, the second rejected. The distinguishing factor in the two cases was in the availability of state protection: the Panel in the first case[3] found that Jamaica *was not able* and willing to protect the claimant; the second ruled that Jamaica *was* able and willing to protect the claimant.[4] Although time does not permit a thorough review of the judgments, I propose that on a fair reading of the two cases, the disparate rulings on state protection are irreconcilable, especially considering that one of the decision makers participated in both hearings.

Reading a bit "between the lines", I suggest that what was really going on is that the first Panel genuinely believed that the claimant had been battered, while the second Panel did not. Instead of resting its decision on a finding of non-credibility, the second Panel took the expedient approach of finding that Jamaica was able and willing to provide adequate state protection. The result is inconsistent and potentially misleading jurisprudence on the meaning of state protection in domestic violence cases generally and, particularly, with reference to Jamaica.

Another technique for avoiding responsibility for credibility determinations is to rule that the claimant has simply failed to discharge her burden of proof. That way, the decision-maker does not have to articulate precisely what it was that was not credible about the evidence — she can just say there was not enough of it. While I do not wish to appear flippant, I suspect that this device is susceptible to misuse where it is used to reject a claimant where the decision maker cannot articulate any cogent reasons to justify that conclusion.

1 T95-01010/11/12, July 30, 1996 (Then, Kelley). Although Then presided, and the presiding member usually writes the decision, this decision was written by Kelley. Then concurred.
2 T95-04279, December 30, 1996 (Then, Wolman).
3 *Supra* note 1.
4 *Supra* note 2.

Of course, it would be fundamentally unfair to impose on claimants unreasonable burdens to produce evidence, given the conditions under which they flee their countries of origin and the difficulty of obtaining documents from home once they have arrived in the country of asylum. Nevertheless, in my experience, the following pattern of reasoning is not uncommon among decision makers: Claimants are rejected because they are unable to furnish sufficient identity documents or documents proving residence in a refugee camp, etc. Some claimants protest that they are unable to obtain documents and are met with the reply that other claimants manage to do so. (Of course, decision makers have no idea early on whether or how many of those earlier documents were not genuine and thus, how easy or difficult it is to obtain genuine documents from one's country of origin). Soon, all claimants show up with the requisite documents, having learned through the grapevine that failure to produce documents will lead to rejection.

Predictably, decision makers become suspicious of the authenticity of documents, and may even send them for forensic testing where (not surprisingly) a number will turn up as fake. This, in turn, is used to impugn the overall credibility of claimants, and can lead directly to rejection. Eventually, decision makers "discover" that it is possible to illicitly purchase genuine documents, a practice which cannot be detected by forensic testing. The result? Decision makers simply begin to discount the probative value of the documents altogether.

The result is that claimants are damned if they do not produce the documents (failing to discharge burden of proof) and damned if they do (the documents turn out to be false, or are discounted on the assumption that genuine documents containing false information can be obtained illicitly anyway). And decision makers are no further ahead in obtaining evidence that they are comfortable relying upon in making decisions.

There is a "flip side" to these avoidance strategies. It is what I would call the trap of false confidence. By this I mean a belief that one can determine with precision not just whether something occurred, but also why it occurred. In a recent U.S. case[5], the 9th Circuit upheld a decision in which the lower tribunals (the Immigration Judge and the Board of Immigration Appeals) rejected a claim by a Filipino man who had received death threats from a left-wing insurgency group that he had informed upon to the government. The Immigration Judge and the BIA agreed that there was no link between the risk to the claimant's life and his political opinion, since it was "likely that [the claimant's] status as informant, not his political opinion, inspired the [insurgents'] acrimony."[6] In other words, the claim failed the "but for" test of causation between persecution and Convention ground.

While I am not in a position to take issue with the ultimate decision in the case, I question the capacity of decision makers sitting in North America, operating on a bare description of events from a claimant, to postulate with such confidence what, from a range of possible options, was going through the minds of various third parties. I also query this "but for" approach to identifying motives, which seems to deny that human action is the product of multiple layers of overlapping and interacting ideas, emotions, and cognitions. To hypothesize that the claimant may well face a risk of persecution for being an informant, regardless of his political opinions, does not mean that *in fact* his real or imputed opinion

5 *Kaur* v. *INS*, 152 F.3d 926 (9th Cir.) 1998.
6 *Id.*, at 1259.

did not also play a causal role, especially in a context where persecutors may well interpret acting as an informant as the expression of a political opinion. The point is, how categorical should a decision maker be in surmising the mindset of a Filipino insurgency group?

A similar critique applies to the deservedly notorious case of *Campos-Guardado* v. *INS*[7], wherein decision makers purported to determine that soldiers' motives for raping female kin of politically active men arose from "sexual desire" and not "political opinion".[8] Similarly, in *Singh* v. *Ilchert*[9], the BIA found that police mistreatment of a Sikh suspected of harbouring militants was motivated by the goal of acquiring information about the militants, rather than by the claimant's political opinion. (This decision was overturned on appeal.) In each of these cases, the assumption that a decision maker can identify not only the possible range of motivations of an unidentified (and necessarily abstract) third party, but can actually isolate one and eliminate all the other motives strikes me as problematic.[10] I suspect that it emerges out of a sense of frustration at how little one can genuinely extract from the limited sources and volume of evidence before us. So we compensate by purporting to draw firm inferences from flimsy evidence.

WHAT CAN WE KNOW?

As the foregoing suggests, in my opinion we should neither run away from credibility issues, nor pretend to be capable of knowing more than we can. We are all familiar with the barriers standing between us and "what really happened". We were not there. The only witness is usually the claimant with whatever fragments of her life she puts before us. Country documentation and assorted governmental and human rights reports that we receive usually paint a canvas with broad, crude brush strokes. They rarely provide the kind of detailed information that would be necessary to corroborate a particular story.

Beyond this, there are the various factors influencing what and how the claimant relates to the decision maker. She may have every reason not to trust anyone in authority. Experience may have taught her that the key to survival is telling the person in authority whatever he or she wants to hear. She may have been threatened by her smuggler not to disclose the actual means by which she arrived in her country. She may recite a story that did not happen to her because she was assured that it was a "winning script", and because she has no story of her own or doubts that her own story will be taken seriously.

The tools we use to attribute meaning to all of this are usually the following: consistency, plausibility and demeanour. I'll begin with the last, which is in some sense the easiest. Examining demeanour for clues to credibility presupposes that we know what truth telling looks like, and that it looks the same on everybody. The stereotype goes something like this: truth tellers look us in the eye, answer the questions put to them in a straightforward manner, do not hesitate, show an "appropriate" amount of emotion, and are neither too laconic, nor too verbose. Liars do not look us in the eye (out of embarrassment or shame),

7 809 R.2d 285 (5th Cir. 1987).

8 The obvious sexism of this decision has been thoroughly critiqued by others (and myself) elsewhere. I acknowledge it, but do not pursue it here.

9 63 F.3d 1501 (9th Cir.) 1995.

10 I recognize that *INS* v. *Elias Zacarias*, 502 US 478 (1992), imposes certain constraints on the ability of a claimant to establish a nexus between persecution and one of the five grounds, but my admittedly cursory survey of jurisprudence does not suggest that this case requires or accounts for the insistent view that motives of third parties can be determined with certainty by decision makers.

do not answer the questions put to them (are evasive), say too little (because there is nothing to say — the story is invented), say too much (because they are trying to distract you) and are either too demonstrative (melodramatic), or lacking in affect (betraying the fact that nothing happened). Yet, as we all know (or should know), culture, gender, class, education, trauma, nervousness and simple variation among humans can all affect how people express themselves. It is dangerous at best, and misleading at worst, to rely on a uniform set of cues as demonstrative of credibility, or a lack thereof.

That is not to say that demeanour conveys nothing. It is, rather, to suggest that the messages conveyed by demeanour are indeterminate and contingent. Speaking personally, I became very wary of relying on demeanour, and did so infrequently.

Plausibility usually refers to the relationship between what the claimant describes and what we think we "know" about how the external world works. Consistency examines the relationship between different statements made by the claimant and searches for contradiction. Plausibility and consistency are sometimes assumed to be equivalent to the truth. They are not. They are, rather, proxies or substitutes for truth. Claimants may tell stories that are perfectly plausible and entirely consistent, yet wholly fabricated. The converse is also true.

In my case, I recall one claimant whose story struck me and my colleague as consistent and plausible. His demeanour was confident, his testimony was straightforward, and he held up well under questioning. The only problem was that his written story happened to be plagiarized word for word from that of a claimant I had heard a few months earlier.

In another case related to me by a former colleague, the claimant insisted that she had arrived in Canada in late November by jumping ship in Halifax. Literally. From a height of about four stories, into the freezing and thoroughly unwholesome ocean waters of Halifax Harbour. I would have had no hesitation in agreeing with my colleague that the scenario was wholly implausible — if not for the fact that the event had been photographed by local newspapers.

One particular case haunts me to this day, because it exposes how culturally contingent the qualities of consistency can be. I once heard a refugee claimant testify about the reasons he fled his country. The claimant was an elite athlete and escaped his country against the orders of his trainers, who were connected to government. He feared that if returned, he would be subject to persecution by authorities. Over the course of the hearing, the claimant provided three different versions of his escape. The accounts were contradictory regarding certain significant details. The claimant's demeanour was earnest, polite, co-operative and unsophisticated. He just could not keep his story straight. When confronted with the inconsistencies, he would either stick with his most recent version, or change the story yet again. His manner was entirely guileless and, for that reason, disconcerting. Most claimants understand that it is bad to be caught in a contradiction and will, if confronted with an apparent inconsistency, attempt to deny it, explain it, or reconcile it. Yet this claimant simply did not "get it". It seemed rather that he was intent on pleasing us, and if his first version seemed to cause us consternation, he would change it in an effort to find a story that we liked better. In addition, the claimant was simply not able to explain why authorities would want to punish him so severely should he return, given that he was the top — and a world-class — athlete in his sport in the whole country.

The next day, the counsel for the claimant produced a Canadian witness, a coach who had significant experience with the system of elite sports in the claimant's country of origin. He was able to corroborate certain aspects of the claimant's story and, most importantly, confirm the fate of an athlete who leaves the country without permission. He also explained how a person in the claimant's position would be targeted for very harsh treatment in order to make an example of him to other athletes who might consider leaving their country for the more promising (and lucrative) future abroad. At that point, we had the requisite information and were able to accept the claimant.[11] Without the benefit of a Canadian witness — someone who provided the answers using a shared "cultural" language — I cannot say what our decision would have been. Why the claimant could not or did not provide us with a single, consistent account of his escape I do not know; yet I am as confident about the ultimate decision as I am about any others I have rendered. I know that this progressive mutation of a story under questioning is a phenomenon which I have noticed among other claimants from the same country of origin as this claimant. In many of those cases, it has led to negative decisions because of serious inconsistencies in the claimant's story. Is this a problem of cultural difference? If so, whose culture poses the problem?

We may take the view that it is the claimant's job to learn, understand and follow the rules of "our" game, where consistency, plausibility and "appropriate" demeanour are the markers of credibility. While I am not unsympathetic to that view, we should understand that we, in so doing, are merely allocating the risk of, and responsibility for, erroneous credibility determination to the claimants; we are not necessarily adopting methods that enhance the odds of accurately capturing "the truth".

WHAT CAN WE DO?

Thus far, I have tried to demonstrate why the "search for truth" is a quixotic task. It presumes not only that there is an objective reality out there, but that decision makers can uncover and apprehend it using tools such as demeanour, consistency and plausibility.

My tenure as a decision maker has taught me that if there is an objective reality out there, I'm unlikely to discern it except incidentally. More importantly, I have learned that it is a mistake to overestimate our own capacity to distinguish truth from falsehood, fact from fiction. I call this mistake the "gut feeling" fallacy — the unquestioned assumption that our gut is a uniquely trustworthy arbiter of truth.

This lesson was brought home to me by the experience of sitting with another decision maker whom I hold in high regard. It was not uncommon for two of us, sitting together, listening to the same testimony, observing the claimant simultaneously, reading the same documentation, to come to different conclusions about the credibility of the claimant. We might agree that the claimant had made certain inconsistent statements — what claimant doesn't? — but differ on the significance of the contradictions. One of us might contend that a certain scenario was utterly implausible, while the other found it merely unusual. We compared notes, observations and impressions. Sometimes our deliberations led us to consensus, other times not. There was no external vantage point from which to assess who was "correct" or, if you prefer, whose gut was better. I could hardly maintain that my judgment, and mine alone, was a transparent lens through which I perceived reality, unmediated by the subjective apparatus that others might bring to the task.

11 I omit here other aspects of the claimant's story which were important to establishing the elements of the claim.

Ultimately, I came to the conclusion that credibility determination is not about "discovering" truth. It is, rather, about making choices — what to accept, what to reject, how much to believe, where to draw the line — in the face of empirical uncertainty. Acknowledging that judging is about choosing, and not about discovering, shifts the focus of credibility determination in significant ways.

Foremost, it means that credibility determination is necessarily and inexorably subjective. As a consequence, when making evaluations about credibility, we indeed need to look outwards — at the claimant, his or her demeanour, the quality of testimony, the documentation, the country information. However, we also have to look inwards — at our own values, prejudices, orientation and perspective — and ask ourselves *why* we choose to find a particular contradiction crucial, *why* we think the claimant is evasive rather than confused or simply telling stories in a way that is typical in that person's culture, and *why* we find the failure to make eye contact indicative of lying instead of shyness or intimidation.

Each of us brings our own complicated baggage to every act of judgment that we perform. A mundane example: I used to sit with a colleague on cases from a particular country where many of the claimants would point to assorted scars on their bodies and attribute them to police brutality. Once, when my colleague and I would discuss various problematic aspects of the case, she commented that despite various other weaknesses in the claim, the scarring weighed quite significantly in her mind. How else would these people end up with so many marks on their bodies if not through torture? My colleague, a much more agile and nimble person than I, remarked that she had no scars on her body. I, on the other hand, am a veritable showcase of the effects of clumsiness, with scars and marks bearing testament to a mis-stepped youth. To me, there was nothing unusual about acquiring various random scars on one's body in the normal course of life. To her, it was rather more unlikely. Our life experience had left us with different perspectives that informed the weight we attributed to a particular form of evidence as proof of credibility.

Other aspects of our life experience exert a subtler, but more pervasive influence on our approach. Am I a suspicious person by nature? Do I mistrust those around me, always on guard for fear being taken advantage of? Do I feel like I have experienced and overcome oppression in my own life? Does that make me identify with the victim, or harden my attitude toward those who have not overcome adversity the way I have? Do I feel personally offended when I think a claimant is lying to me and set out to "teach the claimant a lesson"? Do I internalize other people's pain and take it on as my own? Am I being less rigorous in my questioning of this claimant because I am already inclined to go positive, whereas if I were to probe deeper, I might well find the same problems that led me to reject a similarly situated claimant? As a minority decision maker, am I more inclined to empathize with a claimant who is a member of the same minority, or do I feel pressure to be tougher, in order to "prove" my impartiality to colleagues? We rarely ask these questions of ourselves, but I submit to you that they play as much a role in determining outcomes as do the external factors we think we rely upon in making decisions.

Obviously, there are no easy answers to these questions. I do believe, however, that a critical first step is to acknowledge the subjective nature of drawing inferences from evidence. The next step is to take responsibility for this fact by bringing whatever critical self-awareness one can to the exercise of choosing what and whom to believe. We want our choices to be the best and most just that they can be. My proposal to you is that achievement of that objective requires that we do not confine ourselves to interrogating the claimant, but that we also interrogate ourselves.

D

The Way Ahead
Perspectives d'avenir

Canadian Refugee-Determination Procedures and the Minor Claimant

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Introduction

Current estimates place the number of refugees in the world at 22 million, of which nearly 50% are children. Canada receives a relatively small share of the total world refugee population. In recent years, approximately 24,000 people annually have requested refugee status in Canada, of whom close to 40% have been determined to be Convention refugees. Children make up approximately 20% of this movement to Canada. Although most child refugee claimants come to Canada with a parent or other close relatives, several hundred children arrive each year unaccompanied.[1] While relatively small in number, unaccompanied child refugee claimants are a disturbing phenomenon and one that warrants special consideration given their particular vulnerability.

The circumstances that account for the arrival of unaccompanied children each year, as one would expect, are varied. Some are sent to Canada by parents or relatives to escape armed conflict or human rights abuses in their home countries; others are sent, not necessarily to escape persecution, but to seek and enjoy life opportunities, which would be otherwise unobtainable. We also cannot ignore the possibility of children being used as "mules" in drug trafficking or for the purpose of prostitution. Whatever the reason, the fact remains that over 100 children who are not accompanied by their adult caregivers arrive in Canada each year. Most have travelled thousands of miles with agents or acquaintances whom they do not know; many have left their immediate families, often in circumstances so insecure that there is little assurance they will be reunited with them. These children enter Canada, not knowing the language, some having personally experienced war, persecution and violence, and are then left in the custody of individuals whom they may not know and who often have little knowledge of them. One only has to imagine one's own small children, nieces, nephews or young neighbours in similar circumstances to appreciate the extreme vulnerability and insecurity experienced by these children.

The following discussion[2] focuses on the recent steps that Canada has taken in adapting our refugee-determination procedures in a way that recognizes the unique considerations involved in determining the refugee claims of children. The extent that such efforts have assisted in the fair adjudication of these claims will be examined, as will the ongoing challenges that continue to face us as we endeavor to ensure that our refugee-determination process and our determinations are in accordance with our obligations as a signatory to the *Convention on the Rights of the Child* (CRC).[3]

1 In recent years the majority of unaccompanied child refugee claimants have come from Sri Lanka and Somalia.
2 The opinions expressed herein are the author's own and do not reflect the views of the Canadian Immigration and Refugee Board.
3 Ratified by Canada December 13, 1991 (see Appendix A).

LEGAL FRAMEWORK

As with all refugee claims, the claims of minors involve a determination as to whether they fall within the Convention refugee definition as set out in the *Convention Relating to the Status of Refugees and Protocol,* which has been incorporated into Canadian domestic law.[4] It has long been recognized that international human rights instruments such as the *United Nations Declaration of Human Rights*[5] inform the refugee-determination process. In the case of children, the *Convention on the Rights of the Child* also establishes international standards, which should be taken into account in both the manner in which claims of refugee children are adjudicated and the substantive considerations made in determining whether their fears of persecution are well-founded.

In recognition of the special needs of child refugee claimants, and mindful of the obligations Canada endorsed in ratifying the CRC, the Chairperson of the Immigration and Refugee Board (IRB) issued *Guidelines on Child Refugee Claimants* (Guidelines) in 1996. The Guidelines are designed to provide direction to Members of the IRB when dealing with child refugee claimants. The Guidelines set out procedures to be followed in the determination of such claims, and they address the unique evidentiary issues that arise in eliciting and assessing evidence, recognizing that the best interests of the child shall be a primary consideration.[6]

Canadian Refugee-Determination Process

General

Persons wishing to claim refugee status in Canada must first state their intention to an immigration official. If a senior immigration officer determines that the claimant is eligible to make a refugee claim, the claimant is referred to the IRB. The IRB is an independent quasi-judicial body. Refugee claims are determined by "Members" of the Convention Refugee Determination Division (CRDD) of the IRB. Refugee claims that are referred to the IRB are first reviewed by a Refugee Claim Officer (RCO) who, under the direction of the member assigned to the case, assists in obtaining and verifying relevant information as directed. Claimants are given an oral hearing before two Members (a "Panel"). Claimants have a right to be represented at their hearing at which an RCO may also be present to question the claimant. The burden of proof is on the claimant to show that he or she has a well-founded fear of persecution for reasons of race, religion, nationality, and membership in a particular social group or political opinion. Generally, the proceedings are considered to be informal and non-adversarial. A split decision is determined in favour of the claimant.[7] A failed refugee claimant can apply to the Federal Court to review the negative decision with leave of the Court on limited grounds. A person who is determined not to be a Convention refugee can also apply to remain in Canada on humanitarian and compassionate grounds. The responsibility for removing a failed refugee claimant from Canada rests with the Department of Citizenship and Immigration.

4 Unlike other countries where minors do not necessarily have to make claims at all but can be found to be Convention refugees if their parents are so determined.

5 Others include the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the Convention Against Torture and Other Cruel, Inhumane or Degroding Treatment or Punishment.

6 As per Article 3 of the CRC.

7 An exception to this is where unanimity provisions apply which, in practice, occurs only in a very limited number of cases. Immigration Act, 69.1 (10.1).

Children

The *Immigration Act* does not set out specific procedures for determining the refugee claims of children, although it does require the designation of a representative for all claimants under 18 years of age.[8] The Guidelines, however, do provide procedural direction for processing and determining the claims of children. They recognize that in determining the most appropriate process for the determination of the refugee claim of a child, the "best interests of the child" have to be considered and recognized as fundamental to the child's basic human rights.

The Guidelines identify three broad categories of children who make refugee claims in Canada. The first broad category consists of children who arrive in Canada at the same time as their parents or sometime thereafter. They are considered "accompanied," and these children make up the majority of child refugee claimants. Generally, their parents have also made claims to refugee status, and the claims of the parents and the children are heard jointly, although a separate determination is made for each person. The second broad category consists of children who arrive in Canada or who are being cared for by persons who purport to be members of the child's family. If the CRDD is satisfied that these persons are related to the child, the child is considered "accompanied." If the CRDD is not so satisfied, the child is considered to fall within the third broad category called "unaccompanied," as are children who are alone in Canada without a family member.

Designating the Representative

As set out in the Guidelines, the duties of the designated representative include retaining and instructing counsel, providing evidence in support of the claim, informing the child of the various stages of the process and making decisions with respect to the proceedings. A designated representative must be over 18 years of age. Additionally, the representative must appreciate the nature of the proceedings and not be in a conflict-of-interest situation with the child, such that the person must not act at the expense of the child's best interests and be willing and able to fulfil the duties of a representative and act in the best interests of the child. Unless the child is considered "unaccompanied," the designation of the representative is generally made at the beginning of the refugee hearing.

In cases of "unaccompanied" children, the Guidelines require that a pre-hearing conference be held within 30 days of the claim being referred. The child's claim is assigned to a CRDD Panel and an RCO. At the conference, the Panel determines the appropriate representative for the child and indicates the issues and evidentiary requirements raised by the claim. The files are given scheduling priority unless it is in the best interests of the child that the claim be delayed. The Guidelines recommend that an interpreter with skill in interpreting for children also be assigned early in the process.

The process for designating a representative tends to vary according to the circumstances of the claim. In cases where the child is accompanied by a parent who has valid identification which establishes the parental relationship, the designation process is relatively swift. Members ensure that the parent understands his or her responsibility in representing the child and, where satisfied of such understanding, the designation is made.

8 *Immigration Act*, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s. 69 (4).

In circumstances where the documentary proof does not corroborate the parental relationship, or in circumstances where the child is unaccompanied or accompanied by someone other than his or her parent, the designation process is more thorough. The proposed representative is questioned regarding his or her relationship with the child. Questions are also asked to determine the person's commitment to the child and whether the person has the ability, time, and other resources necessary to fulfil the responsibilities of a representative. In recent years, many Members have found it useful to question the child in the absence of the proposed representative but in the presence of counsel. Efforts are made to make the child comfortable by asking questions that are easy to answer and geared for the child's age level, and which children are used to being asked. Such questions include: How old are you? Where do you go to school? What is the name of your teacher? Is your teacher a nice person? What subjects do you like? An injection of humour into the questioning process is helpful in creating a comfortable environment. The child is also asked questions to try to assist the Member in determining the appropriateness of the proposed representative such as: Who takes you to school? Who meets with your teachers? Who takes you to the doctor? Who makes your breakfast? Who lives with you at home? This line of questioning is particularly useful in assessing whether the proposed representative has had a close association with the child and has already acted in ways that show the person is concerned about the child's best interests.

The CRC requires that each signatory state take appropriate measures to ensure that a child seeking refugee status receives the required protection.[9] The Guidelines are an important initiative in attempting to ensure that the refugee-determination procedures comply with the protection and best-interest principles enshrined in the CRC. There are, however, some areas of ongoing concern.

One area of concern is in regard to children who are not accompanied by their parent and/or guardian, yet for whom arrangements have been made for the child to be met at the port of entry. Every child who arrives in Canada without being accompanied by a parent or adult caregiver is interviewed by an immigration officer to ascertain whether there is someone to whose care the child can be released. Where an immigration officer is not satisfied that the child is accompanied or being met by a relative, the immigration officer designates the child as "unaccompanied" and notifies child-welfare authorities. Once the "unaccompanied" designation is made, and the claim is referred to the CRDD, the pre-hearing conference is scheduled and the designation process begun. Frequently, however, the children are released into the care of an alleged relative or member of their community and a formal assessment, as would normally occur with children in foster care, is not undertaken. These children are considered "accompanied." It may then be many months before their cases are heard at the IRB. The person in whose care the child was originally released is frequently the proposed representative. Often it is only at that point that the IRB can determine whether the person is appropriate as a representative for the child. It has been our experience that, sometimes, children have been released into the care of individuals who demonstrate at the refugee hearing an insufficient regard for the child's well being and/or who subsequently are found to be in a conflict-of-interest situation with such children.

We have seen, for example, situations where the person, in whose care the child is originally released is not necessarily the person who maintains a custodial relationship with that child.

9 Article 22 of the CRC.

This transfer of the care of the child is made without any investigation or supervision. Where a Member has concerns that the child's best interests are not being considered, the Member can inform the child-welfare authorities. Unfortunately our experience has been that some provincial child-welfare authorities lack sufficient resources to maintain close contact with the child claimants who are referred to them. In some provinces, it is rare for the CRDD to receive representation from these officials regarding unaccompanied minors.[10]

Additionally, a large percentage of unaccompanied children come from situations of armed conflict where the basis of their fear of persecution is ethnicity and where identity documents are not verifiable. These children are often represented by a member of their community who is purportedly a relative and who has been determined to be a Convention refugee. We have experienced situations where the information in support of the child's claim contradicts information provided by the designated representative in a previous claim: since the latter is often the one to provide evidence for the child, a conflict of interest emerges which was not apparent at the outset of the hearing.

Another concern that has been raised is in regard to children who arrive in Canada with one parent. Currently there is no procedure in place to determine whether the child has been unlawfully and unjustly taken from the care of the other parent. This has important implications where the parent and child's refugee claims are based on alleged persecution by the other parent in the country of origin. One often has to hear the claim before one can determine whether the allegations are credible and/or whether the parent claimant may, in fact, be in a conflict-of-interest situation with the child. Some Members have insisted, prior to the hearing, that an independent psychiatric assessment of the child be provided. This evidence can inform the designation process and the substantive determination regarding whether the child's fears are well-founded.

Where the Panel is not satisfied that the person who is the proposed or designated representative for the child can properly fulfil the function, the Panel can request that another designated representative be found. In some regions, the IRB maintains a list of individuals who have the necessary experience and are willing to do so. Generally this list is composed of lawyers who have expressed an interest in fulfilling such a role. I note that in some countries the role of designated representative for child claimants is assigned to governmental or non-governmental agencies. It may be worthwhile to consider the appropriateness of such a delegation in Canada and whether there are existing government and/or non-governmental social-service providers who could be appointed to represent those children who arrive in Canada unaccompanied. In this model, the organization would be responsible for acting as the guardian of the child and/or for designating another individual to fulfil those responsibilities that would include ensuring that the child's rights and best interests are safeguarded. As envisioned by the United Nations High Commissioner for Refugees (UNHCR), the function of the guardian would be "to ensure that the child's whole range of needs (legal, social, medical, psychological) are appropriately covered during the refugee status determination procedures and until a durable solution for the child has been identified and implemented."[11] The guardian would act as link between the child and existing agencies and would maintain a dossier containing a social history of the child

10 One exception to this is in Quebec where a liaison officer from the Service d'Aide aux Réfugiés et aux Immigrants de Montréal Métropolitain is assigned a child's file and acts as a link between the Board and child welfare authorities.

11 UNHCR, "Note on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum," Geneva, July 1996, p. 4.

obtained from interviews with the child, relatives, teachers, and medical personnel.[12] This information would be important to ensure that the child's basic needs are addressed and could provide relevant evidence in the refugee-determination process.

In situations where the child is in the care of one parent, the organization responsible for unaccompanied children could be asked to make an initial assessment to determine whether there may be a conflict of interest between the custodial parent and the child in the refugee-determination process. Additionally, where a child is in the care of an adult relative, the organization could be given the responsibility of regularly assessing the child's situation in light of the child's particular vulnerability.

The CRDD continues to be committed to training new Members on the procedures and criteria to be applied in the designation process. This training, together with the Guidelines, has helped to ensure that the Board is responding as effectively as possible to the needs of unaccompanied children within the spirit of the CRC. The manner in which our policies and procedures are effective in the fair determination of the refugee claims of children is the subject of ongoing assessment. Avenues for possible improvements are reviewed such as the possible establishment of specialized Panels for the determination of child-refugee claims. These Pannels would comprise Members with specific training and appropriate knowledge of the psychological, emotional and physical development of children.[13]

Evidentiary Issues

A child-refugee claimant's right to be heard is guaranteed in the *Immigration Act* and provided for in the CRC. The *Immigration Act* provides that the claimant shall have "a reasonable opportunity to present evidence, question witnesses and make representations . . . "[14] Similarly, the CRC obligates state parties to ensure that children who are able to form their own views have the right to express them and an opportunity to be heard in any judicial or administrative proceeding affecting them either directly or through a representative.[15] While it would seem clear that a child-refugee claimant has a right to be heard, an interesting issue is whether the child can be compelled by the Panel hearing the case to testify directly, rather than through his or her representative, on matters affecting the claim. This issue is an important one, particularly in the claims of accompanied children, and one on which there is some difference of opinion among Members.

Most child-refugee claimants in Canada are accompanied by their parents. Their claims are generally based on the evidence of their parents. A question to be answered, however, is in what circumstances is it appropriate to hear evidence from the child with respect to the family's refugee claim. Some Members are of the view that a child's evidence may be important in corroborating the testimony of the parents, and that it is reasonable for Members to question the child where they feel that such corroboration is required. Other Members, while recognizing that a child's testimony may corroborate that of their parents, are

12 See in particular the recommendations made by the UNHCR in "Working with Unaccompanied Minors in the Community: A Family Based Approach," Geneva, 1994, pp. 23, 24, 32.
13 This is consistent with the UNHCR recommendations. See UNHCR "Note on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum," Geneva, July 1996, p. 5.
14 Section 69.1(5) (a) (i).
15 Article 12.

nevertheless concerned that it might also contradict it.[16] Given the vulnerability of children and the importance of the refugee decision for the family's future, these Members maintain that children should not be put in the position of possibly contradicting their parents' evidence, unless their designated representative has requested that they testify. This view seems to be more in keeping with the purpose of designating a representative for a child. The designated representative is the person charged with representing the child at the hearing and should, therefore, speak for the child unless the representative determines that it is in the child's best interest for the child to testify. However, if at any point in the proceedings the Panel is concerned that the parent has a conflict of interest and may be making decisions for the child which are not in the child's best interests, the Panel should request another representative for the child.

The Guidelines provide useful direction for obtaining and assessing the evidence of child claimants. The Members must determine whether the child is capable of providing oral evidence — considering the individual circumstances of the child such as age, ability to communicate and emotional maturity. The child can be asked to take an oath or an affirmation or simply promise to tell the truth providing that the child understands the meaning of the request. Members should endeavour to create a comfortable environment for the child, and questioning should be done in a sensitive manner. In some regions, a special hearing room has been designed and used for cases where an informal hearing room is suitable. Where appropriate, the Guidelines also note that video-taped evidence of the child can also be used as a substitute for oral evidence before the IRB. In assessing the evidence of a child, Members are directed to keep in mind that children are not able to present evidence with the same degree of precision as adults with respect to context, timing, importance and details. They also may manifest their fears differently than adults. Members are reminded to further consider the age, gender, and emotional condition of the child and the opportunity the child would have had to observe and remember the details in support of his or her claim. Once again the importance of specially trained Members and RCOs is apparent.

The claims of unaccompanied children often present unique and very troublesome evidentiary problems. It is not uncommon for the child to be simply too young to have any appreciation of the circumstances or reasons for having had to flee his or her country. It is also not uncommon for the child to enter Canada without documentation and without any written personal history. These children frequently arrive at the border with an address of a purported family relative. It is this person who is generally proposed as the representative for the child and who often can provide little detail regarding the child's recent history. The Guidelines recognize these problems and recommend that the CRDD consider evidence from a variety of different sources, including family members, members of the claimant's community, medical personnel, teachers, social workers, community workers and others who have dealt with the child, as well as documentary evidence of others who are similarly situated to the child.

16 The UNHCR's observations in this regard are useful: Often children and adolescents will attempt to give what they think is the "right" answer rother than the factual one. This occurs for a variety of reasons:
- their belief in what the interview means and what the results will be; instructions from other adults on how to answer certain questions;
- fear of what will happen if they displease the interviewer or do not know the answer to the question; and
- a simple attempt to secure better services or help through giving false information.
Chapter 8: "Interviewing Unaccompanied Children, Unaccompanied Children in Emergency: A Field Guide for Their Care and Protection" (International Social Service, 1987). For other observations on when children feel it is in their best interest to provide misinformation see UNHCR "Working with Unaccompanied Minors in the Community" Geneva, 1996, p. 39.

While evidence from family members is frequently forthcoming, as is documentary evidence on country conditions, it is rare that the Members would have before them evidence of social-services providers. This evidence can be very important in trying to build a picture of the child's current situation and the circumstances which preceded the child's arrival to Canada as seen from the perspective of others in the community who have had a closer association with the child. While technically it is the responsibility of the designated representative to marshal such evidence, our experience is that many of the representatives, relatively new to Canada themselves, do not have the confidence or experience to be able to do so. An independent organization entrusted with this responsibility may be in the best position to assemble the evidence currently not available to decision makers yet, so relevant to the claims of the unaccompanied children who come before us.

Substantive Issues

To be determined a Convention refugee, a child must meet all the elements of the definition. A child, therefore, has all the substantive rights of an adult and the same burden of proof. Nevertheless, what may not be persecutory for an adult may be for a child. Similarly, what may be unreasonable behaviour for an adult may not be so for a child. Thus, experiences that may not give rise to refugee status for an adult may provide the basis for the claim of a child. It is important, when Members are determining the claims of children, whether unaccompanied or not, to keep in mind the particular vulnerability of children and how this, in itself, affects their refugee claims.

Persecution on the basis of religion, nationality and/or ethnic group usually can be corroborated relatively easily through documentation. Thus, where adults with the same background as the child claimant are found to have a well-founded fear of persecution, the same finding will generally apply to the child.

Most commonly, refugee claims based on political opinion are made by adults. This does not preclude children from making such claims, although, in our experience this is rare. Where it occurs, Members have noted that relatively minor and or isolated political statements made by children can be met with the full force of the state. In circumstances where a parent establishes a well-founded fear of persecution on the basis of political opinion, their children are often also found to be refugees on the basis of their membership in a particular social group: the family. Thus, the young children of a prominent Iranian literary dissident were found to be Convention refugees on the basis of their relationship to their father, who was their designated representative. The Members found, given country conditions and the prevailing human rights situation in Iran, that the father's fears that his children could be harmed by the state as a means of persecuting him, were reasonable.[17]

IRB decisions have also recognized children as a particular social group in various circumstances. Young girls have been found to be Convention refugees on the basis of their particular social group. A child facing female genital mutilation (FGM), for example, was granted refugee status on the basis that FGM was a breach of a fundamental human right and constituted persecution.[18] Similarly, young Yemeni girls were also found to be Convention refugees because they faced state-sanctioned restrictions on their dress, movement and educational opportunities, and they faced future restrictions on their

17 CRDD, T97-03868, Kelley, Ramirez, 30 January 1998.
18 CRDD, T93-12198, Ramirez, McCaffery, 10 May 1994.

employment, mobility and right to vote. While acknowledging that the state-imposed restrictions reflected traditional values which some Yemeni women shared, the panel found that in the circumstances of the case before it, these restrictions cumulatively amounted to persecution for the young claimants, who were opposed to them and who found them to be a significant infringement of their human rights.[19] Young Tamil males, accompanied by their parents, have been found to be Convention refugees notwithstanding that the claims of their parents failed. These decisions were based on the finding that the young Tamil males constituted a particular social group and had a well-founded fear of being forcefully recruited into rebel armies and/or persecuted by government forces on the suspicion of subversive activity.

One interesting issue that continues to face decision makers is whether it is persecutory for a child to be denied the care and nurturing of a custodial parent. This can arise, for example, in situations of marital breakdown where the custody of the children is automatically given to their father. There have been a significant number of cases where the mother of the child, who has been the child's principal caregiver, has been subsequently denied access to the child upon the dissolution of the marriage. In circumstances where women's rights are circumscribed by the state on the basis of gender, the question arises as to whether it is persecutory for a woman to be denied access to her children on the basis of her membership in a particular social group. Similarly, where the status of the child is involved, the determinative issue for the child is whether it is persecutory to be denied the care and nurturing of his or her mother. Cases have used the Convention on the Elimination of All Forms of Discrimination Against Women and the CRC[20] in finding that the denial of access between parent and child in such circumstances is a denial of a core human right and, as such, persecutory within the Convention refugee definition.[21]

The application of the principles of persecution, state protection and internal flight alternative (IFA) may be applied in a manner that distinguishes a child's claim from that of an adult. For example, although the denial of higher education may not be persecutory for an adult, cases have acknowledged that the denial of education to children is the withholding of a basic human right as recognized in the CRC and, therefore, can constitute persecution within the Convention refugee definition.[22] Similarly, the concept of state protection may be applied differently in the claim of a child than that of an adult. While it may be reasonable for an adult to seek state protection in certain circumstances, it may not be so for children. Certainly decision-makers would have to consider whether it would be reasonable to expect a child to be able to approach the state for protection. As with adult claimants, an analysis would have to be made as to whether the evidence supports a finding that adequate state protection, if sought, would be forthcoming. With respect to an internal flight alternative, the considerations at play in determining whether a child is likely to be persecuted in the IFA for a Convention refugee reason, generally, are similar to those made in adult claims. However, whether it is reasonable in all the circumstances for the child to do so will inevitably involve factors that may not be at play in adult claims. Thus, for example, while it may not be relevant that an adult claimant is without family in the IFA, this may be a determining factor in finding that the proposed IFA is not reasonable for a child. So, for example, Somali children from Mogadishu have been found not to have an IFA in northern Somalia where

19 CRDD, T96-04022, Kelley, Ramirez, 15 September 1997.
20 Articles 2, 3 and 9 specifically.
21 CRDD, T95-05503, Kelley, Winkler, 5 January 1998, and CRDD, T97-01184, Ramirez, Kelley, 27 January 1998.
22 *Ali, Shaysta-Ameer* v. *M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, 30 October 1996.

their clan dominates, given evidence that they would be unable to support themselves in the absence of immediate family there.[23] This finding was made notwithstanding earlier findings that the absence of immediate family in the north did not render the north an unreasonable alternative for adults.

Conclusion

Canadian experience with child refugee claimants has pointed to the need for special procedures and unique evidentiary and substantive considerations in determining child refugee claims. The *Guidelines on Child Refugee Claimants* have gone a considerable distance in trying to guarantee that our procedures are ones which ensure that children's best interests are taken into account when decisions concerning their status in Canada are made; they have also provided useful guidance in ways to obtain and assess the evidence of children in appropriate situations; they have been a valuable contribution towards ensuring that a child is treated fairly and that the claim of a child is presented in a manner most appropriate for the child.

There remain areas for future consideration. These include efforts to ensure that children who arrive in Canada without a parent and/or official guardian are represented by individuals who have the resources and qualifications to fulfil the duties of a representative and act in the best interests of the child. Claims of children without a parent or official guardian should continue to be given scheduling priority and be assigned to specially trained IRB staff and Members. The CRDD is committed to its ongoing tracking of the refugee claims of "unaccompanied" children and the reasons for decisions. They are useful tools for highlighting areas that may need future consideration. Ongoing dialogue with the UNHCR and countries which are also attempting to ensure that their refugee-determination procedures meet their obligations under the CRC are worthwhile. In sharing practices and jurisprudence in the area, we may all be better able to ensure that the need to extend particular care to children, as recognized in the CRC, is reflected in our refugee determinations.

23 CRDD T98-05827, Smith, Then, 16 July 1998.

APPENDIX A

The following articles of the Convention on the Rights of the Child, inform the procedures and substantive considerations involved in the determination of the Convention refugee claims of children.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinion, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 5

1. States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 9

1. States Parties shall ensure 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. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence . . .

Article 11

1. State Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice . . .

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly . . .

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardian(s) or any other person who has the care of the child . . .

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State . . .

Article 22

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. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. 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.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity . . .
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multi-lateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 37

States Parties shall ensure that:

(a) No child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment . . .
(b) No child shall be deprived of his or her libertyunlawfully or arbitrarily . . .
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of person of his or her age . . .

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities . . .

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Change in Country Conditions: German Law and Procedures

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I. Introduction

A change in country of origin conditions which takes place after an asylum seeker has lodged his claim to refugee status in the country of asylum may work either in favour or against his claim; it may also increase or decrease his risk of being persecuted upon return. Thus, if in the course of the refugee-determination procedure a regime takes over which clearly is set to persecute members of a political party to which the applicant belongs, he obviously will become a refugee *sur place*. On the other hand, if a regime at the hand of which he feared persecution collapses before a decision on his claim has been taken, he may lose his case.

Determining what nature a change must be in order to have such a decisive impact is, as in other litigation, largely a question of the evaluation of the evidence. But in refugee cases, on the basis of the established facts — unlike in most other cases — a prognosis must be developed as to whether or not the applicant is likely to risk persecution upon return.

Thus, before addressing the consequences of a change in country conditions, it seems appropriate to deal first with general questions such as how the facts are established in refugee cases, to what extent the courts have to do their own research, how the facts are evaluated, how certain the courts must be of the reliability of their findings and, finally, what kind of test is to be applied on the basis of the established facts in order to determine whether or not the applicant has a well-founded fear of persecution. Then, some concrete situations and issues shall be addressed to illustrate how a change in country conditions subsequent to the submission of the refugee claim may influence the outcome of the case.

II. General principles governing the finding and evaluation of facts in refugee cases

1. Ascertainment of all relevant facts

a) Establishing the facts — a shared responsibility

The relevant facts of the individual asylum case have to be furnished in the first place by the applicant himself. The administrative authorities and the courts have to take note of his statements, consider them and make further inquiries of their own if necessary (see BVerfG, decision of 13 October 1994 - 2 BvR 830/94 - NVwZ-Beilage 2/1995, 10 <11>). The constitutional guarantee of asylum (Art. 16 a of the *Federal Constitution*) and the *Administrative Court Procedures Act* (Art. 86 para. 1) require that the courts do everything possible up to the very limits of reasonableness ("bis zur Grenze der Zumutbarkeit") to ascertain *ex officio* all the facts which may have a bearing upon the evaluation of the claim. The effort to establish the relevant facts must be adequate and go into sufficient depth; moreover, the established facts must have a sufficient degree of reliability (BVerfG, decision of 22 July 1996 - 2 BvR 1416/96 - AuAS 21/96, 245 = InfAuslR 10/96, 355).

b) Duty to take note of developments up to the end of the decision-making process
In endeavouring to establish the relevant facts, the courts also have to take into account changes in country conditions which take place after the initial decision has been taken by the authorities. In fact, they have to take note of every change up to the very last moment of their deliberations, since they must make their decision on the basis of the law and the facts as they stand at the time of their decision (Art. 77 para. 1 *Asylum Procedures Act*). Even the Federal Administrative Court which, as a rule, is bound by the facts established by the Higher Administrative Court and may decide only on questions of law, may take into account later developments in the country of origin if they are generally known ("allgemeinkundig") and their consequences are evident ("offenkundig") (BVerwG, decision of 3 November 1992 - BVerwG 9 C 21.92 - BVerwGE 91, 150).

2. Assessment of evidence

a) Fundamentals of Evidence Assessment

Free evaluation of established evidence ("Grundsatz der freien Beweiswürdigung")
If the relevant facts of the case are established, the court will have to evaluate them. It will have to assess the credibility of the applicant in the first place. It also will have to assess whether the other evidence is sufficient to reach a clear conclusion as to whether or not certain events have taken place in the past. In German administrative litigation, there are no strict rules governing the process of evaluating the evidence. Instead, within the rules of logic and other basic norms of reasoning, the court is free to evaluate the facts in its own way (Art. 108 para. 1 of the *Adminstrative Court Procedures Act*). The reasoning, of course, may not be arbitrary. Moreover, the court is bound to consider all the evidence available, and the reasoning of its decision must be understandable and verifiable. Furthermore, as a rule, the sources of information used by the court have to be disclosed and cited in its written decision. (BVerwG, decisions of 8 September 1992 - BVerwG 9 C 62.91 -, of 20 March 1990 - BVerwG 9 C 91.89 - BVerwGE 85, 92, of 20 November 1990 - BVerwG 9 C 72.90 - BVerwGE 87, 141 and of 9 April 1991 - BVerwG 9 C 91.90 u.a. - Buchholz 402.25 1 AsylVfG Nr. 143).

b) Full conviction of reliability of evidence ("Überzeugungsgrundsatz")
Even though the court is relatively free in its evaluation of the evidence, it may base its conclusion that the applicant has a well-founded fear of persecution only on those facts or personal statements of the applicant which it is fully convinced are true. Thus, the court may not base its conclusion on findings which it feels are merely *likely* to have happened or on statements of an applicant who, in its opinion, is *probably* credible. Rather, the court has to make up its mind whether or not to believe the applicant or whether or not certain events indeed did take place. If it wants to grant refugee status, it has to be fully convinced ("volle Überzeugung") of the facts on which the applicant's fear of persecution is based (BVerwG, decision of 16 April 1985 - BVerwG 9 C 109.84 - BVerwGE 71, 180). This does not prevent the court, however, from taking into account that in asylum cases, because of their very nature, the applicant quite often is not in a position to produce the necessary evidence about what has happened in his country of origin (*"Beweisnotstand"*). Thus, for the Court to be satisfied that the necessary level of evidentiary threshold is reached it may be sufficient if the applicant is able to substantiate the facts of his case, and his statements are plausible and credible (BVerwG, decisions of 29 November 1977 - BVerwG 1 C 33.71 - BVerwGE 55, 82 and of 16 April 1985 - BVerwG 9 C 109.84 - BVerwGE 71, 180).

3. Well-founded fear of persecution test

a) Determination of refugee status on the basis of a prognosis

Even though the court has to be fully convinced of the facts on which the asylum seeker's fear of persecution is based, this does not mean that it has to be certain of the applicant's fate upon return. Only in rare cases can it be said with certainty that a person is going to be persecuted upon return. But such certainty is not required for the grant of refugee status. Instead, the authorities and the courts normally decide refugee cases on the basis of a prognosis of what may happen to the applicant in the future. Certainly, the prognosis has to be developed on the basis of reliable evidence, but the authorities and the courts may grant refugee status even if they are not fully convinced that their prognosis is going to become true. Rather they decide on the basis of possibility and probability that the applicant will likely be persecuted upon return.

b) Determination on basis of objective elements alone

In deciding refugee cases, the German courts use only objective elements. This may not be fully in line with the refugee definition of the Geneva Refugee Convention, which contains a subjective as well as an objective element. Its element of fear points to a state of mind and thus to a subjective condition, whereas the qualification of that state of mind as "well-founded" implies that the subjective condition must be supported by an objective situation (*UNHCR Handbook*, para. 38). The German courts maintain, however, that in practice their approach does not lead to different results (BVerwG, decision of 26 October 1993 - BVerwG 50.92 u.a. - DVBl 1994, 545 = Buchholz 402.25 1 AsylVfG Nr. 165). This may be true in most cases, since the objective test applied by the German courts in refugee cases turns essentially on the question whether or not it is reasonable to expect an applicant to return home (*"Zumutbarkeit der Rückkehr"*).

c) Prognosis on basis of hypothetical return of claimant to country of origin

The well-founded fear of persecution test requires as a matter of course that, hypothetically, the applicant is placed back into his country of origin. In this context, the courts will take into account whether or not it can be assumed that the applicant will return home alone or with other members of his family. In some cases this may be decisive, since under certain circumstances a well-founded fear of persecution may not exist for a family member if the entire family returns home together. On the other hand, it is also possible that one member of the family may return home safely if the other one stays abroad (see BVerwG, decisions of 8 September 1992 - BVerwG 9 C 8.91 - BVerwGE 90, 364 - and of 17 August 1993 - BVerwG 9 C 8.93 - DVBl 1994, 60).

d) Time horizon for prognosis of risk of persecution

The prognosis as to whether or not a refugee claimant risks persecution upon return may not limit itself to what is happening there at the moment or to what will happen there in the imminent future. Rather, the prognosis has to be established for the foreseeable future (*"absehbare Zeit"*). Thus, a refugee claim may not be denied only because presently the claimant need not fear persecution upon return if there is a likelihood of persecution in the foreseeable future (BVerwG, decision of 26 July 1988 - BVerwG 9 C 51.87 - NVwZ 1989, 69 = Buchholz 402.25 1 AsylVfG Nr. 90).

e) Prognosis in view of constantly changing circumstances

Today, in refugee cases it often is rather difficult to develop a reliable prognosis since, in many countries of origin, the political situation is constantly changing. Even in such situations

a prognosis is possible and required after all the facts have been established even if the prediction may be rather uncertain. Still, the court need not wait with its decision until the situation in the country of origin has stabilized. However, in cases in which the power structure in the country of origin is constantly changing, the court in developing a prognosis of what may happen to the applicant will, as a matter of course, have to take into account all the uncertainties caused by such changes (BVerwG, decision of 3 December 1985 - BVerwG 9 C 22.85 - NVwZ 1986, 760 = Buchholz 402.25 1 AsylVfG Nr. 42). Certainly, sometimes it may be preferable to postpone a case under such circumstances. The German government has quite often postponed the hearings for entire refugee groups as, for instance, in the case of Bosnians during the time of fighting or more recently in the case of refugees from Rwanda.

f) Application of different tests for prognosis depending on whether or not claimant has suffered persecution in the past

A person is a refugee if he presently is in need of protection from persecution. Thus, in principle, it does not matter whether or not he has already suffered persecution or was in imminent danger of being persecuted before leaving his country of origin. Instead, it is essential whether or not he is going to suffer persecution upon return. Still, the German courts have developed two different tests as to whether an asylum seeker has suffered persecution in the past.

i) Persecution more likely than not test ("beachtliche Wahrscheinlichkeit")

In cases in which it is established that the asylum seeker has not suffered persecution or was not in imminent danger of being persecuted before leaving his country of origin, the German courts apply the "serious likelihood standard" ("beachtliche Wahrscheinlichkeit"). Thus, a person is determined to be a refugee if it is more likely than not that he will be persecuted upon return. But the courts have emphasized that this standard is not to be applied in a statistical, but in a "qualifying way" (*"qualifizierende Betrachtungsweise"*). That means the vital question to be answered is whether or not it is reasonable to expect the claimant to return home. In answering this question, the gravity of the human rights violation that the applicant is faced with has to be taken into account. If the applicant must fear for his life upon return, for a grant of refugee status that risk need not be established on the balance of probabilities (i.e., a chance of more than fifty-percent of his being killed). Thus, even though at first sight it may appear that the "serious likelihood test" would require that the risk of harm be established on the balance of probabilities, this is actually not the case (see BVerwG, decisions of 21 February 1997 - BVerwG 9 B 701.96 -, of 4 March 1998 - BVerwG 9 B 232.98 -, of 14 December 1993 - BVerwG 9 C 45.92 - DVBl 1994, 524, of 3 November 1992 - BVerwG 9 C 21.92 - BVerwGE 91, 150, and of 5 November 1991 - BVerwG 9 C 118.90 - BVerwGE 89, 162 <169>).

ii) Adequate safety from persecution test ("hinreichende Sicherheit vor Verfolgung")

In cases in which it is established that the applicant has suffered persecution or was in imminent danger of being persecuted before leaving his country of origin, a lower test is applied for granting refugee status. In these cases, a person is granted refugee status unless it can be established that he is sufficiently safe from persecution ("hinreichend sicher vor Verfolgung") in the future (see BVerfGE 54, 360; 80, 315 <345>; BVerwG, decisions of 28 September 1995 - BVerwG 9 C 376.94 - and of 5 July 1994 - BVerwG 9 C 1.94 -). This standard was developed, first, because it was thought that a person who has gone through the trauma of experienced or imminent persecution should not bear the risk of renewed persecution. More importantly, though, it was felt that as a matter of experience, the risk of renewed

persecution is normally higher in the case of persons who have already suffered persecution in the past ("Wiederholungsgefahr"). This second consideration is held today to be the decisive reason for applying a lower test in such cases. It is judged to be valid, however, only in cases in which there is a logical link between the persecution suffered in the past and that feared in the future. Therefore, the lower test would not be applied in cases in which such a link is missing. Hence, the lower standard was not applied, for instance, in the case of an Eritrean who had been persecuted in the past by the previous government of Ethiopia because of his separatist activities, and who now claimed that he would be persecuted as well by the new government of Eritrea (BVerwG, decisions of 18 February 1997 - BVerwG 9 C 9.96 - BVerwGE 104, 97).

III. Specific Questions in Case of a Change in Country Conditions in the Course of Review Proceedings

Since the German administrative courts have to review refugee cases on the basis of the facts as they stand at the time of their decision, they have to take into account any change in country conditions up to the very last moment of their deliberations, and these changes have to be evaluated in the same manner as any other facts and developments bearing on the validity of the applicant's claim to refugee status. There are, however, a number of questions that call for special attention in the assessment of such changes.

1. Consequences for classification of a country as a "safe country of origin"

A number of countries have been declared in German asylum law by the legislator himself as "safe countries of origin" (Art. 16 a para. 3 of the Federal Constitution; Annex II to the *Asylum Procedures Act*). This has been done in the form of a rebuttable presumption ("widerlegbare Vermutung"). Thus, if an asylum seeker comes from a safe country of origin, the court is not free as it normally is to review fully the situation in that country. Instead, it has to accept the legislator's assessment that generally there exists no persecution in that country. Hence, the court may grant refugee status only if it reaches the conclusion that despite generally safe conditions in that country, the asylum seeker is at risk there because of the exceptional circumstances of his specific case. The court, however, could not grant refugee status by stating, for instance, that the alien belongs to an ethnic group, the members of which generally are persecuted in his country of origin. If the court were to reach the conclusion that the legislator's classification of a country as a safe country of origin is not justified, it could only stay its proceedings and obtain a decision from the Federal Constitutional Court as to the constitutionality of the legislator's classification (Art. 100 para. 1 GG). It may well be argued, however, that in cases in which a fundamental change of regime such as a putsch takes place in a "safe country of origin" during the review proceedings, the administrative court may not have to either submit the case to the Constitutional Court, or wait for the legislator to change the law (see Art. 29 a para. 3 of the *Asylum Procedures Act*). It may, instead, deal with the case as if the country were not classified as a safe country of origin, since the very basis for that classification — stability of the political and legal system allowing for a sufficiently accurate and reliable prognosis of the state's behaviour towards its citizens (see BVerfG, decision of 14 May 1996 - 2 BvR 1507/93, 2 BvR 1508/93 - BVerfGE 94, 115 <141>) — has been swept away.

2. Consequences for classification of a country as a safe third country

Other countries have been classified in German asylum law by the legislator as "safe third countries" (Art. 16 a para. 2 of the Federal Constitution; Annex I to the *Asylum Procedures Act*). In contrast to the classification of a country as a "safe country of origin", the classification of a country as a "safe third country" is not designed as a rebuttable presumption. Thus, if an asylum seeker has passed through a "safe third country" he is considered to have been safe there and is excluded from invoking the constitutional right to asylum under any circumstances. The courts are bound by the legislator's assessment and may not question it at all. Hence, the alien cannot be heard with the assertion that in his specific case the "safe third country" was not really safe. If the court were of the opinion that the legislator's classification of a country as a "safe third country" was not justified, all it could do is stay its proceedings and obtain a decision from the Federal Constitutional Court as to the constitutionality of that classification (Art. 100 para. 1 GG). The Federal Constitutional Court, however, has decided that the courts, as an exception, could review the actual situation in the "safe third country" in cases in which the asylum claim is based on circumstances which, because of their very nature, the legislator could not foresee and therefore not include in its general assessment (BVerfG, decision of 14 May 1996 - 2 BvR 1938/93, 2315 - BVerfGE 94, 49 <99>). This would be the case, for instance, if the circumstances under which the country had been classified as safe were to change abruptly and the Federal Government had not yet removed the country from the list of "safe third countries". In this case, the court could go ahead and look at the merits of the case and grant him asylum.

3. Change in country conditions in cases of applicants having suffered persecution in the past

A change in country conditions has to be evaluated with special care in cases in which it is established that the asylum seeker has experienced persecution before leaving his country of origin or was in imminent danger of being persecuted at the time of his departure. In such cases, according to German jurisprudence, an asylum claim may only be rejected, as has been pointed out above (see under II 3 f, ii, Adequate safety from persecution test), if the applicant is sufficiently safe from persecution upon return. Thus, if the applicant had been persecuted because of his political views or his religious affiliation or his ethnic origin by the previous government, he cannot be denied asylum unless it has been established that the new government is effectively in control of the country, that it clearly pursues a different policy toward members of the political or religious or ethnic group the applicant belongs to, that it is able to protect him against attacks of adherents of the previous government, and that this situation will remain so for the foreseeable future. In view of these requirements, it is clear that a person who had suffered persecution in the past can be denied asylum only if the change is of a fundamental nature and if it appears lasting.

4. Change in country conditions in cases of applicants not having suffered persecution in the past

Applicants who did not experience persecution before leaving their country are to be granted refugee status only, as has been pointed out above (see under II 3 f, i, Persecution more likely than not test), if they can establish a "serious likelihood of persecution" upon return. Thus, even if such an applicant had a good chance of being recognized at the outset of his proceedings, a change in country conditions for the better may lead directly to a denial of refugee status, since it is decreasing his risk of being persecuted. This is evident, since in

asylum cases the burden of proof is on the applicant (BVerwG, decisions of 21 June 1988 - BverwG 9 C 12.88 - BVerwGE 79, 347 and of 16 April 1985 - BVerwG 9 C 109.84 - BVerwGE 71, 180). Hence, if the applicant, because of recent changes, can no longer establish a serious likelihood of persecution, the court has to deny his claim. But even in cases in which the applicant was not persecuted in the past, it should not be overlooked that changes may sometimes be superficial and fleeting. The political party now in power may have promised during the election campaign to adopt a different policy towards minority religious groups but, once in power, for various reasons may continue the discriminatory policies of the preceding government or simply be too weak to protect members of one religious group against the attacks of other groups with other beliefs. Hence, even if the stricter "serious likelihood of persecution" test has to be applied, seeming changes for the better have to be considered carefully before denying refugee status on account of them. The courts will have to bear in mind, in particular, that their task is to establish a prognosis not just for the present moment, but for the foreseeable future (see above under Time horizon for prognosis of risk of persecution).

5. Assessment of claim as manifestly unfounded

After a change in country conditions, a claim to refugee status which at the outset may have had some merit to it may appear now even as "manifestly unfounded". This could be the case, for instance, if the government from which the claimant feared persecution has been ousted. But even in such cases, one should not jump to conclusions. An asylum claim is considered manifestly unfounded (*"offensichtlich unbegründet"*) in German asylum law if conditions for the grant of asylum under Art. 16 a of the *Federal Constitution* or protection against refoulement under Art. 51 para. 1 of the *Aliens Act* (Art. 1 A, Art. 33 para. 1 of the *Geneva Convention*) are obviously not met (Art. 30 para. 1 *Asylum Procedures Act*). The Federal Constitutional Court has emphasized, however, that a claim to asylum may be rejected as "manifestly unfounded" only if at the time of the court's decision there exists no reasonable doubt as to the correctness of the court's findings and, on the basis of such findings according to established jurisprudence, a dismissal of the appeal virtually suggests itself (BVerfG, decision of 15 May 1992 - 2 BvR 207/92 - InfAuslR 1992, 300). Especially after recent changes in country conditions, these requirements for dismissing an asylum claim as "manifestly unfounded" may rarely be met. Certainly, there may be a new government in power, but it may not be clear yet what kind of policy it is going to adopt. It may even turn on those who have assisted it in coming to power, as could be seen recently in Congo. Moreover, it often may not be clear at the beginning whether the new government is already effectively in control of the country. It may well be that forces of the old government still yield some power in the country or in parts of the country, and that the new government is not in a position to protect its citizens effectively against persecutory acts committed by these forces, as can be observed in Rwanda. Finally, after a recent change in country conditions, there may not yet exist an established jurisprudence toward applicants from that country. Hence, a recent change in country conditions for the better normally does not justify the dismissal of an appeal as "manifestly unfounded".

6. Assessment of entire group of applicants as refugees *sur place*

After a change in country conditions such as a putsch, it may happen that an entire group of aliens could be considered as refugees *sur place*. This could be the case if the new rulers of the country are set upon crushing the entire opposition, or driving certain ethnic groups out of the country, or persecuting members of a religious minority. If it is evident that the

new rulers will stay in power for some time and will pursue such policies, it may be justified not to wait for further developments, but to recognize as refugees members of such groups as being at risk immediately after the putsch. This would be appropriate especially if it can be established that the new government has adopted a program for the persecution of certain groups (see BVerwG, decision of 5 May 1994 - BVerwG 9 C 158.94 - BVerwGE 96, 200). At present, a group determination may have to be considered as an adequate solution in favour, for example, of the Hazara in Afghanistan, ethnic Albanians from Kosovo, or Tutsis from Congo.

7. Change in country conditions in the course of a civil war

Changes in country conditions are particularly difficult to evaluate in countries which find themselves in a civil war. A few changes which typically have an impact on asylum claims in civil-war situations (at least according to German jurisprudence) shall be discussed here.

a) Disappearance of all state authority

In the course of a civil war, it may happen that, after the downfall of the old government, no other group is strong enough to take over. Instead the various factions who may even have worked together to topple the previous government may turn against each other — often with constantly changing zones of influence as happened, for instance, in Somalia. If as a consequence of civil war all state authority has vanished, according to German jurisprudence there can be no longer any persecution within the meaning of the constitutional right to asylum and the Geneva Refugee Convention, since persecution is meant to be state persecution (BVerfG, decision of 10 July 1989 - 2 BvR 502, 1000, 961/86 - BVerfGE 80, 315; BVerwG, decision of 18 January 1994 - BVerwG 9 C 48.92 - BVerwGE 95, 42). Thus, changes in a civil-war country could, from one day to the next, lead to a situation in which all claims of asylum seekers from such a country would have to be denied, since that country has fallen into a state of total anarchy with no power left to exercise effective territorial control. In such situations, however, the applicants often would have to be granted some other form of temporary protection.

b) Emergence of new state-like authorities

In the course of a civil war, it also happens that in addition to, or instead of, the old government, there emerge new powers who take control over parts of the country and, possibly in the end, over the entire country. Since according to German jurisprudence such state-like authorities are recognized as agents of persecution, the emergence of new powers in the course of a civil war poses the question at what stage they can be considered state-like. The Federal Administrative Court has decided recently, that a power may be called state-like if it is exercising power over a given territory in an organized, effective and stable manner and is excluding other powers. This could be assumed only if the new power had shown itself able to exercise its power steadily over time and to implement its policies and decisions (BVerwG, decision of 15 April 1997 - BVerwG 9 C 15.96 - BVerwGE 104, 254). Thus, a new power is recognized as "state-like" only if it is of a certain duration and stability. Given these criteria for the emergence of new state-like powers, the German courts constantly have to look at recent changes in civil war countries in order to determine whether or not one of the parties to that war has acquired the quality of a state-like power. The Federal Administrative Court indicated, for instance, that in 1996 the authorities in the so-called Serb Republic in Bosnia-Herzegovina could have been qualified already as "state-like" (BVerwG, decision of 6 August 1996 - BVerwG 9 C 172.95 - BVerwGE 101, 328). On the other hand, it has held that so far the power exercised by the various war lords in Somalia (BVerwG,

decision of 15 April 1997 - BVerwG 9 C 15.96 - BVerwGE 104, 254) or the participants to the war in Afghanistan could not be called yet state-like since their power was still threatened and not of the necessary stability and durability (BVerwG, decision of 4 November 1997 - BVerwG 9 C 34.96 - NVwZ 1998, 750). Recent events in Afghanistan have shown indeed that the control exercised over parts of Afghanistan by Rabbani, Massud, Dostum, Ismail Khan or others did not last. On the other hand, the time may soon come when it is no longer possible to deny the Taliban the quality of a state-like power and thus the capacity to be an agent of persecution.

c) Persecution as a consequence of a change in military strategy

If, in a civil war, there still is a government that is effectively in control of parts of the country, but which has lost control over other parts, this government remains an agent of persecution. Thus, it is important to look at the way it is attempting to recover control over territory lost to insurgent forces. This is of particular importance, for instance, in situations in which the insurgent forces claim to speak for an ethnic group, and in which the government military forces might be tempted to adopt counter-terrorist measures against the entire ethnic group. In such cases the grant of refugee status to each member of the group may be justified even if at the time of their departure they were not faced with persecution. The Federal Administrative Court has stressed, however, that the usual ups and downs in a civil war cannot be recognized as "post-flight-reasons". Such "post-flight-reasons" can only be established where there are outstanding changes of a concrete, tangible nature. For example, the adoption, at one time, of counter-terrorist measures against the Tamil population in areas dominated by the LTTE as a part of a new strategy of the Sri Lankan military to recover these areas was accepted by the Court as such an outstanding, concrete change which justified the recognition as refugees of all Tamils from that area (BVerwG, decision of 13 May 1993 - BVerwG 9 C 59.92 - NVwZ 1994, 1210).

Berlin
20 September 1998

Changed Country Conditions

Justice Marc Nadon
Judge (Trial Division) Federal Court of Canada

The term "changed country conditions", in Canadian refugee law, is relevant to two different situations: Firstly, it is relevant to the situation of refugee claimants who must substantiate their refugee status in reference to the definition of "Convention refugee" by proving that they have a well-founded fear of persecution at the time of their hearing before the Immigration and Refugee Board (the Board). Secondly, the term is also relevant when the government seeks to return to his or her country a refugee who has already obtained status in Canada because conditions in the refugee's country of origin have changed.

When claiming refugee status in Canada, claimants must satisfy the Board that they fall within the definition of "Convention refugee" in s.2 of the *Immigration Act* which reads as follows:

> 'Convention refugee' means any person who
>
> (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or
>
> (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country . . .[1]

If the conditions in their country of origin have changed since fleeing, claimants must prove, at the time of their hearing before the Board, that they still have a well-founded fear of persecution if they were to return to their country of origin.

In *Mileva* v. *Canada (Minister of Employment and Immigration)*, Mr. Justice Pratte of the Federal Court of Appeal describes the test which applies to situations where an applicant seeks Convention refugee status:

> The fact that the political situation existing in a claimant's country of origin has developed in such a way as to remove the reasons causing him to fear persecution is obviously a fact relevant to the question of whether that person can validly maintain that he is a Convention refugee. The question raised by a claim to refugee status is not whether the claimant has reason to fear persecution in the past, but rather whether he now, at the time his claim is being decided, has good grounds to fear persecution in the future.[2]

1 *Immigration Act*, R.S.C. 1985, c. I-2, s.2(2)(e).
2 (1991), 81 D.L.R. (4th) 244 (F.C.A.).

Until January 9, 1995, a number of judges of the Federal Court of Canada, Trial Division, when faced with the issue of changed country conditions, were of the view that the Board had to apply the following test proposed by Professor James C. Hathaway:

> First, the change must be of substantial political significance in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure. Similarly, the mere fact that a democratic and safe local or regional government has been established is insufficient insofar as the national government still poses a risk to the refugee.
>
> Second, there must be reason to believe that the substantial political change is truly effective . . . The formal political shift must be implemented in fact, and result in a genuine ability and willingness to protect the refugee. Cessation is not warranted where, for example, *de facto* executive authority remains in the hands of the former oppressor . . . Nor can it be said that there has truly been a fundamental change of circumstances where the police or military establishment have yet fully to comply with the dictates of democracy and respect for human rights . . . In other words, the refugee's right to protection ought not to be compromised simply because progress is being made towards real respect for human rights, even where international scrutiny of that transition is possible.
>
> Third, the change of circumstances must be shown to be durable. Cessation is not a decision to be taken lightly on the basis of transitory shifts in the political landscape, but should rather be reserved for situations in which there is reason to believe that the positive conversion of the power structure is likely to last. The condition is in keeping with the forward-looking nature of the refugee definition, and avoids the disruption of protection in circumstances where safety may be only a momentary aberration.[3]

An example of this approach is my decision in *Mahmood* v. *M.E.I. (Minister of Employment and Immigration)*[4], a decision rendered in 1993. This was a case in which the applicant, a native of the province of Eritrea in Ethiopia, fled the country in 1975 following the intensification of the armed conflict between the government and the ELP, a provincial organization committed to the secession of Eritrea of which the applicant was a long-time member. When the applicant arrived in Canada and claimed refugee status on the grounds that he feared persecution in the hands of the EPLF, another Eritrean organization, if returned to Ethiopia, the Board dismissed his claim on the basis that substantial changes had occurred in that country which had the effect of removing any objective basis for the applicant's fear of persecution. I determined that the Board had failed to apply the proper test for changed

3 J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 199.
4 (1993) 69 F.T.R. 100.

country conditions: considering that a transitory government was established in Ethiopia in July of 1991 and that the Board heard the applicant on August 8, 1991, I failed to understand how the Board could conclude that the change in circumstances in Ethiopia was of an enduring nature. The effect of this decision and of others similar to it was, in effect, to elevate the issue of changed country conditions into a question of law.

However, this approach to changed country conditions was set aside when, on January 9, 1995, the Federal Court of Appeal decided *Yusuf* v. *Canada (MEI)*. In *Yusuf*, Mr. Justice Hugessen explained that the Board had to make a factual determination in deciding whether changed country conditions were such so as to remove the claimant's fear of persecution :

> . . . the issue of so-called 'changed circumstances' seems to be in danger of being elevated wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal 'test' by which any alleged change in circumstances must be measured. The use of the words such as 'meaningful' 'effective' or 'durable' is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention refugee in s.2 of the Act: does the claimant now have a well founded fear of persecution?[5]

It goes without saying that, following the Court of Appeal's decision in *Yusuf*, the Trial Division has, as it must, followed Mr. Justice Hugessen's dicta. For example, in *Barreto* v. *Canada (Minister of Citizenship and Immigration)*[6], Mr. Justice Wetston, in dealing with changed country conditions, stated:

> 24. In order to be a Convention refugee, the applicants must fall within the definition of "Convention refugee" contained in subsection 2(1) of the *Immigration Act*. In this instance, the Board determined that the applicants were not persecuted in Uruguay; therefore, the applicants' well-founded fear of persecution was not objectively well-founded. When the Board discusses change in country conditions, it does so as part of its determination of whether the applicants' fear was objectively well founded. In this regard, a change in country conditions is one factor, among others, which the Board is entitled to consider in its determination. The Court held in Vallalta v. Canada (Solicitor General) (1993), 68 F.T.R. 304, that the Board need not engage in a conceptual exercise of subtracting changed country conditions from their analysis and then, after such analysis, assess the significance of the changed country conditions, as suggested by the applicants herein. There is also no statutory requirement that the Board consider, in every case, whether the applicant falls within subsection 2(3) of the *Immigration Act*. The applicants must establish that they have a well-founded fear of persecution, both subjectively and objectively. If the applicants wish to rely on subsection 2(3), sufficient evidence must be adduced, in that regard, upon which the Board could make such a determination. In this instance,

5 *Yusuf* v. *The Minister of Employment and Immigration* (1995), 179 N.R. 11.
6 (7 June 1995), Toronto IMM-3978-94 (F.C.T.D.) [Please see [1995] F.C.J. No. 879].

> in view of the Board's finding that the applicants' well-founded fear of persecution was not objectively well-founded, the applicants have not satisfied the Board that they fall within subsection 2(3).

Another example is the decision of Mr. Justice Gibson in *Estrada* v. *Canada (Minister of Citizenship and Immigration)*[7]. In dealing with an argument that the Board had made an error in not considering whether the changed country conditions were meaningful, effective and durable, Mr. Justice Gibson opined as follows:

> 14. Counsel for the applicant urges that the CRDD erred in not reviewing in its assessment of changed country conditions the "meaningfulness", "effectiveness", and "durability" of the changes. In *Yusuf* v. *Minister of Employment and Immigration* [(1995), 179 N.R. 11 (F.C.A.)], Mr. Justice Hugessen emphasized that a change in country conditions is a determination of fact. He wrote:
>
> > A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal "test" by which any alleged change in circumstances must be measured. The use of words such as "meaningful", "effective" or "durable" is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention Refugee in s. 2 of the Act: Does the claimant now have a well-founded fear of persecution? Since there was in this case evidence to support the Board's negative finding on this issue, we would not intervene.
>
> 15. Against the guidance provided in *Yusuf*, I reach the same conclusion here. In this case there was evidence before the CRDD to support its negative finding on this issue.

A final example is the decision of Mr. Justice Richard (as he then was) in *Nkongolo-Beyea* v. *Canada (Minister of Citizenship and Immigration)*[8]. Mr. Justice Richard, again in dealing with changed country conditions, made the following comment:

> 14. La question du changement de circonstances est une question de fait, tel que l'a souligné la Cour d'appel fédérale dans l'affaire *Yusuf*. Il n'y a pas de critère légal prédéfini afin de déterminer s'il y a un changement de circonstances dans un pays donné. Il incombe au tribunal de déterminer, eu égard aux documents dont il dispose, s'il y a vraiment changement de circonstances et si la crainte objective du requérant est toujours fondée.

The Court of Appeal's decision in *Yusuf* is, in my view, a logical development of that Court's "hands-off" approach in dealing with decisions of the Board. The Court has now recognized, as it did not in the earlier years, the specialized nature of the Board and the particular

7 [25 August 1998] Toronto IMM-4089-97 (F.C.T.D.) [Please see [1998] F.C.J. 1214].
8 [6 May 1998] Ottawa IMM-3865-97 (F.C.A.) [Please see [1998] A.C.F. no. 580].

context in which it carries out its work. In *Aguebor* v. *Canada (Minister of Employment and Immigration)*[9], the Federal Court of Appeal made it crystal clear that it would not intervene with respect to factual findings made by the Board unless these findings were "so unreasonable". Mr. Justice Décary, speaking for the Court, put it as follows:

> 4. There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position that the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, the findings are not open to judicial review. In **Giron**, the court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, **Giron** in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden.

In *Shahamati* v. *Canada (Minister of Employment and Immigration)*[10], Mr. Justice Pratte, speaking for the Court, makes the following comments in dismissing an application for judicial review of a decision of the Board:

> 2. In spite of Mr. Paisley's able argument, we have not been persuaded that the Board's finding on credibility was either unreasonable or perverse. Contrary to what has sometimes been said, the Board is entitled, in assessing credibility, to rely on criteria such as rationality and common sense.

When Mr. Justice Pratte says "contrary to what has sometimes been said", I venture to say, with the utmost of respect, that the Court of Appeal itself, had, on a number of occasions, made it difficult, if not impossible, for the Board to rely on rationality and common sense.

Another example of this approach is the decision of the Court of Appeal in *Kumar* v. *Canada (Minister of Employment and Immigration)*[11], where Mr. Justice Décary states:

> In the case at bar the first instance tribunal did not consider the claimant's testimony to be trustworthy. It relied on the many contradictions it found in his testimony, in particular regarding the dates assigned by the applicant to the various events on which he based his fear of persecution. Further, the tribunal did not regard as plausible the three arrests alleged by the applicant and his especially easy release on each occasion.
>
> It was the tribunal's duty to draw its own conclusions on the contradictions found in the testimony, as it was also responsible for assessing the plausibility of what was said. It did this in a way that does not require intervention by this Court.

9 160 N.R. 315.
10 (24 March 1994), Vancouver A-388-92 (F.C.A.)[Please see [1994] F.C.J. No. 415].
11 (4 March 1993), Montréal A-1294-91 (F.C.A.)[Please see [1993] F.C.J. No. 219].

> The tribunal went on to undertake obiter an analysis of the situation of the Hindus in India, and in the Punjab in particular, concluding that the applicant had the possibility of internal refuge. This analysis was not necessary. Even if it was mistaken or if it led the tribunal to exceed its jurisdiction - as to which the Court makes no ruling - it could not vitiate an otherwise valid decision.
>
> We feel that the application should be dismissed.

I now turn to cessation. In that context, changed country conditions are the determining factors when the government seeks to revoke the status of a Convention refugee. Section 2(2)(e) of the *Immigration Act* reads, "[a] person ceases to be a Convention refugee when . . . (e) the reasons for the person's fear of persecution in that country that the person left, or outside of which the person remained, cease to exist."

There has been some disagreement on whether the test for changed country conditions differs in situations where the claimant is applying for Convention refugee status and situations where the Minister attempts to revoke a Convention refugee's status due to changed country conditions. In *Jairo Francisco Hidalgo Villalta* v. *Solicitor General of Canada*, a decision rendered prior to *Yusuf*, Madame Justice Reed, although accepting the applicability of the Hathaway test, was of the view that a higher standard was necessary in cases of cessation:

> I do not mean to suggest that in assessing the significance of changed country conditions, for the purpose of deciding whether to grant status, that the Board should not consider factors such as the significance, the likely effectiveness and likely durability of the changed conditions. But I do not think the Board needs to apply the more demanding criteria, which it is necessary to meet when one is considering removal of status, before being able to take such evidence into account.[12]

In Madame Justice Reed's view, the extent of proof required is necessarily higher in a cessation case as the ultimate objective is to remove from the person his or her status of Convention refugee. With respect, I cannot agree. As I explained in *Mahmoud* v. *Canada (Minister of Employment and Immigration)* :

> [w]hether one is dealing with a cessation situation or an application for Convention refugee status should not make any difference. In both cases, a decision that there has been a change in country conditions means that the person will be sent back to his country of origin. That, to me, is the determining factor.[13]

In my view, the likelihood is that the Court of Appeal would apply the *Yusuf* rationale to a case of cessation. In other words, the Board, when faced with an application by the government to revoke the status of a refugee, would have to make a factual determination regarding existing conditions in the country of origin and decide whether changes to these conditions are such so as to remove the applicant's fear of persecution.

12 (1993), 68 F.T.R. 304.
13 (1993), 69 F.T.R. 100.

Where I believe the difference between Convention refugee claimants and cessation of Convention refugee status lies is not in the test for changed country conditions, but rather in who bears the onus of proving changed country conditions. For the Convention refugee claimant, the onus lies on the claimant to establish persecution by way of the definition of Convention refugee, which includes, as one of the factors, consideration of changed country conditions. Once Convention refugee status is established, however, the burden shifts to the Minister to prove that persecution no longer exists due to, among other things, changed country conditions. In that respect, section 69.2(1) of the *Immigration Act* provides the following:

> The Minister may make an application to the Refugee Division for a determination whether any person who was determined under this Act or the regulations to be a Convention refugee has ceased to be a Convention refugee.

The application to remove status from a refugee is that of the Minister and, consequently, the burden of proof must necessarily fall upon the Minister. The Minister would have to convince the Board, on a balance of probabilities, that changes in the country conditions are such that the refugee may safely return to his or her country. On the basis of the evidence before it, the Board would make a factual finding as to the effect of the changes on the safety of the refugee.

Ottawa, Ontario
October 16, 1998

The Law and the Protection of Refugees: The Way Ahead

Dennis McNamara
Director, Division of International Protection, UNHCR, Geneva

Mr Chairman, Distinguished Judges and Participants:

I would like to express my warm thanks to the Federal Court, the Immigration and Refugee Board and to the Judges Association for organizing and hosting this important event. It has been a pleasure to renew old acquaintances and to see many new faces here this week representing the legal traditions of some 50 countries — including those in Eastern Europe, Asia, Africa and the Middle East.

The great interest in this Conference — not only from judges but also amongst government officials and academics — is testimony to the fact that refugee and forced-displacement issues impact legal systems in every region of the world — whether these regions a source of refugees or a place of asylum.

The Association has come a very long way in the three years since its inaugural Conference in London in 1995. After those rather modest beginnings, it has become a forum for judicial voices internationally. Today this is the largest gathering of its type ever held. Our sincere congratulations to the organizers for this. Your interest and support are of great importance to the Office of the United Nations High Commissioner for Refugees because all of us are wedded to a very special and common vision — the better protection of refugees through the rule of law.

It is to that common vision that I would like to address my remarks today.

Some of you may recall that at the London Conference three years ago, I shared the profound impact that a recent trip to Bosnia had had on me — the consequences of intense conflict and mass human rights violations, leading to the forcible displacement of hundreds of thousands of people, both within and outside their national borders. This tragedy represented a collapse of the rule of law and a massive rupturing of civil society — all within two hours flight from Geneva!

Like all refugees, Bosnians have the right to return home and to enjoy freedom of movement in their own country. However, to a very large extent, their predicament has not been fully redressed. Despite our best efforts and the carefully crafted terms of the Dayton Peace Accords, most of the victims of that vicious conflict have been unable to return to their original homes or to rebuild their lives in places of their choice.

So it is again cause for sombre reflection that this Conference takes place as further tragedies unfold in the Balkans — this time for the people of Kosovo. There is a cruel irony in the fact that tens of thousands of Kosovars are also seeking asylum, even in Bosnia, at a time when many Bosnian refugees are, themselves, still unable to return home.

If I have belaboured this point it is because these events again demonstrate the complexities of refugee displacement today and the often inadequate response with which they are being met by our collective efforts internationally.

As the UN Deputy Secretary-General, Madame Louise Fréchette, reminded us in her keynote address at the opening of this Conference, the vast majority of refugee flows today arise from intra-state conflict which, by definition, involve human rights violations in the broadest sense.

Judges and lawyers working in this area cannot ignore the realities of this changing geo-political environment. Your role in protecting the rule of law lies at the heart of any civil society — whether within an asylum state, or in a society that is in transition either from conflict or to democracy, and which is receiving its people back. Your guardianship of the rule of law provides the ultimate protection for refugees. It is also the re-establishment of law that provides the key ingredient for post-conflict recovery and for the reintegration of the forcibly displaced. Without it, fragile societies taking their first tentative steps to stability, risk collapse into anarchy and violence — a scenario which perpetuates the cycle of population upheaval and displacement, as we have seen recently, for example, again in Cambodia.

A culture of respect for human rights is essential for population stability and development. And as the Honourable Chief Justice of Canada so impressively underscored in his opening address, the cornerstone of such a culture is an independent judiciary.

Mr Chairman: Permit me to dwell for a moment on the complexity and the magnitude of forced population movements and the challenge that they pose for states in responding to them. And let me stress at the outset that despite the major problems which we currently face, the international refugee-protection system itself has, by and large, worked effectively over the past 50 years. It has enabled tens of millions of refugees to enjoy largely safe asylum and to re-establish their lives. It has shown over and over that it is a system worth preserving: it needs to be improved, but not rejected.

At the same time, we must acknowledge that the hospitality of asylum states has also been misused in different parts of the world. Refugee camps have been used as bases for subversion and attacks — whether the Cambodian camps in Thailand, the Afghan camps in Pakistan or the Rwandans in the Congo. We have also increasingly seen mixed refugee populations comprising ordinary civilians, genocidaires, armed militia and criminal elements.

As well, in many developed countries of the North, we have witnessed the misuse of asylum procedures by economic and other migrants desperately seeking new lives, often for legitimate — but non-refugee — reasons. The current economic downturn can only intensify this global search for economic and social betterment and place further strain on the institution of asylum.

In responding to these challenges, we must ask how far states have been able or willing to reconcile the competing responsibilities between their duty to protect their borders from abuse and their human rights and humanitarian commitments to refugees — obligations which they have confirmed through the Refugee Convention and other international human rights treaties.

The dilemma is most graphically illustrated by the range of devices that are increasingly used to prevent asylum seekers from gaining a legal and physical foothold in new territories. These include "safe" third countries, visa controls, carrier sanctions, "interdiction" on the high seas and, in some instances, notions such as "internal flight" and "safety zones" within refugee-producing countries.

While many of these measures are intended to avoid exploitation of asylum systems, collectively they impose formidable barriers to genuine refugees in gaining access to effective protection.

Under these circumstances, many vulnerable groups are able to find a degree of protection only through the discretionary grant of temporary protection or by recourse to other human rights mechanisms. For instance, many rejected asylum seekers are now embracing various human rights remedies against *non-refoulement* that are offered by bodies such as the Committee against Torture and the European Court of Human Rights. State parties themselves are looking with some consternation at the frequency with which these treaty bodies are now pronouncing on refugee issues. This is particularly so in Europe, where some decisions of the European Court have had a profound effect in shaping states' national asylum policies and legislation.

In all of this, there is the striking paradox that in the face of a record proliferation of internal ethnic conflict involving serious human rights violations and suffering for innocent civilians — the majority by far being women, children and the aged — the door of asylum has more safety catches than ever before.

If we reflect on these various developments, I believe we see a common thread, which is the tendency to move away from a structured law-based regime for the protection of refugees and other forcibly displaced people. In many instances this is being gradually replaced by more *ad hoc* and subjective responses by governments that are driven by discretionary policy (and politics) rather than by law.

This tendency poses a serious risk to the basic rights enshrined in refugee law that have been painfully constructed over the last 50 years.

If unchecked, the end result of these measures may well be to push asylum and refugee issues further into the exclusive domain of executive discretion. If this were to happen, a critical element in the separation of powers which is intrinsic to many legal and constitutional systems world wide — judicial supervision — would be lost.

Faced with this, there is an urgent need to revitalize the legal basis and safeguards on which refugee protection so vitally depends. It is in this exercise that the judiciary and Bar in each country have such a critical role to play. Delegates here today represent a broad range of judicial and administrative systems. But you all have a special responsibility in the protection of refugees because due process and the rule of law apply at every level and in every jurisdiction.

I believe that the essential starting point in such a process must be to constantly reflect the core principles and values that underpin the refugee law regime. The grant of refugee protection through asylum is a non-political and humanitarian act that reflects a collective desire to protect those lacking the normal protection of the state. The *Convention* is an

instrument with remarkable human dimensions, and it was not intended to be used in a clinical or ritualistic way. It demands a broad and compassionate construction that gives sense and meaning to the word "protection". Pandit Nehru once said that, "The Rule of Law must strengthen the Rule of Life." This is nowhere more appropriate than in the protection of refugees.

Refugee law must also keep pace with advances in the field of human rights law as a whole. If disgruntled asylum seekers are turning to other human rights principles and mechanisms for support, this may be due, in part, to the insularity with which refugee issues have sometimes been approached. We must recognize that refugee law is born of, and forms part of, human rights law, which remains relevant at all stages of refugee displacement.

In my view there are three distinct points at which strong judicial supervision and intervention are essential in support of refugee protection.

The first is that crucial moment of arrival at the physical and legal borders of the asylum state. Here, judges and advocates have a key role to play in disentangling refugees from the broader and usually very political issue of immigration control in general. UNHCR has no interest in the asylum system being exploited by economic and other migrants, no matter how compelling their claims might be on other (non-refugee) grounds. But equally, we are concerned that any national immigration-control system also allows genuine asylum seekers the opportunity to have their refugee claims fairly and effectively assessed.

We have often seen that beyond the immigration gate lies a no-man's land, which is the exclusive realm of largely unfettered executive control — a place where the law and judges have been reluctant to venture. Recent interdiction border policies and accelerated "turn-around" procedures of some states have had serious consequences for refugees and the institution of asylum, and have met with only limited effective resistance from national courts.

It is therefore imperative that judges and decision makers at all levels of national systems oversee the validity of such devices — for if broader legal and human rights commitments are to be met and genuine refugees protected, it is precisely at the moment of entry that an administrative process must be subject to rigorous legal scrutiny.

The second point at which supervision and intervention are needed is during any process to determine eligibility for refugee status and protection. Procedures must be prompt and accurate, but they must also meet basic standards of justice and administrative fairness. Justice being done — and being done visibly — is critical in such a potentially contentious area.

In this context, I would like to pay tribute to the tremendous contribution that many judges, adjudicators and tribunal members here today have made to ensure consistent, credible and fair refugee-determination procedures. This positive experience is one of the greatest assets of the International Judges Association. Here, may I, however, make a plea for humanity and justice before the law. I would urge against overly legalistic approaches to the refugee definition which has, crucially, at its heart a broad and generous spirit. While UNHCR has a special responsibility to supervise the *Refugee Convention*, your collective efforts as decision makers within national systems to a large degree determine the scope of effective state implementation.

Finally, judges and advocates have a key role to play in ensuring that refugees and asylum seekers are treated properly and humanely throughout their time of refuge. This is a crucial area — beyond refugee status procedures — where judicial oversight and intervention can ensure that the life of a refugee is one of viability and dignity. Strong and sustained judicial interest in issues such as detention, education, family unity, work, housing and social security — all of which draw heavily on human rights law — can give real meaning to the holistic notion of "protection" for refugees.

There are many positive examples of creative judicial intervention by national courts. In the UK, the Court of Appeal has recently ruled that some asylum seekers deprived of basic social assistance in a country of asylum would be "impaled on the horns of an impossible dilemma" — to return home and face persecution, or to stay and face destitution. The Court held that the host state had a legal and, indeed, moral obligation to offer support to those in need — irrespective of their immigration status. Similar creativity has been shown by other judges in the superior courts of India, South Africa and Zimbabwe, where the "right to life" has been given real meaning and vigour for people who need protection.

At the international level, the UN Human Rights Committee, the Committee on the Rights of the Child and the UN Working Group on Arbitrary Detention have each taken a special interest in the legal rights of asylum seekers in detention.

These decisions and measures are among many that testify positively to the value of effective judicial support for the human rights of refugees and asylum seekers. There is now a global jurisprudence across the human rights spectrum which provides a rich vein for refugee protection. Here again, your Association is an invaluable forum for these positive developments to be shared and reinforced.

In urging this broader approach to judicial supervision and intervention, UNHCR recognizes that the combined effect of unchecked executive discretion with the politicization of asylum issues threatens not only refugee protection but also the universality of human rights. Where national legislation or executive action is incompatible with international law, it is essential that judges be alert to the impact that this will have on the universal human rights treaty-based system itself — of which refugee rights are a part. Positive national jurisprudence in this domain importantly reinforces the international system as a whole. The converse is also true.

Mr Chairman: We are very aware of the real constraints that many judges and decision makers face in ensuring both fairness and compliance with international human rights and refugee law. Bold judicial activism in such areas is often easier said than done. The value of recent developments in the UN human rights and European treaty bodies is to show that even this sacrosanct area can be subject to judicial scrutiny, and that migrants, like nationals of any society, cannot be dispossessed of their most fundamental human rights. If human rights have been incorporated into national law — as in monistic systems of law — this will strengthen the degree of judicial oversight of refugee issues. Judges from dualist systems of law might face greater difficulties, particularly if the legislature has not specifically incorporated international rights and obligations into the national law. But even here, important progress has been made in some jurisdictions to give effect to international treaty law.

And even when judges and adjudicators feel their hands tied by legislation, we would hope that, wherever possible, they would be outspoken on the compatibility of national treatment with international standards and principles. The legal community, as respected members of any civil society, has a powerful voice — one which we would like to hear more often on behalf of these most vulnerable groups, both inside and outside the courtroom.

We fully appreciate that this might place some judges in a difficult and possibly even isolated position, particularly in fledging democracies or countries emerging from conflict and chaos, where the refugee issue is often a highly charged topic. We would hope that the solidarity and collective spirit of judges in associations such as this can also serve to strengthen this role.

Mr Chairman, there undoubtedly remain major challenges in the realm of refugee protection, but UNHCR is convinced that a coherent rights-based approach, rooted in the rule of law and supervised by a bold and independent judiciary and Bar, is the only way ahead. I have listened carefully to your deliberations in the past days, and they give us much cause for hope. We are grateful for your support and look forward to a continued and fruitful collaboration with you, not least in the important area of joint training exercises.

May I conclude, Mr Chairman, by offering my personal thanks to you as the first President of the Association. This was largely your brainchild in 1995, and you have the just satisfaction of seeing today, a vibrant and collegiate body of judges and advocates coming together in the cause of refugee protection. For these efforts, UNHCR is also most grateful.

Thank you.

Closing Remarks
Mot de la fin

Geoffrey Care

President, International Association of Refugee Law Judges

Ladies and gentlemen,

I am quite overwhelmed by the achievement of Canada in hosting the third conference of the Association. By Canada I mean Chief Justice Isaac, his Court, all the judges who helped and all that lies behind it; Mrs. Mawani and the IRB; Mme Robillard, Minister of Citizenship and Immigration and her Department — indeed all who have contributed to the success of the conference. I would like us to give them all a hand to show in some small way our appreciation of the amount of work which has gone into it. I can't possibly thank everybody, and I think that to choose one or two is invidious because they have all contributed so much. So I would just simply like to say "thank you".

We had three principal objectives for this conference. The first was to provide a quality legal education program that illuminated major legal and legal-policy issues in refugee determination and protection. Second, we wanted to provide our members, who often work in isolation, with a link to an international judicial community who share many of the same problems, and have tried a number of different solutions to resolve them. Third, we had hoped that the conference, with the opportunity to meet one's counterparts from a great many countries, would lend itself to the informal but invaluable learning that comes from the sharing of experiences and perspectives. On all these fronts I think the conference has met or exceeded the Association's expectations. I would like to signal a few highlights that underscore the Association.

The IARLJ has, I think, reached a certain maturity in this third meeting in Ottawa. The maturity it has brought out has been reflected in the professional way in which we have been able to differ — sometimes quite fundamentally — and yet retain a cordiality and deep concern to learn from each other. There will always be differences, and we provide a focus for discussion of the different approaches to refugee law. But after all, differences of approach and philosophy exist among us as judges at every level and in every area of the law. We face the challenges of our differences and will continue to face those challenges. I hope you will feel that the International Association of Refugee Law Judges is sufficiently all-embracing to continue to provide this type of forum where we both confront our differences and learn from each other in the process.

Sometimes we may be convinced by a different point of view, and change our own views. Sometimes we will hold to our opinions. Whatever we do, there will be an open and honest exchange of ideas.

I would like to signal some of the singular developments of this conference. I would first like to mention the overwhelming response to the workshops of the Inter-conference Working Parties. Despite the early hour breakfast format, you have demonstrated your commitment to these forums. This was our first attempt to tie meetings of the Inter-conference Working Parties to the conference, and it has proved a success that will be built upon. Thanks to the success of the workshops, the Working Parties will continue the study and debates in the periods between conferences.

The Conference has given rise to one or two quite specific developments. The first one is that the members of the Association from the 13 countries in Africa represented at this conference got together early in the deliberations. They wanted to form an African-region group. Coincidentally we had, the day before, decided in a Council meeting that we wanted to make room for national chapters and national groups, so it fitted perfectly well. The African delegates have formed a core group to carry forward their work, which is a little bit like the Steering Committee that formed the original nucleus of this Association. Where it will lead we don't yet know. Perhaps we will see, for example, training programs and regional conferences. I would like to see the Association support this effort. I would like to stress that the formation of this regional grouping is a remarkable achievement of co-operation and unity among the 13 African countries. I think that this development was possible only as a result of the special efforts of the conference planners to ensure a sizeable number of delegates from Africa.

This conference also, for the first time, included a judicial workshop for judges new to refugee law. The workshop was supported by the preparation of unique and high-quality training materials. We obviously want to put to long-term use the training program which has been put together for the workshops. We have been talking about where this program may be replicated. No firm commitments have been made as yet. However, in the next six months we hope to be able to offer the training program at least twice.

At a more general level, the conference has permitted us to pursue some of the long-outstanding issues relating to refugee law and practice. We are not a lobby group, nor yet an NGO: there are some things we cannot, as judges, embark upon. However, as an Association, we wish to encourage a greater consistency in practices, and a greater understanding of the interpretation of the international instruments that underlie our work. We must find the best means to accomplish these things. I think that, in summary, what we are agreed upon is that we ought to develop a *Charter of Best Practice*. The *Charter of Best Practice* should include various aspects, not only the practices surrounding how we actually go about determining the status of the people who come before us, but training procedures as well. I am encouraged by the words of Judge David Pearl during the Conference.

Speaking for myself, I think that the Rule of Law does indeed, as Pandit Nehru says "strengthen the Rule of Life". After all, what is the Rule of Law all about? It is to try to make our lives better; all of our lives better. But the way in which the Rule of Law is to be achieved offers a myriad of opportunities for us as judges. We have our own private views, and we will express our opinions in the way in which we are entitled to express them. But it is as judges, of course, that we will act.

This conference, as a forum for discussion, has provided an opportunity to air different views. It gave us an opportunity to hear Dennis McNamara, Director of International Protection of the UNHCR, whose optimism is encouraging. Surprisingly enough, given that he has been so closely associated with the many of the difficulties that have arisen in giving life to the Convention, he has hope. Perhaps James Hathaway's message was less hopeful. Both had important issues for us to think about. I am grateful to Dennis and James not only for attending, but for being so willing to share their views with us.

I want to express gratitude to UNHCR for their continued support, and for asking, in return only that we exist.

I hope you feel that this week has been worthwhile, and that it has justified all the efforts that each of you has put into it and the expenses you have incurred, in one way or another, to do so. If you think that it has been worthwhile, I hope you will continue to support the Association and will come to the next conference, which will be hosted by Switzerland in October 2000 in Bern.

To conclude , I am able to say *au revoir* to 50 countries who are represented here, which is 50% more than our last conference, and double our first.

Thank you.

Geoffrey Care

Président, Association internationale des juges aux affaires des réfugiés

Mesdames et Messieurs,

Je suis vraiment ravi de ce que le Canada a accompli en tant que pays d'accueil de la troisième conférence de l'Association. Le Canada, ce sont le juge en chef Isaac, sa Cour, tous les juges qui ont prêté main-forte et tous ceux qui ont travaillé dans l'ombre; ce sont M^me^ Mawani et la CISR; ce sont la ministre de la Citoyenneté et de l'Immigration, M^me^ Robillard, et son ministère. À vrai dire, ce sont tous ceux qui ont contribué à faire de cette conférence une réussite. J'aimerais que nous les applaudissions tous pour leur exprimer bien simplement notre reconnaissance pour l'énorme travail qu'ils ont accompli. Je ne peux vraiment pas remercier tout le monde, et il me paraît injuste de nommer une ou deux personnes parce que chacun a tant fait. J'aimerais donc tout simplement dire « merci ».

Nous nous étions donné trois grands objectifs pour cette conférence. Premièrement, nous voulions offrir un programme d'éducation juridique de qualité qui éclairerait nos membres sur les grandes questions juridiques et questions de principe en matière juridique touchant la reconnaissance du statut de réfugié et la protection des réfugiés. Deuxièmement, nous voulions rattacher nos membres, qui travaillent souvent seuls, à une collectivité judiciaire internationale qui partage bon nombre des mêmes problèmes et qui a essayé différentes solutions pour les résoudre. Troisièmement, nous espérions que la conférence, vu l'occasion qu'elle donnerait à chacun de rencontrer des homologues provenant de divers pays, favoriserait l'apprentissage informel mais inestimable que représente le partage d'expériences et de points de vue. À mon avis, la conférence a répondu aux attentes de l'Association ou les a dépassées sur tous ces plans. Permettez-moi de mentionner quelques traits particuliers de l'Association.

Selon moi, l'AIJAR a atteint une certaine maturité au cours de cette troisième conférence à Ottawa. Cette nouvelle maturité s'est manifestée dans la façon professionnelle dont nous avons pu différer d'opinion, parfois d'une manière très fondamentale, tout en demeurant cordiaux et profondément intéressés à apprendre les uns des autres. Il existera toujours des différences, et l'Association offre un lieu de discussion des différentes conceptions du droit des réfugiés. Après tout, il existe des différences sur le plan de la démarche et de la philosophie parmi les juges à tous les niveaux et dans tous les domaines du droit. Nous relevons les défis que constituent nos différences et nous continuerons de le faire. J'espère que vous considérerez que l'Association internationale des juges aux affaires des réfugiés est assez polyvalente pour continuer d'offrir ce genre de lieu de discussion qui nous permet de débattre nos différences tout en apprenant les uns des autres.

Parfois, nous pouvons être convaincus par un point de vue différent et changer d'opinion. Parfois, nous nous en tiendrons à nos opinions. Peu importe ce que nous faisons, il y aura un échange de vues franc et honnête.

J'aimerais signaler quelques-uns des faits nouveaux qui ont marqué cette conférence. Je tiens tout d'abord à mentionner que les ateliers des groupes de travail inter-conférence ont été très courus. Vous avez montré que vous vous intéressiez à ces rencontres sous forme de petit-déjeuner, malgré le fait qu'elles ont lieu à une heure très matinale. C'est la première

fois que nous tentions d'intégrer des rencontres des groupes de travail inter-conférence à la conférence, et cette tentative couronnée de succès aura une suite. Grâce à la réussite des ateliers, les groupes de travail poursuivront leurs travaux au cours des périodes comprises entre les conférences.

Pendant la conférence, un ou deux événements très particuliers se sont produits. Premièrement, les membres de l'Association qui sont originaires des treize pays d'Afrique représentés à la conférence se sont réunis dès le début des travaux. Ils voulaient former un groupe régional africain. Tout à fait par hasard, nous avions décidé la veille, au cours d'une séance du Conseil, que nous voulions promouvoir la formation de sections nationales et de groupes nationaux; cette initiative arrivait donc à point. Les délégués africains ont formé un groupe cadre qui poursuivra leur travail. Ce groupe ressemble un peu au comité directeur qui a constitué le noyau initial de l'Association. Nous ne savons pas encore où cela mènera. Peut-être que nous verrons naître, par exemple, des programmes de formation et des conférences régionales. J'aimerais que l'Association soutienne cet effort. Je tiens à souligner que la formation de ce groupe régional est le résultat remarquable d'une coopération et d'une unité parmi les treize pays africains. À mon avis, c'est uniquement grâce aux efforts particuliers que les organisateurs de la conférence ont consentis pour garantir la participation d'un nombre suffisant de délégués africains que cette situation nouvelle a pu se faire jour.

Au cours de la conférence, il y a également eu, pour la première fois, un atelier organisé à l'intention des juges qui sont novices dans le domaine du droit des réfugiés. Du matériel didactique unique et de grande qualité avait été préparé à cette fin. Nous voulons de toute évidence faire usage dans le long terme du programme de formation qui a été conçu pour les ateliers. Nous avons discuté des endroits où ce programme peut être offert à nouveau. Aucun engagement ferme n'a encore été pris. Nous espérons toutefois être en mesure d'offrir le programme de formation au moins deux fois au cours des six prochains mois.

De façon plus générale, la conférence nous a permis de débattre quelques-unes des questions qui sont depuis longtemps en suspens concernant le droit des réfugiés et l'exercice de ce droit. Nous ne sommes pas un groupe de pression et nous ne sommes pas encore une ONG : comme juges, il y a des choses que nous ne pouvons entreprendre. Par contre, en tant qu'association, nous désirons promouvoir des pratiques plus uniformes et une meilleure compréhension de l'interprétation des instruments internationaux qui régissent notre travail. Nous devons trouver les meilleurs moyens d'y parvenir. Je pense qu'en résumé nous nous entendons sur le fait que nous devrions élaborer une *Charte des meilleures pratiques*. Cette charte devrait contenir divers éléments, pas seulement les façons dont nous procédons, dans les faits, pour déterminer le statut des personnes qui comparaissent devant nous, mais aussi les méthodes de formation. Je suis encouragé par les propos que le juge David Pearl a tenus au cours de la conférence.

Pour ma part, je pense que la règle de droit vient effectivement, comme l'a déclaré le pandit Nehru, « renforcer la règle de vie ». Après tout, que vise la règle de droit? Elle vise à tenter d'améliorer nos vies, toutes nos vies. Mais la façon dont la règle de droit doit s'accomplir offre aux juges que nous sommes une foule de possibilités. Nous avons nos propres points de vue, et nous exprimerons nos opinions de la façon dont nous sommes autorisés à le faire. Mais c'est à titre de juges, bien entendu, que nous le ferons.

Comme lieu de discussion, cette conférence nous a donné l'occasion de découvrir différents points de vue. Elle nous a donné l'occasion d'entendre le directeur de la protection internationale du HCNUR, Dennis McNamara, dont l'optimisme est encourageant. Chose étonnante, il est plein d'espoir, lui qui s'est tant colleté à bon nombre des difficultés qui ont jalonné l'adoption de la Convention. Le message de James Hathaway est peut-être moins encourageant. Ils nous ont tous deux sensibilisés à des questions importantes. Je suis reconnaissant à Dennis et à James non seulement de leur participation, mais aussi de leur empressement à partager leurs vues avec nous.

Je tiens à exprimer ma gratitude au HCNUR pour l'appui indéfectible qu'il nous accorde et qui demande simplement, en retour, que nous existions.

J'espère que vous considérez que cette semaine en valait la peine et qu'elle justifiait tous les efforts que vous y avez tous consacrés, ainsi que les dépenses que vous avez engagées, d'une façon ou d'une autre, pour ce faire. Si vous pensez qu'elle en valait la peine, j'espère que vous continuerez de soutenir l'Association et que vous participerez à la prochaine conférence, qui aura lieu à Berne, en Suisse, en octobre 2000.

En conclusion, je suis en mesure de dire au revoir à plus de cinquante pays qui sont représentés ici, ce qui représente cinquante pour cent de plus qu'à la dernière conférence et le double de la participation à la première conférence.

Je vous remercie.

L'honorable Julius A. Isaac

Juge en chef de la Cour fédérale du Canada

M. Le Président, Juge en chef, Excellences, invités de marque, collègues, Mesdames et Messieurs, chers amis,

Au nom de la Cour fédérale du Canada, j'aimerais vous dire que ce fut un plaisir et un grand honneur d'avoir participé en tant qu'hôte et organisme promoteur de cet événement très important. Tous mes collègues de la Cour qui travaillent à la détermination du statut de réfugié m'ont dit qu'ils ont tiré grand profit de cette occasion d'échanger des idées avec un nombre aussi important de nos homologues du monde entier.

Il est rare que des juges chargés de façon aussi directe et pratique de la protection des droits de la personne se réunissent en si grand nombre. Personnellement, je suis particulièrement ravi d'avoir eu la chance de rencontrer des collègues qui travaillent dans des cultures judiciaires de pays en développement. Je n'ai qu'un regret, c'est que mes autres fonctions m'ont empêché de participer plus longuement à vos débats.

Grâce à la tenue de cette conférence, il ne fait plus aucun doute que cette association est devenue une tribune importante de communication et de collaboration pour les membres de la communauté internationale des décideurs qui interviennent dans des affaires de réfugiés et de demandeurs d'asile. Et il est peut-être encore plus important, comme Geoffrey Care l'a souligné tout à l'heure, que cette association soit devenue une tribune servant à fixer des normes internationales cruciales.

Je vous remercie de votre participation enthousiaste à cet événement. Je vous souhaite à tous un bon retour chez vous et je souhaite le plus grand succès à l'Association dans l'accomplissement du travail intéressant qu'elle projette pour les prochaines années.

The Honourable Julius A. Isaac

Chief Justice of the Federal Court of Canada

Mr. President, Chief Justice, Excellencies, distinguished guests, colleagues, ladies and gentlemen, dear friends:

On behalf of the Federal Court of Canada, I would like to say that it has been both a delight and a distinct honour to have participated as a host and as a sponsoring organization of this very important event. All my colleagues at the Court who have engaged in refugee-determination work have told me that they have derived enormous benefit from this opportunity to exchange ideas with so many of our counterparts from around the world.

It is rare to have such a large gathering of judges who are responsible in such a direct and practical way for the protection of human rights. For me personally, I am especially grateful for the opportunity to meet with my colleagues who work in the judicial cultures of countries from the developing world. My only regret is that my other duties prevented me from participating more fully in your deliberations.

After this Conference, there can be no doubt that this Association has become an important forum for communication and co-operation among the members of the international community of decision makers involved in refugee and asylum matters. Perhaps even more importantly, as Mr. Geoffrey Care stated earlier, it is a forum for the setting of critical international standards.

Thank you for your enthusiastic participation at this event. I hope that you all have a safe return home, and I wish the Association much success in accomplishing the interesting work it has planned in the years to come.

Nurjehan Mawani

Présidente, Commission de l'immigration et du statut de réfugié, Canada

Ce fut un honneur pour nous de coprésider cette conférence avec la Cour fédérale du Canada.

Quand on se lance dans un projet d'envergure internationale visant à réunir des juges et des décideurs de tribunaux quasi judiciaires de nombreux pays, on éprouve forcément une certaine inquiétude. En effet, il importe alors que tous ceux et celles qui se donnent la peine de venir, que ce soit des États-Unis, du Canada ou de pays très éloignés, aient du plaisir, soient satisfaits de leur séjour et en gardent un bon souvenir.

Nous espérons que vous repartirez aujourd'hui riches de nouvelles connaissances et expériences et, ce qui est plus important encore, prêts à renouveler votre engagement envers le travail très important et lourd de conséquences dont nous avons la responsabilité dans nos pays respectifs.

Je crois que nous avons tous été très touchés par l'affabilité du juge en chef du Canada et de la ministre de la Citoyenneté et de l'Immigration, qui nous ont si chaleureusement accueillis, l'un lors de la merveilleuse réception dans le Grand Hall de la Cour suprême du Canada et l'autre lors du magnifique dîner dans le Hall d'honneur. Le fait que bon nombre d'entre vous aient voulu prolonger la soirée, même si les activités commençaient à sept heures le lendemain, témoigne de l'esprit et de l'atmosphère qui régnaient. Je vous promets que, ce soir aussi, vous serez accueillis chaleureusement par vos hôtes canadiens et prendrez un repas agréable en compagnie de vos collègues.

En votre nom, j'aimerais remercier le juge Allen Linden et le Comité de programme d'avoir élaboré un programme des plus stimulants. Je tiens également à remercier le directeur général de la conférence, Philip Palmer de la CISR, Pierre Gaudet de la Cour fédérale, David Dunlop et ses associés ainsi que toute l'équipe d'organisateurs de leur excellent travail et de leur professionnalisme, courtoisie et bonne humeur au cours des derniers jours.

Je souhaite un bon voyage à ceux qui nous quitteront sous peu et un bon séjour à ceux qui resteront au pays quelques jours encore.

Nurjehan Mawani

Chairperson, Immigration and Refugee Board, Canada

It has been a great honour to co-host this Conference with the Federal Court of Canada.

Whenever you embark on an endeavour which has an international focus and is bringing together judges and quasi-judicial decision makers from such a large number of countries, there is a certain amount of trepidation. You want to be sure that everyone who takes the time and trouble to come — whether it's from across the border, from within Canada, or from many, many thousands of miles away — leaves with a sense of satisfaction, enjoyment and positive memories of the occasion.

We hope that as you leave here today you are taking away new knowledge, shared experience and, perhaps most important, a renewed commitment to the very important and consequential work that we are charged with doing in our respective countries.

I think we were all touched by the graciousness of both the Chief Justice of Canada and the Minister of Citizenship and Immigration, who respectively hosted the lovely reception that evening in the Great Hall at the Supreme Court, and the wonderful dinner in the inspiring Hall of Honour. It was certainly a testament to the spirit and atmosphere of the occasion that so many of you were reluctant to leave last night, in spite of the early 7 o'clock start to the day's activities.

I know that I can promise you another opportunity this evening to taste Canadian hospitality and enjoy the camaraderie of your colleagues at the "at-home" dinners.

On all your behalf, I would like to thank Justice Allen Linden and the Program Committee for putting together a Conference program that has been so stimulating. I'd also like to thank the General Manager of the Conference, Philip Palmer of the IRB, Pierre Gaudet of the Federal Court, David Dunlop and his associates, and the entire conference organizing team for organizing an excellent conference and steering us all through the last few days with such professionalism, courtesy and good humour.

For those of you who are leaving soon, I wish you a safe journey home, and for those of you who are remaining for a few more days, I hope that you enjoy your stay.

IARLJ - Ottawa Conference Declaration

AIJAR - Déclaration de la conférence d'Ottawa

Association internationale des juges aux affaires des réfugiés Déclaration de la conférence d'Ottawa

ATTENDU :

que les principaux objectifs de cet organisme, énoncés en 1995, sont « de favoriser, au sein de la magistrature, une meilleure compréhension des obligations découlant de la *Convention des Nations Unies relative au statut des réfugiés* et de promouvoir la reconnaissance de la primauté du droit en matière de détermination des droits des réfugiés »,

que les participants à la conférence se sont réunis pour échanger des points de vue, mettre en commun des expériences et nouer des liens avec les représentants d'autres systèmes de détermination du statut de réfugié dans le monde,

que les participants à la conférence jugent important d'énoncer certains des principes généraux auxquels ils souscrivent collectivement,

LES PARTICIPANTS À LA CONFÉRENCE DÉCLARENT CE QUI SUIT :

1. Ils maintiennent leur engagement à l'égard de la protection efficace des réfugiés par la mise en place dans tous les pays de systèmes de détermination du statut de réfugié au sens de la Convention qui respectent le principe de la primauté du droit, conformément à la *Convention relative au statut des réfugiés* et à son Protocole.

2. Le statut de réfugié devrait être déterminé avec célérité et impartialité d'après les faits et en conformité avec la loi, sans restrictions, influences indues, récompenses, pressions, menaces ou ingérence, directes ou indirectes, peu importe le moyen ou le motif. Même si les décisions préliminaires se rapportant à ces questions peuvent être prises par des agents gouvernementaux, les décisions définitives devraient uniquement être rendues par des juges ou des membres de tribunaux quasi judiciaires indépendants.

3. Il ne peut y avoir d'ingérence inacceptable de la part des agents de l'État relativement à la détermination du statut de réfugié au sens de la Convention, que ce soit dans un cas précis ou dans la mise en application du système de détermination du statut de réfugié au sens de la Convention en général. Ce principe ne porte nullement atteinte au droit des citoyens, y compris la presse, de critiquer le système existant.

4. La souveraineté des nations doit être respectée. Par conséquent, chaque pays doit promulguer ses propres lois régissant la détermination du statut de réfugié au sens de la Convention. Toutefois, ces lois ne devraient porter atteinte à aucun des droits garantis par la Convention et devraient être connues des revendicateurs éventuels et leur être accessibles.

5. La détermination du statut de réfugié au sens de la Convention doit garantir le respect des principes d'équité procédurale ainsi que le respect des libertés et droits individuels.

6. Les participants sont résolus à poursuivre leurs échanges de points de vue, à améliorer les possibilités de formation, à renforcer leurs liens communs et à collaborer en vue d'améliorer, dans leurs pays respectifs, l'équité du traitement réservé aux réfugiés et les systèmes de détermination du statut de réfugié au sens de la Convention.

International Association of Refugee Law Judges Ottawa Conference Declaration

WHEREAS in 1995 this body expressed its principal purposes as "to foster, within the judiciary, an understanding of the obligations created by the *United Nations Convention relating to the Status of Refugees*, and to affirm that the adjudication of the rights of refugee claimants should be subject to the rule of law",

AND WHEREAS we have met to exchange views, share experiences and forge links with other systems of refugee determination around the world,

AND WHEREAS we believe that it would be important to declare some of the general principles to which we collectively adhere,

WE HEREBY DECLARE:

1. We are committed to effective protection of refugees through the establishment of Convention refugee determination systems in all countries pursuant to the United Nations Convention Relating to the Status of Refugees and its related Protocol according to the rule of law.

2. The determination of refugee status should be done expeditiously and impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. While preliminary decisions in these matters may be made by government officials, final decisions should only be made by judges or members of independent, quasi-judicial bodies.

3. There shall be no improper interference by State officials with regard to Convention refugee determination, whether it is specific to one case or to the Convention refugee determination system generally. This principle is without prejudice to the right of citizens, including the press, to express criticisms of the existing system.

4. The sovereignty of nations must be respected. Therefore, each country shall enact its own laws regarding Convention refugee determination, but these laws should not derogate from any rights granted in the Convention. These laws should be made known and accessible to potential claimants.

5. Convention refugee determination shall ensure procedural fairness and respect for individual rights and liberties.

6. We are determined to keep exchanging views, improving educational opportunities, strengthening our common bonds and working together to improve the fairness of the treatment of refugees and the Convention refugee determination systems in our respective countries.

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