THE CHANGING NATURE OF PERSECUTION

LA NATURE CHANGEANTE DE LA PERSÉCUTION

INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES

L'ASSOCIATION INTERNATIONALE DES JUGES DU DROIT DES RÉFUGIÉS

IARLJ-CONFERENCE

2000

in Switzerland

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4th CONFERENCE / 4ème CONFÉRENCE

October 2000 / octobre 2000

Berne, Switzerland

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International Association of Refugee Law Judges
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PREFACE

The International Association of Refugee Law Judges held its Fourth World Conference in Bern Switzerland between October 25 and 28, 2000. The theme was "The Changing Nature of Persecution".

Five major topics of current concern in Refugee Jurisprudence were addressed by judges and academics of international acclaim. The Conference wound up with a look at the Future of International Protection by five senior judges representing views from all over the world.

It has become the practice to publish the papers which were delivered. On this occasion the University of Bern very generously took upon themselves this task. We owe a particular debt of gratitude to Professor Walter Kälin at the University of Bern for his role in this publication.

We are also very grateful to those who took so much time and trouble to prepare and deliver their papers and for consenting to their publication.

Those who were not fortunate enough to attend the Conference may be interested to know that from the 52 delegates from 22 countries who came to the first Conference in 1995 not less than 192 participants from 61 countries, 173 of whom are judges, were present in Bern (the maximum possible).

I should like to record how much we all owe to the Swiss Asylum Appeal Commission / ARK (and all who sailed in her!) for the tireless and most efficient work they put in to all the preparations for, and the running of the Conference, which was hugely successful. Also we could not have held the conference at all without the financial and moral support of the UNHCR and the backing of the Swiss Government, the Canton of Bern and the City of Bern.

As the Preface to the last Conference in Ottawa wound up I too hope that this publication is a valuable addition to the emerging scholarship on refugee law issues.

Geoffrey Care
President of the International Association of Refugee Law Judges

REPORT BY THE PRESIDENT TO THE FOURTH INTERNATIONAL CONFERENCE OF THE INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES

REPORT BY THE PRESIDENT TO THE FOURTH INTERNATIONAL CONFERENCE OF THE INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES

It has now been five years since the first Conference took place in London, chaired by Sir John Laws (then a High Court Judge and now a member of the Court of Appeal). There have been three more International Conferences (including the present one) - two in Europe and one in Canada.

Most of you need no reminding of what our aims are. They are set out in our Constitution, but what we put on the face page of our recent Funding Presentation, in order to tell those who have never heard of us what we do, was:

> "The Association is an independent body of individual judges whose aims are broadly to encourage standardisation of practice procedure and interpretation of refugee law and practice throughout the world."

I commend to you also the *Memorandum of Understanding* entered into between ourselves and the UNHCR on 30 August 1999 and the leaflet produced with the workshop, "Materials for Seminars for New Refugee Law Judges", which gives practical expression to our philosophy.

After each previous Conference, the papers delivered were printed in book form, and there will also be publications following this Conference, albeit in a slightly different form. There have been a number of high-quality papers delivered at various seminars and colloquia as well, but I am unaware whether they have been published. Our website has been used for one article and is available for others. Whilst on the subject of publications, we have caused the *Asylum Practice and Procedure Country by Country Handbook*, which covers procedures in 19 countries, to be published. Because systems change so rapidly, it is planned to put this on a disk.

The Association has grown both in membership and country composition since we last met in Ottawa two years ago. There are now almost 400 members from 63 countries. There is every reason to suppose that by the time of the next Conference, membership will be over 500 representing some 70 countries.

Ottawa was always going to be a hard act to follow, and it took some courage for Walter Stöckli to offer his country as host to the Conference this year, and I would imagine yet more courage for his colleagues to agree that it could and should be done.

Although I write this before the Conference, it is clear that it is going to be a success, with some 30 more people attending than did so in Ottawa.

There have been some changes in our members since Ottawa. Nurjehan Mawani, C.M. is no longer Chairperson of the IRB, her term having finally come to an end. She has been succeeded by Peter Showler. Ms. Mawani was honoured by the Governor General of Canada with the Outstanding Achievement Award of the Public Service of Canada in May 2000. This award is presented to senior public servants each year who have distinguished themselves by a sustained commitment to excellence; we congratulate her for a most well deserved honour and we regret that we have not so far found a way of keeping the benefit of her active presence and help.

The Chief Justices in Canada have also both changed, Beverley Maclachlin replacing Antonio Lamer and John Richard succeeding Julius Isaacs. John Richard was to have spoken in our last session, but found he was unable to come. Instead he has allowed Allen Linden to be with us for the entire programme.

David Pearl has been replaced as President of the IAT in the UK and has been appointed the Director of Studies at the Judicial Studies Board. We have also lost Joachim Henkel to the German Foreign Ministry.

The Workshop Materials developed at Ottawa have been used since not only at both this Conference and in the Philippines but also, in part, in Kampala, Uganda and for the Asylum Judges Support Programme. It is anticipated that they will continue to be much in demand, as will facilitators to present them. It is for this reason that we held a *Training for Trainers Programme* last Saturday and Sunday and are seeking funds for a long term expansion of these activities.

We had planned a Judges Seminar in Dar es Salaam in April this year which had to be postponed, and likewise that planned for Cape Town in the coming January will not now, it seems, take place until later. We continue to receive requests to participate in or to arrange colloquia and seminars in many parts of the world.

We held a very successful seminar in London in November last year on Complementary Protection, and a number of us were able to attend a seminar in Sweden in May hosted by both Swedish Immigration Appeals Boards and the Foreign Ministry. Not only was the hospitality magnificent but the value of the discussions was notable. We participated in a Judges Workshop in Poland last month and Richard Chalkley has assisted in decision-making with the UNHCR in Moldova.

Nurjehan Mawani, Ahmed Arbee and myself participated in a Judges Seminar in Delhi also last November, and I was invited to speak at the University in Calcutta in March. I am giving the Keynote address and George Kanyeihamba and Praxidice Saisi are also participating at a Judges Round Table in Addis Abeba next month. The IARLJ has been asked to assist by the OAU Council of Ministers at their meeting in Conakry in June. On the way back I have been asked to meet Egyptian officials and talk to judges and others at the American University of Cairo. In January, both George Kanyeihamba and I have been asked to make an input from the judge's perspective

on status and individual refugees at the 7th IRAP Conference organised by the International Association for the Study of Forced Migration; the Conference theme is *"Convention 50"* and is being held in Eskom, near Johannesburg.

I followed up the United Nations Deputy Secretary General's talk to us in Ottawa by suggesting that there were a number of ways in which I felt that the IARLJ may cooperate with the UN apart from its existing relationship with UNHCR. After some delays, I now have her reply of July 13, which is annexed.

I have had discussions with the Director of Protection Erika Feller concerning the possible involvement of the IARLJ at the UNHCR ExCom meetings. This she encouraged and after this Conference I will follow it up.

In March, a New Zealand-Australia Chapter was formed in Auckland. The meeting was well supported by members of each country's tribunals and senior benches. I attended this event representing all of us. The quality of debate and the value of such an initiative became very plain. I am pleased to say that another such initiative is being pursued between UK and Republic of Ireland.

Windows of opportunity for the Association continue to present themselves to assist in the creation of better structures for refugee status determinations and to encourage courts more widely to pay regard to decisions in other countries and to do so with the Preamble to the Convention in mind.

I have set out in some detail, in a paper *"The Future of the IARLJ - an appraisal"*, what I see to be the important aspects of the watershed which the Association seems to me to have reached. This paper has been discussed by the Executive and is now circulated. Many of the opportunities that present themselves may have to be rejected, but they still need to be examined before they are discarded or postponed; we do not have the resources in manpower alone to do this adequately. The participation and help of all our members both in this area and actively to support our workshops and Committees will certainly do much to assist, but will never be enough, I fear.

We have identified potential sources of funding. Some are only available if the recipient is a charity and others if the charity is UK-based. Others are for activities centred in particular parts of the world, and some require a partner University. All require a great deal of time to find, write to, and meet with potential funders. If any of our members can suggest people to approach or can render assistance in this area, please speak to one of us.

The effects of regionalisation on refugee policies, procedures and even on the jurisprudence can be most restrictive. Under the cover of respect for the interpretations by courts of one country of decisions of another, a restrictive interpretation in one country can quickly be spread throughout an entire region. The differentials in recognition rates are at best often puzzling. The same background facts can be viewed differently. Different perceptions and attitudes to credibility and fact finding generally can arguably produce disturbingly different recognition rates, which can interfere with any attempts at burden-sharing and can certainly create a perception of success or failure,

being a lottery depending on which country the decision takes place - even the judge in the country itself.

The IARLJ does not see itself as a protagonist for asylum seeker or host country, but recognises that the ultimate test of any acceptable system must be in distinguishing between the claimant entitled to remain and the one who is not - and to do so rapidly and with transparent fairness. There must be a proper regard for the relevant circumstances of both parties, recognising the security and stability demands of a host country and attempting to help bring about the need for a level playing field in which burden-sharing can be a reality.

I am firmly opposed to the international focus of the association being watered down into a collection of autonomous regional groups, but we must recognise that regional issues arise which are often of little relevance elsewhere and cannot in any event await another international conference which only a very limited number of members can attend. In between international conferences there are long gaps, and regional or national chapters could do much to advance the aims of the Association by encouraging and organising events, alone or in conjunction with other relevant organisations.

Indeed an active interrelationship with other groups can not only advance the aims of the association in relation to asylum and refugee issues, it can be of positive benefit in wider spheres. As I have noted, we have established links with the UN, the EU, the Commonwealth Secretariat and the OAU. We have good relationship with the Commonwealth Magistrates and Judges Association, the International Bar Association and, recently, the International Women Judges Association. We need to build on these contacts.

This year I have visited the National Judicial College in Reno, USA with Jerry Armstrong, the Deputy Chief Immigration Judge of the USA. I have also had meetings with the Chief Justices of the Supreme Court and the Federal Court of Canada, India and Bangladesh (who is, I am pleased to say, present with us at this Conference). I have also met and had discussions with other senior Judges in Poland, Canada, Nigeria, Malawi and elsewhere. I have met with nothing but encouragement.

If I were to focus on one single segment of the vision for the Association it would be to facilitate the cross-communication of judges throughout the world - as Madame Frechette puts it, the UN highly appreciates *"[t]he work of your Association, particularly in its efforts to strengthen ties among judges from many different national systems around the world ..."* . In all areas there is much for the IARLJ to do, but setting priorities - achievable ones - with our limited resources must also be a factor on which real and solid progress depends.

Finally, I hope that those of you who have been able to come to this Conference will have found it worthwhile; that those who wished to come but could not will not be discouraged and will help to find solutions in advancing our aims and making the Association something deserving of effort to preserve.

I cannot say how much I have enjoyed being permitted to be involved in this venture and enjoying your confidence and I hope long to have the health to be able to make a contribution to the Association.

I wish you all well, and thank you.

Geoffrey Care
President

Shetland
October 2000

ADDRESSES

ALLOCUTIONS

WALTER STÖCKLI

President of Chamber at the Swiss Asylum Appeal Commission and Vice-President of the International Association of Refugee Law Judges

Dear colleagues, dear friends, dear guests

Welcome to Switzerland! Welcome to this country which - 50 years ago, in the post-war period - became the birth site of important conventions and the seat of significant international organizations.

I recall:

- the four Geneva Red Cross Conventions of 1949[1] which defined the mandate of the International Committee of the Red Cross (ICRC) with its head office in Geneva;
- the establishment of the United Nations High Commissioner for Refugees (UNHCR)[2] in the year 1950 with its head office in Geneva;
- and last but not least, the Geneva Convention relating to the Status of Refugees[3], approved by the United Nations in the year 1951.

It is evident that at this time a political will in favour of a fundamental improvement in human rights and the conditions of refugees was dominant. The European Convention on Human Rights (ECHR)[4] originates from 1950 as well. In those years, Switzerland obviously had the capacity and the will to be a part of the leading group within the international community.

Welcome to the Switzerland of the year 2000, the only country - apart from one city quarter of Rome - which has not yet joined the United Nations and which shows an astonishing despondency relating to other foreign policy affairs. For example, not less than 29 years passed before the International Convention on the Elimination of All Forms of Racial Discrimination[5] of 1965 attained legal force in Switzerland. Sometimes the development of fundamental rights and principles even seems to go backwards: in two of the four political parties forming the Swiss Government, the maintenance of the inde-

[1] Geneva Conventions of 12 August 1949.
[2] Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950, paragraph 19.
[3] Convention Relating to the Status of Refugees, done at Geneva on 28 July 1951.
[4] European Convention on Human Rights of 4 November 1950.
[5] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, entered into force in Switzerland on 29 December 1994.

pendency of the Swiss asylum court is currently being publically called into question.

Two years ago in Ottawa, after a very quick inquiry by telefax to the president of our court, I agreed to organize the next conference, but I formulated the conditions that this fourth conference should not be bigger or more expensive than the third one. The participants of the General Assembly in Ottawa accepted this general framework. Well, 250 people would have liked to participate in our conference. We were overwhelmed by this great interest. On the other hand, this fact raised quite a number of difficulties. Because of shortage of space, because of financial reasons and because we wanted to enable the participation of judges coming from as many countries as possible, we could not find a solution for about 50 applicants. In the name of the organization team, I apologize for these rejections and hope the participants present today will pass our regrets to the applicants turned down. Today we are 200 people and therefore numerically and financially well beyond the level of the conference in Ottawa. Of the 200 participants today, 180 are judges or independent decision-makers from 61 countries. The other participants are academics from seven universities, representatives of UNHCR and of Human Rights Watch, observers from Swiss governmental and non-governmental offices, translators for the English, French and Russian language - as well as some journalists during the present and the subsequent speech. I am specially pleased to welcome the judges from those countries which are represented for the first time at a conference of our association. Thanks to generous financial support by the Swiss Agency for Development and Cooperation, the UNHCR as well as the Asylum Judges Support Project (which is financially supported by the European Union), a total of 63 judges and independent decision-makers were enabled to participate in our two-day workshop in Geneva and our conference here in Bern. We thank all these organizations for their commitment and are grateful for their great support.

We - the judges and decision-makers from the five continents of the world - have *one* common basis within our conference: the 1951-Geneva-Convention and its application, especially in a judicial procedure. The determination of refugee status is closely linked to the human rights instruments, as we will see in diverse reports contributing to the conference. The question, what "refugee" means, also has a lot to do with the understanding of human rights in the respective country and the personal view of the applying judge. In the end, we are always looking at the ill-treatment of human beings fleeing from their persecutors through our national and our personal glasses.

Let me mention four examples:

1. the exclusion of women from political and important parts of social life or significant discrimination based on their particular so-called misconduct, for example extra- or premarital sex;
2. the caste-system with its prohibitions of marriage or professional practice;
3. the death penalty;

4. the effective exclusion of the indigent social class from the access to judicial proceedings.

For me personally, looking through my Swiss glasses, all four phenomena are tremendous violations of human rights.

Some of you, ladies and gentlemen, are coming from countries where this view is not predominant. The different estimations concerning fundamental aspects of daily life will guide us during the following three days, when we discuss the application, the interpretation and the implications of our common base, the 51-Convention.

What associates us besides the fact that our countries of origin have signed the Geneva Convention, is our professional activity. As judges and independent decision-makers we are responsible for the determination of refugee status. We all have a great job, which, for good reasons, we are quite proud of. In the end, we are the ones that can present the gift of hospitality to those who are persecuted. We do this as representatives of our countries and our citizens who have decided to give protection and shelter to human beings that are persecuted because they are the way they are and think the way they think.

It is pleasant to live in a country that is safe and wealthy enough to be in a position to grant protection. And it is even more satisfying that it wants to do so and does so.

In the daily practice of our professional activity, the number of rejections of the asylum appeals may exceed the number of approvals. The return of rejected asylum-seekers and the deterrent measures introduced by many of the receiving countries may be dominant in the public perception of our work. But this is nothing other than the - inevitable - other side of the coin. The granting of hospitality or asylum is only then a true gift if the possibility of refusal exists. And it is up to us as judges to make the distinctions and to garantee that they are well motivated.

In this sense again: Welcome to Switzerland and to the 4th Conference of the International Association of Refugee Law Judges!

WALTER STÖCKLI

Président de chambre à la Commission suisse de recours en matière d'asile et vice-président de l'Association internationale des juges en matière de droit des réfugiés

Chers collègues, chers amis, chers hôtes,
Bienvenue en Suisse ! Bienvenue dans ce pays qui, voici cinquante ans, au sortir de la guerre, a vu la naissance de conventions internationales qui ont marqué le siècle, et qui est devenu le siège d'organisations de première importance.
Je cite, pour mémoire :

- les quatre conventions de Genève de 1949[1] qui ont défini le mandat du Comité international de la Croix-Rouge (CICR), dont le siège a été établi à Genève,
- la création du Haut Commissariat des Nations Unies pour les réfugiés (HCR) en 1950, avec siège à Genève[2], et enfin
- l'adoption de la Convention de Genève par les Nations Unies en 1951[3].

La volonté politique de faire respecter les droits de l'homme et d'améliorer le sort des réfugiés a évidemment marqué cette époque à laquelle remonte aussi la Convention européenne des droits de l'homme de 1950[4]. En ce temps là, la Suisse a manifesté clairement sa volonté et sa capacité d'être à l'avant-garde de la communauté internationale.

Bienvenue aussi dans cette Suisse de l'an 2000, qui, avec un quartier de la ville de Rome, est le dernier pays au monde à ne pas être membre des Nations Unies et qui s'est caractérisé, dans d'autres aspects de sa politique extérieure, par un attentisme étonnant : ainsi, il lui a fallu 29 ans pour appliquer la Convention du 21 décembre 1965 contre le racisme[5]. Il semble même parfois que l'évolution soit allée en sens contraire pour ce qui est des principes et des droits fondamentaux : deux des quatre partis représentés au gouvernement en Suisse remettent publiquement en question l'indépendance du tribunal suisse compétent en matière d'asile.

[1] Conventions de Genève du 12 août 1949.
[2] Statut de l'Office du Haut Commissariat des Nations Unies pour les réfugiés, résolution 428 (V) de l'Assemblée générale du 14 décembre 1950, paragraphe 19.
[3] Convention relative au statut des réfugiés du 28 juillet 1951.
[4] Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950.
[5] Convention internationale du 21 décembre 1965 sur l'élimination de toutes les formes de discrimination raciale, entrée en force le 29 décembre 1994.

Il y a deux ans, à Ottawa, lorsque après avoir consulté par fax le président de notre Haute Cour, j'ai donné notre accord à ce que nous organisions la prochaine conférence, j'ai posé une condition : la quatrième conférence ne devrait dépasser ni en taille, ni en coûts celle d'Ottawa. Les participants à l'Assemblée générale ont accepté ce cadre. Or, plus de 250 personnes ont manifesté leur intérêt pour notre conférence. Cela nous a réjoui mais a aussi créé des soucis. Il nous a été impossible de trouver une solution pour une cinquantaine de personnes car soit la place manquait, soit les moyens financiers étaient insuffisants et parce qu'il nous fallait permettre à des juges venant du plus grand nombre possible de pays d'y participer. Je déplore cette situation et vous prie au nom des organisateurs de transmettre nos vifs regrets à vos collègues aujourd'hui absents. Nous sommes pourtant quelque 200 personnes et dépassons, en effectifs et en coûts, le cadre d'Ottawa. De ces 200 personnes, 180 environ sont des juges ou des décideurs indépendants, originaires de 61 pays. Les autres participants sont des professeurs en poste dans sept universités, des représentants du HCR et de Human Rights Watch, des observateurs délégués par des organisations suisses gouvernementales ou non-gouvernementales, des traducteurs pour les langues anglaise, française et russe, et pour la durée de mon exposé et de celui qui le suivra, des journalistes. Mes vœux de bienvenue s'adressent tout particulièrement aux juges venant de pays représentés pour la première fois à l'une de nos conférences. La générosité de la Direction suisse du développement et de la coopération (DDC), du HCR et du Asylum Judges Support Project, projet financé par l'Union européenne et géré par le HCR, a permis à 63 juges de participer à l'atelier de deux jours à Genève et à la conférence à Berne. Nous remercions vivement ces organisations de leur engagement.

Nous, juges des cinq continents, avons, dans notre association et pour notre conférence, *un* point commun : la Convention de 1951 et son application, notamment au travers de la procédure de recours. La détermination de la qualité de réfugié est étroitement liée aux instruments relevant des droits de l'homme, thème sur lequel nous entendrons divers exposés. Ce que "réfugié" signifie dépend pour une large part de la compréhension des droits de l'homme tel qu'elle existe dans le pays concerné et du juge qui applique la Convention. Finalement, c'est toujours à travers nos lunettes personnelles ou culturelles que nous apprécions les mauvais traitements subis par les personnes fuyant leurs persécuteurs.

Permettez-moi de vous donner quatre exemples :

1. L'exclusion des femmes de la vie politique et de pans importants de la vie sociale ou une forte discrimination à leur égard en raison de comportements sexuels interdits avant le mariage ou extra-conjugaux;
2. Le système des castes et les interdictions qu'il génère en matière de profession et de mariage;
3. La peine de mort;
4. La privation, de fait, des couches sociales les plus défavorisées d'accès aux tribunaux.

Pour ma part, à travers mes lunettes suisses, ces quatre exemples constituent de graves violations des droits de l'homme.

Pourtant, certains d'entre vous, Mesdames et Messieurs, viennent de pays où on ne voit pas les choses ainsi. Ces divergences de conception dans des domaines fondamentaux de la vie nous accompagnerons inévitablement pendant les trois jours qui vont suivre, lors des débats que nous consacrerons à notre sujet commun : la Convention de 1951, son application et son interprétation.

Outre le fait que les Etats dont nous relevons ont signé la Convention de 1951, nous partageons une vocation commune : en tant que juges, nous sommes appelés à statuer sur la qualité de réfugié. Nous collaborons à une grande mission dont nous avons toutes les raisons d'être fiers. En fin de compte, nous sommes habilités par notre fonction à faire aux persécutés le don de l'hospitalité, au nom de notre pays et de notre peuple, lequel a décidé de donner un nouveau foyer aux êtres humains persécutés parce qu'ils sont ce qu'ils sont ou pensent ce qu'ils pensent.

Il est bon de vivre dans un pays qui, vu sa sécurité et sa situation économique, a la capacité d'offrir sa protection. Et mieux encore, qu'il veuille le faire et qu'il le fasse.

Il se peut que, dans notre quotidien professionnel, le nombre de rejets dépasse celui des admissions et que les renvois et les mesures de dissuasion soient plus présents. Mais, ce n'est là que le revers de la médaille, un revers inévitable, voire nécessaire. L'octroi de l'hospitalité ou de l'asile ne devient un don véritable que parce qu'il existe la possibilité du refus. Il nous appartient à nous autres, juges, de faire la part des choses et de dûment motiver nos décisions.

C'est dans cet esprit que je vous souhaite une fois encore la bienvenue en Suisse - et à la quatrième conférence de l'Association internationale des juges en matière de droit des réfugiés!

ERIKA FELLER*

Director, Department of International Protection, UNHCR

Mr Chairman, Distinguished Justices and Judges, Ladies and Gentlemen

It is with great pleasure and some trepidation that I take the floor before so many eminent jurists. Your presence is testament to the major role that the judiciary has to play in today's turbulent and disturbed world in protecting the safety and rights of some of the world's most vulnerable people. It is also a tribute to the unique function served by the International Association of Refugee Law Judges, which has been able to bring together representatives of the legal traditions of more than sixty countries. I would like to thank the Association, together with the Swiss Asylum Appeal Commission, for hosting an event of such importance – and one of particular significance to UNHCR in this the year of its 50th Anniversary. Our sincere thanks also go to the Swiss Government for the generous financial support it has provided, which has made possible the attendance of so many judges both here and in Geneva earlier this week for the Professional Development Workshop.

I have been asked to offer some reflections on the changing nature of persecution. Perhaps the best way to address this rather elusive subject is to focus on change more broadly across the spectrum of the refugee problem, its impact on the possibilities available to persecuted individuals to access effective protection and on the role of judges, in particular, in enhancing these possibilities. I do so not least because, in the fifty years of UNHCR's existence, it is not our experience that man's inhumanity to man has qualitatively changed, or that persecution itself has significantly altered its character. Gross violations of human rights and a flagrant disregard for the sanctity and dignity of the human condition have remained recurring elements in inter-state and intra-state politics for centuries. There is little cause for celebration in the fact that, fifty years on, we are recognizing the *universal* and still *contemporary* importance of the anniversaries both of an office [UNHCR] originally set up for five years only and an instrument [the 1951 Convention Relating to the Status of Refugees] promulgated to respond to what were thought to be the particular dynamics of the aftermath of two world wars.

In analysing the changes since 1951 from the persecution perspective, several questions present themselves for examination: If persecution has remained a feature of human society, has it actually taken on new forms or

* An edited version of this article will appear in 15 Georgetown Immigration Law Journal _ (forthcoming). (The journal may be contacted at <gilj@law.georgetown.edu> or via post at 600 New Jersey Avenue, Northwest, Washington, D.C. 20001, U.S.A.).

rather is it that certain insidious forms are only now coming to be recognized for what they are, that is as manifestations of persecution rather than as endemic and culturally sanctioned behaviour? If it is not persecution which has changed, have the persecutors themselves? Are there new challenges to delivering protection which are giving the notion of persecution a more relative place in the process of determining status and state responsibilities? Are there gaps in the framework of existing principles which might necessitate some additions thereto to ensure that protection remains available against persecution? To all these questions, for UNHCR, the answer is yes.

Mr. Chairman, let me take one question at a time.

Persecution is an age old practice. That there is no definition of it in the 1951 Convention is indicative of the fact that its forms are perhaps as various as its years are many. A determination of whether or not persecution is at issue is more often made by reference to some notion of the severity of the act, or the rights or security of person which are being violated, rather than to the act itself. Relativity has been the result, with the persecutory nature of acts being closely tied, in the final analysis, to their time and social and cultural context. If there has been any change in the nature of persecution, it is far less in the acts themselves and much more in their social and cultural acceptability. It is here that the crux of the matter lies. Behaviours persist but increasingly, as tolerance of them diminishes, the likelihood grows that they will be classified as persecutory activities entitling the victim to protection as a refugee. One clear example of this that I would like to mention - and indeed it is on your agenda for later discussion - are acts of gender related violence.

Gender is not specifically prescribed as a ground of persecution. As has been noted somewhat flippantly by one commentator, "the drafters of the Geneva Convention bequeathed to history a critical, male, intellectual, political activist with a high profile in the resistance movement, organised and ideologically motivated, as the classic example of the refugee."

Happily this stereotype is starting to break down, as surely it must , to allow the Convention to serve as a shield against certain forms of gender violence. There are many types of violence against women which in different societies have been tolerated for centuries. This is particularly the case where the mores of a particular society relegate women to a secondary and subservient place, or when the subjugation of women to traditional practices of various sorts are part of the social expectations and fabric of a society. Violence against women in situations of armed conflict, including rape and sexual violence, has been a longstanding phenomenon as well. Certain offences have traditionally been outside the realm of application of the 1951 Convention, being classified as regrettable acts of human excess, or failures in personal judgement rather than as contemptible violations of fundamental rights, capable of incalculable, even if more invisible, harm. UNHCR's position has long been that, if the drafters of the Convention did not reflect it clearly in words,

nevertheless, violence with a basis in gender is as persecutory in Convention terms as any other violence when the harm inflicted is sufficiently serious and it can be linked to a Convention ground. AND it does not matter in this regard that the Convention is silent on gender as a ground for persecution. AND it does not matter that the crime is gender specific with women as its victims. This position is increasingly a shared one. The need to interpret the refugee definition in such a gender sensitive way has been endorsed by our Executive Committee, and indeed courts around the world are more and more allowing the definition to incorporate gender related claims.

The Committee and the Courts are aided in this regard by important advances in human rights law, which are helping to change the characterisation of violations against women as those relegated to the private realm alone. The rights of refugee women have been particularly and positively impacted through developments with the Convention on the Elimination of All Forms of Discrimination against Women (1979), which has had the effect, inter alia, of lifting the cultural or religious taboos against sanctioning certain abuses against women. The doctrine of the universality of human rights requires their assessment against evolving international human rights standards.

This is not to say that violations of women's rights or discrimination of whatever sort are enough to establish a case for refugee status. Clearly, a distinction must be drawn, for example , between discrimination and persecution. However, various acts of discrimination, in their cumulative effect, can deny human safety and dignity in key ways and are properly recognised as persecution for the purposes of the Convention. Lord Hoffman, in the decision by the House of Lords of Shah and Islam, wrote that "the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the [1951] Convention. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect" . Put another way, human rights law should and must provide the broad and objective indicators against which the term "persecution" can be interpreted.

Mr. Chairman, if persecution has not changed, the next question is, have the persecutors?

The approach to persecution, or more broadly to recognition that persecutory acts must attract international responsibility for providing protection through the grant of refugee status, has also radically been influenced by changes in the international environment in which refugees find themselves today and the 1951 Convention has to function. These changes have impacted on the preparedness of States to accept protection responsibilities in the particular case. This has found its reflection, in the legal area, in a restrictive approach to applying the persecution/refugee status formula in the 1951 Convention, coupled with the growth of concepts which in effect keep the definition at bay.

Today, persecution takes place increasingly in a climate of general lawlessness and impunity within rather than between States. For many diverse reasons, ethnic conflicts and inter-community violence are allowed to flourish because central government has collapsed, or lacks the willingness or simply the ability to govern effectively. There has been a growth in internal, inter-ethnic conflicts characterised by massive population displacements which are not their unintended result, but their actual objective. The victims, unable to find effective relief from serious harm within their own countries, are obliged to claim protection beyond the borders of their State. The perpetrators of this harm and violence range from traditional agents of the State --- such as police and military --- to militia, paramilitary groups, separatist rebels, bandits, and even thugs. But the victims remain largely the same people --- predominantly women, children and the elderly.

In this environment, perhaps the greatest impediment to a "victim-oriented" or "protection-based" approach to refugee protection is the notion, adhered to by a few asylum States, that only those who are victims of actual persecution at the hands of the State or a State-like authority, are legally entitled to international refugee protection. Acquiescence in or complicity by the State in the acts of private individuals or groups are seen as pre-requisites for the State to be *accountable* for those acts. It is argued that, without this nexus, the edifice of international refugee protection is not even engaged, irrespective of the harm caused to human beings. In the view of UNHCR and a growing number of others, this approach is legally questionable at best. If we accept that the primary purpose of asylum is to provide a temporary and surrogate place of safety for people where, for whatever reason, this is not reasonably available in their countries of origin, then any approach that draws an arbitrary "line in the sand" between different but equally deserving victims, must run counter to the objects, purposes and spirit, indeed the letter, of the refugee protection framework.

Legal support for the alternative and preferred *"protection view"* that places objective protection imperatives over the need to establish a nexus of accountability to the State, can be found in related areas of law --- notably, in international human rights law, humanitarian law and criminal law.

As previously mentioned, human rights law has not been static over the past 50 years --- not least on the question of acts by non-state entities. For instance, the case law of international bodies such as the European Court of Human Rights, the UN Human Rights Committee and the Inter-American Court of Human Rights have each held that people cannot be returned (*refouled*) to situations where they are at risk of torture or inhuman treatment --- irrespective of the source of this ill-treatment. Although at first reading, the UN Convention against Torture has a narrower definition of torture that is confined to state entities, its supervisory UN Committee has interpreted it in a broad and inclusive way, for example to protect from *refoulement*, a victim of

inter-clan violence in Somalia --- a country which lacks any form of effective central government.[1]

As for developments in international criminal law, the International Criminal Court Statute recognises that crimes against humanity, including "persecution", can also be carried out by private actors as part of an organisational policy. Criminal liability would extend to the perpetrators of ethnic cleansing and persecution, irrespective of whether they are acting as agents of the State or not.

Mr. Chairman, turning to the third question, there are certainly new challenges to delivering protection which are giving persecution a more relative place in decisions by states to accept protection responsibilities for non-citizens. The recurring cycles of violence and systematic human rights violations in many parts of the world are generating more and more intractable displacement situations. The changing nature of armed conflict and patterns of displacement, the more and more unfavourable cost/benefit equation of asylum, and serious apprehensions about "uncontrolled" migration in this era of globalisation are increasingly part of the environment in which refugee protection has to be realised, and indeed persecution has to be defined. Trafficking and human smuggling, abuse of asylum procedures and difficulties in dealing with unsuccessful asylum-seekers are additional, compounding factors. Many traditional receiving countries increasingly have a sense that they are forced to react to the pressure of these developments, rather than being able to take the initiative to act in the first instance. This has caused a number of countries to put much imaginative effort into the erection of obstacles, including legal obstacles, to hinder access to territory and status determination procedures.

These developments have impacted clearly, if indirectly, on the extent to which persecution is the trigger for States to accept and offer asylum to refugees. To take only one example here – particular problems have been encountered in recent years with the determination of refugee claims that involve analysing whether the fear of persecution extends to the whole of the territory of the country of origin. In the practice of a number of countries, increasing insistence has been put on efforts which the asylum seeker should have made to explore relocating internally prior to seeking asylum. The possibility of accessing safety elsewhere inside the country of origin – termed the "internal flight alternative" or the "relocation principle" – has been used increasingly as a bar to the admissibility of claims for refugee status. The argument is that if the individual concerned could have found safety [however that is defined] within the home country, then the claim would have no foundation and the person could not be a refugee. But where is persecution in this equation? In UNHCR's view, the use of this notion to deny access in the first place to refugee status determination, rather than situating it where it belongs within the framework of the status determination analysis, risks seriously distorting

[1] Elmi v Australia, Communication No.120/1998, 25/05/99, CAT/C/22/D/120/1998

refugee law, by creating a new criterion for refugee status which substitutes for the refugee definition.

We accept that new or refined notions, such as the internal flight alternative or the safe country notion, have a place in the developing repertoire of responses to complex displacement situations. However, preventing their misuse and channelling them into protection sensitive procedures is now one among many of the important challenges faced by UNHCR.

What is clear, Mr. Chairman, is that the 1951 Convention regime has reached a crossroads. Mindful of the many legal, but also very practical problems now confronting refugee protection, we have decided to take the opportunity of the forthcoming 50th Anniversary of the 1951 Convention to initiate a process of Global Consultations with governments, NGOs and refugee experts, like yourselves, with a view to revitalising the protection regime and the place of the Convention in it. Our purpose is both to preserve the Convention's centrality, and that of its basic working concepts, such as the notion of well founded fear of persecution, as a main basis for refugee decisions. We are also seeking to buttress the Convention, where needed, by harmonised additional protections. These Consultations were announced in July, will begin in substance next year and will more than likely continue throughout 2002.

We have a working frame for the Consultations, which has led them colloquially to be termed the "three circles consultations". The inner circle should be seen as the basic, globally agreed framework of the 1951 Convention. We hope that an event we intend to organise for the 50th Anniversary of the Convention will be the occasion for States parties unequivocally to reaffirm their commitment to full and effective implementation of the Convention, and more substantively, to examine ways in which this might be strengthened through better supervisory mechanisms. This, if you like, is the political part of the Consultations!

In the next circle of issues, the legal circle, we have placed certain open interpretative questions regarding the Convention. Our interest here is in examining how and in what directions the law has developed over recent years, that is in a stock taking exercise which would allow decision-makers to be better informed about how the Convention is being understood and applied globally today. We will be organising round-tables of experts, informed by background papers, on topics such as the interpretation of the cessation and exclusion provisions, the ground of membership of a particular social group in the definition, and gender related persecution. We will look to you for support in these roundtables. We intend to publish the papers and results of the discussions as a contribution not only to the 50th Anniversary, but also to better decision-making in the application of the Convention. Such a publication would, we hope, serve eventually as a complement to UNHCR's Handbook.

Finally, in the outer or "practice" circle, there are the gaps being the situations the Convention does not adequately, or at all, cover. Discussions in these matters will take place within the framework of UNHCR's Executive

Committee and will focus, broadly speaking, on four thematic areas where, in UNHCR's experience, the practical problems lie: the civilian character of asylum and the protection of refugees in mass influx situations; protection of refugees through individual asylum systems, including the problems inherent in the migration/asylum interface; and realisation of protection-based durable solutions. The overarching theme which will run through these consultations is better co-operation and responsibility sharing solidarity. We hope the consultative process will better define the problems, as well as help to identify new approaches, tools or guidelines. There might even, at some point, be a standard-setting element involved.

Possible response from the national judiciary

In conclusion, Mr. Chairman, I would like to offer some random thoughts on the role of the judiciary against the background of the problems and challenges confronting refugee protection today.

It is clear that in the search for effective yet humane refugee protection in the 21st Century, the 1951 Refugee Convention remains the foundation instrument -- a useful and living one for both States and refugees. However, for its validity and relevance to continue to be assured, national judges have a crucial role to play in giving the terms of the Convention a proper interpretation that respects its objects and purposes. They must be able to search beyond the traditional context of their own national legal systems for guidance and inspiration in the normative framework of international human rights, humanitarian and criminal law. These standards are increasingly important reference points, with which in our experience judges need to be fully conversant.

To date, progress in this regard has been slow, but, if we may so observe, generally positive. Even in dualist legal systems where the transformation of international law into national law is a more circumspect and osmotic process, judges are showing a greater preparedness to refer to both international standards and jurisprudence from other national jurisdictions. This cross-fertilisation of ideas and experiences is a way of encouraging best practices amongst judges, with this Judges Association being, very clearly, an excellent network within which this can be promoted. Our expectation is that the Consultative process we are now engaged in will also make an important contribution in this regard.

It is not, of course, easy for national legal systems to absorb international legal principles. Judges may be reluctant to embrace standards that have no clear legal authority in their national laws. They may be cautious not to encroach too far into the realm of executive action and may wish to avoid any impression of judicial law-making. Clearly, part of the dilemma facing domestic judges is the imprecision of the language of international law itself. Its interpretation is not an exact legal science because by and large, refugee and human rights law has been crafted by diplomats, not domestic lawyers, with

international law more often than not couched in the language of political compromise. To domestic lawyers and judges used to the precision of national law, these treaties may seem crude and imprecise --- and perhaps unreasonably altruistic.

It is here that judges and advocates faced with interpreting international law in a national context have a dilemma. To ignore the principles runs the risk of creating injustice and hardship and may even make the judiciary complicit in a State's failure to translate its legal commitments into effective domestic action. On the other hand, if judges try to subject international law to minute legal dissection, then the spirit and ethical values of refugee protection may well be eviscerated. In fact, some of the restrictive trends I have just described have been contributed to, at least in part, by the unduly narrow interpretations of judges, rather than politicians. A current concern for example is the effort by the courts in one country to suggest that the absolute and non-derogable character of *non-refoulement* in cases of torture, might not apply to refugees facing torture, who fall within Article 33(2) of the Refugee Convention.

Mr. Chairman

In our view, human rights law and refugee law should be each interpreted in a way that strengthens and enriches the broad protection framework rather than undermines it through aberrant exceptions. On refugee issues, a "purposive" approach to interpreting international law will ensure that the focus is kept on the victim and the palliative purpose of protection. It will also promote the dynamic rather than static character of international law and the State's commitment to it.

A second message I would like to leave for judges to consider relates to the fact that the sheer number of people trying to enter national asylum procedures inevitably seems to tempt some governments to look for economies of due process. These can take a variety of forms, including that of legal devices to allow summary dismissal of claims deemed manifestly unfounded, against criteria which stray far from the notion of what should constitute manifest unfoundedness. The creation of legal concepts which in effect serve as barriers to accessing the asylum procedures is also a concern here. UNHCR acknowledges the need for expeditious procedures and new concepts, but these can never be at the expense of key Convention notions – persecution among them – or basic principles of fairness and thorough enquiry. Here, judges will have an important if likely unpopular role to play.

UNHCR has often seen in this regard how active judicial supervision and an insistence on the rule of law have been able to disentangle refugees from the wider and more politicised net of migration control. This might not be the most popular judicial role but the rationale for it is incontestable. As Lord Bridge rightly observed in the British House of Lords,

"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny." [2]

Mr. Chairman

In the limited time available, I have addressed but some of the many complex challenges that lie ahead. Clearly, if the legal principles and ethical values that underpin asylum and refugee protection are to be revitalised and if the law in this area is to be of contemporary relevance to both States and refugees, then it cannot be monolithic. It must be allowed to evolve organically but, at the same time, preserve its central integrity. The work of your Association, through its expanding membership and the ambitious themes of this Conference, can help to ensure that whatever the challenges, the process of evolution will remain principled and true to its real object and purpose.

Thank you

[2] Bugdaycay et ors v Secretary of State for the Home Department (1987) ImmAR 250, 263.

RUTH METZLER

Federal Councillor

1. WELCOME

It gives me great pleasure to see so many of you here today.
On behalf of the Federal Council I would like to heartily welcome you all to Berne, which is Switzerland's capital and, at the same time, the headquarter of our government.

As Minister of Justice, I know that it is your task to decide on objects of legal interest at the highest level. As a rule these decisions concern individual fates.

Your work, Ladies and Gentlemen, is thus exercised in an extremely responsible and delicate sphere.

In 1992, the Swiss Parliament approved the introduction of a special court, independent of the administration. Since then appeals against asylum decisions have been judged by this Swiss Asylum Appeals Commission. From constitutional considerations, I am convinced of the principle that, also in asylum proceedings, independent judges decide in the last instance.

Many countries have chosen this system, in which final judicial or quasi-judicial instances that are independent of the administration decide on refugee status. It is good so.
Personally, I am assured that it is only with the intensive international co-operation of the competent authorities that our global refugee problems can be successfully solved.
Events such as this Conference of the International Association of Refugee Law Judges (IARLJ) therefore make a most valuable contribution.

- They serve the exchange of knowledge and judicial debate;
- they create the basis for border-crossing co-operation in this sphere
- and help to promote the material international harmonization of asylum law in the long term.

The choice of Switzerland as the host country for this year's IARLJ Conference is directly linked, as you know, to two jubilees:

On the one hand, the UN High Commissioner for Refugees (UNHCR) is this year celebrating its 50th anniversary at the headquarters in Geneva. And, on the other hand, the 1951 Convention relating to the Legal Status of Refugees, the Geneva Refugee Convention, will reach the same age next year.

At this point, to complete the picture, I would also like to draw your attention to a further international jubilee which has great relevance (also) to asylum legislation: the European Human Rights Convention, which was concluded in 1950.

First of all, I intend to talk about the Refugee Convention and then conclude my speech with some references to the situation in the sphere of asylum in Switzerland.

2. UNHCR'S SIGNIFICANCE FOR SWITZERLAND

The Swiss Asylum Act expressly foresees co-operation with UNHCR.

For example, as a partner at Swiss airports, UNHCR is involved in asylum proceedings: according to our Asylum Act, asylum seekers who are refused entry at an airport may immediately be expelled to their native land or country of origin. This is the case if, according to the concurring opinion of the Swiss asylum authorities and UNHCR, there is "manifestly no threat of persecution".

In airport proceedings of this nature, UNHCR has the competence, based on the relevant asylum files, to put a veto on immediate execution of the expulsion order.

This being the case, the person concerned is authorized to enter Switzerland and regular asylum proceedings are conducted.

UNHCR's involvement in special asylum proceedings at the airport has proved worthwhile.

UNHCR, however, is a major partner of the Swiss asylum authorities in other respects, too.

For example, our asylum legislation foresees consultation with UNHCR by the national government before decisions are made as to whether and how long groups of "refugees of violence" are to be granted protection if there is a situation of general violence in their native country.

Finally, I would like to mention the fact that the co-operation between the Swiss authorities and UNHCR functioned particularly well during the Kosovo conflict and the subsequent return program.

3. THE SIGNIFICANCE OF THE GENEVA REFUGEE CONVENTION FOR SWITZERLAND

The paramount importance of the Geneva Refugee Convention can be seen from the impressive list of the Contracting States that have ratified this Convention so far: there are 134 states.

The Convention makes a significant contribution to the substantive harmonization of international refugee legislation and thus to legal equality and legal security.

The main points contained in the Convention, i.e. the definition of refugee status and the incorporation of the ban on refoulement, have considerably influenced asylum practice in the Signatory States.

However, in the almost 50 years since the Refugee Convention was first signed, the Signatory States have experienced enormous socio-political changes.

As you know, the persecution situation of those seeking protection with us has for the most part changed in comparison to the period shortly after the Second World War:

In Western Europe there are clear signs of a growing trend for asylum seekers to request protection from civil wars and general violence. This was vividly illustrated by the situation of asylum seekers from the Balkans or from conflict regions in certain African countries of origin.

On the other hand, there are today far fewer applications than formerly from persons who – particularly because of their political conviction – are exposed to the threat of concrete, individual persecution in their native country.

In Switzerland two issues linked to the Refugee Convention dominate discussion on asylum at present:

On the one hand, asylum practice in Switzerland – as is also the case in certain neighbouring countries – has so far worked on the assumption that, strictly speaking, only state persecution can lead to the recognition of refugee status.

In our practice, direct state persecution is placed on the same footing as so-called quasi-state persecution.

Persecution by private bodies, in contrast, remains strictly irrelevant in asylum legislation in this respect.

A large proportion of asylum experts and also the asylum authorities in many European states represent the opinion that non-state persecution can also lead to the recognition of refugee status.

In Switzerland this issue has led to motions in Parliament and has been the subject of public discussion.

The international brisance of the topic is also demonstrated by the fact that "persecution by non-state agents" was the subject of your discussion this morning.

The second topic for discussion refers to certain limitations that could arise through the strict implementation of the Geneva Refugee Convention. I would like to illustrate this point with the example of the Kosovo crisis:

As you know, the war in Kosovo was characterized by the rapid and widespread military expulsion of the civilian population – a process that is also known by the cynical term of "ethnic cleansing".

In this situation, there occurs a pattern of persecution clearly deviating from that of specific and concrete individual persecution, from which the Refugee Convention offers protection.

In this connection, I would like to pose two questions.

1. Does not a practice of generous, rapid and unbureaucratic provisional admission deal more effectively with the need for protection of persons displaced in this manner than the execution of individual asylum proceedings? For the latter are orientated towards the costly determination of refugee status in those persons.
2. Do we not allocate the financial means and human resources in a more optimal manner if, after the situation has calmed down, they are invested in the well-targeted reconstruction of the war-ravaged country and in appropriate individual return assistance given to the persons concerned, without the need for complex asylum proceedings?

On 1st October 1999 our new Asylum Act entered into force. The new legal institution of "granting provisional protection" was incorporated in the Act on the basis of the above-mentioned considerations.

Summarized, the new regulation foresees the following:

Firstly – after consultation with UNHCR as mentioned above – the national government makes the decision on the group of persons in need of protection; individual applications for the determination of refugee status remain strictly suspended for this period of protection. Excluded from this are persons who are manifestly refugees in accordance with the Convention and the Act and, as such, are directly admitted.

Following the suspension of provisional protection, regular asylum proceedings are only continued if a hearing of those concerned gives concrete indications of persecution that is relevant to refugee legislation.

These legal bases of provisional protection did not enter into force until the war in Kosovo had ended; thus they have not been implemented so far.

Far be it from me, for this reason alone, to extol our new legal institution as a "miracle cure".

I only hope that my explanations have helped to clarify the question as to whether and, if so, to what extent the portentous international instrument represented by the contents of the Refugee Convention can and should take account of changing social conditions and new persecution scenarios.

In any case, the discussions conducted within the scope of the Convention's imminent celebrations on the occasion of its 50th jubilee promise to be interesting.

4. CURRENT TOPICS FROM THE SPHERE OF ASYLUM

Swiss asylum policy can look back on an eventful period, profoundly coloured by the Kosovo conflict.

In 1999 more than 46,000 people filed an application for asylum in Switzerland, more than ever before.

In total, Switzerland granted protection to roughly 53,000 people during the Kosovo crisis.

This figure should be considered in relation to the population of our country, which amounts to 7 million inhabitants.

The fact that a large proportion of Kosovan refugees chose Switzerland as their place of refuge is due, besides to the relative proximity of the conflict region to Switzerland, mainly to the labour market policy pursued in Switzerland in the seventies. This led to a sizeable community of Kosovo Albanians in our country.

One of many examples for the connections and correlations between economic and asylum policies.

The main issue in the sphere of asylum in the year 2000 is the return of refugees to Kosovo.

Two thirds of the persons displaced by war, over 39,000 people, have left Switzerland again in the course of the current year and returned to their native country.

Approximately 90 % of these people have been able to benefit from Switzerland's comprehensive return assistance program.

The program comprises courses of training geared to return as well as individual return counselling and material incentives:

Within the scope of this program the returnees were paid a lump-sum for their travel expenses; they were also offered material aid for reconstruction; in particular they received a choice of various packages of building materials for the reconstruction of their wrecked accommodation.

In addition, financial aid was also invested in the reconstruction of selected local infrastructures.

The great number of refugees from Kosovo really put Switzerland's asylum policy to the test.

Today we can say that the existing structures proved their worth in this extreme situation.

However, this does not necessarily mean that there is no further scope for improvement in the sphere of asylum.

On executing removals after the negative outcome of asylum proceedings, for example, we are faced with the problems caused by those applicants who did not hand over any identity papers to the asylum authorities. This fact exacerbates the execution of removal or even makes it impossible.

Thus doubt is also cast on the acceptance and effectiveness of our asylum proceedings.

I am sure that you, too, are well aware of the real difficulties arising in connection with the departure of rejected asylum seekers to certain countries of origin.

It has long been our objective to reduce the length of asylum and appeal proceedings to a few months.

This with the aim of reducing welfare costs on the one hand and of curbing Switzerland's attractiveness on the other.

But we consider that it is also in the interest of the refugees themselves to learn as soon as possible whether they are to be granted permanent protection in Switzerland.

5. SWITZERLAND'S NON-MEMBERSHIP OF THE EU: CONSEQUENCES FOR THE SPHERE OF ASYLUM

For some time the European Union member States have been making rigorous attempts to promote the harmonization of their asylum policies.

On 1st September 1997 the Dublin Convention entered into force. This agreement defines the Member State competent for the processing of asylum applications.

In this way asylum seekers whose application has been rejected in one EU State can be prevented from filing a further claim in another EU Member State.

With the Treaty of Amsterdam, which entered into force on 1st May 1999, the EU States approved the basis for the gradual development of a uniform legal space and in particular for the harmonization of legislation on asylum and asylum proceedings.

A short time ago the EU Commission already published a proposal for preliminary relevant guidelines.

The European Union's direction of thrust is certainly to be welcomed: you all know, for example, the political constraints and the correlations which arise when neighbouring states tighten their asylum practice or do not implement this consistently.

Switzerland is surrounded by EU countries, without being a member of the EU herself. In the long term it will not be able to cope on her own with the consequences of migratory movements to which Europe as a whole is exposed.

When the Dublin Convention becomes fully operational from a technical point of view, many aliens whose asylum applications have been rejected in one EU State will try to gain admission to Switzerland.

Switzerland has already been exaggeratedly described by the press as the future "reserve asylum country of Europe".

It is both Switzerland's duty and her wish to stand up against these European realities.

For some time, therefore, we have been intensifying our efforts at cooperation, in particular with regard to the exchange of information and ideas with our European partner authorities and international organizations, such as UNHCR.

By adapting existing bilateral readmission agreements with our neighbouring countries and by concluding similar new agreements with other European states, we are endeavouring to compensate for the clear disadvantages EU non-membership brings to Switzerland in the sphere of asylum.

Increasing international co-operation, however, is not only of central importance when it comes to combating current and imminent migratory movements:

We are convinced that one of the keys to the longer-term solution of problems in the sphere of asylum in the Western industrialized states lies in the prevention of conflicts and migration.

In this sphere promising measures must be initiated in the asylum seekers' countries of origin.

It is obvious that individual states can hardly make decisive improvements here either.

6. CONCLUSION

As members of the International Association of Refugee Law Judges IARLJ taking part in this conference, attended by delegates from over 60 states on all the continents, you have documented with your commitment your wish to seek solutions for problems not only affecting your own countries.

I congratulate you on this engagement and wish you much success in your highly responsible activities.

Your visit to Switzerland and participation in this conference have given much pleasure to the Federal Council and, of course, to me personally as Minister of Justice.

BRUNO HUBER

President of the Swiss Asylum Appeal Commission

Dear Federal Councillor,
Dear colleagues and guests,
Ladies and Gentlemen,

It is with pleasure that I convey to you the greetings and best wishes of the Swiss Asylum Appeal Commission here at the old granary of Bern. It is an honour for the Commission to be able to carry out the fourth conference of the International Association of Refugee Law Judges.

Ensuring the organization of a successful conference has been a challenge for the Commission; it had to be accomplished during a very busy period. Many of those who assisted are not present here; nevertheless I would like to express my thanks and my appreciation to them.

A special effort was necessary and was made, an achievement which merits respect.

I would especially like to thank the head of the Federal Department of Justice and Police, Federal Councillor Ruth Metzler, who is honouring us with her presence. I value her presence as a sign of esteem for IARLJ. I would like to take this opportunity to thank our Minister of Justice for publicly supporting the right of refugee law judges to act independently.

Furthermore I would like to express my gratitude to the Association for entrusting the Asylum Appeal Commission with the organization of the conference.

The Commission feels honoured by your confidence and we hope that we can live up to your expectations in all ways.

The olympic motto does not apply to this event. But we hope that you will return home with good impressions and enriched in every respect and that you will have pleasant memories of the days you spent in Bern and Geneva.

J'en viens au HCR avec lequel la Commission a étroitement collaboré en vue du séminaire à Genève et de la Conférence à Berne. Nous regrettons sincèrement l'absence en ce jour de Madame Ogata, Haut Commissaire pour les réfugiés. Je peux toutefois vous assurer que l'excellente collaboration avec le HCR nous donne entière satisfaction. Je lui présente ce soir mes vifs remerciements.

It would be going too far to individually mention everybody who is contributing in one way or another to the success of this conference. But I would like to let them know that the Asylum Appeal Commission greatly appreciates their support, be it the authorities of the town and the canton of Bern, be it the

Swiss Agency for Development and Cooperation of the Federal Department of Foreign Affairs or other federal authorities, friends, experts and employees.

A bon mot has it, that a dinner speech ought to be as short as the first course and as light as the nouvelle cuisine. While the shortness doesn't give me any trouble, the lightness does.

It is and always has been a serious issue that has brought judges from all over the world to the capital of Switzerland: the legal problems connected with the persecution of people. Since antiquity and on all the continents, the protection of refugees, asylum, keeps on arousing emotions and fears that can turn into hate and aggression.

In politics too, asylum has always been a difficult issue. This is understandable.

It is very problematic if the asylum issue and the problems involved are at the mercy of political disputes, and it is unacceptable if the protection of asylum seekers which is demanded by international law is subordinated to or even sacrificed to immediate political success.

This is not the time or place to go into this subject more deeply, although the relationship between politics and law is an issue which a refugee law judge cannot and may not elude. But first of all the Refugee Law Judges Association is a non-governmental organization. Then a judge has to restrain himself as far as the political discourse is concerned. Finally, legal and not political issues are the subject of this conference.

It may be a truism for you that refugee law is a complex issue, more complex than commonly believed. While there are differences between countries and cultures, one observation is generally applicable: legislation by the political authorities only creates a vessel which the judiciary authorities, the refugee law courts, have to fill up. Science can only have an accompanying function, as important as it may be for the execution of our tasks.

Every day each individual judge faces a challenge, a task which can be very delicate at times.

It is a fact that the judgements by refugee law courts do not always meet with general approval. A reason for this is that the jurisdiction is effected in regard to specific cases, that it requires extended knowledge of the subject and that many judgements are difficult to communicate.

It is an ambitious aim to find common denominators and solutions for problems that vary a lot among different countries and continents. Although international law creates a superior framework, it is domestic law that lays down the crucial details.

The application of domestic law is often a very demanding and burdensome, but at the same time an intellectually enriching, job. It is demanding because besides refugee law, a host of other legal provisions have to be observed. Therefore, a refugee law judge is not an expert just in one branch of the law, but he also has to have an extended knowledge of many other fields of law and he has to permanently continue his education and keep himself

informed. The UNHCR-workshop in Geneva and the conference in Bern make an important contribution to this.

The task of the refugee law judge is burdensome because his judgement often determines the rest of the life of an asylum seeker. Furthermore, the refugee law judge can easily come into conflict with politics when carrying out his duty.

On the other hand, our job can be intellectually enriching. A judgement pronounced with conviction is not just an answer to a legal question. We all know that. But a refugee law judge should not expect public recognition and it is quite often the wrong side that applauds loudly.

Dans leur coopération, les juges des différents Etats se heurtent, par la force des choses, à de multiples frontières. Cependant, à l'heure de la globalisation, l'échange d'opinions et la recherche de solutions aux problèmes auxquels est confronté l'ensemble des Etats sont également des tâches qui incombent aux juges en matière d'asile. La Conférence est un forum non seulement intéressant, mais également nécessaire.

Je l'ai déjà relevé, les sciences et la jurisprudence suivent leur propre voie. Il n'en demeure pas moins que ces sciences sont des sources auxquelles ne peut renoncer une autorité judiciaire.

Je saisis ici l'occasion de remercier d'ores et déjà chaleureusement Monsieur le Professeur Walter Kälin pour son recueil des interventions et conclusions de la Conférence. C'est avec grand intérêt que nous attendons cette publication.

Le repas de ce soir revêt certes un caractère officiel, mais il est également l'expression évidente d'un lien tissé par-delà les frontières. Outre le présent protocole, un devoir commun nous unit. Dans la réalisation de cette tâche, je vous souhaite à toutes et à tous chance, ténacité et satisfaction personnelle.

Je lève mon verre à votre santé : votre visite témoigne de votre sympathie pour la Suisse, Berne et la Commission suisse de recours en matière d'asile. Je vous en remercie de tout cœur et présente à l'Association internationale des juges en matière de droit des réfugiés tous mes vœux de succès pour la suite de la Conférence.

SÖREN JESSEN-PETERSEN

Assistant High Commissioner for Refugees

Mr. Chairman,
Distinguished Justices and Judges,
Ladies and Gentlemen,
Mesdames et Messieurs,

I am pleased and honoured to have the opportunity tonight to address, on behalf of Mrs. Sadako Ogata, the High Commissioner for Refugees, such a distinguished gathering of more than 200 judges representing more than sixty countries.

An *independent and competent judiciary* is often the first safeguard for persecution not to occur or at least not to be sanctioned. When flight occurs, the judiciary is the guarantee for a refugee's access to a country of asylum and to fair status determination procedures, to avoid undue detention, to ensure the respect for the fundamental principle of non refoulement, and to ensure the implementation of civil and social rights for refugees. Indeed, your role is precious – for UNHCR, for the refugees and the asylum-seekers under our concern.

As you know, UNHCR is mandated to lead and co-ordinate international action for the *world-wide protection of refugees* and the resolution of refugee problems.

Au début de cette année, le nombre de personnes relevant de la compétence du HCR s'élevait à 22, 3 millions, ce qui représente une légère augmentation par rapport à l'année précédente essentiellement liée au conflit du Kosovo. Les trois continents asiatique, africain et européen rassemblent la majeure partie de ces personnes qui se décomposent ainsi: 11, 7 millions de réfugiés, 2,5 millions de rapatriés, 1,2 million de demandeurs d'asile et presque 7 millions de personnes déplacées et autres personnes relevant de la compétence du HCR. A ces chiffres, il faut malheureusement ajouter des millions de personnes qui ont fui la violence dans leurs propres pays mais qui ne sont pas de la compétence du HCR, surtout – mais pas exclusivement – en Afrique.

In my brief remarks tonight I should like to provide you with a broader view of the *major challenges* facing UNHCR today.

Since the end of the Cold War, there has been a dramatic change in the *context* in which humanitarian organisations - and not the least UNHCR - operate. *First*, the *nature of war* has changed from international to mostly internal conflicts, often with a strong ethnic component. *Second*, increasingly dis-

placement has become the *objective*, rather than the consequence – of the fighting, thereby complicating both protection and solutions. *Third*, these wars have had devastating consequences on civilians – not only in terms of the brutalisation of conflict but also *scale of displacement*. As a result the number of persons of concern to UNHCR has shot up from 5 million in 1980 to 15 million in 1990 to as I mentioned *22 million* today. *Fourth*, not only the size but also the *speed* of some of these population movements has been astonishing: at the end of the Gulf War, 2 million Iraqi Kurds fled in the a matter of 10 days; in 1996, 600,000,000 Rwandese rushed back home in 2-3 days; last year, one million ethnic Albanians escaped – or were deported – from Kosovo and subsequently went back there all in the space of 4-5 months. And *fifth*, the *search for solutions* has become increasingly difficult for two reasons. *One*, many of the refugees are going back to countries where peace is fragile and the root causes of the original flight have not been resolved. Take former Yugoslavia, for example. The return of minority groups back to their home areas there continued to be a *major challenge* four years (!) after the signature of the Dayton Peace Agreement. Why? Because many local politicians have continued to resist such returns, which they view as a reversal of the goals – in this case ethnic cleansing - they pursued during the war. It is only in recent months that we have seen an encouraging breakthrough in this respect. And *two*, the physical infrastructure in these countries has often been devastated, making the successful reintegration of the returnees very complicated.

Permettez-moi de vous décrire brièvement ce que le HCR considère comme les principaux défies à relever:

Tout d'abord, il est primordial que la communauté internationale établisse des mécanismes plus efficaces de résolution des conflicts. Au cours des années 90, les grandes puissances ont trop souvent choisi de remédier aux conséquences des conflicts plutôt que de s'attaquer à leurs causes politiques profondes. En Africa centrale, par exemple, en dépit des avertisements du HCR et d'autres institutions d'aide concernant l'imminence d'une catastrophe, le monde n'a pas réussi à prévenir le génocide de 1994. L'aide humanitaire peut sauver des vies mais ne peut pas arrêter les guerres. Seule une action politique ou régionale peut y parvenir.

Two, while indeed much more must be done to prevent and resolve conflicts, humanitarian crises will nevertheless continue to occur in the future – albeit hopefully with less frequency and less brutality – and people will thereby continue to be compelled to flee for their safety. It is therefore critical that the *right to seek asylum* be upheld. Unfortunately, in many parts of the world, the institution of asylum is being undermined. Many governments, confronted with an upsurge of people knocking at their doors, whom they have less capacity to absorb than in the past, and intimidated by xenophobic calls, are building barriers to keep people out. In this context, it is critical that states develop and maintain *distinct policy responses* to the separate issues of asylum and migration. There is a need to move from a narrow focus on how to *close* the asylum window to a broader focus widening the windows of *oppor-*

tunities – through development aid, increased trade, and orderly migration. In this context, the consultations launched by UNHCR with Governments on the 1951 Convention on refugees in the context of the 50th anniversary of our organisation, which Ms. Erika Feller briefed you on yesterday, represent a unique opportunity to pursue this goal.

Three, the irony in today's world is that if you seek safety across a border, international structures and protection are in place. Persons fleeing inside their own country, however, are most often left to fend off for themselves – as in most cases national authorities have neither the will nor the capacity to protect and assist the IDPs. It is therefore key that the international response to the needs of *internally displaced persons* (IDPs) be enhanced. A UN team will over the coming months visit a number of selected situations to identify gaps in deliveries to IDPs. In addition to supporting this inter-agency effort, UNHCR has earlier this year committed itself to greater involvement with IDPs within certain parameters. The precise nature of our role in a specific operation will depend on the needs of the IDPs, the activities of other organisations, and the political and operational environment. While lending our protection expertise to such involvement, we will pursue a solutions-oriented strategy and will therefore give priority to situations where a political process is underway or being contemplated.

Fourth, more must be done to address the increasing problem of *insecurity* in refugee and returnee-populated areas created particularly by the often "mixed" nature of refugee outflows in recent years – namely "defeated" Government, Army or groups fleeing across the border together with genuine refugees, including women and children (such as was the case in the Great Lakes in 1994 and in Timor last year). UNHCR has devoted a considerable amount of time in the past year developing a "ladder of options", in other words of different types of measures, ranging from *soft* to *medium* to *hard*, that the international community can take to deal in a more systematic and effective manner with situations of insecurity in refugee and returnee-populated areas. The focus is now on operationalising this ladder of options, with a focus on *preventive* measures such as the deployment of Humanitarian Security Officers in new emergencies. Inextricably linked to refugee security is evidently the safety of *humanitarian staff*. As the tragic killings of three of our UNHCR colleagues in West Timor and another in Guinea last month painfully showed, while armed elements are present in camps not only the refugees but also our own colleagues will not be safe. UNHCR is currently undertaking a major review aimed at improving the security of its personnel.

Fifth, the serious issue of *reduced funding* for humanitarian operations in recent years must be addressed. In the case of UNHCR, the gap between, on the one hand, the needs on the ground and, on the other, the resources to address these, remains a major concern. Against the original budget of US$ 1 billion for UNHCR approved by our Executive Committee for 2000, for example, only some US$ 850 are likely to be received. Such resource constraints evidently severely affect our ability to implement agreed strategies and plans

in the Field and to effectively respond to new developments. Most worrying of all, it hurts the refugees.

And *sixth*, the often existing "gap" between humanitarian and *development assistance* in countries emerging from war should be addressed. In many post-conflict situations today reconstruction investment remains too slow in coming – if it comes at all – which in turn hampers the effective and sustainable reintegration of the returnee populations. Mindful of this critical problem, last year the High Commissioner for Refugees and the President of the World Bank launched the so-called "Brookings Process" which aims to "bridge" the institutional and resource gaps between emergency humanitarian aid and development, particularly in "low-donor-interest" situations. We have tried to "pilot test" this concept in West Africa – but the response in terms of the required financial contributions has been disappointing.

Pour conclure, permettez-moi de vous faire part d'une évidence: 50 ans après la création du HCR, notre tâche ne s'est pas simplifiée. Un environment en mutation constante nous présente de nouvelles difficultés, de nouveaux dangers et de nouveaux défis. Pour y faire face, il nous faut une action plus résolue de la part des gouvernements, de la société civile – et des acteurs humanitaires. En tant que gardiens des droits des refugiés et des demandeurs d'asile dans vos pays respectifs, vous tous qui êtes réunis ici ce soir avez un rôle clé à jouer pour garantir une meilleure protection aux millions de refugiés et de demandeurs d'asile de par le monde. Votre rôle est une noble démonstration du thème principal de notre 50ème anniversaire – c'est-à-dire le respect. Le respect des réfugiés, de leurs droits, de leur dignité – de la primauté du droit.

Merci beaucoup.

A. PERSECUTION BY NON-STATE AGENTS

A. PERSECUTION PAR DES AGENTS NON-ETATIQUES

NON-STATE AGENTS OF PERSECUTION AND THE INABILITY OF THE STATE TO PROTECT

Walter Kälin*

1. INTRODUCTION

Asked to identify what developments have had the most profound impact on refugee law during the past ten years, many would mention the decline of State power all over the world and the emergence of non-state agents of persecution as among the most important trends. The nature of persecution is changing, evidenced by the increasing frequency of persecution of minorities by their neighbors belonging to the majority; ethnic cleansing or even genocide carried out by militias; terrorist attacks and killings by groups claiming to fight in the name of a religious creed, or attacks on the civilian population by insurgent groups fighting for independence. Although statistics are not available, it is highly likely that the majority of today's refugees are fleeing dangers emanating from non-state agents.

Host States differ to a considerable extent in their responses to this challenge. In Africa, the 1969 OAU Convention on Refugees[1] recognizes the relevance of persecution by third parties. It states that someone compelled to flee the consequences of "events seriously disrupting public order in either part or the whole of his country of origin or nationality" is considered to be a 'refugee'[2] regardless of who is responsible for these disturbances. This wide definition of 'refugee' is also accepted in Latin America on the basis of the 1984 Cartagena Declaration[3]. In contrast, there is a lack of consensus in Europe which found its expression, inter alia, in the 1996 EU Joint Position on the harmonized application of the term 'refugee'. There it is acknowledged that

* Professor of Law, University of Bern. I would like to thank Krista Nadakavukaren Schefer, Dr. iur., J.D. and Nadia Yakoob, J.D. for their editorial assistance. An edited version of this article will appear in 15 Georgetown Immigration Law Journal _ (forthcoming). (The journal may be contacted at <gilj@law.georgetown.edu> or via post at 600 New Jersey Avenue, Northwest, Washington, D.C. 20001, U.S.A.).

[1] OAU Convention Governing the Specific Aspects of Refugee Problem in Africa, 10 September 1969.

[2] Article I(2), OAU Convention.

[3] Cartagena Declaration on Refugees, adopted at a colloquium entitled "Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios" held at Cartagena, Colombia from 19 - 22 November 1984.

persecution carried out by third parties constitutes persecution as defined in Article 1A(2) of the 1951 Convention on the Status of Refugees[4] (CSR51) if it "is encouraged or permitted by the authorities"; in contrast, where "authorities fail to act" cases will be decided "in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate"[5].

This is not the place to describe the practice of European States regarding the application of Article 1A(2) CSR51 in the context of non-state persecution in detail[6]. It is sufficient to mention that courts in Europe distinguish *four situations* when dealing with this issue[7]:

a) Persecution is carried out by private parties but are instigated, condoned or tolerated by the State. There is consensus that persons fleeing such persecution are refugees because the State is unwilling to protect such victims.

b) Non-state agents of persecution have gained such control over the whole or part of the country that they can be regarded as de facto authorities or "quasi-state" organs. State practice is uniform in agreeing that persons fleeing persecution carried out by such de facto authorities are within the meaning of refugee as defined by CSR51, but practice differs in determining the necessary conditions for a group to become a de facto authority[8].

c) The State does not condone persecutory measures carried out by non-state agents but is unable to provide protection against them. This is the main area of disagreement. While many States grant refugee status in such situations, others, such as Germany[9], Switzerland and France[10] deny asylum because they maintain that such measures do not amount to persecution in the sense of Article 1A(2) CSR51.

d) Persecutory measures are carried out by non-state agents in a situation where the State has collapsed and where no State authorities exist that

[4] Convention on the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137

[5] Joint position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, Official Journal of the European Communities No L 63/2, 13.3.96, Section 5.2.

[6] See, e.g., the comprehensive overviews in: Ben Vermeulen/Thomas Spijkerboer/Karin Zwaan/Roel Fernhout, Persecution by Third Parties, University of Nijmegen, Centre for Migration Law, Nijmegen, May 1998 and ECRE, Research Paper on Non-State Agents of Persecution, London, November 1998, updated in autumn 2000 (available at www.ecre.org).

[7] I prefer to use the term "non-state agents of persecution" as the notion of "persecution by third parties" linguistically also covers persecution by State authorities other than those of the country of origin (e.g., authorities of another country occupying one part of the country of origin).

[8] See, e.g. the overview in Vermeulen et al. (supra note 6), at 36.

[9] See Reinhard Marx, The Notion of Persecution by Non-State Agents in German Jurisprudence, in this volume, pp. 60.

[10] For the French case law see Frédéric Tiberghien, Persecution by non Public Agents, in: International Association of Refugee Law Judges, Refugee and Asylum Law: Assessing the Scope for Judicial Protection, Nijmegen 1997, pp. 105-122 and the contribution by Combarnous, in this volume pp. 75.

could protect the victims. Here, State practice usually follows the approach taken in situation (c). Those countries granting refugee status where a State is unable to offer protection accept the relevance of persecution in the absence of a State as well. In contrast, those States refusing to recognize persecution by non-state agents in situations of inability to protect deny asylum a fortiori where the State has collapsed. However, it is also possible to argue that a distinction between situations (c) and (d) must be made[11].

This article attempts to analyze the two situations (c) and (d) from a conceptual perspective and to evaluate the different jurisprudential approaches in the light of Article 1A(2) CSR51. The paper first describes and criticizes the different approaches taken by European courts and then goes on to show that the gap between them can be bridged if one takes seriously the basic premises of the notion of 'refugee' as defined by the 1951 Convention.

2. PERSECUTION IN CASES OF INABILITY OF THE STATE TO PROVIDE PROTECTION

2.1 THE ACCOUNTABILITY VIEW

2.1.1 Case Law

Courts refusing to grant refugee status in situations where the State is unable to provide protection against persecution by non-state agents stress that responsibility of the State of origin for the acts inflicted upon the victim is a constitutive element of persecution in the sense of Article 1A(2) CSR51. Usually, courts promoting this "accountability view"[12] do not give detailed explanations as to why it is the correct approach. German courts, however, have not shied away from this task.

Especially clear is the reasoning in two decisions of the German Federal Administrative Court. In a 1995 judgment confirming the refusal to grant asylum to a Muslim Bosnian family originating from the Serb controlled areas of Bosnia-Herzegovina, the Court argued that States are the holders of the monopoly of power, i.e. the permanent and effective jurisdiction over the population living on a given territory is that based on the sovereign power granted to official authorities to use force where necessary to safeguard public order[13]. Persecution, in this perspective, is the abuse of such jurisdictional power of the State. Therefore, persecution can only be committed by agents of

[11] See Vermeulen et al. (supra note 6), at 24-26 describing the conflicting case law.

[12] The term which aptly summarizes this approach is used by Vermeulen et al. (supra note 6) at 11.

[13] Bundesverwaltungsgericht, Judgement of 6 August 1996, in: EZAR 200 Nr. 32, at 3.

the State or by groups that have replaced the State as holder of that power and have become a de facto government[14]. Two years earlier, the same Court had stressed that the notion of political persecution as persecution by the State was not only inherent in the then Article 16 Basic Law[15], but was also a part of the definition of Article 1A(2) CSR51. It argued that the drafters of the Convention only wanted to recognize categories of refugees who fled persecution by States; furthermore, it stressed that such an approach was in line with the goal and purpose of the Convention as an instrument protecting persons whose relationship of trust with the State of origin no longer exists[16].

2.1.2 Critique

This approach is problematic in several regards. First, the requirement of a direct link between the agents of persecution and the State cannot be based on an interpretation of the 1951 Convention in accordance with the principles of interpretation[17] as codified in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties[18], requiring that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The wording of the 1951 Convention does not require any direct responsibility of the State. The notion of "persecution" in Article 1A(2) CSR51 is qualified only by the motives of persecution ("race, religion ..."), and any reference to the source of such persecution is lacking. Regarding context, Article 33(1) CSR51 is relevant insofar as it implicitly defines "persecution" by stating that no refugee shall be returned "to the frontiers *of territories where* his life or freedom would be threatened on account of" any of the relevant motives of persecution[19]. Again, the role of the State of origin is not mentioned; all that is necessary is the link between the persecutory measures and a given territory. Such a reading is consistent with the purpose of the 1951 Convention to "assure refugees the widest possible exercise of these fundamental rights and freedoms" and to recognize "the social and humanitarian nature of the problem of refugees"[20]. As has been stressed by Türk, to read a requirement of State accountability into the refugee definition "would in essence formulate an additional requirement, which was not foreseen originally and cannot be justified with reference to the actual wording of the refugee definition"[21]. Such an interpre-

[14] Id. at 4.
[15] Today Article 16a(1) Basic Law.
[16] Bundesverwaltungsgericht, Judgement of 18 January 1994 in: EZAR 230 Nr. 3, at 4-5.
[17] This has been stressed by several authors. See, e.g., Guy Goodwin-Gill, The Refugee in International Law, 2nd ed., Oxford 1996, p. 367; Vermeulen et al. (supra note 6) at 12-13; Volker Türk, Non-State Agents of Persecution (forthcoming), section 4.
[18] Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 336.
[19] Emphasis added.
[20] First and fifth preambular paragraph. According to Article 31(2), the preamble is relevant for the interpretation of a treaty provision, too.
[21] Türk (supra note 17), section 4.3.

tation, thus, arguably contradicts the "good faith" requirement of Article 31(1) of the Vienna Convention on the Law of Treaties.

Second, while it is certainly true that persecution by or with the acquiescence of State agents was in the forefront of concerns of the drafters of the Convention, it is also true that historically the notion of 'refugee' was not necessarily confined to such situations. While in the 19th century, asylum was granted to "political offenders" only, who by definition were victims of State persecution[22], the situation changed after World War I when the League of Nations developed its refugee protection regime[23]. This regime was confined to those particular groups of refugees who became the objects of one of the agreements of this organization. These treaties all contained definitions that were based on two elements: first, a certain national or ethnic origin; and second, a lack of protection by the country of origin. Thus, according to the Agreement relating to the Issue of Identity Certificates to Russian and Armenian Refugees of 12 May 1926[24], e.g., "[a]ny person of Russian origin (...) who does not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired another nationality" was considered to be a refugee[25]. "Protection of the Government" meant diplomatic and consular protection abroad. Substitute protection by the League of Nations, therefore, implied issuing travel documents, certifying the identity, civil status, profession and the like, or recommending the individual to the authorities of the country of sojourn[26]. In legal terms, the lack of such protection was regarded as the very essence of being a refugee[27]. As Heuven Goedhart, the first UN High Commissioner for Refugees, stressed, diplomatic protection "secures for aliens those minimum rights which are ascribed to aliens according to international law. This protection is lacking in the case of refugee: he is an alien in every country, and an alien who lacks the protection of his country of nationality"[28]. Contemporary refugees themselves emphasized the crucial role of diplomatic and consular protection by pointing out that they "enjoy no legal protection such as is accorded to the citizens of every

[22] Political offenders were those who were, or feared being, prosecuted for political offenses in their country of origin. See S. Prakash Sinha, Asylum and International Law, The Hague 1971, pp. 18-9.

[23] For an overview see Sir John Hope Simpson, The Refugee Problem, Report of A Survey, London/New York/Toronto 1939; Claudena M. Skran, Refugees in Inter-War Europe, The Emergence of a Regime, Oxford 1995; James C. Hathaway, The Evolution of Refugee Status in International Law: 1920-1950, in: 33 International and Comparative Law Quarterly (1984), pp. 348-370.

[24] 89 L.N.T.S. (League of Nations Treaty Series) 47.

[25] Similar definitions were used in the Arrangement concerning the Extension to other Categories of Refugees of Certain Measures taken in favour of Russian and Armenian Refugees, 30 June 1928, 89 L.N.T.S. 63, the Provisional Arrangement concerning the Status of Refugees.

[26] Gerrit Jan van Heuven Goedhart, The Problem of Refugees, Academy of International Law, 82 Recueil des Cours 1953 I, Leyden 1954, p. 284, 286.

[27] See Hathaway (supra note 23) at 358-360.

[28] Van Heuven Goedhart (supra note 26)at 283-4.

country by their diplomatic representatives. This imposes a heavy burden upon their lives ..."[29].

The instruments of the League of Nations did not require responsibility of the State of origin for the persecution, and the relevant definitions covered refugees regardless of the source of persecution. Thus, e.g., "Jewish refugees who left Ukraine during the troubled period of the Civil Wars"[30] of 1919 or "victims of the Russian and Ukrainian famines of 1920-22"[31] met the requirements of this definition even if they were victims of generalized violence during this period provided they did not get the protection by the then Soviet government in Russia. Obviously, in these cases, the country of origin's denial of diplomatic and consular protection abroad was taken as sufficient evidence that the State had severed the relationship of trust and loyalty between itself and the individual.

Later, Annex A of the 1946 Constitution of the International Refugee Organisation[32] (IRO) stated that the term "refugee", inter alia, "applies to a person ... who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality". This provision -- which directly influenced Article 1A(2) CSR51 -- did not require the involvement of the State, regarding any kind "of events subsequent to the outbreak of the second world war" as sufficient cause of flight. It thereby clearly distinguished the factors causing the flight from the requirement that the refugee "is unable or unwilling to avail himself of the protection of the Government of his country" of origin.

The drafters of the 1951 Convention, who did not discuss the issue of agents of persecution[33], must have been aware of this historical background. In this regard, it is significant that early commentators of Article 1A(2) CSR51 like Robinson[34] or Weis[35] did not mention the requirement of agents

[29] Letter from Russian Refugee Organizations in London to Lord Robert Cecil of 13 August 1923 (NBKR 4.450), reprinted in Skran (supra note 23) at 103.

[30] Simpson (supra note 23) at 83-84.

[31] Claudena M. Skran, Refugees in Inter-War Europe, The Emergence of a Regime, Oxford 1995, p. 112 and Louise W. Holborn, The International Refugee Organization, A Specialized Agency of the United Nations, Its History and Work 1946-1952, London/New York/Toronto 1965, p. 3.

[32] Constitution of the International Refugee Organisation, 15 December 1946, 18 U.N.T.S. 3.

[33] Vermeulen et al. (supra note 6) at 15.

[34] Nehemiah Robinson, Convention Relating to the Status of Refugees – Its History, Contents and Interpretation, A Commentary (Institute of Jewish Affairs) New York 1953 speaks occasionally about persecution by the State (e.g., pp. 51 and 53) but never states that this is a requirement. Interestingly enough, Robinson, pp. 53-4 discusses a case where the responsible State is unable to protect. Regarding the situation where someone is persecuted in a semi-independent territory such as a protectorate, he stresses that under the 1951 Convention it would be the parent State that is responsible for protecting the victim and then asks: "What value can be attached to the protection by the parent state if the persecutee cannot return to his permanent residence because the protecting state has no authority to intervene if he suffers persecution? It would seem that the Convention did not consider such cases and that they have to be treated on the basis of realities. In other words, if 'protection' becomes a mere formality, the person involved ought to be regarded – if he

of State. It is also significant that even German courts (including the Federal Administrative Court) supported granting refugee status to victims of non-state persecution during several decades up to the 1980s[36]. In any case, there is no positive evidence that the drafters of the Convention wanted to exclude cases of persecution by non-state actors from the scope of the refugee definition. At the same time, however, there also exists no evidence that they positively intended to protect victims of non-state persecution. Thus, the historical argument remains inconclusive. In any case, it cannot be advanced against an interpretation of "persecution" that recognizes persecutory measures by non-state agents in situations where the State is unable to afford protection.

Third, the proposition of the German Courts that "persecution" is, by definition, limited to an abuse of State power, might have some validity within the framework of German constitutional law, but cannot be accepted on the level of international law. The German reasoning goes back to the notion of "political persecution" that entitles its victim to acquire asylum according to Article 16a(1) German Basic Law. In a landmark decision, the German Federal Constitutional Court, in 1989, stressed that persecution is only "political" in the sense of this provision if it is based on State measures directed against the victim's political opinion, religious beliefs or similar inalienable characteristics. According to the Court, the right to asylum as enshrined in the German Constitution is based on the conviction that no State is entitled to violate human dignity by disregarding the basic human rights of the victim. Thus, political persecution must emanate from agents of a sovereign power. It is the State who is the representative of such sovereign power, and by exercising it the State ensures peace and enables the individual to lead a life of dignity in community with others. Political persecution is the other side of the coin because singling out some individuals and removing or isolating them from the "overall order of peace" ("*übergreifende Friedensordnung*") created by public order is an abuse of sovereign power[37]. This reasoning is firmly rooted in a particularly German understanding of the notion of "political" that is inherent in traditional German concepts of constitutional and administrative law.

At the turn of the 20th century, Georg Jellinek, one of the founders of legal positivism in the area of public law and an important defender of the le-

so desires – as a refugee even if the protecting state is willing to accord him protection and the refugee has no valid reason to refuse accepting it."

[35] See, e.g., Paul Weis, Le concept de réfugié en droit international, 87 Journal du Droit International (1960), pp. 929 – 995, who stresses on p. 971 that no definition of the term persecution can be found and that this gap probably was intentional. There is no reference that the agent of persecution must be an agent of State.

[36] For the early 1960s see the discussion of German case-law by Atle Grahl-Madsen, The Status of Refugees in International Law, Vol. I, Refugee Character, Leyden 1966, pp. 190-191; as examples of later cases see, e.g., Bundesverwaltungsgericht, Judgement of 2 July 1980 in: EZAR 200, No. 1, p. 11.

[37] Bundesverfassungsgericht, Judgement of 10 July 1989, BVerfGE 80, 315, at 333-335.

gitimacy of the authoritarian rule of the German emperor[38], defined the State as a corporation of men settled on a given territory that has *original* power to rule[39]. The most important consequence of this definition is the idea that State power needs no source of legitimacy external to it (such as natural law, social contract or the democratic will of the people) and what is powerful in reality sets the norm (normative force of facticity)[40]. "Political" is everything related to that power; therefore, as Jellinek put it, "political" means "governmental", and the notion of "State" is inherent in the notion of "political", as all power to rule emanates from the State and its sovereignty only[41].

Carl Schmitt, an important and highly controversial constitutional theorist of the Weimar Republic, criticized the positivists but did not give up the equation of "State" and "political". In 1927, he even went as far as reducing the notion of political to the distinction to be made by the State between "friend and enemy"[42], thus paving the way for ideas facilitating the rise of the fascist "Führerstaat". In this context, he stressed that organizations such as churches or trade unions cannot take political actions as they lack the power and determination to wage war against their enemies as ultima ratio[43].

After World War II, the reduction of the notion of "State" to the idea of sovereign power to rule was abolished by German legal theory. The idea, however, that the notion of "political" is confined to the sphere of the State and has nothing to do with struggles within society about public affairs or the role of different groups in the governance of the country, continued to be defended by eminent post-war legal theorists like Scheuner[44]. Of course, this notion of "political" is very narrow and not shared by legal theory in other States where, within the framework of a tradition going back to the ancient Greek notion of "politikos", i.e. civics, "political" refers not only to the State and its government but also to public affairs in general[45].

Consistent with this wider notion of "political", contemporary international criminal law acknowledges that non-state agents can also carry out political, religious, ethnic and similar persecution. The crime of persecution on political , racial and religious grounds is punishable as a crime against humanity if carried out as part of an attack on the civilian population even if the

[38] See Ulrich Scheuner, Das Wesen des Staates und der Begriff des Politischen in der neueren Staaatslehre, in: Konrad Hesse, Siegfried Rieke, Ulrich Scheuner (Eds.), Staatsverfassung und Kirchenordnung, Festgabe für Rudolf Smend, Tübingen (J.C.B. Mohr Paul Siebek), 1962, pp. 232 - 233.

[39] Georg Jellinek, Allgemeine Staatslehre (General Theory of the State), 3d ed., Berlin 1929, pp. 180-181 (first published in 1900).

[40] Id. at 341-343.

[41] Id., p. 180 ("'Politisch' heisst 'staatlich'; im Begriff des Politischen hat man bereits den Begriff des Staates gedacht. Alle Herrschaftsmacht im Staate kann nur vom Staate selbst ausgehen").

[42] See Carl Schmitt, Begriff des Politischen, 3d ed., Hamburg (Hanseatische Verlagsanstalt) 1932, pp. 11-12.

[43] Id. at 25-26.

[44] See, e.g., Scheuner (supra note 38) at 253.

[45] See The New Oxford Dictionary of English, Oxford 1998, p. 1435 defines "political" as "of or relating to the state, the government, or the public affairs of a country."

perpetrators are not acting on behalf of a government[46]. The leading commentary on the Rome Statute broadly defines persecution on "political" grounds as persecution for "at least the existence of a difference of opinion" concerning public affairs issues[47].

Finally, the accountability approach cannot be reconciled with the neutral character of the institution of asylum[48]. In general international law, the granting of asylum is traditionally regarded not as an unfriendly act vis-à-vis the country of origin, but as an exercise of territorial sovereignty allowing each State to decide freely about the admission of aliens[49]. In contrast, the accountability view presupposes a violation of basic duties by the country of origin, turning every grant of asylum into an implicit accusation against that country.

For all these reasons, it can be concluded that the arguments in favor of the accountability approach are hardly convincing.

2.2 The Protection View: "Unable to Avail Himself ..."

2.2.1 The Theory

The so-called "protection view"[50] stresses that the purpose of the CSR51 is to help victims of persecution in need of international protection. That need not only exists in cases where the State is unwilling to protect the victim of non-state persecution, but also where the State is unable to do so. Proponents of this view base their argument on the requirement of Article 1A(2) CSR51 that a refugee is a person who not only has left the country of origin owing to a well-founded fear of persecution but, at the same time is also "unable or, owing to such fear, ... unwilling to avail himself of the protection of that country". They argue that in the case of an inability of the country of origin to protect the refugee he is "unable ... to avail himself of the protection of that country".

This position finds support in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status which states that, although "persecution is normally related to action by the authorities of a country", it also exists

[46] Statute of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Article 5 (h); Rome Statute of the International Criminal Court of 17 July 1998, Article 7(1)(h).

[47] Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, Baden-Baden, 1999, pp. 148-149.

[48] Vermeulen et al. (supra note 6) at 17.

[49] See, e.g., Atle Grahl-Madsen, Territorial Asylum, London/Rome/New York 1980, pp. 12-13.

[50] Vermeulen et al. (supra note 6) at 11.

where these authorities "prove unable to offer effective protection"[51]. Since then, UNHCR has reiterated this position on many occasions[52].

2.2.2 Case Law

The "protection view" is especially well developed in common law jurisdictions. An excellent example is the 1991 Zalzali decision by the Canadian Federal Court of Appeal:

> [**23] The definition of a "refugee" refers to the fear "of persecution", without saying that this persecution must be "by the government". This omission seems to me to be extremely significant: I do not see by what rule of interpretation the meaning of the word "persecution" should be limited, ...
>
> [**24] That is not all. ... [T] he natural meaning of the words "is unable" assumes an objective inability on the part of the claimant, and the fact that "is unable" is, in contrast to "is unwilling", not qualified by "by reason of that fear", seems to me to confirm that the inability in question is governed by objective criteria which can be verified independently of the fear experienced, and so independently of the acts which prompted that fear and their perpetrators. Seeing a connection of any kind between "is unable" and complicity by the government would be to misread the provision.[53]

The House of Lords has taken a similar, but somewhat more elaborated, approach in its recent Horvath decision[54]. Lord Hope of Craighead correctly recalled that the "[t]he general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community"[55]. He also recalled that regarding the question as to whether victims of non-state persecution are refugees, it is important to distinguish between two elements of the 'refugee' definition: (1) the person concerned must have a well-founded fear of persecution; and, (2) , he must be unable or unwilling to avail himself of the protection of the country of origin. The first element requires a "fear test", the second a "protection test".

Building on this approach, Lord Lloyd of Berwick (who had originally developed this terminology[56]) stressed that the notion of international protection as surrogate protection is helpful in finding a solution consistent with the

[51] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Reedited Geneva 1992 (Doc. HCR71P/4/Eng/Rev.2), p. 17, para. 65.

[52] See, e.g., Agents of persecution - UNHCR Position 1995 (available on UNHCR RefWorld CD-ROM, July 1999, No 37a080df6); UNHCR, State practices, An Overview of Protection Issues in Western Europe: Legislative Trends and Positions taken by UNHCR, 1 European Series 3, Geneva, August 1995, pp. 28-30.

[53] Zalzali v. Canada (Minister of Employment and Immigration)], Federal Court of Appeal, 1991 ACWSJ LEXIS 17678; 1991 ACWSJ 20778; 27 A.C.W.S. 3d 90, April 30, 1991.

[54] Opinions of the Lords of Appeal for Judgment in the cause Horvath (A.P.) (Appelant) v. Secretary of State for the Home Department (Respondent), on 6 July 2000 (http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000706/horv-1.htm).

[55] Id.

[56] Lord Loyd of Berwick in Adnan v. Secretary of State for the Home department [1999] 1 A.C. 293, 304C-E.

language of Article 1A(2) CSR51: if the country of origin can make protection available to victims of persecution by non-state agents[57], "there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of their own country? But if, for whatever reason the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied."[58] Therefore, "the principle of surrogate protection finds its proper place in the second half of Article 1A(2). If there is a failure of protection by the country of origin, the applicant will be *unable to avail himself* of that country's protection."[59] Thus, Lord Lloyd of Berwick also based his argument on the "unable to avail himself"-clause.

2.2.3 Critique

There is one fundamental problem with the approach taken by proponents of the "protection view". Historically, the notion of "is unable or, owing to such fear, ... unwilling to avail himself of the protection of that country" does not refer to "internal" protection, (i.e., protection provided inside the country of origin) but rather to "external" protection (i.e., diplomatic or consular protection granted by the country of origin abroad). As mentioned above, this clause goes back to Annex A of the IRO Constitution where it clearly referred to "external" protection, thus seeing a refugee as "a person who has no consul or diplomatic mission to whom to turn, and who does not benefit from reciprocal agreements between countries maintaining friendly relations which protect the nationals of one country living on the territory of another"[60].
The same understanding prevailed during the drafting the 1951 Convention as is well established in early writings about this topic. According to Weis, e.g., these words pertain first to stateless refugees but they also aim at refugees who have a nationality and whose government denies them a passport or any other protection[61]. This obviously refers to diplomatic and consular protection[62]. Grahl-Madsen uses the same approach[63]: protection refers to "external" protection, i.e., the possibility to enlist

[57] Here, Lord Lloyd of Berwick insists that the notion of „persecution" does not contain an element of absence of State protection but has to be understood in its broad meaning. In this, he differs from Lord Hope of Craighead who came to the conclusion that there is no persecution where the State is able to provide protection against non-state actors.
[58] Lord Lloyd of Berwick in Horvath, quoting himself in Adnan (supra note 56) at 305-306.
[59] Id. (emphasis added).
[60] Holborn (supra note 31) at 311.
[61] Weis (supra note 35) at 975 (referring to UN Doc E/1618, p. 37).
[62] Id.
[63] Grahl-Madsen (supra note 36) at 254-261. See also his comments at 381 – 385.

> "the services of the authorities of his home country in some way or another in order to reap some benefit due to nationals of that country. He may do this by applying for and receiving a national passport (...) or a certificate of nationality, for the purpose of regularizing his stay in a foreign country on the basis thereof, in order to be able to invoke a treaty of reciprocity, or to claim other benefits due to persons of his nationality, or for some similar reason. In more rare cases he may request his national authorities to intervene in his favour with the authorities of another State."[64]

He mentions case law that deals with questions linked to issues of passports and other contacts with the embassy of the country of origin[65]. These cases confirm the view that the second half of the definition in Article 1A(2) CSR51 refers to "external" protection only, i.e. to the relationship between refugee and country of origin outside the territory of that State. Similarly, the then High Commissioner for Refugees, Poul Hartling, emphasized in 1973 that "lack of protection (*in the sense of normal consular and diplomatic protection*) of the refugee and the need to establish a substitute system of protection was very much linked with the manner in which the refugee was to be defined"[66]. These views are supported by the drafting history where the Ad Hoc Committee stated that "'unable' refers primarily to stateless refugees but includes also refugees possessing a nationality who are refused passports or other protection by their own government"[67]. Finally, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, although not defining "protection", gives as sole examples of a lack of protection the "refusal of a national passport or extension of its validity, or denial of admittance to the home territory"[68], thus restricting the notion to its external aspects.

If the notion of being "unable to avail himself ..." refers to external protection only, then the argument used by proponents of the "protection view" is considerably weakened. Conceptually, it is possible that a victim of persecution by non-state actors that cannot be controlled by the authorities may be forced to leave his or her country of origin but is able and willing to live abroad as an alien enjoying full external protection by his country. In such cases, he or she would be in a situation similar to that of many migrants who are forced to go abroad in order to survive economically but are not in need of surrogate international protection. Such a victim of non-state persecution would get a passport, be able to fully profit from bilateral treaties between the country of origin and other countries in areas such as freedom of movement and establishment, exchange of students and the like, and call on his embassy

[64] Id. at 255. See also id. at 261 where he says that the "test of non-availability of protection is ... meaningless in the case of stateless refugees" because "it is a long-established rule of customary law that stateless persons do not enjoy the diplomatic protection of any State".
[65] Id. at 255, referring to French case law.
[66] Poul Hartling, Concept and Definition of "Refugee" - Legal and Humanitarian Aspects, Inaugural Lecture given on 23 April 1979 at the Second Nordic Seminar on Refugee Law, University of Copenhagen, unpublished manuscript, p. 8, referring to the definition in Article 1A(2) CSR51. Emphasis added.
[67] UN Doc E/1618, p. 39.
[68] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (supra note 51) at 23, para. 99.

if he or she gets into difficulties with authorities abroad. Therefore the "protection view" as represented by the Zalzali[69] and the Horvath decision[70] can be criticized for putting too much emphasis on the literal meaning of the text of Article 1A(2) CSR51 and, thus, for providing a "naive" reading of the Convention. It does not sufficiently take into account the historical background of Article 1A(2) CSR51 and, thus, may not convince proponents of the accountability view insisting on the relevance of the original meaning of this treaty[71].

3. BRIDGING THE GAP BETWEEN PROTECTION AND ACCOUNTABILITY VIEW

3.1 JUSTIFYING THE PROTECTION VIEW

In international law, States are free to choose how they implement their obligations at the domestic level, as long as the treaty in question does not prescribe a specific conduct and the State reaches the required result. Therefore, it is not necessary that all States follow the same doctrine: Both theories, the "accountability" as well as the "protection" view, can be applied provided that the same types of persons are granted refugee status. In this regard, the result can only be achieved by recognizing, as refugees, also those who are persecuted by non-state agents in situations where the State is unable to provide protection.

As shown above, the accountability view promoted by German and Swiss Courts cannot be reconciled with an interpretation of Article 1A(2) CSR51 as required by general principles of treaty interpretation. Overall, the protection view is clearly much more convincing despite the fact that its present formulation does not conform with the historical meaning of the "unable to avail himself ..."-clause of that article. However, in international law, the so called "historical" interpretation of international treaties is only a supplementary means of determining the content of a treaty provision[72]. More importantly, this clause has lost much of its original meaning as the function of diplomatic and consular protection has fundamentally changed since the 1951 Convention was drafted. Although such protection remains important in many regards, it has lost its original function of securing basic rights to aliens at a time when international human rights were virtually non-existent. In the 19th

[69] Supra note 53.
[70] Supra note 59.
[71] For a recent defense of this position see Christian Klos, Deutschlands Verhältnis zur Genfer Flüchtlingskonvention und zur Europäischen Menschenrechtskonvention, 20 Zeitschrift für Ausländerrecht und Ausländerpolitik (2000), pp. 202 – 210. See also Bundesverfassungsgericht (supra note 13) at 334, insisting that the narrow notion of „political persecution" in the German Basic Law reflects the original understanding of the drafters of Article 1A(2) CSR51 that persecution must emanate from agents of State.
[72] Article 32 Vienna Convention on the Law of Treaties.

and the first half of the 20th century, diplomatic protection was conceived as a right of States to put pressure on foreign States and to ultimately obtain compensation for injuries inflicted on their own citizens who had traveled abroad and were ill-treated there in violation of the so called "International Minimum Standard"[73]. Diplomatic protection, thus, was the procedural substitute for the lack of international human rights protecting human beings against violations of their basic rights in foreign countries. With the emergence of international human rights law, the importance of the minimum standard has dwindled dramatically[74] as this legal regime entitles individuals to invoke their own rights vis-à-vis a foreign state directly.

Another significant shift lies in the fact that during the first half of the 20th century, admission to many countries could still be obtained relatively easily, whereas the treatment there was often highly problematic. Today, the opposite is true: admission is the main problem facing refugees while those admitted are normally treated relatively well.

These changes provide strong reasons for an interpretation of the text of Article 1A(2) CSR51 giving the notion of "protection" in the "unable to avail himself ..."-clause an extended meaning that covers internal protection, too. This can be regarded as a logical extension of the original idea of the drafters of the 1951 Convention that persecution plus lack of protection are the two core requirements of the refugee definition.

3.2 Redefining the Accountability View

While the accountability theory, in its present form, cannot be reconciled with the language, the purpose and the history of Article 1A(2) CSR51, it is right, however, in stressing that the link between persecution and the role of the State is an inherent part of the refugee definition. This link cannot be found in the notion of "persecution", as persecutory measures must not necessarily be undertaken by the State. Article 1A(2) establishes this link in the clause referring to the refugee being "unable, or owing to such fear, ... unwilling to avail himself of the protection of that country". If one does not want to follow the interpretation of these words adopted by proponents of the protection view, the following reading of the Convention imposes itself: If the country of origin is unable to provide protection against persecution, then the victim has to fear persecution in case of return and, therefore, has good reasons not to ask that State for external protection. In other words, in such cases, he is "owing to such fear, ... unwilling to avail himself of the protection of that country". This unwillingness is based on a very valid reason, as the inability of the country of origin to fulfill its primary task of guaranteeing peace and security

[73] See Detlev F. Vagts, Minimum Standard, in: Rudolf Bernhardt (Ed.), Encyclopedia of Public International Law, Vol. 8, Amsterdam/New York/Oxford (Elsevier Science Publishers B.V.) 1985, pp. 382-4.
[74] Id at 383.

to its citizens destroys the "bond of trust, loyalty, protection, and assistance between the citizen and the state [that] constitutes the normal basis of society" and is severed in the case of refugees[75]. In this sense Robinson, in his 1953 Commentary, stressed that someone is not a refugee in the case of "events which are being combated by the authorities, because in such cases there would be no reason for a person possessing nationality to be unwilling to avail himself of the protection of his country or for a stateless person to be unwilling to return to the country of his former residence."[76]

In contrast, such unwillingness is also justified where the fear of persecution is based on persecutory measures of non-state agents that are not "being combated by the authorities" due to an inability of the State to protect[77]. This approach takes the role of the State, so much emphasized by German courts, seriously. As Hathaway has rightly pointed out, "the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population"[78]. A State fails to fulfill this basic duty not only where its authorities are unwilling to provide protection against persecution by non-state actors but also where it is so disorganized that it is no longer in a position to provide security to some of its citizens against acts of violence by other citizens. As has been pointed out by Shaknove[79], this idea is deeply rooted in Western political thinking: According to Hobbes, to defend the citizen not only "from the invasion of foreigners" but also from "the injuries of one another" is the very foundation of the political commonwealth[80]. The State must, at least, provide such protection, and where it is no longer available "the bonds which constitute the normal basis of citizenship dissolve"[81].

What about the situation of persecution in the absence of any State authorities? It can be argued that the existence of a functioning State is a prerequisite for the concept of persecution in the sense of Article 1A(2) CSR51. Therefore, refugee status cannot be granted in such situations, even if one assumes that relevant persecution may exist where a State is unable to provide protection against persecutory measures by non-state agents[82]. An example is the reasoning by the Dutch Council of States in a 1995 decision stressing that

[75] Andrew E. Shacknove, Who is a Refugee? Ethics 95 (January 1985), p. 275.
[76] Robinson (supra note 34) at 46.
[77] It has to be noted in this context that it is sufficient for being granted refugee status that one of the alternatives (unable/unwilling) is present. If, for instance, „he is unwilling to avail himself of the protection of his country, his position is not affected by the fact that he obtains a national passport in order to obtain a permit to reside or work from the authorities of the country of refuge ..." (Sinha, supra note 22 at 103).
[78] James Hathaway, The Law of Refugee Status, Toronto 1991, pp. 103-4.
[79] Shacknove (supra note 75) at 278-9.
[80] Thomas Hobbes, Leviathan, Indianapolis (Bobbs-Merill Co.) 1958, p. 142.
[81] Shacknove (supra note 75) at 279.
[82] See Vermeulen et al. (supra note 6) at 24-26.

there cannot be persecution in the sense of the 1951 Convention where there are no State authorities left[83]. This reasoning is not convincing. It is true that the existence of a country of origin (or of former habitual residence in the case of stateless persons) is a necessary element of the notion of refugee. However, a collapse of governmental power does not terminate the existence of a State. Failed States remain subjects of international law even if they no longer have any functioning authorities: they usually do not terminate their membership in international organizations; their territory cannot be annexed by another state as stateless land, and an invasion of this territory still constitutes, according to the UN Charter, a violation of the prohibition of the use of force[84] and it leads to an interstate armed conflict in the sense of 1949 Geneva Conventions on humanitarian law. Thus, States without governments just represent an extreme case of a situation of inability to protect because authorities are not just too weak to do so but are totally lacking. In such situations, victims of persecution by non-state actors are *unable* to get external protection because the State no longer has functioning embassies and consulates abroad or, even if such institutions still exist, will be too weak to provide the necessary diplomatic and consular protection effectively[85].

4. CONCLUSION

Defenders of the so called "protection view" grant refugee status to victims of persecution by non-state actors in situations where State authorities are unable to provide protection against such persecution either because they are too weak or because they have collapsed. Proponents of the accountability view regard this approach as a radical departure from the original meaning of Article 1A(2) CSR 51. While it is true that when the 1951 Convention was elaborated, the problem of persecution by the State was in the forefront of the discussions, this provision was drafted in a flexible way that clearly allows taking into account the changing nature of persecution in the last decade and responding to it in an humanitarian spirit. To achieve this, it is necessary to take the text of Article 1A(2) seriously, namely to distinguish between the element of persecution, which does not require that it is carried out by agents of State, and the element of inability or unwillingness of the refugee to avail him- or

[83] Decision of the Judicial Department of the Council of State, 6 November 1995, R02.93.4400(61/245, quoted in Tiberghien (supra note 10) at 253 and Vermeulen et al. (supra note 6) at 26. More recently, the Hague District Court has decided that even where there are no State authorities left, persecution in the sense of Article 1A(2) CSR51 is possible: Osman Egal v. State Secretary for Justice, Judgment of 27 August 1998, AWB 98/3068 VRWET, available on UNHCR RefWorld CD-ROM, July 1999, No 37bd4d1e3.

[84] See Daniel Thürer/Mathias Herdegen/Gerhard Hohlich, Der Wegfall effektiver Staatsgewalt: „The Failed State" (The Breakdown of Effective Government), Heidelberg, at 17 and 45 (Thürer), 58 (Herdegen).

[85] In such cases, the breakdown of government may even destroy "the representative powers of diplomatic missions" (Herdegen in Thürer/Herdegen/Hohlich, supra note 84, at 84).

herself of the external protection of the country of origin. As has been shown, proponents of the accountability view do not have to give up their theory. However, they should accept that the unwillingness of refugees to avail themselves of the protection of their country of origin is well founded if this country is unable to provide the minimum of safety and security that serves as the very foundation of the legitimacy of State power. History shows that such State power may fail, be it because a government abuses its power or because authorities have become too weak to fulfill their duties. This historical experience constitutes the very cornerstone of the regime of international refugee protection as surrogate protection created by modern international refugee law. The more frequent persecution by non-state agents becomes, the more this regime is threatened unless all victims of such persecution are granted asylum.

THE NOTION OF PERSECUTION BY NON-STATE AGENTS IN GERMAN JURISPRUDENCE

Reinhard Marx*

1. INTRODUCTION

Traditionally, German case law on the right to asylum has been mainly based on persecutory acts by agents of the State. Thus the *accountability approach* and not the *protection view*[1] is at the heart of the notion of persecution. Only a few months before the end of the Cold War, the Federal Constitutional Court landed a landmark decision, strictly endorsing the State-centered concept of persecution[2]. The background in this case was the civil war in Sri Lanka and the question of whether, and to what extent, the Sri Lankan army could be considered an agent of persecution. The court took an ambiguous approach, but ruled in principle that acts of a State involved in a civil war lose their persecutory character. Hence German jurisprudence was well prepared in the following years, which have been characterized by the decline of State power and the emergence of quite different agents of persecution.

While the Federal Constitutional Court strictly referred to the Constitutional right of asylum, in 1994 the Federal Administrative Court expanded this approach to the refugee definition of Article 1(2) of the 1951 Refugee Convention, that is Section 51 Para. 1 of the Aliens Act. It indeed conceded that State practice had evolved a concept of persecution far beyond the accountability approach but ruled that Germany could only be bound by that State practice as had been developed at the time of ratification in 1953. At that time, however, interpretation of the notion of persecution was focussed on the State[3]. Without considering international rules of interpretation as laid down in Article 31 and Article 32 of the Vienna Convention of the Law of Treaties, the court held that the German

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[1] This divergence in state practice is identified by Ben Vermeulen, Thomas Spijkerboer, Karin Zwaan, Roel Fernhout, Persecution by Third Parties, University of Nijmegen, 1998, p. 11.

[2] Bundesverfassungsgericht (Federal Constitutional Court; hereinafter FCC), Decision on 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315.

[3] Bundesverwaltungsgericht (Federal Administrative Court, hereinafter FAC), Decision of 18 January 1994, Collection of Decisions, Vol. 95 (1994), 42, 47.

legislator refers to the phrase "political persecution" in Section 51 Para. 2 of the Aliens Act. Hence, the refugee definition must be interpreted in conformity with the constitutional notion of "political persecution".

It is interesting to note that the New Zealand Refugee Status Appeal Authority takes the opposite view, arguing that the narrow state-centered interpretation of the refugee definition was not originally intended by the drafters of the Convention and not applied in State practice, having been developed only in a few European States in recent years[4]. Neither the wording of Article 1A(2) of the Refugee Convention nor its purpose support the State-centered interpretation of the persecution element of the Convention.

Furthermore, in explicit opposition to the case law of the European Court of Human Rights, the Federal Administrative Court brings Article 3 ECHR into play only when there is an act of persecution and this is imputable to the State[5]. Accountability of persecution is thus at the *heart* of German refugee law and human rights law practice.

2. HOW TO COPE WITH THE NOTION OF PERSECUTION?

German case law in the field of refugee law is hardly comprehensible to international lawyers and judges. Concepts and doctrines developed in the past serve specific national purposes and do not take into account internationally based thinking in refugee law. Thus, outlining the different criteria used in German jurisprudence regarding the notion of non-State actors is not an easy task. The question of persecutory acts is essential to reachieving a consensus in international law. Furthermore, considering the prominent role of State practice in developing the Refugee Convention (see Article 31 Para. 3b of the Vienna Convention of the Law of Treaties), at least a common understanding of the methodology applied is essential for discourse in the field of refugee law.

Walter Kälin distinguishes between four different situations when dealing with the issue of non-State agents of persecution: (1) persecutory acts committed by private persons but instigated, condoned or tolerated by the State, (2) acts of persecution by de-facto authorites or quasi-State organs, (3) the State does not condone persecutory acts by private parties but is unable to provide protection against them. (4) persecutory acts committed by non-State agents in a situation where the State has collapsed and where no State authorities are left that could protect the victims[6].

German courts distinguish between two different types of situations based on whether or not there is a well functioning government. The first group of

[4] RSSA, Decision of 12 February 1996, No. 2039/93; see also Job van der Veen, Persecution by Fellow-Citizens, Netherlands YIL, Vol. XI (1980), 167.

[5] FAC, Decision of 15 April 1997, Collection of Decisions, Vol. 104 (1997), 265, 272.

[6] Walter Kälin, Non-State Agents of Persecution and the Inability of the State to Protect, conference paper.

situations relates directly to such a government. The question arises whether, and under what conditions, the government can be held accountable for acts of private parties and government officials against members of minority groups. These questions refer to categories 1 and 3 in Walter Kälin's scenario. The second group relates to so-called *"quasi-government entities"* in the state of formation during a civil war situation. This refers to groups 2 and 4. De facto authorities and the total collapse of State structures are phenomena of civil war situations and should thus be seen together.

Hence, in the following, the description of German case law initially will deal with the question of *"failure of protection"*, i.e. groups 1 and 3. Secondly, it will consider persecutory acts in a course of a civil war. With regard to the latter case, German jurisprudence applies a specific standard to acts of the central government under pressure from internal strife or war. In general, with regard to both government and opposition forces a different standard is applied, which differs significantly from the test usually applicable if the government is not in a state of civil war.

3. FAILURE OF PROTECTION

3.1 Doctrine of Accountability

3.1.1 Ability to protect and to persecute

Crucial for the understanding of German jurisprudence is the major ruling of the Federal Constitutional Court on the notion of persecution. It ruled that *in principle, political persecution is State persecution.* The power to protect includes the power to persecute. Hence, if the State loses its capacity to protect it also loses its ability to persecute. If the State has no means and resources at its disposal to protect, it cannot be perceived to be accountable for acts of private parties[7].

The court took the traditional view of German jurisprudence, which requires a certain kind of involvement of the government in acts of private persons or groups. Thus the State is only accountable for acts committed by those actors if it supports or tacitly tolerates them or is unwilling to protect the persons concerned. Whereas this type of persecution is not a matter of controversy in State practice, it is of interest whether an applicant claiming that his or her government was not indeed involved in the private act but did nothing to protect him or her will be considered to have been persecuted.

In 1980, the Federal Constituation Court ruled that accountability only arises if it can be established that the government was unwilling or not able to grant protection[8]. However, inability of protection is not imputable if the State takes,

[7] FCC, Decision of 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315, pp. 334.
[8] FCC, Decision of 2 July 1980, Collection of Decisions, Vol. 54 (1989), 341, 358.

by and large, necessary safeguards to combat mob-violence ("*aufs Ganze gesehen*")[9]. This decision is the starting point for the subsequent key decision of the court by which it ruled that the State cannot be perceived to be accountable for acts of private parties if it has no means and resources to protect the victims at its disposal[10].

3.1.2 The "by-and-large approach"

The Federal Administrative Court made reference to this Constitutional jurisprudence and emphasized that accountability may indeed be established if the government, by and large, is willing to grant protection but due to loss of control is unable to do so for a certain time. However, the State is not held accountable if it is willing to take necessary safeguards to protect victims against persecutory private acts, but such measures prove to be insufficient with regard to individual cases. No State is able to accord its citizens absolute protection[11].

In the nineties the Federal Administrative Court developed a higher threshold for the protection test stating that it is the responsibility of the government to provide protection for its citizens in general. Hence, the State is not responsible for private acts if national legislation imposes duties on State organs to offer protection and the government ensures that it is implemented. If the authorities deny protection in individual cases, but these incidents as such do not reflect a systematic governmental policy of inaction, accountability cannot be assessed. Thus, the applicant who claims that he has sought protection but was rejected will not be recognized as a refugee. Neither the incompleteness of the national protection system nor the well-established withdrawal of national protection as such turns the private into an imputable act, unless it can be established that the State, in principle, denies protection[12].

Theoretically, the German accountability test is premised on the internationally recognized standard of *due diligence*. This standard implies the duty on States to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this, the Inter-American Court of Human Rights ruled that States must prevent, investigate and punish any violation of human rights and, if possible, restore the right violated and provide compensation for damages resulting from the violation[13].

[9] FCC, Decision of 1 July 1987, Collection of Decisions, Vol. 76 (1987), 143, 169; FAC, Decision of 2 August 1983, Collection of Decisions, Vol. 67 (1983), 317, 320.
[10] FCC, Decision of 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315, pp. 334.
[11] FAC, Decision of 22 April 1986, Collection of Decisions, Vol. 74 (1986), 160, 163.
[12] FAC, Decision of 5 July 1994, Entscheidungssammlung zum Ausländer- und Asylrecht 202 No. 24, p. 3.
[13] IACourtHR, Decision of 29 July 1988, 9 HRLJ (1988), 212, 240 - *Velásquez Rodriguez*; see also Wolfram Karl, The Time Factor in the Law of State Responsibility, in: United Nations Codification of State Responsibility, ed. by M. Spinedi/ B. Simma, 1987, 95; Astrid Epiney, Die völkerrechtliche

International law, therefore, distinguishes between more general measures to establish effective safeguards for the protection of people and concrete duties States must fulfil if protection is in play in a specific case. Hence, it is a matter of whether the by-and-large approach of German jurisprudence meets the requirements of the due diligence standard seen from a human rights perspective. The decisive point is whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, impose the appropriate punishment and ensure the victims adequate compensation[14].

Whereas the international standard of due diligence is focussed on the *individual circumstances of a given case*, the German by-and-large view does not consider the individual facts but only the more general protection measures of the State. Based on this approach, the request of an Algerian asylum seeker, for example, claiming that he was under immediate pressure by Islamic terrorist groups because of his former police activities, was rejected for the reason that the Algerian State combats the F.I.S. with all appropriate means at its disposal[15].

It is true that preponderant State practice in refugee law requires that the claimant must have made an attempt to be assured national protection by authorities of his or her national State. Hence, he or she has to establish why it was not possible to approach national authorities under the prevailing facts in that case. In Canadian jurisprudence a general rule is that it should be assumed that the State is capable of protecting a claimant. However, while it places the burden of proof on the latter, he or she may *establish clear and convincing confirmation* of a State's inability to provide protection[16]. Thus, when it comes to the question of a State's inability to protect, determination officers look at the prevailing individual facts.

Even French practice, which is usually perceived as being as restrictive as German jurisprudence in regard to the notion of State agents, applies a more flexible and less demanding approach to the notion of "voluntary tolerance" and examines at least whether the claimant has applied to the authorities. Sometimes the refusal of protection has to be "systematic", sometimes it suffices if the authorities were aware of the persecution and deliberately refrained from acting[17].

Unlike these approaches, German case law does not consider individual facts with regard to whether protection was sought or could not be claimed due to the

Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater, 1992, pp. 229.

[14] IACourtHR, Decision of 29 July 1988, 9 HRLJ (1988), 212, 241 - *Velásquez Rodriguez.*

[15] Supreme Court of the State of Lower-Saxony, Decision of 13 February 1997, No. 1 L 915/97, in: Zentrale Dokumentationsstelle der Freien Wohlfahrtspflege für Flüchtlinge (ZDWF), Schriftenreihe No. 73, Rechtsprechungsübersicht 1998, Vol. 1, p. 63.

[16] Supreme Court of Canada, Judgement of 30 June 1993, No. 21937 - *Ward.*

[17] Fréderic Tiberghien, Persecution by Non Public Agents, International Association of Refugee Law Judges, Nijmegen 1997, p. 8.

prevailing circumstances; it emphasizes the more general aspects of the national protection system. If the government's *intention* is not to promote official misuse of power or misconduct of authorities, the private act will not be imputable to the State[18]. Hence, a subjective element is given a prominent role in German asylum determination procedures. The fact-finding process is primarily a subjective one, focussing on whether the government applies a systematic policy of withdrawal of protection with regard to certain groups. Since concrete circumstances as to whether it was possible or not to expect the claimant to seek national protection will not be considered, he or she is denied the opportunity to overcome the burden of proof with regard to his or her concrete case by establishing clear and convincing reasons for not being able to seek national protection.

3.1.3 The degree of general measures of efficient protection

Although the Federal Constitutional Court applies the by-and-large approach, it has ruled that prevention measures must be linked to the severity of endangered rights: the more rights concerned are at risk, the more the State has a duty to protect minority groups from private perpetrators[19]. The Federal Administrative Court, however, in a concrete case disagrees with the Supreme Court which has stated that the State is under an urgent obligation to take immediate steps to protect minorities from mob violence. Contrary to this, the Federal Administrative Court holds that due to the spontaneous and grave character of the internal strife, the State needs time to react. While this can be seen as a correct description of the State's difficulties with riots, it appears that the court lowers the standard of protection with regard to such conflicts. The court's ruling can thus be understood that the degree of human rights violations does not impose a higher standard of protection on the State but a lower one[20].

Taking together both the by-and-large approach as well as the required threshold of protection measures, one can hardly argue that German jurisprudence satisfies international protection standards. Whereas in preponderant State practice the burden of proof imposed on the claimant can be rebutted by establishing clear and convincing reasons that claiming national protection was not possible or risky, in German case law the notion of failure of protection remains abstract and general and does not consider the prevailing individual circumstances in a given case. However, the Refugee Convention requires an examination of the question whether the failure of State protection was for a Convention reason. To worsen the scenario according to German jurisprudence, the more worrying the human rights situation is, the less the national government will be under an obligation to protect minority groups from mob violence and other acts.

[18] FAC, Decision of 5 July 1994, Entscheidungssammlung zum Ausländer- und Asylrecht 202 No. 24, p. 3.
[19] FCC, Decision of 23 January 1991, Collection of Decisions, Vol. 83 (1991), 216, 235.
[20] FAC, Decision of 30 October 1984, Collection of Decisions, Vol. 70 (1984), 232, 237; FAC, Decision of 3 Dec. 1985, Collection of Decisions, Vol. 72 (1985), 267, 271.

3.2 Complicity by the State

Whereas in German case law the absence of national protection in general does not entail accountability, the Federal Administrative Court has ruled that a private act is attributable to the State if the necessary protection measures are at its disposal, but due to the interest of certain social or political groups are not applied[21]. Hence, if failure of protection originates in State complicity with acts committed by private parties, the claimant's State of origin will be considered responsible for acts of private agents and refugee status will be granted[22]. This is the exclusive exemption from the general rule that failure of protection excludes determination of refugee status.

However, this case is not really related to the situation in which the State is *unable* to protect its citizens; it is rather a clear illustration of the State's unwillingness to protect victims against acts by private parties. Acquiescence in or complicity by the State in acts of private individuals or groups are thus the definite pre-requisites for the State to be accountable for private acts in German jurisprudence.

3.3 State Agents

The Federal Administrative Court also applies the by-and-large approach with regard to criminal acts of State officials against members of a certain minority group. If, in general, the government combats illegal acts by its agents against persons at their disposal, it is not responsible for acts arising from religious intolerance which lead to grave violations of human rights by State officials[23]. The Federal Constitutional Court seems to disagree with the Federal Administrative Court's interpretation of the accountability standard so far. In the Constitutional Court's view, it does not suffice if the government just declares that it will implement national legislation to protect minorities. Rather, effective protection provides a concrete assessment of the steps being taken[24]. If State agents are involved in illegal acts against minorities accountability can be denied only in exceptional cases [25].

Both views run counter to international law, which rules that it is independent of whether the organ or official has contravened the provisions of domestic law or has overstepped the limits of his authority. Rather, under international law a State is responsible for the acts of its agents in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate domestic law. Thus, in principle, any act carried out by a public

[21] FAC, Decision of 24 March 1995, Entscheidungssammlung zum Ausländer- und Asylrecht 202 No. 26, p. 3.
[22] FAC, Decision of 18 January 1994, Collection of Decisions, Vol. 95 (1994), 42, 49.
[23] FAC, Decision of 22 April 1986, Collection of Decisions, Vol. 74 (1986), 160, 164.
[24] FCC, Decision of 23 January 1991, Collection of Decisions, Vol. 83 (1991), 216, 235.
[25] FCC, Decision of 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315, 352.

authority or by persons who use their position of authority is imputable to the State[26].

4. PERSECUTION AND CIVIL WAR

4.1 Insufficiencies of the Accountability Approach

Persecution arising from a civil war situation pose specific problems for doctrines premised on the accountability approach. A State afflicted by civil war is less able to protect its citizens than a State enjoying peace. If central institutions have collapsed or where there is a complete breakdown of State authority there can be no agents of persecution. Since there is no State to be accountable, access to the protection system is barred by the accountability approach, leaving victims unable to find effective relief from serious harm within their own State without any international protection at all.

To overcome this serious gap in protection, a significant number of signatories of the Refugee Convention apply a "protection-based" approach. Perpetrators of serious human rights violations in the context of civil wars and internal strife range from traditional agents of the State to militia, paramilitary groups, war-lords and the like. However, the victims remain largely the same people. A protection-based approach of the Convention examines whether the claimant has a well-founded fear of persecution by reasons set out in the Convention. If that is the case it does not matter whether the State has collapsed. Rather, the granting of protection follows the assessment of a well-founded fear, regardless of where the perpetrators are.

4.2 Accountability Approach in German Jurisprudence

4.2.1 Government as a Party to the Conflict

German courts have elaborated a specific doctrine of the notion of persecution occurring during a state of war. This notion differs significantly from the concept of persecution normally applied. In its landmark decision on State persecution, the Federal Constitutional Court held that if the government is to be seen as a party to the conflict in a civil war situation, it loses its power to protect citizens and thus falls short of its capacity both to protect and to persecute[27]. However, if the government endeavours to exterminate members of minority groups in its role as a party to the conflict, it is responsible for these acts.

The court also distinguishes between situations of *traditional civil war* (*"offener Bürgerkrieg"*) and civil war between the government and guerilla

[26] IACourtHR, Decision of 29 July 1988, 9 HRLJ (1988), 212, 241 - *Velásquez Rodriguez*; Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, 1991, p. 156.
[27] FCC, Decision of 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315, 341.

troops ("*Guerilla-Bürgerkrieg*"). In both cases the government loses its power to govern the State and, thus, its ability to protect. Hence, in such situations its acts cannot be perceived as acts of persecution, even if the State infringes rules of humanitarian law[28].

In subsequent rulings, the Federal Constitutional Court has clearly and repeatedly distinguished between parts of the State territory in which the government is a mere party to the conflict (and thus involved in an armed conflict) and in those parts in which it still exercises effective control (and thus upholds normal governmental functions). In the latter case, the court refers to the rules normally applied to the State and holds it responsible for acts of its agents[29]. While this jurisprudence can be understood to exclude only combatants from the national system of protection, German case law applies a geographical approach. Hence, those claimants who have fled from a region in which the government has lost control and is trying to regain it by military operations against the armed opposition are denied asylum.

4.2.2 Non-Relevance of Humanitarian Law Norms

If the government in its role as a party to the conflict falls short of its ability to persecute, the Federal Constitutional Court holds it, as already has been mentioned, nonetheless acountable for acts of its agents if they endeavour to exterminate members of minority groups. Extermination of members of certain minority groups, however, again brings the accountability of the State into play. Obviously, this part of the ruling was a matter of great controversy during the court's discussion preceding the final decision. As a matter of principle the court feels that the concept of protection presupposes a strong, efficient government. The more it loses control of its agents and military forces the less protection is granted. It is a logical infringement of this concept to hold a government responsible for acts of extermination if it has lost its power to protect due to a state of civil war. The least that could be said is that the court felt uneasy about developing its doctrine strictly and logically, but tacitly endorsed human rights and humanitarian law standards without conceding this in order to keep the gate to the national protection system very narrow.

Whereas the Federal Constitutional Court with regard to both traditional war situations and armed conflicts between the government and guerilla groups held the government accountable for acts of its agents aimed at the extermination of non-combatants, the Federal Administrative Court explictly ruled that the key distinction of humanitarian law between combatants and non-combatants is not to be applied in civil war situations. In its view, it is an inherent element of military attacks of guerilla groups that they are undertaken from areas inhabited

[28] FCC, ibid, p. 341.

[29] FCC, Decision of 9 October 1990, Informationsbrief Ausländerrecht 1991, 22, 25; FCC, Decision of 7 November 1990, Neue Zeitschrift für Verwaltungsrecht 1991, 771; FCC, Decision of 8 September 1992, Neue Zeitschrift für Verwaltungsrecht 1993, 191.

by the civilian population. Arbitrary and indiscriminate acts of revenge by the army, even if they are aimed at non-combatants, thus form part of the civil war and cannot be perceived as persecutory acts. Those acts are indeed detestable but as such not acts of persecution[30].

Furthermore, the court explicitly distinguishes between two different kind of civil war situations. As long as the government has not totally lost control of its territory it is bound by the humanitarian principle of *proportionality*. Disproportionate measures against non-combatants may thus be regarded as political persecution. If however the government has lost control of its territory and tries to regain it by military means only those acts which could be characterized as *blind terror* (*"blinder Gegenterror"*) may be considered in the refugee determination procedure[31].

This jurisprudence is not acceptable. Humanitarian law is essential in drawing the line between forms of conduct which are persecutory and those which are not. It delineates in detail these dividing-lines in relation to armed conflicts. Thus, in the *Tablada case* the Inter-American Commission on Human Rights held that common Article 3 of the four Geneva Conventions protect the right to life and thus prohibit, inter alia, *summary executions in all circumstances*. Hence, claims alleging arbitrary deprivations of the right to life are attributable to the State[32]. The Federal Constitutional Court's restricted approach that the intention of the perpetrators in committing acts of elimination must aim at the victim's status as a member of a religious, racial or ethnical minority[33] contradicts humanitarian law obligations. In particular common Article 3 and Protocol II contain a basic core of human rights and are, therefore, perceived as a *mini-bill of human rights* within *humanitarian law*[34].

4.2.3 Accountability of Non-State Agents

4.2.3.1 The Concept of "Quasi-State" Persecution in the Jurisprudence of the Federal Administrative Court

In the 1980s the Federal Administrative Court developed the concept of "quasi-State" persecution[35]. In its leading decision on State persecution, the Federal Constitutional Court referred to this jurisprudence but did not elaborate a clear-cut concept[36]. It was generally understood that in so far as the government had lost control of a certain territory and was replaced by a de facto authority the

[30] FAC, Decision of 3 December 1985, Collection of Decisions, Vol. 72 (1985), 269, 276.
[31] FAC, Decision of 30 April 1996, Collection of Decisions, Vol. 101 (1996), 123, 128.
[32] IACHR Report No. 55/97, Case No. 11.137, No. 331.
[33] FCC, Decision of 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315, 315.
[34] L.G. Green, Derogation of Human Rights in Emergency Situations, in: CanadianYIL 1978, 92, 106.
[35] FAC, Decision of 31 March 1981, Collection of Decisions, Vol. 62 (1981), 123; FAC, Decision of 3 December 1985, Informationsbrief Ausländerrecht 1986, 82.
[36] FCC, Decision of 10 July 1989, Collection of Decisions, Vol. 80 (1989), 315, 334.

latter was accountable for persecution taking place in the territory under its control.

German case law was so far in line with a wide range of national approaches which considered persecutory acts of de facto authorities. State practice demonstrates that even where there is a complete breakdown of State apparatus there may be several established authorities in a State to provide protection in the part of the territory controlled by them. Thus, the determination authorities must consider whether there is an established authority from which protection may be sought and whether adequate protection is available[37].

Neither the Federal Constitutional Court nor the Federal Administrative Court have come up with a consistent and concise notion of a de facto authority over the years. But in November 1997[38], the latter court quashed two Supreme Administrative Court decisions in which the different parties to the conflict in *Afghanistan* were considered to be "quasi-State" authorities. In May 1998 the court[39] endorsed its view and suspended a further upper court's decision on Afghanistan. The court argued that in order to be regarded as a "quasi-State", a non-State authority must have established a *durable, organized, effective and stable control* over a territory. However, as long as the parties to the conflict aim to achieve control over the whole territory with military means, a settled and effective permanent authority cannot be established[40].

The consequence of this approach is that during an ongoing armed conflict or civil war effective and durable organizational structures cannot be established unless one party to the conflict does not strive for control of the whole State territory, but attempts to separate its already gained part of the State territory and begin with its own process of State building. Thus, the Bosnian Serbs were considered to have established a de facto authority in the Republica Srpska[41]. That the court's jurisprudence has elaborated an isolated specific German approach of a de facto authority which no other member State of the 1951 Refugee Convention is applying will become clear when one considers that already in March 1997, the court in its Somalia decision referred to the notion of a *"core territory"* (*"Kernterritorium"*)[42], which is measured by a much lower threshold than the one applied in the Afganistan decision.

While the reference to a "core territory" allows consideration of more than one established de facto authority within a still formally existing State territory, in the judgement on Afghanistan the court did not refer to its own approach recently developed in the Somalia decision. Nor did it consider the relevant parts of the Supreme Administrative Court's decision. This decision indeed conceded

[37] See for example Canadian Guidelines on "Civilian Non-Combatants Fearing Persecution in Civil War Situations, issued 7 March 1996, p. 12.

[38] FAC, 4 November 1997, Collection of Decisions, Vol. 105 (1997), 306; FAC, Decision of 4 November 1997, Informationsbrief Ausländerrecht 1998, 1998, 242.

[39] FAC, Decision of 19 May 1998, Buchholz 402.25 § 1 AsylVfG No. 198.

[40] FAC, Decision of 4 November 1997, Collection of Decisions, Vol. 105 (1997), 305, 311.

[41] FAC, Decision of 6 August 1996, Collection of Decisions, Vol. 101 (1986), 328, 334.

[42] FAC, Decision of 15 April 1997, Collection of Decisions, Vol. 104 (1997), 254, 258.

that there was no de facto authority in Afghanistan satisfying the required criteria for keeping effective control over the whole country. In different parts of the country, however, several organizations had been established which meet the requirements of "quasi-State" organizations[43]. Taken together, these facts suggest that the Federal Administrative Court requires that to be perceived as a de facto authority a non-State agent must have achieved total control over the entire country and defeated the enemy.

The reason for this exaggeration of the internationally recognized notion of a de facto authority is that, in relation to the requirement of effective control of the territory, the Federal Administrative Court sets a far higher threshold for de facto authorities than it applies with regard to governments[44]. Hence critics conclude that this jurisprudence will never arrive at a positive conclusion in respect of State-like agents of persecution as long as there is an ongoing armed conflict in the State.

4.2.3.2 The Decision of the Federal Constitutional Court of 10 August 2000

Considering the consequences of this jurisprudence, the decision of the Federal Constitutional Court of 10 August 2000 on Afghanistan - which quashed the Federal Administrative Court's rulings on Afghanistan - cannot be overestimated. Although the court endorsed its traditional focus on the State, it explicitly disagreed with the concept of "durable, organized, effective and stable control", but held that it suffices if the de facto authority has achieved a *"certain stability of control"* in at least a *"core territory"*[45]. Thus the interpretation of the Constitutional concept of persecution by State-like agents arising from a civil war context seems to be more or less in line with the concept of "established de facto-authorities" which is applied in State practice.

Meanwhile, the Federal Administrative Court has revised its jurisprudence and has accepted the criteria elaborated by the Federal Constitutional Court. Hence it considers the Taliban in Afghanistan now to be State-like agents[46]. It is, however, still doubtful whether for example the "Republic of Somaliland" or even other regions in Somalia will be considered as fitting into the concept of established organizational power within a "core territory". At least in April 1997, the Federal Administrative Court[47] denied that the "Republic of Somaliland" met the required threshold. It is hardly conceivable that the court will change its view.

[43] Supreme Administrative Court of the State Hesse, Decision of 8 July 1996, No. 14 UE 962/96.A.
[44] FAC, Decision of 4 November 1997, Collection of Decisions, Vol. 105 (1997), 305, 312.
[45] FCC, Decision of 10 August 2000, No. 2 BvR 260/98, 1353/98, at 7.
[46] FAC, Decision of 20 February 2001, BVerwG 9 C 20.00, 21.00, 30.00, 31.00, 32.00.
[47] FAC, Decision of 15 April 1997, Collection of Decisions, Vol. 104 (1997), 254, 258.

4.3 Conclusion

Human rights obligations stated in international humanitarian and human rights instruments increasingly extend to private individuals and to private action. Common Article 3 of the Geneva Conventions also imposes on the non-governmental party to the conflict the obligation to comply with important humanitarian norms. Members of the non-governmental party to the conflict, whose acts could not be imputed to the government concerned, may themselves be responsible for breaches of such humanitarian norms as violence, murder, mutilation, cruel treatment, torture and hostage-taking[48].

Hence the accountability approach, if reasonably applied, may be perceived as a responsive tool to the changing patterns of persecution. The threshold of common Article 3 of the Geneva Conventions is far lower than the concept of an established de facto authority evolved in general international law. The scope of this humanitarian norm must be as wide as possible[49]. This demonstrates that humanitarian law and, particularly, its human rights-based Article 3 of the Geneva Conventions, may reconcile the accountability approach with the protection view. The nucleus of humanitarian law is absolute protection of non-combatants. This is the victim-oriented approach. All parties to the conflict are bound by humanitarian law and acts of their agents are, therefore, imputable to them.

The German concept of persecution is far from reconcilation in this sense. The focus on State persecution is based on a long and deeply rooted judicial tradition. Certainly, this specific case law has its historical reason in Germany's late nation-state building. The notion of state thus plays an extraordinary role in political and juridical thinking in Germany. But this state is an important player in the field of refugee law which, in terms of interpretation and development of doctrines, so strongly depends on State practice. Hence, the recent judgement of the Federal Constitutional Court on de facto authorities is an encouraging signal both for the domestic decision-makers and for other signatories. Restrictive interpretations of the notion of a de facto authority no longer can be justified by reference to German jurisprudence. Still unsatisfactory is the specific notion of State failure of protection in German case law. Internationally based criticism, in particular well-reasoned examples of case law in State practice, might be helpful for gradually developing a refugee law oriented concept of non-state persecution in German case law.

[48] Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, 1989, pp. 164.
[49] Jean S. Pictet, Commentary: IV Geneva Convention, 1958, p. 36.

5. PRINCIPLE OF NON-REFOULEMENT ACCORDING TO ARTICLE 3 ECHR

Besides the national case law on asylum and refugee law, the specific German interpretation of the doctrine of non-State actors is also of relevance with regard to immigration law. Section 53 Para. 4 of the Aliens Act refers to the European Convention of Human Rights and prohibits deportation which is not in accordance with the Convention. The most prominent role has so far been played by Article 3 ECHR. Additionally, Section 53 Para. 6 of the Aliens Act entitles the immigration police to abstain from deportation if the claimant will face an immediate danger to life, physical integrity or freedom upon return to his or her country of origin or last habitual residence. While Section 53 Para. 4 of the Aliens Act is mandatory, Section 53 Para. 6 of the Aliens Act is not. Rather, the decision of deportation has discretionary character.

Since 1995, the jurisprudence of the Federal Administrative Court on Article 3 ECHR has been developed in explicit opposition to the jurisprudence of the organs of the Convention. In 1995 the court stated that Article 3 ECHR requires that the State of origin be accountable for private acts. If the claimant cannot satisfy this threshold, Article 3 ECHR is not applicable[50]. At that time only the Commission had taken a clear stance on non-State actors in *Ahmed v. Austria*[51]. The court only cited this decision without discussing its relevance for its jurisprudence.

In 1997, however, the court explicitly decided against the European Court of Human Rights. It referred to the decisions *Ahmed v. Austria* and *D. v. United Kingdom*, criticizing the Strasbourg court for blurring the boundaries of the scope of Article 3 ECHR and opening it to *"all refugees of poverty and misery"*. Hence, the Strasbourg court's interpretation of Article 3 ECHR interfered with the member States' sovereign right to decide on the admission of foreigners[52]. However, the Federal Administrative Court ruled that Section 53 Para. 6 of the Aliens Act applies in those cases which the European Court on Human Rights regards as matters of concern for Article 3 ECHR[53].

It appears that the controversy is of a purely academic nature. But the anxious fixation of the federal court on the specific national immigration law remedy is for an obvious reason. Unlike Article 3 ECHR, which is absolute, Section 53 Para. 6 of the Aliens Act is discretionary. Hence, it reserves at least a residual domain of the right to decide on admission. The Federal Adminstrative Court's willful interpretation of Article 3 ECHR is vigorously criticized by most authors in Germany and is supported by only a few. The case of an unlucky Tamil who, after a final rejection of his asylum claim in Germany, fled to United Kingdom and whose equally unsuccessful case in the UK was brought to the European

[50] FAC, Decision of 17 October 1995, Collection of Decisions, Vol. 99 (1995), 330, 335.
[51] ECHR, Decision of 5 July 1995, Nr. 25964/94.
[52] FAC, Decision of 15 April 1997, Collection of Decisions, Vol. 104 (1997), 265, pp. 271; FAC, Decision of 2 September 1997, Collection of Decisions, Vol. 105 (1997), 187, 191.
[53] FAC, Decision of 2 September 1997, Collection of Decisions, Vol. 105 (1997), 187, 192.

Court of Human Rights by British lawyers gave the court the opportunity to clarify, albeit cautiously, the controversy.

The court, firstly, underscored the "*apparent gap in protection* resulting from the German approach to non-State agent risk", but secondly took note that this gap "is met, to at least some extent, by the application by the German authorities of Section 53 Para. 6"[54]. A treaty organ sees to it that member States do not infringe their international obligations. Hence, it is of no relevance whether Section 53 Para. 4 or Section 53 Para. 6 of the Aliens Act is applied by German authorities as long as they scrupulously attend to Article 3 ECHR. Taking into account the discretionary nature of Section 53 Para. 6 of the Aliens Act, the court was satisfied with the German government's statement that it follows the court's interpretation that "there is an obligation to apply its protection to persons who have shown that they are in grave danger"[55].

Considering the *absolute character* of Article 3 ECHR which the court, with particular regard to immigration law, repeatedly emphasized in *Chahal v. UK* and *Ahmed v. Austria* the German government has no choice but to abolish the discretionary nature of Section 53 Para. 6 of the Aliens Act. Consequently, the distinction between both protection standards will fall and Section 53 Para. 6 will lose its relevance. Up to now neither the legislature nor the government nor the courts have responded to *T.I.*

Indeed, it is alleged that the reference to the discretionary character of Section 53 Para. 6 of the Aliens Act is purely theoretical since deportation has not been carried out in the past. This is true, but it is relevant that courts *legally entitle* immigration police to execute the deportation order notwithstanding the granted status of Section 53 Para. 6 of the Aliens Act[56]. The Federal Administrative Court explicitly holds that Section 53 Para. 6 of the Aliens Act only preliminarily hinders the execution of the deportation order[57].

[54] ECHR, Decision of 7 March 2000, No. 43844/98 - *T.I. v. UK.*
[55] ECHR, Decision of 7 March 2000, No. 43844/98 - *T.I. v. UK.*
[56] Supreme Administrative Court of the State of Hesse, Decision of 5 March 1997, Ausländer- und asylrechtlicher Rechtsprechungsdienst 1997, 146, 147.
[57] FAC, Decision of 15 April 1997, Neue Zeitschrift für Verwaltungsrecht 1997, 1132, 1134: "*zeitweilige Vollziehbarkeitshemmung*".

PERSECUTIONS PAR DES AGENTS NON ETATIQUES

La pratique française

Michel Combarnous*

La question de savoir si des persécutions émanant d'agents autres que les autorités publiques du pays dont le demandeur a la nationalité ouvrent droit à la qualité de réfugié a souvent été considérée comme l'une des questions d'interprétation de la Convention de Genève les plus difficiles.

Cette difficulté apparaît dans les conclusions très nuancées figurant dans les positions communes adoptées par les pays membres de l'Union Européenne en 1996[1]. En France la question de l'auteur non étatique des persécutions est l'objet d'un débat doctrinal récurrent, elle est à l'origine d'importantes innovations législatives dans la période récente et elle a donné lieu, et donne toujours lieu, à une jurisprudence complexe et évolutive.

1. ORIGINE ET PORTEE DE LA POSITION ADOPTEE PAR LES JURIDICTIONS FRANÇAISES

Devant des situations de guerre civile, d'exactions commises par des groupes d'opposants ou des organisations criminelles, la Commission des recours des réfugiés a, dans les années 60 et 70, refusé la qualité de réfugié parce que les persécutions invoquées ne sont pas le fait des autorités publiques. Le fondement de cette jurisprudence semble pouvoir être recherché à la fois dans la notion même de *persécution* qui suppose une action systématique de la part de personnes ou de groupes qui détiennent des pouvoirs – et dans une analyse de l'article 1 A 2 de la Convention de Genève qui, en subordonnant la qualité de réfugié à la condition que le demandeur ne peut (ou ne veut) se réclamer de la protection de ses autorités *du fait* des persécutions subies ou des craintes de

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[1] Article 5.2 de la position commune du 5 mars 1996: «... les persécutions commises par des tiers sont comprises dans le champ d'application de la Convention de Genève ... lorsqu'elles sont encouragées ou autorisées par les pouvoirs publics. Lorsque les pouvoirs publics restent inactifs, ces persécutions doivent donner lieu à un examen particulier de chaque demande... au regard notamment du caractère volontaire ou non de l'inaction constatée».

persécutions, peut être interprété comme impliquant que ces autorités ne soient pas étrangères aux persécutions.

Très vite cependant, la Commission des recours des réfugiés a assoupli cette position de principe, admettant que «l'inaction de l'Etat, sa complicité de fait avec des émeutiers peut faire regarder les persécutions comme émanant de l'Etat (A. Heilbronner, président de la CRR en 1978)[2].

C'est cependant le Conseil d'Etat[3] qui a été conduit à dire le droit dans un arrêt de 1983 (27 mai 1983 Dankha): cette décision juge que peuvent ouvrir droit à la qualité de réfugié non seulement les persécutions émanant des autorités de l'Etat mais également celles qui sont le fait de particuliers, organisés ou non, dès lors qu'elles sont, en fait «*encouragées* ou *tolérées volontairement* par l'autorité publique, de sorte que l'intéressé n'est pas effectivement en mesure de se réclamer de la protection de celle-ci.»

C'est donc, par rapport à la jurisprudence dominante de la Commission des recours des réfugiés des années antérieures, un élargissement très important des conditions exigées pour obtenir le statut de réfugié que consacre cet arrêt. Depuis 1983, il n'est plus exact de qualifier la jurisprudence française comme limitant aux seules persécutions par les autorités publiques le bénéfice de la Convention de Genève. Cette solution a d'ailleurs, été considérée pendant longtemps par la doctrine, en France, comme une solution libérale et équilibrée. (Cf les commentaires de M. TIBERGHIEN dans son ouvrage «La protection des réfugiés en France» 1988, p 93).

La définition donnée par l'arrêt Dankha reste la base de l'interprétation de l'article 1 A 2 de la Convention de Genève. Elle a été confirmée à plusieurs reprises par le Conseil d'Etat dans le période la plus récente. Bien que la formule de l'arrêt Dankha soit scrupuleusement reproduite, elle a donné lieu depuis quinze ans à des développements jurisprudentiels importants de la part de la Commission des Recours des Réfugiés.

2. DEVELOPPEMENTS JURISPRUDENTIELS RECENTS

Ces développements, inspirés par la complexité des situations prévalant dans les pays d'origine des demandeurs d'asile, ont emprunté deux directions principales.

La notion de *tolérance volontaire* Si la notion d'encouragement qui suppose une complicité active, sinon avouée avec les auteurs des persécutions, est assez claire, la notion de tolérance volontaire l'est beaucoup moins. Se fondant sur le deuxième terme de la définition, la jurisprudence a longtemps eu tendance à exiger que les autorités publiques, saisies d'une *demande de pro-*

[2] Etudes et documents du Conseil d'Etat 1978/79 p. 111.

[3] Il est rappelé que le Conseil d'Etat peut être saisi comme juge de cassation des décisions rendues par la Commission des Recours des Réfugiés.

tection de la part des personnes victimes ou menacées de persécutions, *refusent* cette protection.

Cette exigence a pu paraître formaliste et soulever de difficiles problèmes de preuve à la charge des demandeurs. Elle a donc, dans un souci de réalisme, été interprétée de façon très souple: Le refus de protection n'a pas à être exprimé de façon explicite, il pourra résulter de *l'inaction* des autorités sollicitées. La demande de protection n'a pas davantage à être présentée dans des formes déterminées et la jurisprudence a été jusqu'à admettre la tolérance volontaire des autorités publiques même en l'absence d'une demande de protection par les victimes, lorsqu'il apparaît clairement que cette demande aurait été vouée à l'échec. L'essentiel est que l'autorité publique responsable soit clairement informée d'une situation à laquelle elle devrait mettre fin, et qu'elle ne mette pas en œuvre les moyens dont elle dispose pour assurer la protection de ses ressortissants.

Parmi les cas les plus fréquemment admis d'agissements encouragés ou tolérés par les autorités publiques, on relèvera en particulier ceux de groupes extrémistes d'inspiration nationaliste ou religieuse dans des pays de l'ex-Union soviétique (à l'encontre de citoyens d'origine russe ou juive) ou dans certains pays dotés de gouvernements islamistes (à l'encontre de personnes de confession juive ou chrétienne). Parmi les hypothèses récemment rencontrées, on citera les persécutions subies par des tchétchènes réfugiés dans les régions voisines (Ingouchie, Daghestan) de la part de la population locale: la «tolérance volontaire» des autorités russes a été déduite de l'absence de toutes mesures propres à assurer la protection de ces populations déplacées sans qu'ait été exigé un refus explicite et personalisé de protection.

Très éloignée de l'exigence initiale de persécutions émanant des autorités publiques sont également des décisions accordant le statut de réfugié à des personnes appartenant à des minorités ethniques et soumises dans certaines familles à une situation assimilable à l'esclavage domestique, la passivité des pouvoirs publics à l'égard de ces usages coutumiers traditionnels, qualifiée de tolérance volontaire, ayant rendu possible ces traitements inhumains[4].

Le second axe, celui de la reconnaissance *d'autorités de fait*, a également connu des développements considérables dans la jurisprudence récente. Cette notion a permis de prendre en compte les situations dans lesquelles les persécutions émanent de groupes opposés au gouvernement légal, qui, loin d'être tolérés sont combattus par ce gouvernement mais qui ont réussi à prendre le contrôle d'une partie du territoire. Dès lors que sur un territoire déterminé s'exerce un pouvoir doté d'un minimum d'organisation et de stabilité, les persécutions qu'il exerce ou qu'il tolère sont prises en compte sans qu'il y ait lieu de se préoccuper ni du statut de ces autorités en droit international, ni de leur légitimité. Les troubles qui ont affecté de nombreuses régions du monde depuis deux décennies ont donné lieu à de nombreuses applications de cette no-

[4] Ainsi jugé pour des demandeurs d'asile appartenant au groupe des Haratine en Mauritanie: 30juin 1995 M'Zeirigne p. 165 et 15 juin 2000 Diagara.

tion d'autorité de fait (Afghanistan, Liban, Liberia, plus récemment Somalie). Les solutions les plus intéressantes sont sans doute celles qui ont été dégagées lors des conflits qui ont déchiré l'ex-Yougoslavie, où les différentes «entités» qui ont établi leur contrôle sur telle ou telle partie de la Croatie ou de la Bosnie Herzégovine ont été traitées, pour l'application de la Convention de Genève, comme autant d'autorités de fait.

Ces évolutions ont notablement élargi le champ d'application de la Convention de Genève. Contrairement à ce qui est souvent soutenu, la jurisprudence Dankha a permis de prendre en compte des situations très variées dans lesquelles les persécutions ne sont pas le fait des autorités publiques.

La principale différence qui sépare l'interprétation des juridictions françaises de celle du HCR concerne le cas où l'absence de protection des autorités étatiques contre des persécutions émanant de personnes ou de groupes «privés» résulte non de la passivité mais de l'impuissance de ces autorités. Ces cas ne sont pas très nombreux dans la mesure où seule une défaillance caractérisée dans la protection que doit assurer un Etat ouvrira droit au statut de réfugié, et où parmi les victimes de tels agissements, beaucoup sont les victimes d'un terrorisme aveugle et non de persécutions qui trouvent leur origine dans l'un des cinq motifs énumérés à l'article 1A2 de la Convention de Genève.

3. L'INTERVENTION DU LEGISLATEUR (LOI DU 11 MAI 1998)

Pourquoi dans ces conditions, le législateur français a-t-il cru nécessaire d'intervenir? Parce qu'il y a eu conjonction entre une volonté politique -dans le cadre du débat sur la politique d'immigration des années 97/98- de renforcer le droit d'asile, et une situation particulière, qui a nourri les critiques contre une pratique et une jurisprudence jugées excessivement restrictives: celle de l'Algérie, toute proche, où l'importance et la gravité des exactions commises par les groupes islamistes, et l'attitude souvent jugée, (à tort ou à raison) ambiguë des autorités algériennes- ont donné le sentiment que les autorités françaises ne faisaient pas leur devoir à l'égard des victimes de ces exactions.

La Loi du 11 mai 1998 a donc introduit deux innovations importantes qui l'une et l'autre ont été conçues pour répondre au problème algérien.

a) L'asile «Constitutionnel»

La loi sur le droit d'asile prévoit désormais que la qualité de réfugié est reconnue non seulement aux personnes qui répondent aux définitions de la Convention de Genève mais aussi à «toute personne persécutée en raison de son action en faveur de la liberté».

Cette disposition a donc pour objet d'étendre la qualité de réfugié à une nouvelle catégorie de demandeurs d'asile. Alors que depuis 1952 les conditions de fond pour obtenir la reconnaissance de la qualité de réfugié résultaient, en droit français, directement et exclusivement de la Convention de Genève, ces conditions sont désormais complétées par une disposition de droit interne.

Au lieu de traiter directement le problème des persécutions par des agents non étatiques, la loi de 1998 a défini les nouveaux bénéficiaires de la qualité de réfugié par référence au préambule de la Constitution: «tout homme persécuté en raison de son action en faveur de la liberté a droit d'asile sur les territoires de la République»[5]. Or cette définition est *restrictive* puisqu'elle exige une *action*, excluant ainsi toutes les personnes victimes de persécutions du seul fait de leur *appartenance* à un certain groupe (ethnique, religieux, social...) et que parmi ces militants seuls sont visés ceux qui agissent «en faveur de la liberté». Donc, parmi les victimes de persécutions non étatiques non prises en compte par la jurisprudence, seule une élite de «combattants de la liberté» auront droit à la qualité de réfugiés.

Enfin, dernier paradoxe, bien que reconnus réfugiés sur une base différente, les bénéficiaires de ces nouvelles dispositions ont le même statut que les réfugiés de la Convention de Genève et la procédure de reconnaissance de la qualité de réfugié est la même: décision administrative de l'OFPRA et recours devant la CRR.

b) L'asile territorial

Selon le texte introduit dans la loi sur le droit d'asile, Article 13 de la Loi de 1952 «Dans les conditions compatibles avec les intérêts du pays, l'asile territorial peut être accordé... à un étranger si celui-ci établit que sa vie ou sa liberté est menacée dans son pays ou qu'il y est exposé à des traitements contraires à l'article 3 de la Convention européenne de sauvegarde des droits de l'homme...».

Quelle est la portée de ce texte?

L'asile territorial, s'il figure dans la loi de 1952 sur le droit d'asile est complètement détaché du statut de réfugié:les bénéficiaires de l'asile territorial n'ont pas la qualité de «réfugié» et ne sont pas assimilés aux réfugiés de la Convention de Genève. Il ne s'agit que «d'asile» au sens traditionnel, c'est à dire d'admission sur le territoire. La compétence pour l'accorder appartient au Ministre de l'intérieur, après avis du Ministre des affaires étrangères sous le contrôle des juridictions administratives de droit commun.

S'agit-il *d'un droit*?. En principe non; la loi a multiplié les précautions: référence aux «intérêts du pays»; le ministre «peut accorder» (et non pas «ac-

[5] Les raisons pour lesquelles le législateur s'est référé au préambule de la Constitution sont liées à un débat politique et juridique complexe lors de l'adoption des conventions de Schengen et Dublin et des lois «Pasqua» de 1993. La loi de 1998 donne un contenu positif au droit que le Conseil Constitutionnel a tiré en 1993 du préambule de la Constitution.

corde»); absence de motivation des décisions de rejet. Cependant dans la mesure où la loi *définit des* et *conditions* et exige que le demandeur *établisse les risques* encourus, il sera très difficile de refuser ceux qui remplissent ces conditions. En outre, dès à présent, des personnes qui courent des risques graves en cas de retour dans leur pays ne peuvent pas être légalement renvoyées dans ce pays en vertu d'une jurisprudence bien établie du Conseil d'Etat fondée sur l'article 3 de la Convention européenne des droits de l'Homme. Il y aura sans doute «contagion» pour le contentieux sur l'octroi de l'asile territorial.

La même ambiguïté se retrouve dans le statut accordé aux bénéficiaires de l'asile territorial. Ils n'ont droit qu'à d'un titre de séjour temporaire d'un an, mais, assorti de conditions favorables: *accordé au conjoint* et *enfants mineurs*, avec *droit au travail et renouvelable* (et à terme pouvant se transformer en titre de dix ans).

Quelle a été l'application faite par l'autorité administrative, et par la jurisprudence de ces deux innovations législatives?

Les décisions accordant le statut de réfugié aux personnes persécutées en raison de leur action en faveur de la liberté ont été très peu nombreuses, non pas du fait d'une interprétation restrictive de la loi (les quelques décisions de la Commission des Recours des Réfugiés montrent au contraire une conception large de l'action en faveur de la liberté[6] mais parce que les demandes présentées sur ce fondement ont elles-mêmes été très rares. Cela s'explique à la fois par les exigences imposées par la Loi aux personnes qui sollicitent l'asile constitutionnel et par les assouplissements ci-dessus mentionnés apportés par la jurisprudence pour l'application de la Convention de Genève.

La situation est différente pour l'application de l'asile territorial. Les demandes ont été relativement nombreuses (environ six mille en 1999, et trois mille six cents pour le 1er semestre de 2000 – chiffres à comparer aux trente mille et dix-huit mille demandes de statut de réfugié pour les mêmes périodes), mais les décisions du Ministère de l'Intérieur accordant le séjour au titre de l'asile territorial n'ont pas dépassé 10% du nombre des demandes.

L'absence de motivation des décisions de refus, et le très petit nombre de jugements rendus à ce jour par les tribunaux administratifs ne permettent pas de dire clairement la signification de ces chiffres. Ce qui apparaît en revanche de façon certaine c'est qu'à l'heure actuelle en France la protection des demandeurs d'asile reste essentiellement assurée par l'application de la Convention de Genève, non seulement parce que ce statut est beaucoup plus protecteur que celui de l'asile territorial, mais même d'un simple point de vue quantitatif: le taux d'admission des demandes et le nombre de statuts de réfugié accordés sont beaucoup plus élevés que le taux d'admission et le nombre de décisions en matière d'asile territorial.

[6] Ont été par exemple, regardées comme ayant agi en faveur de la liberté des personnes ayant eu des responsabilités dans les associations à but *humanitaire* ou *social* (9/7/99 Aconta Barrero). 21/10/99 Bouidgaghen.

La loi de 1998 si elle a introduit des instruments juridiques nouveaux importants sur le plan conceptuel et sur le plan pratique, n'a donc pas bouleversé la pratique française en matière de protection accordée aux demandeurs de la qualité de réfugié.

4. REMARQUES FINALES

On peut se demander aujourd'hui s'il y a réellement une opposition entre deux doctrines pour l'interprétation de l'article 1 A 2 selon que seraient ou non prises en compte les persécutions émanant d'agents autres que les autorités publiques. Comme on l'a montré, en ce qui concerne la France, sont largement prises en compte les persécutions émanant de personnes ou de groupes «non étatiques», grâce en particulier à une interprétation réaliste de l'inaction des pouvoirs publics vis à vis de ces agissements de tiers. Or les systèmes d'interprétation qui n'opposent pas à priori le caractère non étatique des persécutions n'en sont pas moins appelés à vérifier le défaut de protection de l'autorité nationale contre ces persécutions. Or le droit à la protection des autorités étatiques nationales ne peut être absolu: si celles-ci mettent en œuvre avec un zèle raisonnable les moyens dont elles disposent pour protéger les victimes d'agissements criminels, ces victimes n'ont pas droit à la protection de la Convention de Genève, du fait du caractère subsidiaire de cette protection[7].

C'est probablement dans la voie d'une application généreuse et raisonnable de cette notion de subsidiarité plutôt que dans un affrontement doctrinal que peut être souhaité un rapprochement des interprétations de la Convention de Genève.

[7] Pour un bon usage de cette notion de subsidiarité, voir la décision de la chambre des Lords du 6 juillet 2000 Horvath c/Home Department

B. FEMALE ASYLUM-SEEKERS AND REFUGEES

B. DEMANDEUSES D'ASILE ET RÉFUGIÉES

VIOLENCE AGAINST WOMEN, WOMEN'S STATUS, AND THE ROLE OF GOVERNMENTS IN VIOLATING HUMAN RIGHTS

Regan E. Ralph*

1. INTRODUCTION

Thanks to the very vocal women's rights advocates around the world and the very brave women who have recorded their stories of human rights abuse, we know more now than we ever have about the threat and fact of violence against women. We know that, in countries across the world, to be a woman is to be at risk of violence. Women in conflict zones, from Chechnya to Sierra Leone, to East Timor, live in terror of battles being waged against civilians in which the sexual assault of women is a weapon of choice. Shocking statistics show that domestic violence is a real threat to millions of women. Tens of thousands of women are trafficked into forced labor every year. Women who step outside the bounds of socially accepted behavior pay a price when they are attacked, maimed or killed by family members or people in their community.

We also understand quite a bit more about why these abuses occur. Much of the violence, discrimination and ill treatment that women suffer have in common a belief in women's subordination. For example, if you take the problem of domestic violence, it is a belief that men have a right to physically discipline their wives. Or, looked at another way, it is a belief that women have a certain place in the family or society and they need to be kept there, by beating them if necessary. Many such abuses play an important role in constructing and maintaining women's inferior position in society.

With my remarks, I set out to look at the extent and nature of violence against women: where does it occur, what form does it take, who does it, and why. Understanding why is important for at least two reasons. First, understanding the motivation of those who perpetrate violence against women reveals that these abuses typically are gender-based. That does not mean that they necessarily are gender-specific in form like, for example, rape or female genital cutting. But rather that they are motivated by the desire, for example, to keep women in their place or to take advantage of women's relative lack of power and autonomy. Second, we need to understand why an abuse is com-

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mitted, where we can, in order to determine the appropriate remedy to be applied.

2. NATURE OF VIOLENCE AGAINST WOMEN

Women experience violence in virtually all aspects of their lives: at home, on the street, at work, in prison, and in conflict situations. Human Rights Watch has documented a wide range of abuses in countries around the world: of women attacked by husbands who are never held to account, of women raped in ethnic cleansing or genocide campaigns, of women trafficked into forced labor in the sex industry, and of women assaulted in refugee camps. In some cases, violence is committed by government agents, for example, prison staff who assault women in custody or soldiers who rape as a tactic of war. In other cases, governments are responsible, not for actually committing the abuse, but for failing to investigate or punish private actors, whether intimate partners or strangers, who beat or sexually assault women.

Grim statistics show just how prevalent violence against women continues to be. Official estimates from Russia indicate that 12,000 women die every year as a result of domestic violence. The nongovernmental Human Rights Commission of Pakistan concluded that upwards of 80 percent of women in that country are victims of domestic violence. In South Africa, there were 49,280 reported rapes in 1998; the nongovernmental Rape Crisis Center asserts that the actual number of rapes is much higher. Peru's National Police received 28,000 reports of domestic abuse in 1998, of which the victims were overwhelmingly women. Official statistics from Jordan indicate that, each year, one third of the country's homicides are so-called honor killings, in which women are killed by family members in the name of honor. In the United States, the Center for Disease Control has reported that at least 1.8 million women are assaulted every year by their husbands or boyfriends.

Although violence against women takes many forms, today I would like to focus on the problem of domestic violence as an illustration both of why women are at risk and what the obstacles are to securing meaningful protection for women threatened with violence and effective redress for those who have suffered it. Domestic violence is a leading concern for women around the world, but has only recently come to be seen as a human rights concern. The failure to treat domestic violence as a human rights problem is due, at least in part, to a failure to understand the nature of the violence itself and the role of the state in perpetuating it.

Domestic violence is one of the leading causes of female injury in almost every country in the world and it accounts in some countries for the largest percentage of hospital visits by women. It operates to diminish women's sense of self-worth and autonomy. For instance, women who experience domestic violence frequently begin to believe that such violence is an acceptable part of

their lives and that they are at fault both for provoking the violence and for not preventing it. Often, psychological harm, including verbal abuse and demeaning treatment, precedes physical or sexual abuse, destroying a woman's self confidence. Further, women in battering relationships may be reluctant to make independent decisions because they fear violence if their partner disapproves of a decision.

The fact is that this form of violence against women is prevalent in almost every country of the world. What does differ from one place to the next is the role the government plays in accepting, allowing or even encouraging such violence. Human Rights Watch has documented how states respond to violence in numerous countries around the world, including Pakistan, Peru, Russia, South Africa, and Jordan. This research shows that, even in very different countries, women confront similar barriers to justice as well as appropriate and humane treatment when they are victims of violence.

Despite increasing recognition that unprosecuted domestic violence is a human rights issue, it continues to be endemic in many, if not most, countries of the world. As the examples I will cite demonstrate, in addition to the lack of a remedy, there are several reasons for persistently high levels of domestic violence. First criminalization alone is insufficient; in order for a government to indicate that it takes the problem of violence against women seriously, it must act to prevent violence, something many governments do not do. Further, many legal systems allow defenses in domestic violence cases that operate to mitigate sentences for such crimes, and thus reduce the penalty for the perpetrator and underscore the belief that this form of assault is less serious. Finally, while some countries may put penalties in place, and may even set forth appropriate civil remedies, the routinely fail to enforce such remedies. To really provide meaningful protection and redress, governments should take a comprehensive approach that includes legal reform, appropriate legal and social services, and efforts to enforce government policy.

It is also worth noting that the severity and impact of violations of women's rights are often affected by factors other than gender, including race, class, religion, and sexual orientation. Consequently the manner in which women experience such mistreatment can differ vastly within and between countries. For example, women who are part of a racial minority may confront issues of racial discrimination when seeking official redress for domestic violence. Women with sufficient financial resources are better able to access available legal remedies to certain abuses than women with fewer resources, who may continue to find themselves without legal redress, either because they cannot afford it or are unaware of the relevant remedies. Thus, for example, a cross-cultural survey demonstrated that economic independence economic independence gives women in abusive relationships the ability to walk away from crisis situations as well as the freedom to make important choices

3. WHAT MAKES THIS EPIDEMIC OF VIOLENCE POSSIBLE? THE ROLE OF STATE ACTORS

Violence against women is fueled by various factors such as societal acceptance, tradition or custom, and women's subordinate status, which is often enforced by governments' discriminatory laws and practices. According to one scholar and women's rights activist, "Wife-beating is not an individual, or aberrant act, but a social license, a duty or sign of masculinity, deeply ingrained in culture, widely practiced, denied and completely or largely immune from legal sanction." Constructions of sexuality also play a defining role in the context of violence against women. Rape has been used to subjugate women and as a means of ensuring that women conform to behavior patterns required by community. Fear of women's sexual activity has led to practices such as female genital mutilation. Women who do not conform to traditional sexual expectation are often victims of violence in their communities. Compounding such violence are state laws and policies regulating sexuality, many of which result in structures and violence that compromise women's autonomy.

Governments typically play a significant role in contributing to violence against women. According to the UN's special rapporteur on violence against women, policies of the state, manifested by state action as well as inaction perpetuate, support, and condone violence within the domestic sphere. First, there is the fact that state agents themselves commit acts of abuse against women. Women in custody face torture and demeaning treatment. In conflict situations, violence against women serves as a weapon of the state. Knowing that state actors themselves abuse women's rights makes it difficult for women to know whether they can rely on these individuals for help. It also sends a broader message—that violence against women will be tolerated. This is not to suggest that governments and their representatives are uniform in their response to violence against women. In our work, we encounter more and more people in government who support women's human rights and work to protect them. The concern of individuals or even entire agencies, however, does not necessarily translate into government policies that promote women's human rights. Nor does it mean that individual women will not encounter obstruction and even harassment when they seek protection from domestic violence.

State actors also reinforce the acceptance of violence against women in other ways, through, for example, laws and policies that reinforce biased norms. In many countries, governments have imposed or refused to amend legal codes that explicitly discriminate against women. In other situations, governments have applied gender-neutral laws in discriminatory ways or failed to enforce constitutional or other guarantees of nondiscrimination whether in the home, the workplace, or the criminal justice system. Because gender discrimination is not perceived to be as destructive as acts of physical abuse, it often is viewed as being less grave. But discrimination plays a criti-

cal role in maintaining women's subordinate position in society, and can often be the motivating factor for grievous physical or psychological harm.

Laws or the absence thereof make it difficult and in some cases dangerous to pursue justice when women have been victims of sexual assault or domestic violence. Some laws define rape as a crime against honor or custom, rather than a crime against the physical integrity of the victim, and thus understate its seriousness. In some cases, the law allows a perpetrator to escape punishment if he agrees to marry his victim. Other laws exempt rape in marriage from criminal sanction. Few countries explicitly criminalize domestic violence, and even where they do, police and judges often treat it as a non-justiciable, private or family matter or, at best, an issue for civil, rather than criminal, courts. In the case of Peru, women are required to undergo conciliation proceedings before prosecutors will pursue charges against their batterers. In conciliation, women are urged to modify their behavior to stave off attacks as if they bear responsibility for them. In countries such as Jordan, laws allow for "honor" or "heat of passion" defenses in cases where women are killed by husbands or family members, thus acquiescing in murder on grounds of "legitimate provocation," such as actual or perceived transgressions of a woman role in that particular society.

When women who have suffered sexual or domestic violence first confront the law enforcement system at police stations, they often encounter abusive treatment and rejection of their complaints. When it comes to domestic violence, Human Rights Watch has documented countless cases of police dismissing complaints , either refusing to believe the woman's allegations or failing to recognize intra-family violence as a crimes. Such biased attitudes among police frequently mean that women complainants are turned away and, at times, even intimidated or warned against attempting to file charges. In Peru, for example, we learned of cases in which police mistreated women filing complaints and even jeopardized their safety by having them deliver police summons to their abusers, who then responded with another violent attack. In Russia, women were told by police to go home and consider themselves luck that they had not yet been killed. Rather than register cases, police in some countries pressure women to return to abusive situations. In Pakistan, the police frequently intervene at the behest of the accused, to try to force the concerned parties to reach a settlement without officially registering a complaint.

Women who have been able to register a case of domestic violence face additional hurdles from the criminal justice system. In many countries, trial procedures reflect societal biases against the successful prosecution of such cases. Too often, prejudiced prosecutors or judges doom a case from the outset and help ensure impunity for the perpetrators.

Many judges view victims of violence skeptically and tend to hold them responsible for bringing the violence upon themselves. Many judges treat domestic violence as a husband's right, and put the onus on the wife to either leave the marriage or accept the abuse. The man is deemed to have no respon-

sibility to stop beating his wife and is instead granted legal sanction for behavior that, were it committed under any other circumstances, would be punishable by a prison sentence. In a Russian case, a domestic violence victim in court for a custody hearing was subjected to a harangue by a judge on the importance of staying with her husband, despite ten years of physical abuse.

All too often, violence against women whether committed by state agents or private actors receives less severe punishment and government attention than similar crimes against men. Such a disparity in state response brings all of these acts, whether or not committed by private actors, into the arena of human rights. Where states commit violence against women, they are directly implicated in violating their human rights. When they routinely fail to prosecute such abuses committed by private actors, they are indirectly implicated in human rights violations. Where law enforcement agencies fail to respond to evidence of murder, rape, or assault of women by their intimate partners, they send the message that such attacks are justified or, at a minimum, will not be punished. In doing so, states fail to take the minimum steps necessary to protect their female citizens' rights to physical integrity and, in extreme cases, to life.

4. CONCLUSION

In conclusion, I would like to emphasize that, as dispiriting as it is to look at the scale and scope of violence against women around the world, women's rights advocates and their allies are working to change the attitudes, policies and practices that have long protected such abuse from public scrutiny and censure. It is telling that, in our fight to end violence, we challenge not only acts of violence but also the many factors that make women vulnerable to that violence. Our research has shown that violence against women is both made possible by and acts to reinforce women's secondary status. So when we look at what it will take for women to be free from violence and to enjoy their fundamental human rights, we know that we must look to the context in which violence occurs and particularly the role of the state in reinforcing unacceptable norms.

We should not underestimate the obstacles to progress. Acceptance of violence against women, especially when it occurs within the family, runs deep. A demographic survey in Egypt, for example, revealed that 86.6 percent of respondents believed that there are reasons that justify men beating their wives. Given how prevalent such biases are, it is not surprising that they influence and determine how governments respond to violence against women and whether women can find the protection that international human rights standards require.

When governments fulfull their human rights obligations to women, they will change women's ability to enjoy their rights. Several years ago, I interviewed a woman in Moscow who had barely survived repeated attacks and

death threats from her husband. She repeatedly sought help from police and was rebuffed every time. In our conversation, she recalled, "He told me, 'I can kill you and no one will know. No one will care.'"

Her terror came from knowing that he was right.

Human rights standards require governments to dismantle the structures and biases that condone violence or shirk responsibility for it, to challenge popular acceptance of violence, and to end impunity for perpetrators. Until they do, women's rights will be at risk.

REFUGEE STATUS AND VIOLENCE AGAINST WOMEN IN THE "DOMESTIC" SPHERE: THE NON-STATE ACTOR QUESTION

Deborah Anker*

1. INTRODUCTION

Over the past decade, the jurisprudence of different states, as well as the UNHCR and national gender guidelines, has addressed various issues critical to the recognition of status and availability of protection for women asylum seekers. Forms of harm that are unique to or disproportionately affect women — forms of violence that women are especially vulnerable to including rape and other sexual assault — are no longer routinely dismissed as "private" harms. Instead, they have been recognized as serous harms, core human rights violations that are included within the concept of persecution. The experiences of women have been incorporated into the interpretation of the Convention grounds, so that, for example, there has been some recognition that women whose beliefs in equality lead them to resist discriminatory rules, physical violence, etc. may have cognizable "political opinions" or religious beliefs, depending on the nature of the state or the belief system which it supports or tolerates.[1]

One of the most important breakthroughs has been in the interpretation of the particular social group ground. An emerging consensus was most evident in, and most certainly consolidated by, the landmark decision of the House of Lords in *R v. Immigration Appeal Tribunal; Ex Parte Shah.*[2] In that case, their Lordships, building on the immutable characteristic formulation of the American Board of Immigration Appeals in *In re Acosta*[3] and of the Canadian Supreme Court in *Canada (Attorney General) v. Ward*,[4] found that gender could be the defining characteristic of a particular social group, and that where there

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[1] Deborah Anker, Law of Asylum in the United States 365-75 (1999).

[2] [1999] 2 AC 629.

[3] 19 I. & N. Dec. 211 (BIA 1985), *rev'd in part on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

[4] [1993] 2 SCR 689.

was a pattern of discriminatory treatment, women in a country could constitute a particular social group for Convention purposes.[5]

Thus, some of the fundamental issues in women's claims have been defined, even with some measure of consensus in interpretation emerging. Certainly when a woman flees serious harms at the hands of the state, many of the most difficult problems of interpretation have been at least addressed, and an approach to their resolution in particular cases, suggested.

The next — or current — stage in the development of the law addresses specific questions of interpretation when the agent of harm is a non-state actor. As has been noted by many commentators, this context is especially salient for women asylum seekers, since a large number of them face serious harms from "private" actors including, for example, members of their families or communities in cases of bride burning and forced marriages, and tribal authorities in cases of forced female genital mutilation. As Audrey Macklin has noted, a "paradigmatic example" of gender specific abuse committed by private actors is "domestic violence"[6] — violations of women's core human rights to physical integrity, protection from cruel, inhuman and degrading treatment or punishment, among other rights, by their husbands or domestic partners. Certainly the non-state actor question has been raised in non-gender cases: the decision of the Canadian Supreme Court in *Ward* is perhaps the most notable instance. However, in cases of violence by husbands and male domestic partners, the question of state protection is especially complex, as there may be different levels of interweaving responsibility and enabling of the "private" harm by the state. In many countries where protection is not available, "it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. In other words, the fact that [a] state does not adequately protect women from domestic and sexual violence is both an institutional manifestation of the degraded social status of women and a cause of its perpetuation."[7]

Although women's claims raise challenging issues, their appropriate analysis fits within traditional refugee law. There is nothing radical or "other" about women as refugees, or about theories or doctrines that incorporate their claims into the body of refugee law. Gender is not a special or different category of refugee law. Refugee law has matured and evolved over the past decade. Gender has reflected and been part of – perhaps even a key impetus or ingredient of – that maturation, but gender has not transformed refugee law; gender has always been there, albeit latent and undeveloped. This point is

[5] As Lord Steyn notes in *Shah*, some major commentators interpret the particular social group ground as defined in part by its social significance or the "common victimization" of group members, in a particular context. *See* Guy S. Goodwin-Gill, The Refugee in International Law 362 (2d ed. 1996).

[6] Audrey Macklin, Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims, 13 Georgetown Immigration Law Journal 25 (1998).

[7] Id. at 48.

especially brought home by recent jurisprudential developments on the non-state actor question. Over the course of the past year and a half, an exceptional group of opinions has been issued in cases involving women applicants fleeing violence by their husbands. Taken together, these cases articulate a framework, grounded in accepted refugee law doctrine, for analyzing the relationship between private harm and state protection, with implications not only for women's claims.

The first of these is, again, the historic judgement of the House of Lords in *Shah*, with its core analysis applied and elaborated in the Federal Court of Australia's decision in *Minister for Immigration and Multicultural Affairs v. Khawar*[8] and especially in the notable recent opinion of Chairperson Rodger Haines of New Zealand's Refugee Status Appeals Authority (RSAA), *Refugee Appeal No. 71427/99*. The evolution of this thinking and its transmutation across the borders of signatory states will no doubt continue; indeed it may now be extended to the United States. There the Attorney General vacated the Board of Immigration Appeals' decision in *In re R-A-* in which the Board had denied status and protection to a Guatemalan woman fleeing her husband's severe physical and other violence, from which the State provided no protection.[9] Pending regulations porpose a more general framework that recognizes "domestic violence" as a basis for refugee status in some cases.

The general principles for acceptance of claims by non-state actors were laid out in the Canadian Supreme Court's decision in *Ward*. Most states parties to the Convention recognize that nothing in the Convention requires that the agent of persecution be the state.

> The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution. The former is, of course comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection.
>
> [P]ersecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but it is simply unable to protect its citizens.

The agent of persecution need not be the state, but to meet the requirements of the Convention, there must be a failure of state protection and the persecution must be for a Convention reason. These are the issues addressed in the recent series of decisions from the UK, Australia and New Zealand. What is the analysis of "persecution" in non-state actor cases: more particularly, what is the necessary relationship between the harms perpetrated by the non-state actor and the state? What level of state involvement is required? What is the standard for assessing state protection in such cases? How can causation or

[8] 2000 FCA 1130.

[9] Interim Dec. 3403 (Attorney General 2001) (vacating decision of the Board of Immigration Appeals and remanding for reconsideration in the future after promulgation of final regulations published in proposed form at 65 Fed. Reg. 76588 (Dec. 7, 2000)).

the nexus to a Convention ground be established? If the ground is a gender-defined particular social group, to what entity must the gender-related reason be attributable: the state, the non-state actor, both in some combination, or either separately? If the non-state actor violence is deemed personal, can the linkage be made if the failure of state protection is, in intent or effect, discriminatory on the basis of gender?

2. SHAH: THE MEANING OF PERSECUTION

Shah involved a conjoined appeal of refugee claims by two Pakistani women, who came to the United Kingdom after fleeing their violent husbands. Both women feared continued assaults and violence by their husbands, and denunciation by them for adultery, with resulting criminal prosecutions and severe sanctions under Pakistani law. The House of Lords found that women in Pakistan suffer severe discrimination. Although the constitution prohibits discrimination on grounds of sex, in law and practice married women, it found, are treated as subordinate to the will of their husbands and protection from abuse is effectively unavailable.

As noted, the central issue addressed in *Shah* was the particular social group ground, and a majority of their Lordships found that, especially in light of state-sanctioned and tolerated discrimination against women, Pakistani women constituted a particular social group. But of course, the determination of the Convention ground was not sufficient to establish refugee status. What comprised the persecution and how could the link or nexus be made between the feared persecution and the particular social group ground?

The only two opinions to address this question were those of Lords Steyn and Hoffman. These opinions analyzed persecution as constituted by both a serious harm, rising to the level of a human rights violation, and a failure of state protection. This is the formula, put forth by the Refugee Women's Legal Group and specifically referred to by Lord Hoffman, i.e. "Persecution = serious harm + failure of state protection." Both Lords found that even if the serious harm was committed by a non-state actor for personal, non-Convention reasons, the claims could be recognized where the failure of state protection was for a Convention reason, that is, on account of gender. The linkage was established by the evidence of state tolerated or sanctioned discrimination, which was as much the reason for the harm feared, as the direct violence and threats of denunciation by the husbands. In the words of Lord Steyn, "Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic." Lord Hoffman made the failure of state protection/causation analysis more explicit.

> What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs. Islam by her husband and his political friends and to Mrs. Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two element have to be combined to constitute persecution within the meaning of the convention.[10]

As noted, the non-state actor/nexus analysis of *Shah* has now been applied in two important decisions issuing from the Refugee Status Appeals Authority of New Zealand (*Refugee Appeal No. 71427/99*) and the Federal Court of Australia (*Khawar*). In elaborating on *Shah*, each raises new issues: in the New Zealand case, the standard for assessing state protection where the non-state actor is the agent of persecution, and in *Khawar*, the question of intent and state action: how much active involvement or enabling of the harm by the state is required for a finding of persecution and the necessary linkage to the Convention ground.

3. THE STANDARD FOR ASSESSING STATE PROTECTION: REFUGEE APPEAL NO. 71427/99 (REFUGEE STATUS APPEALS AUTHORITY OF NEW ZEALAND)

In the New Zealand case, Chairperson Rodger Haines unpacked and made explicit much of the underlying assumptions of *Shah*, creating a framework both theoretically coherent as well as practical for analyzing persecution and the relationship between non-state actor agency and state responsibility. The case involved an Iranian women fleeing her violent first husband, in this case in the context of a custody battle over their son. As in *Shah*, there was overwhelming evidence that the state, in this case Iran, condoned if not encouraged the "private" violence from which the applicant fled. Especially with respect to the custody battle, the RSAA concluded that the state had established "the very legislative framework which to a large measure is the source of the harm" faced by the applicant. The RSAA readily found the Convention grounds of religion, political opinion, and particular social group applied; with

[10] In a subsequent decision of the House of Lords, *Horvath v. Secretary of State for the Home Department* [2000] 3 WLR 379, Lord Berwick opined that Lord Hoffman's definition of persecution as including the question of state protection was not necessary for the decision in that case. With all due respect, this seems to me to be wrong. The majority in *Shah* not only determined that Pakistani women constituted the relevant social group, but in finding that status could be recognized and protection granted, they had to address and find a nexus between the persecution and that Convention ground. They found that the state was not the perpetrator of the harm, and they found that the acts of the husbands were personal; failure of protection had to be a part of the persecution formula.

respect to the latter, it described as "indisputable" that gender can be the defining characteristic of a social group and that "women" may constitute a particular social group.

On the critical question of nexus, Chairperson Haines restated the *Shah* conclusion and removed any ambiguity from its formulation or implications. Persecution must consist in a serious harm *and* a failure of state protection.

> This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of Convention grounds, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention ground.

In this case, Chairperson Haines concluded, like Lords Hoffman and Steyn in *Shah*, that the serious harm perpetrated by the applicant's husband could not be said to be for a Convention reason – for the fact that she is a woman or for reasons of religious or political opinion. Although he recognized that there are gender motives behind such violence, he concluded that they are not exclusive or unambiguous. He found, however, that the Iranian state was motivated by gender in denying protection. The Iranian state condones if not actively encourages the non-state actors, in such cases, husbands or former husbands, to cause serious harm to women, through a system of institutionalized discrimination and subordination of women. The nexus is supplied by the failure of state protection "limb" of persecution.

Addressing the standard for assessing state protection in such cases, Haines concluded that the state fails to protect when it does not bring the risk of harm from the non-state actor to below a well-founded fear. He rejected the reasoning of the House of Lords in *Horvath*, in which their Lordships, using various tests, concluded that the standard of state protection should be analyzed separately either from the concept of persecution or a well-founded fear. If the state has in place a system for the protection of the citizen and a reasonable willingness to operate it, then state protection is available, even if the person faces a well-founded fear of the persecution upon her return. Haines rejected this formulation in favor of a holistic understanding of refugee status and protection. "[T]he purpose of refugee law is to identify those who have a well-founded fear for a Convention reason. If the net result of a state's 'reasonable willingness' to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied that individual."

It should be emphasized that application of the New Zealand holistic formulation — recognizing refugee status where the applicant establishes a well-founded fear of persecution, the latter understood to include both the serious harm and the failure of state protection — will certainly not result in recognition in all "domestic violence" cases. In some cases, the harms by the husband will not be sufficiently serious to meet the first part of the persecution test. In

others, there will not be a particularized failure of state protection; as Lord Hoffman stated in *Shah*, it is not the occurrence of the violations by husbands but the failure or availability of state protection that differentiates among countries. In some countries, systems of protection are in place which, although not eliminating all risk, reduce the risk to below the well-founded fear threshold. A woman who has never been abused and cannot articulate specific grounds for fearing that she will be battered in the future will not be able to establish an objective basis for her claim. A woman who was battered in the past, but successfully left the relationship and has lived openly and safely since then, will have difficulty establishing that any fear she has is "well-founded."

A woman may have access to protection if her husband is an ordinary citizen, but not if he is influential with government officials. In some countries, a female victim of such violations may be able to obtain state protection if she has the support of her family of origin in seeking it; in other cases, her access to such protection may be more limited without such support. The refugee status inquiry is always individual; it is always particularized.

4. PERSECUTORY INTENT AND STATE ACTION: MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS V. KHAWAR (FEDERAL COURT OF AUSTRALIA)

In *Khawar*, the Pakistani woman applicant, like the claimants in *Shah* and the New Zealand case, fled severe violence by her husband. The somewhat different factual context, as well as a vigorous dissent, forced the Court to address issues of persecutory intent and state action not raised in the other decisions. The other decisions did focus on the failure of the state to protect the women applicants from their husbands' and former husband's violent attacks. However in the UK and New Zealand cases, there was also evidence of the state's active involvement in some aspects of the harm feared: in the laws enabling prosecutions for adultery in *Shah*, and in the laws enforcing an Iranian husband's superior rights in custody disputes in the New Zealand case. In *Khawar*, the relevant evidence discussed largely concerned the applicant's attempts and failures to obtain police protection on several occasions.

The *Khawar* court adopted the *Shah* dual understanding of persecution, and its implications for the nexus requirement. The nexus to the gender-defined particular social group ground could be found even if the applicant's husband and other family members were exclusively motivated by personal reasons (although the Court did not necessarily conclude they were, a point I will discuss at the end), since the failure of state protection was for reasons of gender. The Court found that gender-related motivation, evidenced in a "well-established pattern of discrimination against women and in favor of men in

Pakistan." It also found an acquiescence in and acceptance of the unavailability of protection of women against the violence of men "by those organs of the state that are charged with a protective role."

The Court rejected any requirement of a showing of "enmity" or "malignity" by the state. State inaction would be sufficient. "[S]tate perception of a particular social group as "inferior, "less deserving" or "second class" by reference to the rest of society, and in particular, a view of members as not possessing the same human rights as the rest of society or, if possessing them, as not entitled to have them enforced and protected to the same extent as the rest of society" constituted a sufficient motivation.

5. THE SURROGACY PRINCIPLE AND FAILURE OF STATE PROTECTION

This body of decisions goes a long way towards creating a framework for adjudicators especially (but not exclusively) in such cases of core rights violations by husbands and partners, where the state's involvement may be both pervasive and invisible. Like many of the interpretations that have been offered in gender cases, the analysis presented by these cases is, I believe, grounded in accepted principles and doctrine.

As noted, the fundamental starting point for all these decisions is an analysis of persecution as encompassing both a serious harm *and* a failure of state protection. Many leading commentators, the House of Lords, the Canadian Supreme Court, the Australian and New Zealand authorities —among others — have accepted the principle of refugee protection as "surrogate" protection. Refugee law exists to provide surrogate or substitute protection when the state has failed in fundamental duties it has towards its population and when this failure has a discriminatory impact based on race, religion, nationality, membership in a particular social group or political opinion. Failure of state or national protection is key, because the international community only steps in to provide protection, when national protection is lacking. For persecution to be found there must be, as was stated by James Hathaway and recognized by the Canadian Supreme Court in *Ward*, a "sustained or systemic violation of human rights *demonstrative* of a failure of state protection." Obligations cannot be placed on other states to provide substitute protection merely because a harm, even a serious harm, has occurred; it must be a harm with respect to which the state owes a duty. To constitute persecution, there must, therefore, be both a serious harm *and* a failure of state protection.[11] *Shah*, *Khawar* and the New Zealand authorities are correct, it seems to me,

[11] "The intention of the drafters was not to protect persons against any or all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state it its own population." James C. Hathaway, The Law of Refugee Status 103-04 (1991).

that the linkage to the ground, the reason for the risk — in these cases gender — is provided by the state's failure to provide protection, even where there is no finding that the non-state agent, the source of the serious harm, acted out of gender or discriminatory motivations. As Chairperson Haines most fully explains, this follows logically from the bifurcated nature of persecution.

Haines' conclusion with respect to the standard for assessing state protection, also seems to me to be correct, and flows from the language of the refugee definition and the Convention's purposes. A holistic approach is required. The issue whether a person faces a well-founded fear of persecution for a Convention reason raises a single question. The refugee definition requires recognition, and Article 33(1) requires protection, where the risk faced is that of a well-founded fear, and it is against this specific risk that the adequacy of state protection must be measured. The requirements of the Refugee Convention are violated "by a process of interpretation which measures the sufficiency of state protection not against the absence of a real risk of persecution, but against the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate that system." Refugee law is not concerned with abstract questions of culpability, i.e. whether the state is doing enough in general to protect its citizens. Refugee law is concerned with the very concrete question of protection in individual cases; not, as *Horvath* suggests, with whether the state has a formal system in place to protect its citizens, but rather whether such a system functions in practice and in particular whether it functions to eliminate a real (well-founded) risk of harm for the applicant.

This question is clearly relevant in many "domestic violence" cases where the evidence of discriminatory treatment may be in the implementation, or the failure to implement protections that are on the book, for example, in the discriminatory enforcement of the criminal law. This it seems to me is the special significance of *Khawar*. *Khawar* extends protection beyond those cases where state discrimination is formalized and official. As *Khawar* suggests, intention to harm is irrelevant and the nexus to the gender-related reason can be found whether the failure of state protection is the result of commission or omission, where a discriminatory effect — a pattern and practice if you will — can be established.

6. CONCLUSION

I will end this talk with one note of criticism, which also suggests where "the next stage" of cases may be headed. I do not think it should be assumed that the reason for the violence by husbands against wives is "private" or personal. Domestic violence is purposeful behavior intended to control and dominate an intimate female partner. It serves a "historical, culturally sanctioned purpose,

which was and is for men to keep their wives 'in their place.'"[12] Studies of batterers have observed that "the typical batterer" uses violence "to meet needs for power and control over others. Their actions are often fueled by stereotypical sex-role expectations for 'their' women."[13] It is no coincidence that, "The strongest risk factor for being a victim of partner violence is being female."[14]

This may suggest the relevance of the political opinion ground in these cases; it also suggests that the linkage to a Convention reason, be it to "women" as a social group or political opinion, can be the non-state actor husband, not (or as alluded to in *Khawar*, not *just*) the enabling state. It may be, therefore, that the requirements of the Convention's refugee definition can be met where the evidence available only supports a finding that the state is "unable" rather than in some sense "unwilling" to control these violations. In such cases, and assuming the bifurcated nature of the concept of persecution, the nexus between the Convention reason and the persecution can be provided by the "serious harm limb." Lord Hoffman suggests that these may be the more difficult cases — although I am not sure why they are conceptually more difficult — where there is no evidence of a state discriminatory policy but where there is evidence that the non-state actor is inflicting the harm on a discriminatory basis. As suggested, this may be important in "domestic violence" cases, especially where problems of lack of available evidence make it difficult to prove that the state's failure to protect is in some sense deliberate and discriminatory.

[12] David Frazee, Ann M. Noel, and Andrea Brenneke, *Violence Against Women: Law and Litigation* (1998).
[13] *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996)
[14] Id.

GENDER CASES: DOUBTS AND QUESTIONS

David A. Martin*

Although this conference is titled "The Changing Nature of Persecution," I suspect that persecution really has not changed so much in the 50 years since the Geneva Convention[1] was adopted. Instead, the world's sensitivity and activism regarding human rights abuses have changed, an evolution reflected in many ways in refugee status decisions. Today, refugee lawyers pose legal questions on behalf of their clients that would not have occurred to them or to the adjudicators in earlier years, even though people were probably suffering harm in the same ways. This is particularly true of the field addressed by this panel: gender cases.

At first, greater sensitivity and activism on human rights manifested themselves in the refugee arena in efforts to bring improvements to neglected adjudication procedures. Many nations adopted changes to make decisions more professional, more independent, better informed by access to current information about conditions in source countries, and fairer to the applicant, yet still capable of reaching decisions, including negative decisions, in a reasonable time frame. That there are now *judges* of refugee law, and that they self-consciously advance their important mission through a transnational association attest to this welcome and hard-won evolution. These institutional and procedural changes created a framework for a second phase of sensitivity and activism, focusing on difficult questions of doctrine, and asking whether forms of harm beyond core cases involving repression of political dissidents or hated minorities might fit within the legal definition of refugee.

Interpreting the definition: clarity about underlying policies. These questions pose considerable challenges, because the central legal definition of "refugee" -- a person who has a well-founded fear of persecution in his or her home country for reasons of race, religion, nationality, membership of a particular social group, or political opinion[2] -- is remarkably plastic. What is "persecution"? How is one to understand "particular social group"? What kinds of motivational connections lead to the conclusion that the harm is inflicted "for reasons of" one of the specified Convention grounds? One could, without doing violence to the lan-

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[1]Convention relating to the Status of Refugees, *done* 28 July 1951, *entered into force* 22 April 1954, 189 U.N.T.S. 137.

[2]Id., art. 1(A)(2), as modified by the Protocol relating to the Status of Refugees, *done* 31 Jan. 1967, *entered into force* 4 Oct. 1967, 606 U.N.T.S. 267.

guage of the definition, adopt a wide range of interpretations or applications, from broadly protective to narrowly restrictive.

With such broad phrasing, then, it is inevitable that background judgments about the policy or policies underlying the machinery of refugee protection play a significant role in specific interpretations. Often the rules of the legal game forbid judges to be explicit about the policy judgments that inform their interpretations, but the legal realist movement taught us to be skeptical that such silence, particularly when a new range of questions comes into view, means the absence of policy or value judgments. In other cases, however, greater explicitness is sometimes possible. Particularly with regard to treaties, where under prevailing rules the "object and purpose" of the treaty are specifically to play a role in interpretation, judicial decisions can more directly address the deeper policy considerations.[3] But there remain enigmas, for object and purpose are never wholly transparent. Deciding on object and purpose is inevitably a creative act, retelling the story of the treaty's creation and implementation in a way that illustrates consistent themes, themes that may not have been wholly apparent to the instrument's drafters or its early implementers. Further, a multi-nation drafting conference, like other legislative institutions, almost always has multiple objects in mind, many in tension if not in outright contradiction. And to the extent that the modern refugee law judge is also to be guided by subsequent practice under the treaty (as the Vienna Convention on the Law of Treaties suggests[4]), that practice too is hardly univocal.

Some critics of current refugee practices in Europe and the United States seem to base their criticism on an assumption that the refugee treaties straightforwardly serve a single object or purpose -- the advancement of human rights. If this were the case, no doubt the interpretive task would be far easier. One might well indulge the broadest possible interpretations of the key elements of the definition, so as to protect as many asylum seekers as possible, from a whole host of threats.[5] But this was manifestly not the sole objective of the treaty's drafters, who were preoccupied with questions of *status*, as the title of the 1951 Convention attests, largely for a group of migrants already in place in the asylum countries of western Europe -- left there after World War II and reluctant to

[3]Vienna Convention on the Law of Treaties, art. 31(1), *done* 23 May 1969, *entered into force* 27 Jan. 1980, U.N. Doc. A/CONF.39/27 (1969). A recent decision of the Refugee Status Appeals Authority in New Zealand effectively illuminates the greater wisdom of the "object and purpose" approach, as compared with a dictionary-bound "plain language" approach. Refugee Appeal No. 71427/99 (16 Aug. 2000), at para. 44-47.

[4]Vienna Convention, art. 31(3)(b) (interpretation should take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

[5]I have elsewhere raised questions, however, about whether the encouragement of foreign relocation by the maximum number of individuals might not actually retard human rights progress in some circumstances, by diverting efforts away from a communal struggle to change the bad practices *in situ* and toward an individualist process of seeking escape. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in *Refugee Policy: Canada and the United States* 30, 44-45 (H. Adelman ed. 1991).

return to their Communist-ruled homelands. This was not a treaty about admissions or rescues, and it manifests no comprehensive strategy for dealing with the problem of persecution around the globe. (This is not surprising; human rights efforts toward these ends were only in their infancy at that time.) The record of the conference of plenipotentiaries contains many references to the drafters' intention to avoid drafting a "blank cheque" that would leave their societies exposed to unknown and uncontrollable levels of migration in the future.[6] Human rights was a concern, of course, but one measured and tempered by a realism concerning the public's tolerance for any legal pledge, or the creation of legal entitlements, that might hold forth the prospect of unchecked migration. The treaty therefore reflects a complex mix of objects and purposes. It is unmistakably meant to provide, as a legal entitlement, an important form of protection to certain people threatened with persecution, but to do so while still keeping a reasonable measure of control over immigration.[7]

Therefore the drafters did not offer shelter for all human rights victims, but only those faced with that subset of violations severe enough to be called persecution. Further, they delphically limited coverage even of that set of wrongs by appending the "for reasons of" limitation. And of course, the limiting impulse found its most concrete expression in the dateline provision in Article 1(A)(2) of the 1951 Convention, which confined protection under the 1951 treaty to persons who were outside their countries of origin "as a result of events occurring before 1 January 1951." I suppose one might argue that the UN General Assembly's decision in 1967, in adopting the New York Protocol and thereby eliminating the dateline from the definition,[8] reflected a turn toward a single-minded human rights objective and a forswearing of the immigration control objective. But that would be a misreading. That very same year the General Assembly adopted a Declaration on Territorial Asylum that reveals much about that body's understanding of the object and purpose of the refugee treaties.[9] To be sure, the Declaration was protection-oriented in many important respects. For example, it urged states not to engage in rejection of asylum seekers at the frontier. (Whether the principle of *nonrefoulement* included a ban on such a practice at the borders had long been contested). But the Declaration clearly manifests concern with the control objective, for it qualified its urgings regarding *nonrefoulement* with this language: "Exceptions may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, *as in the case of a mass influx of persons.*"[10]

[6]See, e.g., U.N.Doc. A/CONF.2/SR.21, p. 12 (1951).

[7]For an account of how entitlements to protection (as distinguished from ad hoc political efforts to extend protection when circumstances allow) pose a unique worry from the standpoint of those who wish to maintain a reasonable level of immigration control, see Martin, supra note 5, at 31-37.

[8]Protocol, supra note 2, art. I(2).

[9]G.A. Res. 2312 (XXII), U.N. GAOR, 22d Sess., U.N.Doc. A/Res/2312 (XXII) (14 Dec. 1967).

[10]Id., art. 3(2) (emphasis added).

State practice in the 33 years since the Protocol was adopted also manifests the same mix of objectives. The ability to maintain reasonable control of migration into the territory has certainly been among the concerns driving changes to law and practice of states over that period.

The refugee regime's need for continued popular support and legitimacy. One could put this basic point in a different way. Treaties of this type don't enforce themselves. They need continuing support by the populace, particularly in democratic societies, if they are to remain vital. Overambitious efforts to afford too expansive and capacious a protection through this legal entitlement system risks undermining that support, by raising worries among the population and among the politicians about the ongoing objective of reasonable immigration control. Asylum, in short, is a scarce resource -- politically scarce, not physically scarce. It can provide a vital and needed part of an overall global human rights protection strategy, *when it is focused on those whom the wider public believe legitimately need protection outside the borders of their home countries.* If protection systematically reaches beyond what is seen as legitimate, then the system is in trouble and may face correction -- or too often overcorrection -- through political response. Sustained political support requires a popular sense that the protective apparatus is being deployed for those with a significant degree of risk, and who face harms that are accepted as the type that were intended for protection. Below I will attempt to sketch the traditional paradigm of legitimate harms that serves as a starting point for such popular judgments.

The influence of the control object on interpretation. I would submit that this mix of policy considerations -- an impulse to protect the genuinely threatened, plus an impulse to sustain reasonable immigration control -- has informed most interpretations of the components of the refugee definition, although many of the interpretations could be explained -- and have been explained -- on the basis of more technical interpretive approaches. One rarely finds a statement that the court has adopted the narrower interpretation because otherwise too many people might qualify for asylum. Nonetheless I believe that that concern has often been operative. It accounts, for example, for the way in which "well-founded" is usually understood. The phrase could easily be interpreted to set a lower and thus more protective threshold. If a home government is known to persecute, for example, such governmental behavior provides a solid rational foundation for any citizen's fear of persecution. Applying the dictionary to such a claim then leads to the conclusion that the fear is well-founded. The fear is neither fanciful nor paranoid; it is founded in the real practices of the government. But no interpretation I know of sets the threshold that low -- implicitly because such a standard would give rise to an overwhelming number of successful claims. Interpretation instead usually calls for a demonstration of why the claimant himself or herself is at real risk of becoming a target of the proven persecution.

Perhaps a better example of the force of the numbers concern may be found in the treatment of persons fleeing civil war. It would be possible to construe each central element of the definition -- well-founded fear, persecution, and the nexus requirement (using a broad concept of imputed political opinion) -- in a way that would cover most such persons. But instead we have a reasonably solid consensus that, without more, such persons ordinarily do not count as Convention refugees. It is as though everyone understands that the legal entitlement system at the heart of formalized refugee protection would be overwhelmed by the numbers who would qualify under such a reading. Therefore we ordinarily leave those who flee civil war outside the legal entitlement framework. This does not mean they are inevitably consigned to swift return. Instead, the world community ordinarily allows greater political flexibility in crafting ad hoc responses, such as temporary protection. But ad hoc responses do not guarantee similar treatment to the next group in flight; hence they can claim greater popular support because they do not inevitably hold open the prospect that large numbers can claim a legally mandated right to enter or remain in the national territory.

In my view, this same numerical concern, usually *sub silentio*, drives the caution of many decisionmakers regarding refugee claims founded on gender discrimination and persecution. What I want to do here is explore that and related concerns regarding gender cases. I will wrestle with when that concern validly calls for restriction and when it could perhaps be overcome by a careful deployment of asylum protection to guard against gender-based harms.

Refugee protection does not mark the boundaries of human rights policy. One point deserves emphasis before proceeding further. As indicated above, refugee protection is not coterminous with international human rights law and diplomacy. Asylum as a legal entitlement under the 1951 Convention covers a subset of human rights violations -- those that are appropriately addressed through a system contemplating foreign relocation. To say that certain kinds of risks do not come within the ambit of the refugee definition is not to ignore or condone the situation. Gender discrimination is wrong. It is properly regarded as a significant human rights violation. But I do not regard such discrimination, by itself, as a valid basis for asylum, because ordinarily discrimination does not rise to the level of persecution. It is not inconsistent to take this position while still supporting vigorous initiatives through national diplomacy, international institutions, or NGO efforts, to move against such discrimination *in situ* as forcefully and swiftly as possible.

A measuring stick: the traditional paradigm for legitimate refugee protection. A rough sketch is in order of the basic vision of legitimate protection that has been the unarticulated starting point for the public in receiving states with highly formalized systems for refugee status determinations. I do not offer this as a static picture or the only measure of valid protection, but rather as a construct of

core claims to refugee protection that are readily recognized as legitimate in the eyes of the public. The construct is no doubt somewhat artificial, and certainly contestable, but it may help reveal why gender-based claims have often encountered resistance and reaction, and it may help reveal what further steps could be taken to minimize that resistance. Decisions that fall outside the paradigm can of course occur, and they can be sustained, for awhile, by the institutional strength of the judicial or quasi-judicial body that pronounces them. But in the long run, such decisions risk being overturned by more politically responsive players (legislatures or top executive officials), *unless* the general framework of legitimacy can be moved. That -- shifting the paradigm -- is the essential task for those who would argue for a wider range of protection, in gender cases as on other frontiers. And of course, judicial decisions can play a role (albeit a modest one) in moving that framework. But it is not solely a matter of lawyer's logic in building on certain language or precedent. It is also a matter of connecting to the public's sense of legitimacy by bridging to the central paradigm, and also allaying public worries fears about unmanageable numbers or loss of a reasonable measure of immigration control.

Here then is my attempt at a rough sketch of the traditional paradigm:

> Persons protected should be at risk of severe harm -- persecution and not some lesser, even if undeniably objectionable, mistreatment. In the paradigmatic case of a refugee, the persecution is accomplished by a state actor or is at least state-instigated, and it is performed with a consciously malevolent animus (crudely captured in the "for reasons of" element of the definition as well as in the very concept of "persecution"). The actor wants to hurt the victim, because he regards the latter as a political opponent, perhaps, or because he hates the racial, religious, or other group to which the victim belongs. And the risk must rise above a certain threshold level, to the point that it is too much to expect for the individual to return home and face down or overcome such a threat. Only above that threshold is the fear "well-founded."

Using this construct, I will now examine several possible bases of gender-related claims.

Rape. Is rape persecution? This isolated question has never struck me as a difficult issue, although it is sometimes contested. Rape should be understood as a form of persecution. This is of course only the first step in deciding whether the threat of rape gives rise to refugee status. But to take care of those other steps, let us here postulate a case where there is no doubt that a Convention reason underlies the harm, and that the state is behind it. For example, consider an ethnic cleansing campaign during which the state apparatus has told its troops that they may -- or even should -- rape female detainees from the other ethnic group. Whether this order manifests pure ethnic hatred or is instead seen as a way of inflicting a more severe and demoralizing harm on the men the state may have to face on the battlefield is immaterial. It is not hard to gain public understanding that such an act is a severe form of mistreatment, meriting the label "persecution." Rape is undeniably a severe invasion of personal integrity. That the poten-

tial individual rapist may also be driven by personal lust (once he has this broad permission from the government) does not diminish the persecutory quality of the act nor does it crowd out the underlying Convention reason, any more than traditional state-directed torture loses these qualities whenever the individual officer takes a sadistic personal pleasure in the process of inflicting pain.

What about the immigration control concern? In this stipulated example, the control prospects are manageable. The normal limitations of well-foundedness and nexus to a Convention reason make this approach no more likely to generate unsustainable numbers than are more conventional forms of ethnic persecution, such as torture or lengthy detention in concentration camps.

Culturally embedded practices: female genital cutting. This practice, sometimes called female genital mutilation (FGM) or female circumcision, is readily regarded in most of the major asylum-seeker receiving states as a severe harm, thus meeting a key requirement for being regarded as persecution. A more difficult fit with the traditional paradigm is the animus element, because those who perform the act of cutting are usually women of the community who by no means wish to harm the girl or young woman who is being cut. They subjectively believe that they are performing a ritual indispensable for her full and pure womanhood. As a technical legal matter, moreover, it is not easy to figure out exactly what would be the appropriate Convention ground to assign to the practice. Some form of "particular social group" is the most likely candidate. But lawyers in the pathbreaking cases have tended to describe the social group in a variety of different ways -- perhaps as all women or as a subset described by ethnic or religious group, plus uncircumcised status. Others add elements of political opposition to the practice, or may seek to describe the Convention ground wholly in terms of political opinion. Further, the state is usually not directly involved in the commission of the act, although absence of laws against the practice, or complete underenforcement of those that may exist is of course a part of the picture.

Can a convincing bridge be made, in popular understanding, to the core paradigm, with particular attention to the elements of animus and state involvement? Can the bridging process adequately allay possible public concern that protecting against this form of harm, as a matter of legal entitlement, opens too great a threat to immigration control? I believe that the answer to both questions is yes, and I will illustrate that claim with the way in which protection for potential future victims of female genital cutting (FGC) came to be recognized in the United States.

The legal issue gained remarkable public attention throughout the country in the spring of 1996, with the case of Fauziya Kasinga.[11] I represented the US government in the argument before the Board of Immigration Appeals (BIA),

[11]See *In re Kasinga*, Interim Dec. 3278 (BIA 1996) (en banc).

where we took the position (a change from earlier stages of the litigation) that FGC *did* amount to persecution that could give rise to refugee status, if certain other elements of the definition were satisfied. (We still disagreed with Ms. Kasinga's attorneys on certain subsidiary questions.) As the case was being scheduled for consideration by the BIA, it drew more media attention than most decisions by the U.S. Supreme Court. As a result, the case provided an opportunity not only for broad public education on the history and practice of FGC -- a practice most of the populace had probably never heard of -- but also for wide public discussion and reflection on how the refugee paradigm should or should not be adapted to cover this situation. With this kind of national seminar on the television screens and front pages of national newspapers, it became possible to connect her case to the basic framework of legitimate refugee protection even though it lacked certain traditional elements.

First, the lack of direct state involvement proved a small obstacle. U.S. legal doctrine had far earlier reached a reasonably settled conclusion that nongovernmental persecution could give rise to a valid refugee claim, if the government was either unwilling or unable to provide adequate protection. The *Kasinga* case presented so graphic a set of risks that popular understanding was readily brought around to the kind of "surrogate protection" understanding that Professor Hathaway has long advocated.[12] Refugee law should provide protection when the government fundamentally fails in its duty of protection, at least against certain kind of harms.

What about the subjectively benign intent of the alleged persecutors? This was a bit more complicated, because there is a lingering public diffidence about intruding into culturally embedded practices that are subjectively well-intentioned. This is probably a healthy presumption, but it proved no more than that -- a presumption, which could be overcome by other elements. Here, the news coverage focused on Ms. Kasinga. From her point of view there could be no doubt that the practice would be felt as a deeply objectionable intentional harm. Moreover, since most Americans had never had to think about the prospects of such a practice, and since it involved the most fundamental kind of physical invasion, it was not hard for them to shift to a victim-centered viewpoint. I doubt that this reflects a broad principle that the asserted harm should always be judged from the victim's viewpoint. The key here was probably the vast gulf between the subjectively benign view of the act held by those who perform the cutting and the nearly unanimous reaction to the practice among the public in the receiving state. From the view of the populace in the host society, the victim's categorization of the act as persecution struck a deeply resonant chord. When the victim's view contains what is seen as such an objectively sensible judgment of the harm, such a bridging can be accomplished. These of course are highly contextual and culturally influenced judgments (about what is objectively sensible), but when such a connection between the victim and the

[12]See James C. Hathaway, The Law of Refugee Status 135 and *passim* (1991).

culture of the asylum state can be accomplished, we are far more likely to see an expansion of refugee protection.

For this reason, it would probably be inaccurate to generalize from *Kasinga* to say that all physical invasions amount to persecution if so regarded by the victim. Medically reasonable surgery to be performed on a teenager at the insistence of his parents would not be counted as persecution, even if the teenager subjectively viewed it as a horrible harm. Or to take a more closely comparable issue, although there are incipient movements opposing male circumcision, I doubt that a male teenager facing circumcision in hypothetical circumstances otherwise quite similar to Ms. Kasinga's, would have generated anything like the same reaction, in the public or in the legal proceedings.[13]

There still remains the numbers issue. In fact, it rather surprised me in the way it resurfaced in the coverage of the *Kasinga* case. The evening of the day when the case had been argued before the BIA, I appeared on a national television news show, *Nightline*, to discuss the issues. Most of the press coverage until then had been highly sympathetic to Ms. Kasinga, and the opening 15 minutes of Nightline consisted of a sensitive and careful taped interview with her, interspersed with information about FGC and the significant health risks associated with the practice. I therefore expected most questions in my interview to ask why the government had taken so long to recognize that FGC could be the basis for asylum, or why we still had legal issues that might delay a grant of asylum to Ms. Kasinga. Instead the first question from the interviewer zeroed in precisely on the floodgates question. He pointed out that there are 80-100 million women who have been subjected to FGC globally, and asked whether the government's stance would not invite an unmanageable number of asylum claims.

This is, as I have indicated, a legitimate question to ask, because it connects with one of the objects or purposes of our refugee protection system. Proponents of broader protections in refugee cases have to be prepared to offer answers that acknowledge the force of this concern -- so that the concern does not overwhelm the fragile bridging otherwise accomplished to the paradigm.

My answer focused on the fact that the government's position promised asylum only to those, like Ms. Kasinga, who faced a future risk of FGC, not to those who had been subjected to it in the past. As a practical matter, few women would be in a position to seek distant asylum before being subjected to FGC, since it is usually imposed on girls at a younger age. (The main address to this human rights abuse will therefore have to come through initiatives and diplomacy targeted at the home societies.) Ms. Kasinga was unusual, because she had been shielded from her people's traditional practice by her father, who unfortunately died when she was 18. Moreover, the protection the U.S. government argued for covered

[13]I do not overlook that there would doubtless be other significant differences in the two types of circumcision cases, such as alternative means within the country of origin to avoid the decreed fate, which might more readily account for a conclusion denying protection to the hypothetical male.

only those at risk of being *forced* to undergo the procedure, not those who would merely suffer some societal ostracism for failure to conform.

Therefore, as indigenous efforts to suppress the practice strengthened or as networks of support for those who sought to oppose it became more prominent, the need for distant refugee protection would decline correspondingly. Defining the line between forcing someone to undergo FGC and merely pressuring toward such an end is of course not easy. But greater attention to hard questions of this kind will remain essential if conceptual expansions of refugee protection are to be sustainable. This ongoing dynamic also holds forth prospects for asylum states to minimize their potential burden if they can foster local efforts to overcome the objectionable practice in the home state. This set of issues will have an important bearing on the next major round of FGC cases that are now arising in the United States -- claims filed by mothers (and sometimes couples) essentially on behalf of their female children, who would, they assert, have to undergo the procedure if returned. Whether the risk is substantial when one parent (or sometimes both) is resolutely opposed to the practice will have to be examined closely, and the line between pressure we expect people to endure and that which is intolerable will have to be mapped.

Domestic violence. These reflections lead to the most challenging set of current gender-related asylum cases, those involving domestic violence. Although in principle the violence could be perpetrated by either spouse or partner, overwhelmingly it is the man who abuses the woman. The phenomenon probably occurs in all societies. Although it was rarely an explicit focus of public policy until approximately 40 years ago, the fact that domestic violence is now classed as a human rights abuse and is prominently targeted by both governmental and nongovernmental campaigns marks an important advance. In many countries these efforts against domestic violence have brought increased awareness and increased knowledge about how the public domain can shape and influence what had been regarded as the realm of the private.

But is the threat of domestic violence a proper basis for refugee status? Severity of harm is not a problem in making that connection. Many domestic abuse cases cross that threshold and are exactly analogous to paradigmatic harms of torture or prolonged detention or beatings. But the abuse is almost never state-instigated in any direct sense. Even where government provides notoriously poor or nonexistent protection for abused women, not all women are abused by their partners. The state's attitude is indifference -- morally reprehensible, to be sure, and a human rights violation. But does that stance adequately connect this particular set of harms with the traditional refugee paradigm? It may well be that, by now, in many receiving states the public's understanding of government inaction when it has a duty to protect has matured to a point that state instigation or initiation of the harm is no longer required for a new realm of refugee protection to be regarded as legitimate. But for that connection to hold in the public mind, there must be more than the normal level of law-enforcement failure. The

challenge, as I will develop below, may be to develop better criteria for deciding when law enforcement is adequate, though imperfect -- i.e., when state protection reaches a level of sufficiency so that the claim to distant asylum is properly rejected.

Nexus and Convention reasons. The most challenging conceptual question with regard to domestic abuse cases is probably the issue of a nexus between the persecution and a Convention reason. Is domestic abuse persecution "for reason of" race, religion, nationality, membership in a particular social group, or political opinion? Some scholars who advocate broader protection in such cases have argued that political opinion is an appropriate basis for the key finding. In this view, the woman, by resisting the husband's violence, manifests a political opinion (however inchoate) that rejects such male dominance. Or the male's acts, even without any sign of overt resistance from the female, manifest his political opinion that such dominance is right and proper.

It is certainly possible to describe the situation in these terms, assigning a political description to an act that, on an initial look, involves only a badly dysfunctional private relationship. Indeed, this kind of analysis, locating political agendas within the most commonplace or private activities of daily life, has become a kind of standard exercise in undergraduate seminars. It is a hallmark of postmodernism to analyze such activities and identify the structures of dominance built into the very conceptual machinery we use to describe and organize our every experience. As an early feminist insight puts it: the personal is political. I do not want to dismiss such approaches. They can be powerful keys to deeper understanding of culture and politics, and can sometimes serve as the stimulus to human rights activism on the part of people who were indifferent before.

But the legitimacy question for refugee law purposes is not whether an undergraduate seminar could find a way to describe such abuse as motivated by political opinion. Clearly it could. The question is whether a convincing connection can be made in the broader public understanding, which tends to be uncomfortable with or skeptical of dazzling theoretical recastings. At the level of daily life, the distinction between the private and the public realm still carries important weight. And I believe that the refugee definition must be applied, in general, at the level of common discourse, even if the official doing the applying could easily perform the more sophisticated analysis. In this common-sense perspective, the husband's abusive behavior is usually motivated by his own internal demons or frustrations, or by a history of physical abuse that he suffered as a child, not a desire to overcome political opinion in his wife.

Is it possible, nonetheless, to identify a smaller subset of domestic abuse cases that have a political element and therefore might qualify under the "political opinion" rubric? Some cases have taken this approach, in an apparent effort to provide protection against genuine harms presented in the individual case and yet do so in a way that would minimize the concern about unmanageable num-

bers. For example, the court in *Lazo-Majano v. INS*[14] found that a Salvadoran woman qualified for asylum, based essentially on the years of abuse she had suffered at the hands of a sergeant with whom she lived. At certain points when she resisted his acts he threatened to denounce her to the government as a subversive. The court seized on these episodes and concluded that because of them she would face persecution based on imputed political opinion if she were to return. That is, she would be considered to hold the views of the subversives.

This approach may sometimes be valid, but very often it strikes me, as it did in *Lazo-Majano,* as highly artificial. The real issue is the threat of renewed abuse and violence, against which there is no effective governmental protection. The occasional remark that has a more explicitly political flavor is generally quite accidental. It does not really capture the reason why the man committed the violence against the woman nor the reason why he might well resume the abuse upon her return.

What about "particular social group" analysis? Under different advocates' approaches, the relevant group could be women, or it could be some subset depending on the circumstances, perhaps women suspected of adultery, or women living with male companions who believe in male dominance, or women who lack a male relative who could protect them against abuse. The difficulty lies not in constructing a group designation that can be said to fit the circumstances, but in honestly concluding that the threatened violence would be inflicted by the abuser *because of* that characteristic. As opponents of such a conclusion point out, the male typically abuses only one person -- his wife or companion. If there were group-based animus, one would expect it to find expression in violence committed against other members of the group.

For a long time I found myself at this analytical pass in analyzing cases of this sort. Domestic abuse could be serious enough to rise to the level of persecution. It is doubtless reprehensible and deserves suppression through a full range of sanctions, both civil and criminal. Efforts to pressure governments to create more effective internal safeguards against such abuse are validly seen as part of the global movement for human rights.[15] But, as noted, not all human rights abuses translate into occasions for refugee protection. And in these cases I could not bring myself to conclude honestly that a sufficient nexus between the abusive behavior and a Convention reason had been established. The abuser (at least in most such cases) does not act "for reason of" one of the Convention grounds, interpreted in a common-sense and public-discourse manner. He acts because of a bad day at work, or because the meal is cold, or because he takes objection to a comment. The BIA decision in *Matter of R-A-*[16] provides about the most complete and thorough spelling out of this analytical approach, in the course of denying asylum to a woman who, the Board clearly recognized, faced a heinous

[14]813 F.2d 1432 (9th Cir. 1987).
[15]See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (20 Dec. 1993).
[16]Interim Dec. 3403 (BIA 1999).

level of abuse. The Board's opinion virtually pleads with the INS to find an ad hoc solution that might let her remain in this country, but it rules that she cannot fit the refugee definition. The basic problem is an insufficiently proven nexus.

The dissenting opinion in *R-A-*, however, set forth an argument on the nexus point that has lingered with me and has forced me to reflect further on my initial conclusions. The argument is based on a passage from Lord Hoffman's decision in *Islam (A.P.) v. Secretary of State for the Home Department,*[17] which decided that Pakistani women at risk of severe violence because they were suspected of adultery were entitled to asylum in Britain. In a thought-provoking analogy, Lord Hoffman asks the reader to consider the situation in Nazi Germany in 1935. Suppose that the Nazi government in those days (before the gas chambers) pursues a policy of not giving any protection to Jews who are subjected to violence by neighbors. A businessman, knowing of this policy, then beats up a Jewish competitor, hoping to drive him out of business. At one level, the beating is not for reasons of the race or religion of the victim; it arises because of the attacker's desire to claim a business opportunity. But it is emboldened, made possible, facilitated, carried out with impunity, because of the class-wide governmental policy, which *was* adopted for a Convention reason -- namely, animus for the race or religion of a class of invited victims.

The central question then becomes whether it is valid and sustainable -- legitimate in the public mind -- to bridge this nexus gap, between the immediate motivation of the actor and the fundamental group-based background feature of public policy. If one makes that leap in the Nazi case, a conclusion I find attractive, then the domestic abuse case would seem to provide a close analogy. In some societies, where an abused or threatened wife really can expect no remedy from the courts or the police (even though assaults against other victims would draw a response), the failure of government protection is class-based, not a failure that affects a single indvidual. Moreover the failure occurs for reasons of membership in a particular social group, whether that group is described as women or wives or domestic partners or women suspected of adultery.

Nonetheless, the argument from analogy is not wholly conclusive. The *R-A-* majority addressed it head-on, finding a distinction between the case before it and the Nazi hypothetical. The Nazi government affirmatively wanted harm to come to Jews, whereas, in the BIA's view, the Guatemalan government (the country at issue in *R-A-*) was merely indifferent about domestic abuse. That government would not deploy effective machinery to protect domestic abuse victims, to be sure, but on the other hand it did not encourage such abuses or portray them as desirable. The inadequacy of state protection, whatever its characteristics, the BIA majority essentially insisted, goes to the question of well-foundedness and cannot provide a link in the nexus chain.

The challenge, then, for proponents of protection in these circumstances, is to convince the public that it is appropriate to read a kind of transferred intention

[17]38 Int'l Legal Materials 827, 844 (House of Lords, March 25, 1999).

into these circumstances -- actually a two-way transfer. To meet the legal requirement of nexus, one must attribute to the immediate actor a social-group-based motivation that is descriptively true only of the background legal practice. In the other direction, one must project the affirmative and subjective desire to harm (one component of the traditional paradigm) from the individual actor onto the state that enables him to get away with it, even though the state may not affirmatively promote the violence.[18]

Addressing the numbers concern. That challenge of persuasion may well be surmountable. But sustaining that approach may be possible over the long term only if advocates also have a believable means of dealing with the numbers issue. Sustaining reasonable immigration control is among the objects and purposes of refugee protection. Choosing to protect via asylum the victims of domestic abuse seems remarkably ambitious when viewed through that lens -- precisely because violence against women is unfortunately such a widespread practice. What may be most damaging to the advocates' cause would be a public sense that once a country gets on the list (because of a systematic failure of government protection for women), nearly any woman who comes from that country can obtain asylum, and that the country's presence on the list is likely to persist indefinitely. To allay the former concern, the cases should protect only those with a credible personal story of focused risk -- and not simply any woman who comes from that country. This is not because the currently unthreatened woman is free of risk. She might someday find herself in a situation where her partner begins to abuse her, at which point she would be without effective recourse to home government protection. But the risk must take on a more concrete and immediate shape before we can afford to use the mechanism of refugee protection (as opposed to human rights pressure or diplomacy) to address it. In short, the simple existence of the discriminatory legal framework does not make out a refugee claim; that framework must usually be combined with a pre-existing abusive relationship -- a private actor who will exploit the failure of state protection.[19] Decisions should also pay close attention to alternative means of protection that the victim might be able to engage inside the home country, such as through relatives -- a domestic flight alternative analysis.

To allay the second numbers-related concern -- the feeling that a country might remain on the hit list for an indefinite period -- we need further conceptual development. Once a country is named as having inadequate state protection for women (or another identified group), just what benchmarks do we look to in

[18]The New Zealand Refugee Appeals Authority's decision, supra note 3, para. 79, apparently relies on a kindred notion when it speaks of how the "harm sourced from the husband is compounded by the harm sourced from the state in the form of [Iran's] severely discriminatory laws."

[19]In this connection, I could be persuaded by the result of the New Zealand decision cited in note 3 supra, which ultimately speaks of both the systematic failure of state protection for women in Iran *and* the malignantly abusive actions by the claimant's first husband. But I would still have difficulty with that portion of the opinion (para. 78) that seems to suggest that gender discrimination in state policies alone would make out the claim.

deciding whether adequate protection has been established or restored? The question is timely precisely because women's human rights efforts, focused on in-country developments, are in fact having some impact, albeit still mixed and uneven.[20] Providing a comprehensive answer should become a priority for the advocates of wider protections in gender cases, precisely in order to help allay public concerns about numbers.

For a host of reasons, that line (demarcating adequate state protection) cannot be drawn at the point where domestic abuse is eliminated, for no state has achieved that objective. No law enforcement scheme enjoys 100 percent success. Anti-stalking or other protective orders issued by courts in societies that take domestic abuse seriously cannot completely guarantee the safety of the threatened individual. Nor does even a well-funded effort to prosecute abusers provide full deterrence against future violence. But if the state does undertake enforcement with seriousness, most of the public in receiving states would probably expect the potential victim to seek protection through those means rather than through foreign relocation. Achieving such protection in the home country may require disruption in the woman's life, perhaps including internal relocation (provided that relocation is possible for a divorced or separated woman within that country's culture). But refugee law is not meant to assure against difficulties, only against persecution.

If we can develop such new conceptual tools, they will help, of course, not only to deal with gender cases but also to manage state-protection issues in a host of other contexts as well.

[20]See, e.g., Amir Zia, *Pakistan Addressing Women's Rights,* Wash. Post, Sept. 4, 2000 -- an article that caught my eye as I was preparing this paper, in part because Pakistan is the very country found woefully lacking in this respect in the House of Lords' *Islam (A.P.)* decision.

C. INTERNATIONAL HUMAN RIGHTS AND PROTECTION OF REFUGEES

C. DROITS DE L'HOMME ET PROTECTION INTERNATIONALE DES RÉFUGIÉS

CONVENTION DE GENEVE ET DROITS DE L'HOMME: UNE APPROCHE COMMUNE PAR LA THEORIE DES TROIS ECHELLES

Jean-Yves Carlier*

ABSTRACT

The author summarises here his Theory of the Three Scales which, from the words of the refugee definition: "well-founded fear of persecution", centres the analysis on three scales or levels of degrees: the risk, the persecution and the proof (R.P.P.), that must be combined later.

He links this theory, and the central notion of persecution, to the international standards of protection of human rights. The reference to human rights is not used in a hierarchical system of these rights in order to define the notion of persecution, but rather as a mechanism of interpretation of texts, based on the inter-relationship and the flexibility, namely from the principle of proportionnality.

Etablir un lien entre la protection spécifique des réfugiés, au sens de la convention de Genève de 1951, et la protection générale des droits de l'homme, au sens des instruments internationaux de protection des droits de l'homme, conduit à répondre à deux questions:

1. *Pourquoi* établir un lien entre réfugiés et droits de l'homme?
2. *Comment* établir ce lien?

I. POURQUOI ETABLIR UN LIEN ENTRE PROTECTION DES REFUGIES ET DROITS DE L'HOMME?

Intellectuellement, le lien est simple: la protection des réfugiés répond au besoin d'universalité des droits de l'homme. Si quelque part dans le monde les droits de l'homme ne sont pas protégés, la personne concernée doit pouvoir trouver refuge ailleurs dans le monde. Certes le droit de rechercher et de bénéficier de l'asile, proclamé par l'article 14 DUDH, demeure – encore – lié à la

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souveraineté nationale. Il reste que la convention de Genève de 1951, en définissant une notion de réfugié et en y attachant un principe de non-refoulement, offre un droit subjectif à cette catégorie particulière de personnes que sont les réfugiés, au sens de la convention de Genève.
L'affirmation la plus étendue du lien entre l'universalité des droits de l'homme et le droit d'asile est inscrite à l'article 10 §3 de la Constitution italienne:

> «Le ressortissant étranger auquel, dans son pays, on a interdit l'exercice effectif des libertés démocratiques garanties par la Constitution italienne, a droit d'asile sur le territoire de la République, dans les conditions fixées par la loi».

Le cercle de l'universalité est ici complet. Si les droits fondamentaux *garantis par la Constitution italienne* ne sont pas respectés à l'étranger, l'Italie offrira asile à un ressortissant de ce pays. Le futur «offrira» doit toutefois se traduire au conditionnel «offrirait», dans la mesure où il est d'interprétation courante que cette disposition de la Constitution italienne n'est pas d'application immédiate. Elle demeure sans effet aussi longtemps qu'une loi ne la met pas concrètement en œuvre[1].
La référence aux droits de l'homme est expressément inscrite au préambule de la Convention de Genève de 1951 dont le premier considérant se lit:

> «Considérant que la Charte des Nations Unies et la Déclaration universelle des Droits de l'homme approuvée le 10 décembre 1948 par l'Assemblée générale ont affirmé ce principe que les êtres humains, sans distinction, doivent jouir des droits de l'homme et des libertés fondamentales».

En 1997, la conclusion générale n° 80 (XLVIII) du Comité exécutif du H.C.R. notait «qu'une approche globale de la protection des réfugiés comprend, entre autres, le respect de tous les droits de l'homme» (lettre b).

En 1998, le même Comité exécutif dans sa conclusion générale n° 85 (XLIX) sur la protection internationale, a introduit 8 paragraphes (lettres f à m), expressément titrés: *Droits de l'homme et protection des réfugiés*, réaffirmant que «l'institution de l'asile ... figure parmi les mécanismes les plus fondamentaux de la protection des réfugiés» (lettre f) et reconnaissant que «la problématique des réfugiés à tous les stades est étroitement liée au degré de respect des droits de l'homme et des libertés fondamentales ainsi que des principes connexes de protection des réfugiés (lettre g), déplorant que «les violations graves et répétées des droits de l'homme et des libertés fondamentales qui constituent l'une des principales causes des mouvements de réfugiés, se poursuivent tant en temps de paix, qu'en temps de conflit armé» (lettre h).
Ces quelques références aux textes soulignent, si besoin en était, le lien congénital, que confirme l'histoire, entre la protection générale des droits de l'homme et la protection spécifique des réfugiés. En 1941, lorsque Franklin D. Roosevelt fait connaître au Congrès des Etats-Unis son opinion sur les valeurs qui devront être défendues après la deuxième guerre mondiale comme «a de-

[1]Sur l'ensemble, voy. F. MODERNE, *Le droit constitutionnel d'asile dans les États de l'Union européenne*, Paris, Economica, 1997.

finite basis for a world attainable in our own time and generation », il cite expressément quatre libertés:

- freedom of speech
- freedom of worship
- freedom from want
- freedom from fear

La quatrième liberté se présente comme la concrétisation des trois premières et nous conduit à la protection contre la «well founded fear of persecution» de la convention de Genève, dix ans plus tard.

Il reste que, s'il est généralement admis que la violation des droits de l'homme est cause de production de réfugiés, la référence aux droits de l'homme dans la procédure de reconnaissance de la qualité de réfugié est plus rare. Cette dichotomie s'explique probablement par deux motifs, l'un de procédure, l'autre de fond. La procédure de reconnaissance de la qualité de réfugié est généralement confiée à des autorités et juridictions spécialisées, chargées d'appliquer la seule convention de Genève, à la différence d'autres juridictions, nationales et internationales, de plus en plus sollicitées par l'application de l'ensemble des textes de protection des droits de l'homme s'insinuant dans tous les domaines du droit. Longtemps abandonnée à des autorités administratives, voire policières, la récente juridictionnalisation des procédures de reconnaissance de la qualité de réfugié conduit à une intégration progressive des textes internationaux de protection des droits de l'homme dans une véritable «jurisprudence». La présente conférence de l'IARLJ en est une illustration éclatante. Le motif de fond risque de rencontrer des résistances plus profondes et mérite un examen plus approfondi: comment intégrer dans le champ d'application matériel assez restreint qu'est la persécution du chef de cinq causes, le champ d'application immense de l'ensemble des textes de protection des droits de l'homme. C'est l'objet du deuxième point.

II. COMMENT ETABLIR UN LIEN ENTRE PROTECTION DES REFUGIES ET DROITS DE L'HOMME?

La définition du réfugié, au sens de la convention de Genève du 28 juillet 1951, est connue:

> «le terme 'réfugié' s'appliquera à toute personne ... qui ... craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité [ou dans lequel elle avait sa résidence habituelle] et qui ne peut, ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays ...»

Il est admis que les termes principaux de cette définition sont «craignant avec raison d'être persécuté». Prolongeant les travaux d'autres auteurs, particuliè-

rement de James Hathaway[2] tendant à objectiver cette définition et à la relier à la protection internationale des droits de l'homme, j'ai, au terme d'une étude comparée de jurisprudence, proposé une grille commune d'analyse de la définition à partir des trois mots centraux: la crainte qui, objectivée, devient le risque (R.), la persécution (P.) et les raisons qui, objectivées, deviennent les preuves (P.). Ces trois questions sont examinées séparément sous forme de trois échelles de degré – quel niveau minimum de risque, de persécution, de preuve faut-il atteindre – et ensuite combinée en une Théorie des trois échelles (R.P.P.) qui permet de déterminer si les trois niveaux mis ensemble conduisent à la reconnaissance de la qualité de réfugié.

L'examen se fait ici en deux points. D'abord une présentation de la Théorie des trois échelles permettant de voir comment le mécanisme procédural global ainsi proposé s'apparente aux mécanismes de protection des droits de l'homme par deux caractéristiques majeures: la souplesse et l'interrelation (A). Ensuite, dans un deuxième pont, l'examen porte sur la notion centrale, objet du présent colloque, de persécution. Ici tant le mécanisme procédural spécifique à l'échelle de persécution que la définition du contenu de la notion, font appel aux mécanismes et aux notions propres à la protection des réfugiés, notamment à la notion centrale de proportionnalité (B).

L'objectif de la Théorie des trois échelles est double. D'une part, proposer un mécanisme procédural, relativement simple, qui puisse conduire à une motivation plus précise des décisions relatives à la qualité de réfugié. D'autre part ancrer, la notion de réfugié dans le droit international des droits de l'homme en proposant une souplesse d'interprétation à partir du principe de proportionnalité, plutôt qu'une hiérarchie stricte des droits fondamentaux, afin de faire de la convention de Genève, comme des textes de protection des droits de l'homme, un «instrument vivant», selon l'expression de la Cour européenne des droits de l'homme.

1. La Theorie des trois echelles[3]

Au regard de la «crainte avec raison de persécution» en cas de retour, avancée par un candidat réfugié, le juge se pose une question légitime; que risque (1) comme persécution (2) le requérant en cas de retour, au vu des éléments de preuve rapportés (3). Les trois parties de cette question peuvent être distingués dans trois échelles de niveau

[2]James HATHAWAY, The law of refugee status, Toronto, Butterworths, 1991.

[3]La théorie des trois échelles est ici résumée à partir de sa dernière présentation dans: «La reconnaissance de la qualité de réfugié. Chroniques de jurisprudence», *Revue du droit des étrangers* (Belgique), 1999, n° 105, p. 675. Elle fut présentée initialement dans J.-Y.CARLIER, D. VAN HEULE, K. HULLMANN, C. PEÑA GALIANO, *Qu'est-ce qu'un réfugié?*, Bruxelles, Bruylant, 1998 et *Who is a Refugee?*, Kluwer, 1997. Les références à ces deux versions de l'ouvrage sont faites à la seule édition française qui est plus complète, mais en indiquant le numéro de paragraphe (et non de page) parce qu'il est le même dans l'édition anglaise. Voy. aussi «The Geneva refugee definition and the theory of the three scales», in Fr; NICHOLSON and P. TWOMEY, *Refugees: Rights and Realities*, Cambridge University Press, 1999, pp. 27-74.

1. Quel est le niveau de risque?
2. Quel est le niveau de persécution?
3. Quel est le niveau de preuve?

1. *Risque (R.)*

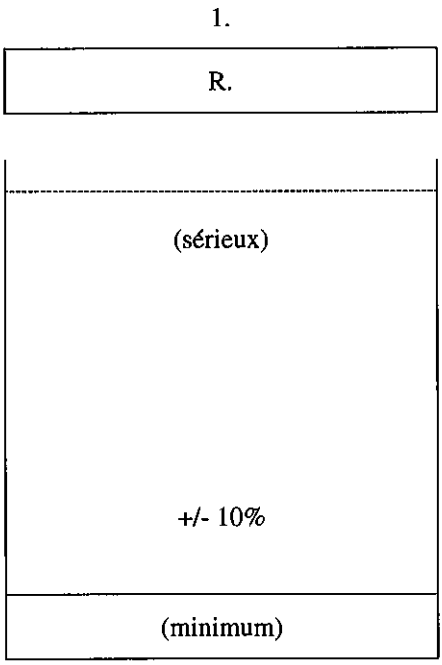

Tableau 1: le risque

La première échelle de niveau répond à la question: quel est le niveau de risque? Y a-t-il un risque que quelque chose se passe en cas de retour de l'intéressé? Cette question impose l'examen de trois points:
(1) le **moment** auquel le risque doit être évalué,
(2) le **lieu** où le risque doit se matérialiser, et
(3) le **niveau** minimum de risque à atteindre.

(1) S'agissant du **moment**, il convient de se placer au moment de la décision puisque par hypothèse l'évaluation du risque est l'évaluation d'un futur. Le requérant doit toutefois avoir la possibilité de s'expliquer sur les circonstances nouvelles et, au besoin, de faire valoir les «*raisons impérieuses tenant à des persécutions antérieures*» qui motivent son «*refus de retourner dans le pays*», par parallélisme avec la clause de cessation (article 1, C, 6, § 2). Une plus grande souplesse et prudence s'imposent lorsque la durée de la procédure, non

imputable au requérant, conduit à tenir compte de circonstances nouvelles alors que, entendu plus tôt, il eût été reconnu réfugié afin d'éviter des discriminations entre réfugiés d'une même catégorie en raison d'aléas de procédure qui ne sont pas un critère «*objectif et raisonnable*» de traitement différencié.

(2) L'examen du **lieu** permet d'examiner le risque matérialisé dans le pays d'accueil ou dans le pays d'origine. Dans le pays d'accueil, c'est l'hypothèse du réfugié sur place. Dans le pays d'origine cela revient à examiner si le risque se matérialise sur l'ensemble du territoire du pays d'origine ou si, à l'inverse, il y a une alternative de protection interne (A.P.I.). Ce point est examiné dans une autre séance du présent colloque, notamment par James Hathaway, initiateur d'une rencontre ayant conduit aux *Michigan Guidelines*. L'examen du lieu peut également porter sur la notion de pays tiers sûr (P.T.S.) dans lequel l'intéressé eût pu bénéficier d'une protection. Cet examen est généralement conduit plus tôt, lors de l'accès au territoire et de l'admissibilité de la demande.

(3) Enfin, il convient de s'interroger sur le **niveau** de risque requis. Faut-il une probabilité «*considérable*», «*très probable*», «*probable*», «*raisonnable*», «*sérieuse*» ou «*minimale*». Pour trancher, il convient d'insister sur un point: ce qui est ici recherché est le minimum requis dans chaque échelle étant entendu qu'il ne suffira pas d'avoir ce minimum dans chaque échelle pour être reconnu réfugié (*infra*). Dans cette optique, l'on peut admettre avec les jurisprudences américaine et canadienne que le niveau de risque requis est minimum. Selon la jurisprudence de la Cour Suprême des Etats-Unis «one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking palce (*INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987) Nicaragua). Si comme le font ces jurisprudences, l'on veut chiffrer le niveau de risque pour imager la théorie, on peut, comme indiqué dans le tableau 1, l'évaluer au minimum de 10%.

Cette première échelle pose déjà une question de relation avec les mécanismes de protection des droits de l'homme. La jurisprudence conduisant à condamner l'exécution d'une mesure d'éloignement du territoire parce qu'il y a un risque de traitement inhumain ou dégradant ou de torture (art. 3 CEDH et art. 3 Convention torture) applique généralement «des critères rigoureux» conduisant à l'exigence d'un niveau plus élevé, qualifié par la Cour européenne des droits de l'homme de «risque réel» (3 octobre 1991, *Vilvarajah c. U.K.*, Série A, n° 215, pt. 108). Y a-t-il là contradiction?

Trois positions paraissent possibles. Soit on estime, avec les jurisprudences allemande et autrichienne par exemple, que le niveau de risque exigé en matière de reconnaissance du statut de réfugié doit être plus élevé et également qualifié de «considérable» ou «sérieux». Soit on estime, à l'inverse, que l'exigence de la Cour européenne des droits de l'homme est trop élevée. Soit, comme l'indique le juge Matti Pellonjää dans sa contribution, on accepte que le champ d'application matérielle des deux textes est différent, la protection contre le traitement inhumain ou dégradant étant plus large que la protection contre la persécution du chef de cinq causes, en manière telle que «While the

sphere of protection is broad ... the 'threshold' of protection ('real risk of torture or inhuman treatment') would seem to be higher than that under refugee law». Si l'on accepte cette position, on constate déjà l'interrelation entre les deux premières échelles (risque-persécution) qui permettra, en combinant les échelles, de s'inspirer d'une lecture de la notion de réfugié en lien avec la protection internationale des droits de l'homme: la reconnaissance du statut de réfugié pourrait intervenir avec un risque minimum de persécution forte ou un risque élevé de persécution faible.

Ceci conduit à l'analyse de la deuxième échelle.

2. *Persécution (P.)*

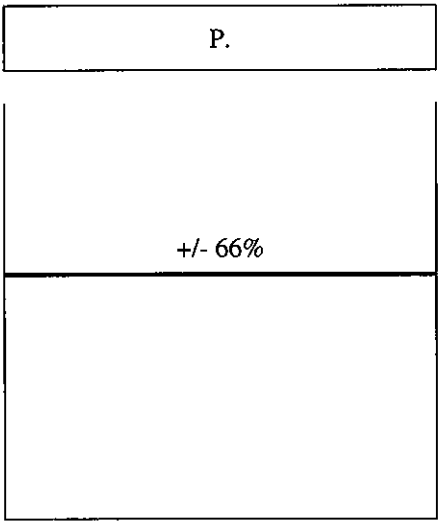

Tableau 2: la persécution

La deuxième échelle de niveau répond à la question: Quel est le niveau de persécution? Y a-t-il, dans ce qui va être risqué, une atteinte aux droits fondamentaux qui puisse être considérée comme persécution? Cette échelle permet également d'aborder trois points:

(1) le **sujet** et l'**auteur** de la persécution,
(2) les **causes** de persécution
et
(3) le **niveau** de persécution.

(1) Si l'examen du risque de persécution futur est individualisé, il ne doit pas être confondu avec le **sujet** d'une persécution passée qui pourrait être un membre de la famille, du même groupe politique ou social.
Le débat sur l'**auteur** de la persécution est plus ancien. Il est examiné dans une autre séance de la présente conférence, notamment par Walter Kälin. Quelques éléments sont toutefois indiqués ici, afin de faire le lien avec la protection des droits de l'homme. Si la persécution fut d'emblée acceptée lorsque l'auteur est l'État ou un agent de l'État, la persécution par des tiers fut plus controversée, la Convention n'en faisant pas état. A dire vrai, la Convention ne fait aucune référence à quelqu'auteur de la persécution que ce soit en manière telle que l'on pourrait très simplement s'étonner de cette fausse question, considérant que la Convention vise toute persécution pour l'un des motifs énoncés. Le débat trouve son origine dans une décision *Dankha* du Conseil d'État de France de 1983 constatant, à propos de persécutions à l'encontre de la minorité Assyro-chaldéenne en Iraq par d'autres groupes de la population, que ces persécutions, qui n'émanent pas des autorités publiques, peuvent entraîner la reconnaissance de la qualité de réfugié lorsque «des persécutions exercées par des particuliers, organisés ou non, sont en fait encouragées ou tolérées par l'autorité publique, de sorte que l'intéressé n'est pas effectivement en mesure de se réclamer de la protection de celle-ci»[4]. Cette motivation avait permis de reconnaître la qualité de réfugié à des personnes persécutées par des particuliers. Depuis la même motivation a été reprise plusieurs fois pour refuser la reconnaissance de la qualité de réfugié, par exemple à des Algériens persécutés par des fondamentalistes, considérant que ces persécutions ne sont pas tolérées ou encouragées par l'État. C'est oublier que la décision *Dankha* avait été prise sur les conclusions du Commissaire de Gouvernement, M. Genevois qui se lisaient comme suit:

> «Dans le texte de la Convention de Genève, l'autorité étatique n'apparaît que dans la mesure où elle s'avère incapable d'assurer la protection de ses ressortissants [...]. En droit, il n'y a donc aucune raison de subordonner la reconnaissance de la qualité de réfugié à des actes de persécution de la part des autorités officielles d'un État. La passivité de ces autorités, leur *incapacité* à maîtriser une situation dans laquelle une minorité raciale, religieuse, sociale ou politique se trouve persécutée ou menacée de l'être, est suffisante pour ouvrir le droit au statut»[5].

[4] C.E. France, 27 mai 1983, aff. *Dankha*, n° 54.178 in F. TIBERGHIEN, *La protection des réfugiés en France*, Paris, Economica, 1998, p. 247; *Clunet*, 1984, p. 11, note F. JULIEN-LAFERRIÈRE et «*Qu'est-ce qu'un réfugié* ?», p. 429.
[5] Idem, nous mettons en italique.

Tout était dit. Et sera redit, dix ans plus tard, sous l'influence de la doctrine éclairée de James Hathaway, par la Cour suprême du Canada dans l'arrêt *Ward*, longuement motivé:

> «La persécution au sens de la Convention comprend les cas où l'État n'est pas strictement complice de la persécution, mais est simplement incapable de protéger ses citoyens»[6].

Ici également un lien avec la jurisprudence relative aux droits de l'homme est possible. Contrairement à ce qui a été vu dans l'échelle du risque, le niveau de protection offert par les organes de protection des droits de l'homme s'aligne sur l'interprétation large. En effet, s'agissant de la protection contre un traitement inhumain ou dégradant dans le pays vers lequel une personne serait expulsée, la Cour européenne des droits de l'homme a estimé qu'elle pouvait

> «examiner le grief d'un requérant au titre de l'article 3 lorsque le risque que celui-ci subisse des traitements interdits dans le pays de destination, provient de facteurs qui ne peuvent engager, directement ou non, la responsabilité des autorités publiques»[7].

En revanche, pour le Comité contre la torture, la «torture non étatique» est exclue du champ d'application de la convention contre la torture[8]. Toutefois, lorsque l'autorité étatique centrale n'existe plus, les traitements infligés par des groupes de particuliers exerçant le pouvoir *de facto* peuvent être assimilés à la torture[9].

En droit des réfugiés, l'interprétation n'est pas unanime. Ainsi, dans la décision belge de refus d'admissibilité de la demande de statut de réfugié de Semira Adamu, jeune Nigériane morte étouffée lors de son expulsion de Belgique, il est opposé à l'intéressée qui disait refuser un mariage forcé avec un homme âgé, violent et polygame qu'elle «n'a évoqué aucun problème de quelque nature que ce soit avec les autorités nigérianes»[10].

De même, la *Position commune concernant l'application harmonisée de la définition du terme de réfugié*, adoptée au sein de l'Union européenne le 4 mars 1996, ne reconnaît que les persécutions de tiers «encouragées ou autorisées par les pouvoirs publics»[11].

Une décision de la Court of Appeal de Londres rejette expressément les jurisprudences française et allemande comme étant une interprétation incorrecte de la Convention de Genève écartant son fondement protectionnel. La juridiction anglaise considère que

[6] Canada c. Ward, 1993, RCS 689, p. 717 (C.S.C.), (Irlande).
[7] Cour EDH, 2 mai 1997, D. c. Royaume Uni, Rec. 1997, III, pt. 49.
[8] Communication 83/1997, G.R.B. c/ Suède, 15 mai 1998, pt. 6.7.
[9] Communication 120/1998, Sadig Shek Elmi c. Australie, 25 mai 1999, pt. 6.5.
[10] CGRA, 1er avril 1998, Semira Adamu, CG/98/01331/23D/E98-302; J.-Y. CARLIER, «Le droit d'asile et la politique d'immigration», *Journal des Tribunaux* (Belgique), 1998, p. 849.
[11] J.O.C.E., 13 mars 1996, L 63/2. Voy. C. PEÑA GALIANO, «Application harmonisée de la définition du terme de réfugié au sein de l'Union européenne», *Revue du droit des étrangers*, 1996, p. 84 et *Qu'est-ce qu'un réfugié?*, appendice. Adde, K. HAILBRONNER, *Immigration and Asylum law and Policy of the European Union*, The Hague, Kluwer law International, 2000, pp. 377 ss.

«the scope of Art. 1A(2) [of the Geneva Convention] extends to persons who fear persecution by non-State agents in circumstances where the State is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective State authority exists) to afford protection»[12].

En Belgique, la Commission permanente de recours des réfugiés ne paraît pas suivre les voies françaises considérant qu'elle doit

«apprécier si des individus qui sollicitent une protection internationale ont des raisons de craindre de leurs autorités nationales ou *de ne pas pouvoir en attendre protection*»[13].

Encore faut-il que cette protection ait été sollicitée quand cela est possible, ce qui est le cas lorsque «le requérant s'est heurté à un refus de protection de ses autorités»[14].

En conséquence, il est préférable de remplacer le mot «agent» de persécution par «auteur» de persécution. L'agent est en effet «celui qui agit» alors que l'auteur est celui «qui est la première cause d'une chose». Sans être l'agent d'une persécution, l'État peut en être l'auteur en raison de son incapacité à protéger ses nationaux.

(2) Les **causes** de persécutions sont connues: race, religion, nationalité, appartenance à un certain groupe social, ou opinion politique. Le lien («nexus») entre la persécution et l'une de ces causes doit pouvoir être établi. Ce lien ne trouve pas toujours sa cause dans le chef du persécuté. Il peut se faire aussi que ce soit le persécuteur qui impute au persécuté une cause de persécution.

Parmi les causes de persécution se situe notamment le débat sur les persécutions à raison du sexe, abordé dans une autre séance par Regan Ralph, Deborah Anker et David Martin[15].

(3) Le **niveau** de persécution requis est la question centrale, en lien avec les droits de l'homme. Elle est examinée plus loin. On peut dès à présent préciser qu'il se déduira des facteurs qualitatifs et quantitatifs exposés que le niveau d'atteinte aux droits fondamentaux doit être sérieux pour s'apparenter à la persécution. Une image chiffrée permet de la fixer à 66%.

[12] Court of Appeal, 23 juillet 1999, R. c. Secretary of State for the Home Department, ex parte Adan et al., 1993, *INLR*, 362, at 384 G. En conséquence les ressortissants Somaliens, Sri Lankais ou Algériens concernés ne pourraient être renvoyés vers la France ou l'Allemagne qui ne peuvent être considérés comme pays sûrs. En l'espèce le Secrétariat d'État avait décidé de ne pas renvoyer les intéressés vers ces pays, la juridiction se prononçant sous forme d''academic appeal' en raison des questions de principe en jeu. *I.J.R.L.*, 1999, p. 702, note G. GOODWIN GILL, «The Margin of Interpretation: Different or Disparate?».

[13] CPRR, 98-0129/R7358 (Congo), nous mettons en italique.

[14] CPRR, 98-0701/F757 (Arménie).

[15] Pour une réflexion globale sur la classification des persécutions pour motifs sexuels, voy. Th. SPIJKERBOER, *Gender and Refugee Status*, Ashgate, Aldershot, 2000.

3. *Preuve (P.)*

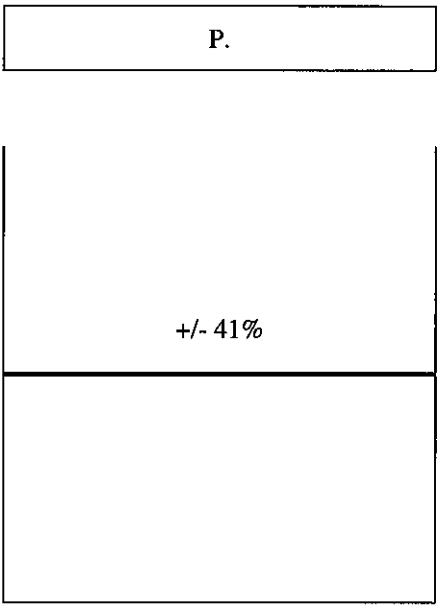

Tableau 3: la preuve

La troisième échelle de niveau répond à la question: Quel est le niveau de preuve? Cette question porte sur les deux premières échelles: quelle preuve y a-t-il du risque de persécution? L'examen des preuves est consubstantiel au risque et à la persécution; il s'agit d'évaluer les «raisons» de crainte de persécution telles qu'elles sont objectivées par des éléments probants. La question pourrait être intégrée dans les deux premières. En faire une échelle distincte permet toutefois de l'examiner avec précision.

Elle se compose également de trois facteurs:
(1) la **charge** de la preuve,
(2) les **moyens** de preuve, et
(3) le **niveau** de preuve requis.

(1) S'agissant de la **charge** de la preuve, des questions de procédure peuvent déjà être posées au regard des droits de l'homme notamment des dispositions garantissant un procès équitable comme l'article 6 CEDH. Ces dispositions, qui souvent visent les procédures civiles et pénales, s'appliquent-elles aux procédures de reconnaissance de la qualité de réfugié, souvent qualifiées de procédures administratives? La réponse à cette question pourra varier d'un

système juridique à l'autre[16]. Quoi qu'il en soit, l'on peut admettre que la *charge* de la preuve dans la procédure de reconnaissance de la qualité de réfugié est partagée: le requérant doit fournir tous les éléments dont il dispose et un récit crédible et cohérent, exempt de contradictions fondamentales; l'autorité doit confronter ces éléments aux données générales sur la situation dans le pays d'origine et, au besoin, procéder à des investigations de vérification. Il s'en déduit qu'un débat contradictoire doit pouvoir s'instaurer.

(2) Les **moyens** de preuve acceptés sont larges, le moindre n'étant pas le récit du requérant lui-même.

Le niveau général de preuve accepté s'apparente à un *balancing test of probabilities* étant accepté que «si le récit du demandeur paraît crédible, il faut lui accorder le bénéfice du doute, à moins que de bonnes raisons ne s'y opposent». Il s'en déduit que le niveau de preuve requis est un niveau moyen qui se situe, compte tenu du bénéfice du doute, quelque peu en-deça des 50%, soit, de façon imagée, à 41%.

- La théorie des trois échelles (R.P.P.)

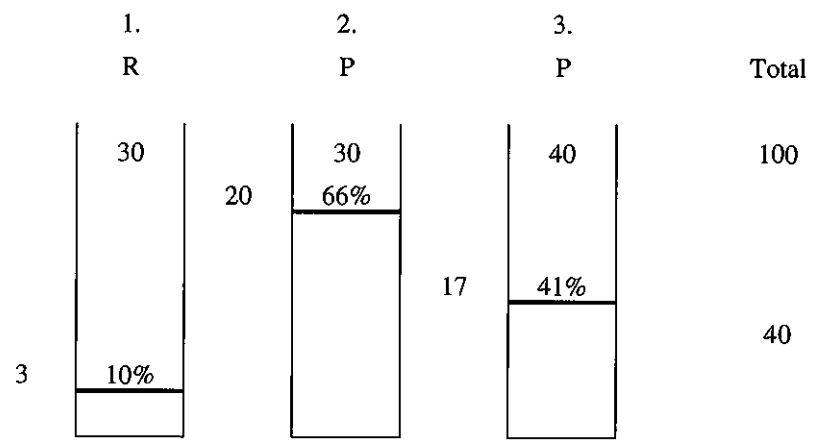

Tableau 4 les trois échelles

[16] S. SAROLEA, «La nature civile du droit des réfugiés en droit belge et au sens de la Convention européenne des droits de l'homme. Essai de définition et analyse des enjeux. L'arrêt de la Cour d'arbitrage du 18 mars 1997», *Revue belge de droit international*, 1996, p. 633 et «Les droits procéduraux, du demandeur d'asile au sens des articles 6 et 13 de la Convention européenne des droits de l'homme», *Revue trimestrielle des droits de l'homme*, 1999, p. 119. Pour une décision sur cette question de la Commission permanente de recours des réfugiés en Belgique, Chambres néerlandophones, voy. V.B.C., 98-1304/W 5576, *Revue du droit des étrangers*, 1999, p. 627. Il convient de noter qu'un arrêt de la Cour européenne des droits de l'homme du 5 octobre 2000 (aff. *Maaouia*) a décid, en grande chambre, que l'article 6 § 1 CEDH (délai raisonnable) ne s'applique pas aux procédures d'expulsion d'étrangers. Bien que la décision ne concerne pas la procédure de reconnaissance du statut de réfugié, on notera qu'elle considère que le fait que la mesure a pu entraîner accessoirement des conséquences importantes sur la vie privée et familiale de l'intéressé ne saurait suffire à faire entrer cette procédure dans le domaine des droits civils.

Le mécanisme de la combinaison des trois échelles est mieux illustré lorsque l'on introduit des chiffres, sans que ceux-ci ne doivent être considérés comme des absolus, mais comme des indications vers lesquelles il y a lieu de « tendre » comme en matière de convergences monétaires.

Pour arriver à un total de 100 comme maximum, on attribue aux deux premières échelles (R.P.) 30 points et à la troisième (P) 40 points car la preuve porte sur les deux premières échelles, ce qui augmente sa valeur. On constate que l'addition des minima dans chaque échelle donne un minimum global de 40 sur 100 ([R: 30 x 10% = 3] + [P: 30 x 66% = 20] + [P. 40 x 41% = 17]).

R.P.P.

100		
40	+ 17 P.	
23	+ 20 P.	
3		3 R.

Tableau 5 : Les trois échelles rassemblées

R.P.P.

100		Réf.
60	+ 20 ?	
40	+ 17 P.	
23	+ 20 P.	
3		3 R.

Tableau 6 : la théorie des trois échelles

Ici l'image de la combinaison des trois échelles est plus forte en français qu'en anglais, car le mot « échelle » désigne à la fois *scale* mais aussi *ladder*.

Si l'on met les trois échelles ensemble (tableau 6), comme une triple échelle de pompier destinée à franchir le mur d'une forteresse, pour reprendre une image des défenseurs du droit d'asile, l'on postule que 40 sur 100, soit la simple addition des trois minima n'est pas suffisant pour être reconnu réfugié et qu'il faut trouver 20 points complémentaires pour atteindre 60 sur 100.

Ces points complémentaires peuvent être trouvés dans l'une ou plusieurs des trois échelles.

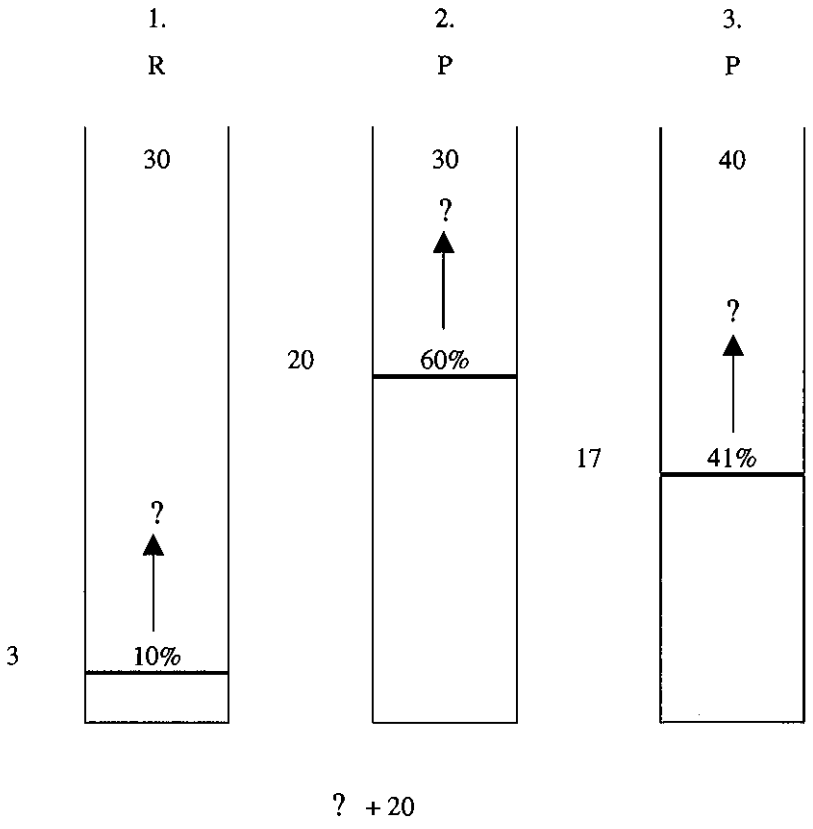

Tableau 7: la théorie des trois échelles

Ainsi le requérant peut avoir un risque très sérieux (23 sur 30) d'une persécution légère (le minimum 20 sur 30) prouvée de façon normale (20 sur 40). Avec 63 sur 100 il est reconnu. Tel pourrait être le cas d'un Palestinien dont on sait, selon des informations générales, qu'il risque très certainement de ne pas trouver d'emploi dans son pays d'origine.

Un requérant peut avoir un risque faible (10 sur 30), d'une persécution très grave (30 sur 30) moyennement prouvée (20 sur 40). Avec 60 sur 100 il est reconnu. Tel pourrait être le cas d'une personne dont les membres de la famille ont été assassinés. Il est possible que le persécuteur l'ait cru mort

également. Le risque est faible s'il retourne discrètement mais ce qu'il risque selon les témoignages rapportés est la mort.

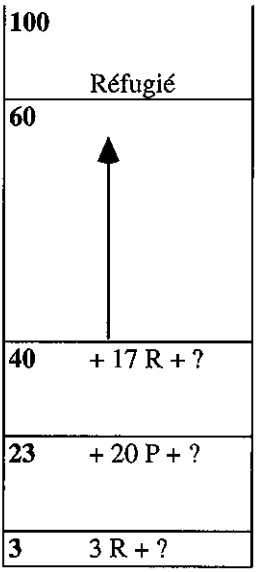

Tableau 8: la théorie des trois échelles

La technique de la théorie des trois échelles est double. Premièrement, il s'agit d'examiner en détail les trois éléments centraux de la crainte avec raison de persécution en répondant aux trois questions:
Y a-t-il un niveau de risque suffisant (minimum)?
Y a-t-il un niveau de persécution suffisant (sérieux)?
Y a-t-il un niveau de preuve suffisant (moyen)?

Si la réponse est positive à chacune des trois questions cela signifie que le minimum est atteint dans chaque échelle ou niveau. Il s'agit alors, deuxièmement de mettre ensemble les trois échelles ou, comme dans des vases communiquant, de faire communiquer les trois niveaux pour examiner s'ils atteignent le minimum global requis qui dépasse la somme des minima dans chaque échelle ou niveau.

L'objectif de la théorie des trois échelles n'est pas de convertir les personnes chargées de reconnaître ou non la qualité de réfugié en calculettes ou ordinateurs, de déshumaniser la procédure mais, par un moyen imagé, de les

inviter à rencontrer l'ensemble des questions soulevées tant individuellement que globalement, pour une motivation aussi complète que possible. Selon un commentaire, « l'intérêt de la théorie des trois échelles est de proposer le recours à une motivation qui fasse appel à la fois à chacun de ses éléments séparément, et à ses trois éléments globalisés »[17].

Ce mécanisme participe à la souplesse des différents mécanismes développés par les jurisprudences en matière de protection des droits de l'homme - pesée des intérêts, proportionnalité, marge d'appréciation - tout en proposant une structure devant servir à clarifier le raisonnement[18].

2. La persecution

L'élément central de la persécution, qui fait l'objet du présent colloque, peut, au sein de la deuxième échelle et du point de vue des droits de l'homme, s'analyser conjointement du point de vue de son contenu (1) et des modalités de sa détermination au travers du principe de proportionnalité (2).

2.1 Contenu

La persécution n'étant pas définie dans la Convention, l'on peut à partir de la définition française de « *traitement injuste et cruel infligé avec acharnement* » (Petit Robert) retenir les facteurs qualitatifs (injuste et cruel) et quantitatif (acharnement) pour établir le *niveau* d'atteinte aux droits fondamentaux qui s'apparente à la persécution. La référence expresse à la Déclaration universelle des droits de l'homme dans le premier considérant du préambule de la Convention de Genève établit clairement le lien qu'il convient de faire entre la protection contre la persécution et la violation des droits de l'homme.

Est-il alors possible de déterminer de façon absolue ce qu'est une persécution en tant que violation de certains droits de l'homme? Cela conduirait à introduire une hiérarchie stricte au sein des droits de l'homme. Certes, une classification est possible, par exemple entre les droits auxquels il est permis de déroger et les droits indérogeables, entre les droits soumis au principe de proportionnalité ou non. Cette classification est toutefois trompeuse et s'oppose à l'universalité et à l'indivisibilité des droits de l'homme[19]. Ainsi, un droit absolu comme l'interdiction de la torture et des traitements inhumains et dé-

[17]O. DE SCHUTTER, in *Annales de droit de Louvain*, 1998, p. 228.

[18]Pour une analyse plus fondamentale de ces questions, voyez O. DE SCHUTTER, Fonction de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques américain et européens, Bruxelles, Bruylant, 1999, 1164 p.

[19]Voy. ma critique de l'ouvrage S. MARCUS HELMONS (dir), *Dignité humaine et hiérarchie des valeurs. Les limites irréductibles*, Bruxelles, Bruylant, 1999, in *Annales de droit de Louvain*, 2000, Pour une structuration plus intéressante des droits de l'homme, sans hiérarchisation, , voy. P. MEYER - BISCH, « D'une succession de générations à un système de droits humains », in *Les droits de l'homme à l'aube du XXI siècle. Liber amicorum Karel Vasak*, Bruxelles, Bruylant, 1999, p. 333

gradants, qui ne souffre aucune dérogation même en cas de danger pour l'ordre public[20], est en soi relatif dans son appréciation. Ce qui est aujourd'hui traitement inhumain n'était hier que traitement dégradant et sera demain torture.

C'est ainsi que la Cour européenne des droits de l'homme, qui avait qualifié de traitements inhumains et dégradants des actes « de nature à créer des sentiments de peur, d'angoisse et d'infériorité propres à humilier, avilir et briser éventuellement la résistance physique et morale »[21], s'est demandée si de tels actes, en l'espèce des sévices imposés par la police française à un étranger, devaient être considérés comme des « douleurs ou souffrances aiguës, physiques ou mentales ... intentionnellement infligées à une personne » et partant être qualifiées de torture selon la définition donnée par l'article 1er de la Convention des Nations-Unies contre la torture et autres peines ou traitements cruels inhumains ou dégradants. Modifiant sa jurisprudence, la Cour va qualifier de torture, ce qui, avant, était qualifié de traitement inhumain ou dégradant. Il est intéressant de reproduire textuellement sa motivation :

> « Compte tenu de ce que la Convention [européenne des droits de l'homme] est un instrument vivant à interpréter à la lumière des conditions de vie actuelles, [...] la Cour estime que certains actes autrefois qualifiés de 'traitements inhumains et dégradants' et non de 'torture', pourraient recevoir une qualification différente à l'avenir. La Cour estime en effet que le niveau d'exigence croissant en matière de protection des droits de l'homme et des libertés fondamentales implique, parallèlement et inéluctablement, une plus grande fermeté dans l'appréciation des atteintes aux valeurs fondamentales des sociétés démocratiques »[22].

En d'autres termes, s'agissant des réfugiés, il convient d'accepter que si le mot *persécution* recouvre *a priori* des atteintes sérieuses aux droits de l'homme, ce n'est pas le contenu intrinsèque de ceux-ci qui déterminera *per se* s'il y a ou non persécution mais les modalités de leur évaluation qualitative et quantitative.

2.2 Modalité

Comme l'a proposé James Hathaway, une hiérarchie non pas absolue mais relative, susceptible d'évoluer dans le temps et selon le contexte, permet d'effectuer, non pas une appréciation abstraite de la notion de persécution au regard des droits de l'homme mais une appréciation concrète et contextualisée qui instaure une dialectique au sein de la deuxième échelle - qui complète la dialectique entre les trois échelles - entre le facteur qualificatif et le facteur quantitatif.

[20]Cour eur. D.H., 15 novembre 1996, *Chahal c. Royaume-Uni*, Rec., 1996 - 1, p. 1855, pt. 79

[21]Cour eur. D.H., 18 janvier 1978, *Irlande c. Royaume-Uni*, Série A, n° 25, pt 167, 27 août 1992, *Tomasi c. France*, Série A, n° 241-A, p.115

[22]Cour eur. D.H., 28 juillet 1999, *Selmouni c. France*, pt 101 ; pour un autre exemple où l'appréciation de la (non) violation de l'article 3 C.E.D.H. est faite au regard du contexte, en l'espèce la minorité du requérant, voy. Cour eur. D.H., 16 décembre 1999, *V... c. Royaume Uni*, pt. 97

Plus le niveau qualitatif du droit concerné est important, moins le niveau quantitatif devrait l'être. Ainsi le *Guide des procédures et critères* du H.C.R. relève que « des menaces à la vie ou à la liberté... sont toujours des persécutions »[23]. A l'inverse, « des mesures diverses qui en elles-mêmes ne sont pas des persécutions... pris[es] conjointement peuvent provoquer chez le demandeur un état d'esprit qui permet raisonnablement de dire qu'il craint d'être persécuté pour des motifs cumulés »[24].

Il convient de souligner cette reconnaissance, en droit des réfugiés de motifs cumulés de persécution. Elle n'apparaît pas aussi expressément dans la jurisprudence relative aux droits de l'homme, particulièrement de la Cour européenne des droits de l'homme qui examine chaque disposition potentiellement violée de la CEDH séparément sans examiner si, à défaut de violation isolée de chaque disposition, la combinaison de «moindres» violations de chaque disposition n'entraîne pas un niveau suffisant de violation globale des droits de l'homme devant entraîner condamnation. Une démarche plus holiste, précisément soucieuse de l'indivisibilité des droits de l'homme pourrait ici être puisées dans des jurisprudences en droit des réfugiés. Au demeurant, sur le principe, la Cour européenne des droits de l'homme a plusieurs fois répété que «les dispositions de la Convention et du Protocole doivent être envisagées comme un tout» (Cour eur. D.H., 23 juillet 1968, *aff. linguistique belge*, pt. B.1).

Selon un critère devenu classique en matière de droits de l'homme, il convient d'examiner la proportionnalité entre l'objectif poursuivi et le moyen utilisé. Deux exemples pourraient être débattus par les praticiens et juges. Ils montrent des décisions contrastées dans la jurisprudence. Il s'agit des femmes chinoises menacées de stérilisation forcée et des déserteurs[25]. Seule l'utilisation du principe de proportionnalité, qu'il convient de distinguer radicalement de l'exigence de discrimination, permet une réponse conforme aux principes de protection des droits de l'homme.

Ainsi, si l'Etat chinois poursuit un objectif légitime de limitation des naissances, l'on peut s'interroger sur la proportionnalité du moyen utilisé — la stérilisation forcée — pour considérer que, s'agissant d'une atteinte disproportionnée à un droit fondamental, elle s'apparente à une persécution.

Le même raisonnement peut être tenu, s'agissant de la désertion d'une armée. L'Etat qui poursuit un but légitime de défense, le fait-il par un moyen disproportionné?

En Belgique, la Commission a jugé que

> « la crainte de poursuites et d'un châtiment pour désertion ou insoumission ne peut servir de base à l'octroi d'une protection internationale que s'il est démontré, ce qui

[23]HCR. Guide des procédures et critères à appliquer pour déterminer le statut de réfugié, Genève, 1979, pt 51.

[24]Idem, pt 53.

[25]Pour des références de jurisprudence, *Qu'est-ce qu'un réfugié ?*, Rapport général, n° 22 et 23. Voy. aussi A. FABBRICOTTI, "The concept on Inhuman or Degrading Treatment in International Law and its application in Asylum Cases", *I.J.R.L.*, vol. 10, n° 4, 1998, p. 636.

n'est pas le cas en l'espèce, que le demandeur se verrait infliger pour l'infraction militaire commise une peine d'une sévérité disproportionnée du fait d'une des cinq causes »[26].

L'exigence de disproportion de la mesure ne se double pas d'une exigence que la mesure revête un caractère discriminatoire. S'il faut une mesure disproportionnée, il n'est en effet pas nécessaire qu'il y ait discrimination au sein d'un même groupe pour que cette mesure s'apparente à la persécution. Ce n'est pas parce que toutes les femmes chinoises seraient stérilisées dans le cadre de la politique de l'enfant unique qu'il n'y aurait plus persécution. Raisonner autrement consisterait à dire que plus l'atteinte aux droits fondamentaux est généralisée, moins il y a persécution.

Sur ce point, l'on s'éloigne de la jurisprudence *Vilvarajah* précitée de la Cour européenne des droits de l'homme qui a considéré qu'il n'y avait pas de violation par ricochet de l'article 3 C.E.D.H. par l'expulsion de jeunes Tamouls vers le Sri Lanka, notamment car les requérants n'établissent pas que leur situation fut pire que celle de la généralité des membres de la communauté tamoule (pt 36).

A l'inverse, si la discrimination n'est pas une condition nécessaire, elle peut être une condition suffisante lorsque le traitement discriminatoire est constitutif d'une persécution pour motifs raciaux par exemple.

D'autres exemples pourront être examinés à partir de jurisprudences comparées, notamment dans les exposés de Matti Peloupää (CEDH) et de Peter Burns (CCT). L'examen pourrait aussi porter sur le rôle subsidiaire[27] de la protection contre le refoulement ou une mesure d'éloignement du territoire, puisée dans les textes relatifs aux droits de l'homme, lorsqu'une personne est exclue du statut de réfugié, notamment en application de l'article 1 section F, lettre a et c de la Convention de Genève (crimes contre l'humanité et agissements contraires aux principes des Nations Unies)[28]. Toutefois, ici ce n'est pas tant le caractère complémentaire de la protection du réfugié par les textes relatifs aux droits de l'homme qui a été examiné, que le caractère inhérent des droits de l'homme dans la protection du réfugié.

[26]C.P.R.R., 98-0777/R7400 (Israël). De même C.P.R.R., 97-1385/R7743 (Russie) relève que le requérant a "en tout état de cause la possibilité d'échapper à l'obligation militaire en invoquant le droit constitutionnel à l'objection de conscience dont l'effectivité est garantie par les juridictions russes". En revanche, dans un autre pays, (Rép. Féd. Yougoslavie) la Commission relève « een onvenredig zware bestraffing voor het door hem begame militair misdrijf... », (une condamnation excessivement lourde pour l'infraction militaire qu'il a commise » (VBC, 98-0546/E328)

[27]B. GORLICK, "The Convention and the Committee against Torture : A complemtary Protection Regime for Refugees", *I.J.R.L.*, Vol 11, n° 3, 1999, p. 479 ; T. EINARSEN, « The European Convention on Human Rights and the Notions of an Implied Right to de facto asylum » I.J.R.L., vol 2, 1990 ; R. PLENDER and N. MOLE, « Beyond the Geneva Convention : constructing a de facto right of asylum from international human rights instruments », in F. NICHOLSON and P. TWOMEY, Refugees : Rights and Realities - Evolving International Concept and regime ? Cambridge University Press, 1999, p.81.

[28]Voy. J.-Y CARLIER et S. SAROLEA, « Chronique de jurisprudence » *Revue du droit des étrangers*, n° 105, p. 688.

De façon générale, l'examen de la notion de réfugié à partir de la théorie des trois échelles permet de lier l'ensemble de la définition, et particulièrement le concept de persécution à l'ensemble des standards de protection des droits de l'homme. Ce faisant, ce n'est pas tant une définition hiérarchisée du concept de persécution qui est proposé qu'un mécanisme d'interprétation à la fois souple et structuré faisant d'une part de l'interrelation entre les trois éléments de la définition (crainte avec raison de persécution) et d'autre part du principe de proportionnalité les deux bras qui permettent de relier efficacement le droit des réfugiés aux droits de l'homme. L'analyse montre que ce lien n'est pas unilatéral, l'un et l'autre étant appelés à s'enrichir mutuellement.

ECHR CASE-LAW ON REFUGEES AND ASYLUM SEEKERS AND PROTECTION UNDER THE 1951 REFUGEE CONVENTION: SIMILARITIES AND DIFFERENCES

Matti Pellonpää*

1. INTRODUCTION

From the point of view of refugees and asylum seekers, the EHCR system contains certain inherent limitations. First of all, the European Convention was not intended as an instrument of refugee law at all. It neither guarantees the right to asylum or right of an alien to reside in a particular country nor contains any explicit rule of *non-refoulement*. Second, the Convention does not purport to have extraterritorial application in so far as the rights defined in it shall, according to the wording of Article 1, only be secured by the contracting states "to everyone within their jurisdiction". As emphasized by the Court in the *Soering* judgment:

> "Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I', sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting state may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention." [1]

On the other hand, despite this language, the Court has given certain extraterritorial effects to the Convention precisely in the context of refugee and deportation cases; but these cases are exceptions. Furthermore, they are only a fraction of the Court's caseload. The great bulk of the thousands of applications coming before the Court concern the position of individuals within the territorial jurisdiction of States, covering very wide areas of the life of modern societies: fair trial in civil and criminal proceedings; freedom of expression in

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[1] Judgment of 7 July 1989, Series A no. 161, § 86

political and non-political contexts; expropriation and different measures of control of the use of private property; police surveillance by modern technical means and its impact on the right to privacy; detention of mental patients; discrimination on the basis of one's sexual orientation; child care and access disputes; and so on. Individual asylum and refugee related cases may be of great importance - if only for what may be at stake - but as a whole they simply are not a central part of the Court's activities. Nor can the Court realistically acquire expertise comparable to that of national and international authorities working in the field of refugee law.

This suggests that the protection provided for refugees and asylum seekers under the European Convention is only complementary to the primary protection which is to be provided by nation-states and the UNHCR under the 1951 Refugee Convention. Such an approach is not only in conformity with the limited - if any - role which was intended for the convention in refugee law contexts, but also with the principle of "subsidiarity". This principle is discussed first in the following review of the Court's approach in refugee related cases.

2. PRINCIPLE OF "SUBSIDIARITY"

The system created by the ECHR is governed by what may be called the principle of "subsidiarity". This principle emphasizes the supplementary nature of the protection provided by the Court, the idea being that human rights should be primarily guaranteed in their natural environment, i.e. domestic law. Subsidiarity has found different expressions in the case-law of the Court. For example, in connection with various restrictions on human rights, the Court sometimes leaves a certain "margin of appreciation" to domestic authorities, emphasizing that "it cannot assume the role of the competent national authorities", for doing so would be to "lose sight of the subsidiary nature of the international machinery established by the Convention".[2] To take another example, in connection with the guarantee of a fair trial in criminal proceedings, the Court repeatedly emphasizes that the admissibility of evidence is primarily governed by domestic law and that as a general rule it is for the national courts to assess the relevance and weight of evidence before them.[3]
Subsidiarity thus being a principle governing the Convention system as a whole, it should come as no surprise that the principle finds certain reflections also in the Court's case-law concerning refugees and related issues. It is in

[2] E.g. the *Belgian Linguistic* judgment of 23 July 1968, Series A no. 6, § 10. See Petzold, "The Convention and the Principle of Subsidiarity", in *The European System for the Protection of Human Rights* (ed. by Macdonald, Matscher and Petzold), p. 41 pp.
[3] See e.g. the *Edwards* v. *United Kingdom* judgment of 16 Dec. 1992, Series A no. 247-B, § 34 ("Moreover, it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them.").

part against this background that one has to see the emphasis placed, for example, in the *Cruz Varas* case on the

> "fact that the Swedish authorities had particular knowledge and experience in evaluating claims of the present nature by virtue of the large number of Chilean asylum seekers who had arrived in Sweden since 1973. The final decision to expel the applicant was taken after thorough examinations of his case by the National Immigration Board and by the Government..." [4]

Or, to take another, a more recent example, in a case decided in 2000, the Court stated that

> "the Federal Office of Refugees carefully evaluated the evidence which the applicants submitted in support of their renewed asylum request. Furthermore, the Court observed that altogether three different asylum proceedings have been carried out by the German courts in the applicants' case. They carefully evaluated the evidence which the applicants submitted in support of their asylum requests. The Court recalls that, as a general rule, the assessment of the facts and the taking of evidence and its evaluation is a matter which necessarily comes within the appreciation of the national courts and cannot be reviewed by the Court unless there is an indication that the judges have drawn grossly unfair or arbitrary conclusions from the facts before them. However, nothing in the file suggests that the assessment of evidence was arbitrary."[5]

Of course, to provide meaningful protection to asylum seekers, the Court sometimes must depart from the assessment made by the national authorities. The *Chahal* judgment, to be discussed below, is an important example of a case in which the Convention organs accepted the applicants' evidence concerning the situation in India rather than solely basing their decision on the conclusions reached by the national authorities.[6] The Court, it seems, is more likely to depart from such conclusions if the applicant can put forward before it relevant evidence not taken into account by national authorities[7], or there are other special circumstances. Even so, the logic of the Convention under the principle of subsidiarity puts certain limits on overruling national evaluations which are not easily overcome by the Court, which has to see to it that its interpretations are coherent not only inside one particular group or cases, such as "aliens law" or refugee related cases, but also seen as a whole. It would not necessarily be conducive to the general credibility of the Court to have a reserved attitude as regards interference in national evaluation of evidence in such core areas (from the point of view of the Convention) as fairness of civil and criminal proceedings, and a more interventionist attitude in the field of refugee law.

[4] Judgment of 20 March 1991, Series A no 201, § 81.

[5] 61479/00 (*Damla and Others* v. *Germany*), Dec. *26 Oct. 2000.*

[6] *Chahal v. United Kingdom* judgment of 15 Nov. 1996, Reports 1996-V, p. 1831. See also Mole, *Asylum and the European Convention on Human Rights*, Directorate General of Human Rights, Strasbourg, May 2000 at 57.

[7] Cf. 43844/98 (*T.I. v. UK*), Dec. 7 March 2000 ("Before the Court, the applicant has provided two medical reports which strongly support his claims that he was tortured. He has also provided photographs of scars of his injuries of his arm, leg and head. These materials were not before the German authorities and it is not apparent that the German authorities gave any consideration to this aspect of the case").

3. ECHR, UNHCR AND OTHER INTERNATIONAL ORGANS PROTECTING HUMAN RIGHTS

It is perhaps not entirely illogical that something - at least remotely - resembling "subsidiarity" also seems to govern the relationship between the ECHR and the UNHCR in so far as the Court frequently relies on conclusions reached by the latter, the international agency primarily mandated with refugee protection. In the *Vilvarajah and Others* judgment the Court, when evaluating the risk facing the Tamil applicants, stated, *inter alia*, that

> "...the UNHCR voluntary repatriation program which had begun to operate at the end of December 1987 provides a strong indication that by February 1988 the situation had improved sufficiently to enable large numbers of Tamils to be repatriated to Sri Lanka notwithstanding the continued existence of civil disturbance." [8]

Or, to take a more recent example, in *G.H.H. v. Turkey*, the Court, when assessing whether the applicants had such an "arguable claim" as to entitle them to an Article 13 remedy (see below) observed "that the UNHCR had on three occasions already rejected their applications for asylum..."[9]

In the cases just referred to, the deference to the UNHCR worked against the individuals but it may go in the opposite direction, too. This is illustrated by the recent judgment in *Jabari v. Turkey*, in which the Court gave "due weight to the UNHCR's conclusion" about the applicant' refugee status when coming itself to the conclusion that her deportation to Iran, if carried out, would constitute a violation of Article 3 of the European Convention.[10] In the light of the UNHCR's decision to recognize the applicant as a refugee within the meaning of the Geneva convention it was also clear that she had on "arguable claim" so as to entitle her to a remedy within the meaning of Article 13.[11]

More often than not the Court relies on material published by the UNHCR or submitted to the Court by the parties, but it may also itself invite the UNHCR to make written submissions on a subject relevant to the case under consideration.[12]

Reliance on the UNHCR can be seen as an expression of the fact that the Court interprets and applies the European Convention as a part of the body of universal human rights law. Other human rights conventions and the practice of other international bodies is regarded as a part of the context to be taken into account in the interpretation of the European Convention. In the case of

[8] The *Vilvarajah v. United Kingdom* judgment of 30 Oct. 1991, Series A no. 215, § 110.
[9] Judgment of 11 July 2000, § 38.
[10] Judgment of 11 July 2000, § 41.
[11] *Ibid.*, § 80.
[12] This happened in *T.I.* (note 7 above) in which the Court invited the UNHCR to make written submissions on certain questions concerning the relationship between the Dublin Convention and the Refugee Convention.

Selmouni v. France, the Court sought guidance from the UN Convention against Torture when defining the notion of torture - and expanding it so as to reflect present day conditions and take account of the nature of the European Conventions as a "living instrument" - within the meaning of Article 3 of the European Convention.[13] This case did not concern expulsion, but it is not excluded that the practice of the UN Torture Committee may come to play a certain role in the expulsion jurisprudence of the Court.[14]

The relationship between the ECHR and other international bodies, especially the UNHCR, is not a one-way street. The Court not only seeks guidance in the practice of the UNHCR but it may occasionally also be able to give procedural support for that practice. In the *Jabari* case, the asylum seeker's application had been rejected by national authorities, because it had not been submitted within the five-day time limit imposed by the relevant Ministry of the Interior Regulation. The Court, first by indicating an interim measure on the basis of Article 39 of its Rules (see below) and then by rendering the above-mentioned judgment, "enforced" the UNHCR's decision to recognize the applicant as a refugee.

The last-mentioned case is also an illustration of the fact the ECHR does not only play the role of an extraordinary safeguard in individual cases but may also have a "gap-filling" function or a more general scope. While the case was pending before the European Court, the relevant regulation was amended so as to extend the five-day time limit to ten days.

4. ON THE SCOPE OF THE "EXTRATERRITORIAL" PROTECTION GIVEN BY THE ECHR

The *Jabari* case, for example, suggests that the ECHR does have relevance in the context of refugee and asylum law - understood in a broad sense. This is so despite some of the inherent limitations indicated above. Or, perhaps one should say that some of the weaknesses are at the same time strengths in so far as the Court is not restricted by any definition of refugee or the like. Article 3, the most important provision in the refugee context, provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment", including removal to a country where the person faces "a real risk" of being subjected to such treatment. This protection is not limited to "Convention refugees" or any other pre-defined category of persons and applies

[13] Judgment of 28 July 1999, §§ 96-105.

[14] It has been suggested that in its report in *Hatami v. Sweden* the European Commission of Human Rights "for the first time echoed (without express reference) the case-law of the United Nations Torture Committee to the effect that 'complete accuracy is seldom to be expected from victims of torture'." Mole, note 6 above, at 22. The case was settled before the Court after the applicant was granted a permanent residence permit by Swedish authorities. Judgment (striking the case out of the list) of 9 Oct. 1998.

equally to asylum seekers or persons with no legal status within its jurisdiction under the domestic law of the state concerned.

Under Article 3, the Court may in certain respects have gone even further in refugee and asylum seeker protection than many jurisdictions. For example, the state must, in principle, also provide protection against torture or inhuman or degrading treatment or punishment by non-State actors, provided there is a "real risk" emanating from such actors in circumstances in which "the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[15] This may be seen as one logical consequence of the nature of the state obligation under Article 3, which is not obligation to impose Convention standards on other states or see to it that other states to which a person is removed respect all the Convention standards. The obligation under Article 3 rather involves the expelling state's responsibility for foreseeable consequences of its own action (expulsion), in principle regardless of whether the direct source of these consequences are foreign authorities or a group of gangsters.

Furthermore, the Court has interpreted sending an AIDS patient in the advanced stage back to a country where medical resources are limited as amounting to real risk of an Article 3 violation. In *D. v. UK*, it ruled that in the exceptional circumstances of the case the expulsion of the applicant (an AIDS-patient at an advanced stage) from UK to his home country St. Kitts, where the medical resources would be very limited, would "expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment."[16] Additionally, in a recent case the Court held that Article 3 prohibits not only expulsion to a state in which the applicant faces a real risk of being subjected to treatment contrary to that of Article 3 but also to a third state which does not provide guarantees against the individual being expelled therefrom to a state where there is "real risk" in the abovementioned sense.[17] Finally, in this connection it may also be mentioned that the Convention obligations have been held to extend to flight zones. In a case concerning asylum seekers held in such a zone the Court held that any "extraterritoriality" of such a zone under domestic law did not exclude the responsibility of member States under the European Convention.[18] For the Convention purposes facts occurring in the zone clearly took place "within the jurisdiction" as stated in Article 1.[19]

[15] The *H.RL v. France* judgment of 29 April 1997, Reports 1997-III, p. 1745, § 40. In this case the applicant, however, did not succeed in convincing the Court of the fulfillment of these conditions.

[16] Judgment of 2 May 1997, Reports 1997-III, p. 777, § 53. See also Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, pp. 525-7 (2000).

[17] *T.I.* (note 7 above). See Mole, note 6 above, at 29.

[18] The *Amuur* v. *France* judgment of 2 June 1996.

[19] There is no doubt that, despite the main rule of the territorial limitation of the Convention obligations, public functions exercised by a contracting state's consular or diplomatic representation abroad falls under its "jurisdiction". For an argument that there might be an obligation under

5. ECHR AND NATIONAL SECURITY

It is also to be noted that Article 3 does not contain any qualification or caveat excluding persons regarded as threats of national security from the scope of its protection. The Court indeed has taken the provision on its face value, emphasizing the absolute nature of the protection guaranteed by it. There is no room "for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged".[20] The message thus is that a threat to national security should be taken care of by ordinary criminal laws of the country concerned. Consequently, in this respect the protection afforded by Article 3 is wider than that provided by Articles 32 and 33 of the 1951 Convention. [21] This is another example of the complementary function of the ECHR.

6. THE THRESHOLD OF PROTECTION: "REAL RISK OF TORTURE OR INHUMAN OR DEGRADING TREATMENT"

While the sphere of the protection is broad in the sense indicated above, the "threshold" of that protection ("real risk of torture or inhuman treatment") would, at least in some respects, seem to be higher than that under refugee law which requires showing of ("only") a "well-founded fear of persecution". First of all, in the case-law thus far, only risk of treatment contrary to Article 3 prohibiting torture and inhuman or degrading treatment has justified extraterritorial protection. As has been noted, these forms of mistreatment, however, "are only a fraction of all conceivable practices amounting to persecution."[22]

Thus all forms of persecution in the sense of refugee law may not necessarily entitle to the extraterritorial protection guaranteed by Article 3. This difference, which in any case may not be so fundamental in practice, is mitigated if there has been a UNHCR or a national refugee determination procedure. Deference to the latter means that if well-founded fear of persecution has been established in such procedures, there is a very strong presumption that the threshold of Article 3 is reached, as well. Thus in *Ahmed v. Austria* the Court attached "particular weight" to the fact that the applicant had, in 1992, been granted asylum on the ground of well-founded fear of persecution.

Article 3 to issue a visa to a refugee reaching such a representation, see Noll, note 16 above, at 443-4.

[20] The above-mentioned *Chahal v. UK* judgment, § 81.

[21] *Ibid.*, § 80.

[22] Noll, note 16 above, at 410.

The fact that the applicant lost that status on the ground of criminal convictions (rather than changes of the conditions prevailing in the home country, Somalia) could not remove him from the scope of the protection of Article 3.[23]

On the other hand, if there is no such national or UNHCR determination, there may be a difference between the Court's approach and that of some national authorities in that only certain qualified forms of threatening persecution would trigger the protection under Article 3. Under Professor Hathaway's four tier hierarchy of rights[24], the extraterritorial protection by the ECHR seems to be limited to the first tier of non-derogable rights and, moreover, only part of them. The Court has frequently emphasized the special role of the protection against torture and inhuman treatment as "fundamental values of a democratic society", which may provide an explanation for the extraterritorial "extension" of the protection of Article 3 - but also for the limits of that protection. Those limits may even be found inside Article 3 in so far as there seems to be no case in which the threat of *degrading* treatment alone in the country of destination would have sufficed for the finding of a violation of Article 3. Although threat of degrading treatment is, in principle, not excluded from the scope of the protection against expulsion, it remains to be seen whether all the forms of such treatment (e.g. corporal school discipline) would be sufficient to prevent removal from a contracting state.

It is true that the Court has very often also emphasized the importance in a democratic society of the fair trial guarantee of Article 6. Therefore, it may not be surprising that it has hinted to the possibility of extraterritorial protection being derived from that "second tier" right as well. In the *Soering* judgment the Court stated that

> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks of suffering a flagrant denial of fair trial in the requesting country...however, the facts of the present case do not disclose such a risk."[25]

Extension of the extraterritorial protection beyond the situations envisaged in Article 3 is thus not excluded but would only seem possible in very exceptional circumstances.

Another aspect of the threshold of the protection under Article 3 is the question of proof of a "real risk". The Court requires, in principle, proof of

[23] Judgment of 17 Dec. 1996, Reports 1996-VI, p. 2195, §§ 42-47. To take another example, it is most likely that the Court would regard the Immigration Appeal Board's (Dr.H.H. Storey, Chairman, Mrs. A. Weitzman J.P.) determination of 19 July 2000 in *Mustafa Doymus v. the Secretary of State for the Home Department* as conclusive also for the purposes of Article 3.

[24] As presented, e.g., in the Report of the Human Rights Nexus Working Group at 9.

[25] Judgment, § 113. See also the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, § 110 and Mole, note 6 above, at 23-4. By a decision of 11 Jan. 2001 a chamber of the Court declared admissible a case raising, *inter alia*, this issue. 58073/00 (*Yang Chun Jin v. Hungary*).

individualized risk. In *Vilvarajah* the Court paid attention to the fact that the applicant's personal position did not seem to be "any worse than the generality of other members of the Tamil community or other young make Tamils who were returning to their country."[26]

This approach is very strict but can be explained by the nature of the obligation under Article 3. It is recalled that there is under the Convention no general obligation to see to it that Convention rights are respected in other countries, the expelling state being responsible for foreseeable consequences of its own actions. What is prescribed in Article 3 is that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." When it comes to the interpretation of the extent of this obligation, general principles of state responsibility under international law must be taken into account. These presuppose the existence of two interlinked elements: attribution and causation. As a point of departure, the state is responsible for foreseeable consequences of an act attributable to it; conversely, there must be an unbroken causal connection between the act attributable to the state and the alleged injuries. These conditions are easily fulfilled if there is a risk of treatment contrary to Article 3 threatening a particular individual and he is expelled despite such a risk. In those circumstances harmful effects are a foreseeable consequence of the expelling state's action - that state "subjects the individual to torture or to inhuman treatment" within the meaning of Article 3. On the other hand, if the person has not been "singled out" for ill-treatment, his situation, to quote the *Vilvarajah* judgment, not being "worse than the generality of other members or the Tamil community or other young male Tamils who were returning to their country", the conclusion may be different. It is not different, if every member of the group is threatened with the same foreseeability to be ill-treated. The reference to the "mere possibility" in *Vilvarajah*, however, should rather be understood that, instead of likelihood of ill-treatment, there was a more or less remote possibility of such treatment. Even if such a possibility exists, its actual materialization is not necessarily such a foreseeable consequence of the expelling state's act as to trigger its responsibility under Article 3.

The risk must be assessed

> "primarily with reference to those facts which were known of ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears".[27]

These principles also should be seen against the background of the nature of the state obligation under Article 3: responsibility of the expelling state for foreseeable consequences of its own action. Such responsibility must be

[26] Judgment, § 111.
[27] *Ibid.*, § 107.

evaluated as at the time at which the facts allegedly triggering that responsibility took place. However, if the person has not been expelled by the time of the Court's judgment, the material point of the time is that of the Court's consideration of the case.[28]

There must be "substantial grounds" of a "real risk". The Court has defined the standard of proof as one of proof "beyond reasonable doubt". In applying this standard the Court does not operate on any strict burden of proof but rather applies the standard in a flexible manner. As stated in *Vilvarajah*:

> "In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it, or, if necessary; material obtained *proprio motu*".[29]

The Court has emphasized that its

> "examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe".[30]

As to the material taken into account, the special position of the material emanating from the UNHCR has been emphasized. The Court, however, takes into account other material also. In *Jabari*, in which the Court gave "due weight to the UNHCR's conclusion" (see above), it also relied on the latest Annual Report of Amnesty International and the 1999 Country Reports on Human Right Practices issued by the US Department of State in coming to the conclusion that the applicant would risk treatment contrary to Article 3 if expelled to Iran.[31] In *T.I.* it had resort to materials emanating from the same sources but in addition made references also to a report by the Medical Foundation for the Victims of Torture and a report of UN Special Rapporteur on extra-judicial and summary executions. Other sources, such as the practice of the UN Torture Committee, are by no means excluded. It also should be added that in expulsion/extradition cases intervention by NGO's has been allowed by the Court.[32]

[28] E.g. *Chahal*, § 86.
[29] *Vilvarajah*, § 107.
[30] *Ibid.*, § 108.
[31] Judgment, §§ 31-32.
[32] See e.g. the *Chahal* judgment, § 6 (leave to submit written observations granted to Amnesty International, Justice and Liberty in conjunction with the Centre for Advice on Individual Rights in Europe and the Joint Council for the Welfare of Immigrants).

7. PROCEDURAL QUESTIONS: DEPORTATION, RIGHT TO A REMEDY, AND RIGHT TO A FAIR TRIAL

Rule 39 of the Rules of Court, which replaces the former Rule 36 of the Commission's Rules of Procedure and the old Court's Rules, provides as follows:

> "The Chamber, or where appropriate its President, may at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or the proper conduct of the proceedings before it."

For example, the judgment in the *Jabari* case discussed earlier was preceded by interim measures indicating to the respondent Government that it was desirable in the interest of the parties and the proper conduct of the proceedings not to deport the applicant to Iran while the proceedings were pending in Strasbourg. The Turkish Government, like other governments in the overwhelming majority of similar situations, abided by these rulings, although interim measures "indicated" by the Court are not legally binding decisions[33]

In addition, through its Article 13 (right to an effective remedy) the Convention imposes requirements on the national procedural law which, if there is an "arguable claim" under Article 3, must provide adequate remedy.

On the other hand, it has been the constant holding in the case-law of the European Commission of Human Rights that Article 6 containing far reaching guarantees of a fair trial by a court of law does not apply to asylum, expulsion or related proceedings. While the Court's position was somewhat open, it was clarified by the judgment rendered on 5 October 2000 in *Maaouia v. France.* In this case the Court followed the Commission's line, holding that Article 6 was not applicable to proceedings concerning the rescission of an exclusion order. The reasoning of the Court makes it clear that the conclusion of non-applicability is not limited to the particular question of exclusion orders but concerns related alien law matters generally.

8. CONCLUDING REMARKS

To sum up, the ECHR and its procedure can never replace the national procedures for refugee protection or the international protection under the 1951 Refugee Convention and by the UNHCR. The European Court can and does draw inspiration from the practice of the UNHCR and other bodies but as the applicable norms are not identical, the interpretations are not likely to coa-

[33] This is at least the situation as long as the *Cruz Varas* judgment of the old Court has not been overruled. In 1995-99 the average number of annual applications made under Rule 39 (or former Rule 36) were some 155, the corresponding acceptance rate about 22 (calculations made by Hannah Gary). With a few exceptions all these cases concerned threatened expulsion or similar measures.

lesce fully either. The European Court and Convention can complement the protection of refugees by revealing and filling certain gaps existing in the regimes applied by specialized refugee authorities. They can also occasionally give "procedural support" to the UNHCR and in the same context act as an "alarm bell" to national authorities who in practice in many cases have allowed the stay of an alien after the Court's indication under Rule 39. Articles 5 (on deprivation of liberty) and 8 (protection of, *inter alia*, family life) also play a role in refugee related and other aliens law contexts. In looking towards the future, there may be certain unused potential in the European Convention with regard to refugee and asylum seeker claims and complementing refugee protection. Thus Article 4 of Protocol No. 4 prohibiting collective expulsion of aliens may be important if deportation of groups of asylum seekers tends to develop patterns of "mass procedure". Finally, there is Article 1 of Protocol no. 7 which gives certain minimum guarantees in individual expulsion situations.[34] In conclusion, the current and potential application of the European Convention by the ECHR in relation to refugees and asylum seekers may serve as a useful complementary tool for protection of refugees; but, it will never replace the primacy of the responsibility of the individual states and the UNHCR under the 1951 Refugee Convention.

[34] In general, see Mole, note 6 above.

THE UNITED NATIONS COMMITTEE AGAINST TORTURE AND ITS ROLE IN REFUGEE PROTECTION

Peter Burns, Q.C.*

1. INTRODUCTION

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1] (the Torture Convention) had its formal genesis in a General Assembly resolution in 1984[2] and came into effect on 26 June 1987. In its preamble it makes clear its goal of reinforcing the struggle to prevent torture and other cruel, inhuman and degrading treatment or punishment throughout the world.[3]

It does this in a variety of ways. Pursuant to Art. 19 of the Torture Convention States Parties are obliged to submit reports to a Committee of experts

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Sup. No. 51, U.N. Doc. A/39/51 (1985) (entered into force 26 June 1987), reprinted in (1984) 23 *I.L.M.* 1027 [hereinafter "CAT" or "the Convention"]. The Convention created a monitoring body, known as the Committee Against Torture, to oversee its implementation pursuant to art. 17. At the time of writing, there are 117 state parties to the Convention. Voyame and Burns, 'The Convention Against Torture' in *Manual on Human Rights Reporting* (U.N.O., Geneva, 1977) at 367. For a full account of the origins of the Convention and how it applies, see Lippman, 'The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', (1994) 17 *Boston College Intl and Comp L Rev* 275; Burgers and Danelius, *The United Nations Convention Against Torture* (Dordrecht: Martinus Nijhoff, 1988); Burns and Okafor, 'The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or How it is Still Better to Light a Candle than to Curse the Darkness', (1998) 9 *Otago L Rev* 399.

[2] A/Res/39/46, 10 December, 1984.

[3] The Preamble to the Torture Convention reads *inter alia*:

"The States Parties to this Convention, . . .

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows: . . . "

created by Art. 18 (the Committee). These reports are required to outline the measures taken by the state to ensure (*inter alia*) the prohibition of torture, the pursuit and prosecution of torturers[4] and the compensation and rehabilitation of torture victims.[5] The same requirements extend to other cruel, inhuman, degrading treatment or punishment.[6] The Committee receives the reports; analyses and comments upon them and issues appropriate conclusions and recommendations.[7]

This reporting obligation applies to all States Parties and receiving reports is the most fundamental jurisdiction exercised by the Committee.

The Committee also has jurisdiction, under Art. 21, to adjudicate in situations where one State Party has denounced another for breaching the terms of the Convention. To date, no such denunciation has occurred.

The Convention is unique among the United Nations Human Rights treaties in granting, by virtue of Art. 20, a confidential investigative jurisdiction. But this is a jurisdiction that is dependent upon a number of qualifications. It can only be exercised if the state party, under Art. 28(1), has not at the time of ratification reserved against such jurisdiction, and if the Committee is convinced that it has received reliable information which appears to it to contain well-founded indications that *torture* is being systematically practiced in the territory of the State Party.[8] It also obliges the Committee to attempt to obtain the co-operation of the State Party in implementing Art. 20.[9]

It is the last type of jurisdiction, however, that is most directly relevant to the theme of this workshop. Art. 22 grants the Committee the jurisdiction to receive individual complaints from persons who claim to have been victims of violations of the Torture Convention.[10] Art. 22 only applies to those States Parties that have declared in favour of this jurisdiction.[11] This jurisdiction is known as the communications process.

2. THE COMMUNICATIONS PROCESS UNDER ART. 22 OF THE TORTURE CONVENTION

At the present time there are 41[12] of the 120 odd states that have ratified the Torture Convention that have also declared in favour of individual communications to the Committee pursuant to Art. 22.

[4] Torture Convention, Arts. 4 and 12.
[5] *Ibid.*, Art. 14.
[6] *Ibid.*, Art. 16.
[7] *Ibid.*, Art. 19.
[8] *Ibid.*, Art. 20(1).
[9] *Ibid.*, Art. 20(5).
[10] Pursuant to Art. 22(1) of the Torture Convention the Committee can receive individual complaints from those under the jurisdiction of a State Party that has declared in favour of the Committee's Art. 22 jurisdiction.
[11] *Ibid.*, Art. 22(1).
[12] These are: Algeria, Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Rep., Denmark, Ecuador, Finland, France, Greece, Hungary, Iceland, Italy, Liechtenstein,

Such communication must not be anonymous,[13] an abuse of the right of submission,[14] or inconsistent with the terms of the Torture Convention.[15] They can only be received by the committee if they are not before or have been before any other type of international process,[16] and all domestic remedies have been exhausted.[17]

The communications process is a confidential one, and the views of the Committee are published only after notification to the author and the State Party.[18]

The Committee has been established since 1988 and has registered 163 communications of which 39 are pending.[19] To date, violations have been found in 18 cases and in 27 cases findings of no violation have been made.[20] The remaining cases were either discontinued or found to be inadmissible, or are yet to be dealt with by the Committee.

In recent years the vast bulk of the communications received by the Committee have involved failed refugee claims before domestic refugee determining processes.[21] This occurs through the intersection of the effects of Art. 22 with Arts. 1 and 3 of the Torture Convention.

Art. 1 defines torture to mean:

> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering rising only from inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Art. 3 reads as follows:

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

Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Russian Fed., Senegal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Uruguay, Venezuela, Yugoslavia.

[13] *Supra*, note 1, Art. 22(2).

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*, Art. 22(5)(a).

[17] *Ibid.*, Art. 22(5)(b).

[18] This is the effect of *ibid.*, Art. 22(6) and (7).

[19] As of June 5, 2000.

[20] *Ibid.*

[21] For example, all 14 cases published in the Committee's 1999 Annual Report involved failed refugee claims: *Report of the Committee Against Torture*, G.A. Supp. No. 44 (A/54/44), at pp. 45-137.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The combined effect of Arts. 1, 3 and 22 enables individuals to complain directly to the Committee that if, having failed to obtain refugee status, they are sent to or returned to a particular state where there are substantial grounds to believe that they would be in danger of being subjected to torture, then for a state to expel or return them would breach the Torture Convention.

If they are successful in this claim then, even if they are terrorists or other criminals, they are entitled to the protection of the Torture Convention. Article 3 is non-derogable[22] and cannot be diminished by a State Party that may be influenced by matters of state security, international comity or even domestic politics.[23]

The effect of this jurisdiction of the Committee on the refugee determination process of the States Parties is not difficult to discern. After a refugee claimant has exhausted all reviews and appeals in a State Party he/she can communicate with the Committee.[24]

The Committee, under its Rules of Procedure,[25] when it is considering the admissibility of a communication may ask a state party to take protective measures to ensure irreparable damage to the author is not done to him or her in the meantime.[26] In the context of Art. 3 cases this inevitably means that a State Party should permit the author to remain in the jurisdiction until admissibility is decided.

Assuming that there is no patent procedural flaw in the communication, and given the nature of Art. 3 protection, a nexus for interim measures and protection[27] virtually always flows from the Committee to the State Party. This has certain obvious results:

(a) Since the Committee meets only twice a year in Geneva to deal with the whole of its work, if a state observes such a request then the author will

[22] *Paez v. Sweden*, Communication No. 39, 1996, para 14.5

[23] A strained ambiguity is created by the language of Art. 16(2) of the Torture Convention:

2. The Provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

Although some may argue that this means that where national legislation provides for the expulsion of, e.g., terrorists, then Art.3 of the Torture Convention would not apply, the better view is that Art. 3 is non-derogable, dealing with the intentional crime of *torture*, and that all that Art. 16(2) does is highlight the fact that a state cannot use the Torture Convention to limit or reduce protections in other treaties or domestic law.

[24] Assuming that the complaint properly refers to the conduct of a State Party that has declared in favour of the Committee's Art. 22 jurisdiction.

[25] CAT/C/3/Rev. 3, 13 July 1998; paras 96-112.

[26] *Ibid.*, Rule 108(9).

[27] *Ibid.* The subject-matter relates to torture, which apart from death is the most severe of all the possible effects of return. If the author presents an arguable case, it is virtually inevitable that a request for interim protection will emanate from the Committee.

remain in the State party for (usually) up to a year before the Committee can determine the merits of the case.

(b) Most refugee-receiving countries also have highly developed and human rights sensitive legal systems, including the legal profession. So the lawyers in these countries are making heavy use of the communications system of the Torture Convention – to the consternation of the States Parties concerned.

(c) At least one State Party is sufficiently concerned at what is perceived to be a loss of national sovereignty in granting the Torture Convention its communications jurisdiction over it,[28] that it has begun to telegraph an inclination to denounce it, at least so far as interim protection measures are concerned.[29]

In short, those states that have been most liberal in receiving potential refugees and who have also demonstrated the highest commitment to the objects and ideals of the torture Convention have borne the heaviest brunt, both economically and politically, of the committee applying Art. 3 in response to a communication.[30]

This should have been foreseen by those states, but this does not diminish their critical reaction to these results in some cases.[31]

3. RELEVANT JURISPRUDENCE OF THE COMMITTEE

Over the years the Committee has developed a fair body of jurisprudence that gives guidance to the way in which it will handle any communication. In *Mutombo v. Switzerland*[32] it was held that for the purposes of determining the level of the risk of torture the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the [receiving state] of a consistent pattern of gross, flagrant or mass violations of human rights. But the purpose of the determination is to ascertain whether the author would be personally at risk, so the presence or absence of such violations of human rights do not automatically resolve the matter.[33]

Very often domestic refugee determination authorities place weight upon inconsistencies in the applicant's version of events. But if the applicant has claimed to have been tortured, and there is some reliable evidence in support

[28] Australia

[29] See the text above, note 52, *infra.*

[30] The States that have the heaviest number of cases to date are: Australia (14), Canada (30), France (26), Netherlands (8), Sweden (24) and Switzerland (33). (Information provided by the Secretariat of the Committee Against Torture on March 6, 2001.) These are all states that have developed legal systems that can be characterized as human rights sensitive.

[31] *Supra*, note 29, illustrates how one country, Australia, is reacting to the situation.

[32] Communication No. 13/1993, views adopted 27 April, 1994.

[33] *Ibid.*

of this claim the Committee has held that complete accuracy is seldom to be expected by such victims and that not all facts invoked by such an author need be proved;[34] it is sufficient if the Committee considers them to be sufficiently substantiated and reliable.[35]

In one case, *Sadiq Shek Elmi v. Australia*,[36] the State Party argued that the Committee had no jurisdiction because the Art. 1 definition of "torture" was confined to conduct of a "public official ... or other person acting in an official capacity", and the author was to be returned to Somalia, a collapsed state without an effective government. The Committee rejected this argument, holding that various factions in Somalia *de facto* exercised powers that were comparable to those normally exercised by legitimate governments. Accordingly, members of those factions can fall for the purposes of the application of the Convention within the phrase "...other persons acting in an official capacity".[37]

This should be compared to the case of *GRB v. Sweden*[38] where the author claimed to have been tortured by members of the Shining Path guerillas in Peru. The Committee held[39] that the issue whether the State Party has an obligation to refrain from expelling a person who might risk torture inflicted by a non-governmental entity, without the consent or acquiescence of the government, falls outside the scope of Art. 3 of the torture Convention. One must note in this respect that Peru was not a "failed state" and that the government of Peru claimed to exert authority over all its territory and was actively taking steps to do so.

The Committee has also taken the view that where there is a real danger that a country will in turn expel a returnee to a country where there are substantial grounds that he will be tortured, he must not be returned to the first state.[40]

In an attempt to delineate the way in which Art. 3 cases will be dealt with by the Committee, a general comment was issued at its 19th session:[41]

[34] *Tala v. Sweden*, Communication No. 43/1996, para 10.3; *Ayas v. Sweden*, Communication No. 97/1997, paras 6.5, 6.6; *Haydin v. Sweden*, communication No. 101/1997, para 6.7, but there must be some evidence of prior torture or maltreatment: *N.P. v. Australia*, Communication No. 106/1997, para 6.6.

[35] *Aemi v. Switzerland*, Communication No. 34/1995, para 9.6.

[36] Communication No. 120/1998.

[37] *Ibid.*, para 6.5.

[38] Communication No. 83/1997.

[39] *Ibid.*, at para 6.5.

[40] *Korban v. Sweden*, Communication No. 88/1997, para 6.5.

[41] Report of the Committee Against Torture, 1998, G.A. 53rd Sess., Supp. No. 44, (A/53/44), at 52-53.

ANNEX IX

General comment on the implementation of article 3 of the Convention in the context of article 22

In view of the requirements of article 22, paragraph 4,of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that the Committee against Torture "shall consider communications received under article 22 in the light of all information made available to it by or on behalf of the individual and by the State Party concerned",

In view of the need arising as a consequence of the application of rule 111, paragraph 3, of the rules of procedure of the Committee (CAT/C/3/Rev.2), and

In view of the need for guidelines for the implementation of article 3 under the procedure foreseen in article 22 of the Convention,

The Committee against Torture, at its nineteenth session, 317th meeting, held on 21 November 1997, adopted the following General Comment for the guidance of States parties and authors of communications:

1. Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.

2. the committee is of the view that the phrase "another State" in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.

3. Pursuant to article 1, the criterion, mentioned in article 3, paragraph2, of "a consistent pattern or gross. flagrant or mass violations of human rights" refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Admissibility

4. The Committee is of the opinion that it is the responsibility of the author to establish a prima facie case for the purpose of admissibility of his or her communication under article 22 of the Convention by fulfilling each of the requirements of rule 107 of the rules of procedure of the Committee.

Merits

5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis of the author's position sufficient to require a response from the State party.

6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk

of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.

7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter.

8. The following information, while not exhaustive, would be pertinent:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para 2)?

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the author?

(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?

9. Bearing in mind that the Committee against Torture is not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only, it follows that:

(a) Considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned; but

(b) The Committee is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

Recent practice of the Committee has been to deal with procedural and substantive admissibility at the same time, unless the State Party raises objections to procedural admissibility. This has shortened the time needed to deal with cases to resolution.

4. SOME FEATURES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COMMITTEE OF THE TORTURE CONVENTION COMPARED

Each of the bodies has a crucial role to play in combatting torture and cruel, degrading, and inhuman treatment or punishment. The European Court of Human Rights is a court in the full and traditional sense. Its jurisdiction applies to states in the Council of Europe[42] and its orders are binding.[43] The Committee, on the other hand, is neither a court nor an administrative review body; it is a monitoring body with declarative authority that relies upon the political effect of its declarations for the enforcement of them.[44] The jurisdiction of the Committee is extended to any state ratifying the Torture Convention, whereas the European Court of Human Rights jurisdiction is confined to those Council of Europe states that have ratified the Convention For the Protection of Human Rights and Fundamental Freedoms 1950.[45]

The Committee can only receive individual communications arising from events occurring in the 41 states that have ratified Art. 22 of the Torture Convention, whereas all states in the Council of Europe are potentially subject to the jurisdiction of the European Court of Human Rights.

The European Court of Human Rights obtains jurisdiction over much the same matters as are covered by the Torture Convention by reason of Art. 3 of the European Convention For the Protection of Human Rights and fundamental Freedoms.[46] It reads:

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

With slight variations in language, the practices of the European Court of Human Rights (the Court) in the context of failed refugee applications and the risk of torture and those of the Torture Committee, are quite congruent. The Court will not permit states to expel unsuccessful asylum seekers to a country where there is a real and personal risk of torture[47] upon the grounds of their terrorist or criminal status.[48] The burden of establishing the risk of torture is upon the applicant[49] and is described as a "real risk".[50]

[42] That have ratified the European Convention For the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5.

[43] E.T.S. No. 5, Art. 53.

[44] *Supra*, note 41 at 53.

[45] *Supra*, note 43, as amended by E.T.S. Nos. 45, 55 and 118.

[46] Whereas Art. 1 of the Torture Convention defines torture and Art. 5 imposes upon all States Parties the obligation of rendering its commission a criminal offence. Art. 16 prohibits cruel, inhuman degrading treatment or punishment.

[47] *Vilvarajah v. U.K.*, 15 November 1996, at para 111.

[48] *Chahal v. U.K.*, 15 November 1996, at paras 80-8.

[49] *Cruz Varas v. U.K.*, 20 March, 1991, at para 75.

[50] Judge Pellonpää, "ECHR Case Law, etc.", IARLJ Conference, 26 October 2000 (preliminary version), at 3: "... the legal proof which must be met to find an article 3 violation is higher than that of a well-founded fear in refugee law".

One obvious difference lies in the narrow definition of torture contained in Art. 1 of the Torture Convention. There it is confined to severe pain, etc., inflicted for certain purposes by state agents or their surrogates. The Court is not constrained by a treaty definition in the way the Committee is. Another obvious difference is that the Court can order the non-return, etc., of a failed asylum seeker for reasons that constitute a well-founded fear of the real risk of inhuman or degrading treatment or punishment. Whereas, the Committee's jurisdiction is confined to cases of torture as defined in Art. 1 of the Torture Convention.[51]

5. THE ROLE OF THE COMMITTEE IN THE MODERN SYSTEM OF REFUGEE LAW

At the outset two points can be made. The framers of the Torture Convention did not envisage it as being an instrument in developing a system of refugee determination. The Committee, too, does not see itself in this role. So, if the decisions of the Committee over recent years have shaped domestic refugee determination practices this has been as an indirect result of its implementation of Art. 3.

This indirect effect has surprised some of the States Parties, particularly the refugee-receiving countries that have wanted to expel unsuccessful asylum seekers and have been advised that they would be in breach of the Torture Convention if they did so. In a few instances State Party reaction has been extreme.

There have also been cases where the Committee has asked for interim measures for protection (interim non-expulsion) and where the request has been ignored and the author has been expelled before the Committee has had the opportunity of dealing with the substance of the case. Fortunately, there have been only a few such instances.

More troubling, perhaps, is the recent reaction of the Australian government to the U.N.O. Human Rights Treaty Bodies generally. On 29 August 2000, the Australian Foreign Minister announced "the need for a complete overhaul of U.N. human rights treaty bodies to ensure that Australia gets a better deal" from them.[52] The government is reported to have said that it will reject "unwarranted requests from treaty committees to delay removal of unsuccessful asylum seekers from Australia".[53]

[51] Art. 3 of the Torture Convention as interpreted by the Committee in para. 1 of its *General Comment, supra*, note 41.

[52] Joint Statement of the Australian Ministers of Foreign Affairs, and Immigration and Multicultural Affairs, and the Attorney General, dated 29 August, 2000

[53] See also, the open letter to the Australian Prime Minister, from Peirre Sané, Secretary General, Amnesty International, dated 5 September 2000, at p. 3. The views expressed by the Government

These responses to decisions of the Committee highlight *the* essential difference between the Committee and the Court. No Council of Europe government would react towards an adverse ruling of the court in the way in which the government of Australia has towards the rulings of the Committee. The Committee's decisions do not draw upon the systemic sense of internalised commitment that is usually found in relations between a domestic court and the parties that appear before it, or, in the case of the Council of Europe, the Court and Council members.[54]

But the Committee is obliged to apply the terms of the Torture Convention as it perceives them, and if such application means that some failed refugee seekers cannot be expelled by States Parties, the Committee looks to the State Party concerned to pay equal, honest respect to the Torture Convention by observing the views of the Committee itself. If the Committee's reliance upon the good faith of States Parties is misplaced, the U.N.O. universal human rights bodies structure, a fragile entity, at best, may wither away over time.

of Australia have found resonance in the editorial opinions expressed recently in one of the two national newspapers of Canada: *National Post*, 18 September, 2000, at A-15.

[54] Council of Europe members can denounce the Convention for the Protection of Human rights and Fundamental Freedoms pursuant to Art. 65; and States party to the Torture Convention can denounce it in accordance with the terms of Art. 31. One of the expressed concerns of Australia, the influence of Non-Governmental Organisations on the decisions of the U.N.O. Treaty Bodies, highlights another real difference between the Court and the Committee. N.G.O.'s play no role in the Court processes.

INTERNATIONAL HUMAN RIGHTS AND PROTECTION OF REFUGEES - THE INDIAN EXPERIENCE

Bellur N. Srikrishna*

Till 1993 there was no law in India containing any specific provision obligating the State to enforce or implement the International Humanitarian Law. The only law which dealt with the subject was the Geneva Convention Act, 1980. The main object of this Act is to deal with the 1949 Conventions relating to punishment for grave breaches and prevent and punish the abuse of Red Cross in other emblems. The Supreme Court of India, after examination of the scope of the Geneva Conventions Act held that, though the Act by itself does not give any special remedy, it does give indirect protection by providing for breaches of conventions. The conventions are not made enforceable by Government against itself, nor does the Act give a cause of action to any party for enforcement of the Conventions. There is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population, but there is no right created in respect of protected persons which the Court could be asked to enforce.[1]

The Constitution of India guarantees certain fundamental rights for citizens as well as non-citizens. The preamble of the Constitution declares that the provisions of the Constitution have been made to, "assure the dignity of the individual" which is also the basic objective of the International Humanatarian Law. Article 21 of the Constitution of India guarantees the right to life and personal liberty. No person can be deprived of the fundamental right to life and liberty except by the procedure established by law.

Article 51(c) of the Indian Constitution imposes a duty on the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised people with one another". In *Peoples Union for Civil Liberties vs. Union of India*[2] the Supreme Court had to consider whether the right to privacy could be protected under the Constitution. India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 of the said Covenant declares that no one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has a right to the protection of law against such interference or attacks. To similar effect is Article 12 of the Universal Declaration of Human Rights, 1948. The Supreme

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[1] Monterio vs. State of Goa, AIR 1970 Supreme Court 329.

[2] 1997 (I) Supreme Court Cases 301.

Court laid down the salutary principle that the rules of customary International law which are not contrary to the Municipal law should be deemed to be incorporated in the domestic law. Article 17 of the International Covenant on Civil and Political Rights, 1966 did not go contrary to any part of the Indian Municipal law. Hence, the Supreme Court interpreted Article 21 of the Constitution which guarantees right to "protection of life and personal liberty" in consonance and conformity with International law so as to include the right of privacy therein.[3]

In *Nilabati Behara vs. State of Orissa*[4] the Surpeme Court relied on Article 9(5) of the International Covenant on Civil and Political Rights, 1966[5] to hold that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed fundamental right. The State was directed to pay compensation for custodial death on a petition for enforcement of the guaranteed fundamental right under Article 21.

In *Vishaka and others vs. State of Rajasthan*[6] and *Apparel Export Promotion Council vs. A.K.Chopra*[7] the Supreme Court read into Article 15 of the Indian Constitution (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), Article 42 (the State shall make provision for securing just and human condition of work and for maternity relief) and in the fundamental duties of citizens in Article 51-A, an obligation upon the State to ensure that there is no sexual harassment of woman at the workplace. In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of International Conventions and norms were held significant for the purpose of interpretation of the guarantees of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and further that the safeguards against sexual harassment are implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with their spirit ought to be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. It was also laid down as an accepted rule of judicial construction that regard must be had to International conventions and norms for construing law when there is no inconsistency between them and there is a void in the domestic law.

[3] See also Keshavanand Bharati vs. State of Kerala, 1973 (4) SCC 225 , ADM vs. Shivakant Shukla, 1976 (2) SCC 521, Jolly George Verghese vs. Bank of Cochin, 1980 (2) SCC 360.
[4] 1993 (2) SCC 746.
[5] Article 9(5) - "Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".
[6] 1997 (6) SCC 241.
[7] 1999 (1) SCC 759.

In 1993, Indian Parliament enacted the Protection of Human Rights Act, 1993. Section 2(b) defines "Human Rights" to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution, embodied in the international conventions and enforceable by Courts in India". The Vienna Declaration on the elimination on all forms of discrimination against women ("CEDAW") was ratified by the UNO on 18th December 1979. The Indian Government which was an active participant ratified it on 19th June 1993 and acceded to CEDAW on 8th August 1993 with reservations on Article 5(e), 16(1), 16(2) and 29 of CEDAW. Notwithstanding the reservations, the Supreme Court in *C.Masilamani Mudaliyar and others vs. Swaminatha Swami and others*[8] held that the directive principles and the fundamental rights provide the matrix for development of human personality and elimination of discrimination; these conventions add urgency and teeth for immediate implementation. That it was imperative for the State to eliminate obstacles and prohibit all gender based discriminations, as mandated by Articles 14 and 15 of the Constitution of India. In the light of Article 2(f) and other related Articles of CEDAW , the Supreme Court interpreted the constitutional mandate in Articles 14 and 15 of the Indian constitution as casting an obligation on the State to take all appropriate measures including legislations to modify or abolish gender based discrimination in the existing laws, regulations, customs and practices which amounted to discrimination against women. Thus, by a conjoint reading of the definition of "Human rights" in the Protection of Human Rights Act, 1993 and the International Conventions, the Supreme Court read the Convention principles into the Indian constitutional provisions.

In *Valsamma Pol vs. Cochin University*[9], once again the Surpeme Court held that the principles embodied in CEDAW and the concomitant right to development became an integral part of the Constitution of India and that the Human Rights Act had become enforceable. Section 12 of the Protection of Human Rights Act, 1993, charges the National Human Rights Commission with the duty of proper implementation as well as prevention of violation of human rights and fundamental freedoms. Though the Government of India had expressed its reservations on Articles 5(e), 16(1), 16(2), and 29 of CEDAW, the Supreme Court held that the reservations were of little consequence in view of the fundamental rights guaranteed under Article 15(1), 15(3) and under Article 21 and the directive principles formulated in Part IV of the Constitution.

There is no specific statute dealing with refugees or their rights. Since or about 1947, about 35 to 40 million people have moved across the border into India. Tibetians, Sri Lankans, Chakma tribals, Afghans and others have freely crossed the borders and have sought refuge in the country. In the absence of a

[8] 1996 (8) SCC 525.
[9] 1996 (3) SCC 545.

specific law dealing with the subject, the Indian Courts have had to innovavte new techniques to ameliorate the plight of refugees

The universal declaration of Human Rights was adopted by the General Assembly of the United Nations by the resolution of 3rd December 1949. The United Nations General Assembly also established the High Commissioner's office for Refugees under the statute of the office of U.N. High Commissioner for Refugees adopted by the General Assembly of U.N. on 14th December 1950. The U.N. General Assembly called upon the Member-Governments to co-operate with the High Commissioner in the performance of his duties concerning refugees.

In *National Human Rights Commission vs. State of Arunachal Pradesh*[10] the Supreme Court was concerned with persecution of Chakma tribals who had crossed over from the erstwhile East Pakistan and taken refuge in the States of Tripura and Assam. It was found that the State authorities were collaborating with a local organization of the civilians for denying the Chakma refugees the process of acquisition of citizenship and were also threatening to physically evict them out of the State. The Supreme Court expansively read Article 21 and held that the State Government was under a constitutional and statutory obligation to protect the Chakma refugees and directed the State Government to protect the life and liberty of Chakma refugees.

In *Ktaer Abbas Habib Al Qutaifi vs. Union of India*[11] the Gujarat High Court on a conspectus of several other judgments, formulated the following principles in the matter of enforcement of humanitarian law :-

1. The International Conventions and Treaties are not as such enforceable by the Government, nor do they give cause of action to any party, but there is an obligation on the Government to respect them.

2. The power of the Government to expel a foreigner is absolute.

3. Article 21 of the Constitution of India guarantees right of life on Indian Soil to a non-citizen, as well, but not the right to reside and settle in India.

4. The international covenants and treaties which effectuate the fundamental rights guaranteed in our constitution can be relied upon by the Courts as facets of those fundamental rights and can be enforced as such.

5. The work of the UNHCR being humanitarian, on certification of Refugees, the Government of India is under obligation to ensure that Refugees receive international protection until their problem is solved.

6. The principle of `non-refoulment' is encompassed in Article 21 of the Constitution of India and the protection is available, as long as the presence of the refugee is not prejudicial to the national security.

7. In view of the directives under Article 51(c) and Article 253, international law and treaty obligations are to be respected. The Courts may apply those principles in domestic law, provided such principles are not inconsistent with domestic law.

[10] AIR 1996 Supreme Court 1234.
[11] 1999 Criminal Law Journal 919.

8. Where no construction of the domestic law is possible, Courts can give effect to international conventions and treaties by a harmonious construction.

The Indian courts have innovated a methodology of reading the obligations in International Covenants, Treaties and Declarations into the fundamental rights guaranteed under Part III, the directive principles of State policy enumerated in Part IV and Fundamental Duties enumerated in Part IV-A of the Indian Constitution. The protection of Human Rights Act, 1993 was but a limited step taken in this direction for it is confined to protection of "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution embodied in the International Covenant and *enforceable by the Courts in India*" (Emphasis added). There are several aspects of International Human Rights, including protection of Refugees, regarding which there is no legislation in India to implement the State obligation embodied in the International declarations, conventions or Treaty obligations. Strictly speaking, therefore, such rights may not be enforceable by the Indian Courts. The Judges in India recognised the constraints and adopted the innovative methodology of reading the principles embodied in International conventions, declarations and treaties into the guarantees, directive principles of State policy and the Fundamental Duties enumerated in the Indian Constitution to achieve the Indian ethos and humanitarian thrust from Rama to Buddha to Gandhi expressed in the felicitous words of the great Indian epic Ramayana :

"Sakrideva prapannaya, tavasmiti cha yachate Abhayam Sarva bhutebhyo dadaamyetad Vratam mama"[12]

("It shall be my pious duty to protect from fear anyone who seeks my refuge and beseeches me for protection").

[12] Ramayana, Yuddhakanda, 18th Sarga, verses 33-34.

D. THE INTERNAL FLIGHT ALTERNATIVE / THE INTERNAL PROTECTION ALTERNATIVE

D. POSSIBILITÉ DE FUITE INTERNE / POSSIBILITÉ DE PROTECTION INTERNE

THE DIFFICULTIES OF "INTERNAL FLIGHT" AND "INTERNAL RELOCATION" AS FRAMEWORKS OF ANALYSIS

Sir Kenneth J. Keith*

A judgment of the New Zealand Court of Appeal,[1] given three years ago, is the reason for my participation in this Conference. A wise practice in our jurisdiction and others like it is for Judges to say that their judgments should speak for themselves and not try to defend them. What I can do however is to summarise the judgment, comment on judicial approaches to the interpretation of the 1951 Convention relating to the Status of Refugees, particularly concerning "internal flight" or "internal protection", comment on aspects of the method of implementing the Convention and its 1967 Protocol in New Zealand law, and relate those two matters to wider issues about the role of international law in national law.

1. THE BUTLER JUDGMENT

Daniel Butler, a citizen of the United Kingdom and of the Republic of Ireland, challenged as erroneous in law the refusal of the New Zealand Refugee Status Appeals Authority to grant him refugee status. The Authority had held that while there was a real chance of his being persecuted in Northern Ireland (once he was released from a term of imprisonment which he still had to serve) there was no such real danger were he to go to Great Britain or (according to two of the three members) Ireland. Daniel Butler's fears related to death threats made against him by the Royal Ulster Constabulary and by the IPLO, a splinter group which had emerged by 1987 from the Irish National Liberation Army, a paramilitary wing of the Irish Republican Socialist Party which itself had broken from the official Irish Republican Army.

* Judge of the Court of Appeal of New Zealand. In revising the paper for publication, I have taken some advantage of the discussions at the Conference. An edited version of this article will appear in 15 Georgetown Immigration Law Journal _ (forthcoming). (The journal may be contacted at <gilj@law.georgetown.edu> or via post at 600 New Jersey Avenue, Northwest, Washington, D.C. 20001, U.S.A.).

[1] *Butler v Attorney-General* [1999] NZAR 205; (1997) 114 ILR 568.

Mr Butler's legal argument before the Court of Appeal was that

> if the Authority held, as it had, that the appellant had a well founded fear for Convention reasons in respect of part, but not all, of the country of nationality it must consider the reasonableness in all the circumstances of any resulting location to another part of the country. As well, in a case involving family members like the present, the Authority in carrying out that reasonableness inquiry must have regard to rights in respect of the family as found in the Universal Declaration of Human Rights (UNGA Resn 217A(III)), the International Covenant on Civil and Political Rights (999 UNTS 171) and the Convention on the Rights of the Child (1993 NZTS No 3).[2]

The Court rejected the arguments for reasons relating to (1) the process followed before the Authority, (2) the decisions given by its members and (3) the interpretation of the definition of refugee in article 1 of the Convention.
It is the third matter that is relevant to this paper. Counsel for Mr Butler argued that, given the findings about protection being available in only part of the United Kingdom, the Authority had to consider as a separate matter whether it was reasonable in all the circumstances to expect him to relocate. The Court rejected that argument. The Court first stressed the protection element in the Convention:

> Central to the definition of "refugee" is the basic concept of protection - the protection accorded (or not) by the country of nationality or, for those who are stateless, the country of habitual residence. If there is a real chance that those countries will not provide protection, the world community is to provide surrogate protection either through other countries or through international bodies. So both paragraphs of article 1A(2) define refugees in part by reference to their ability or willingness to avail themselves of the protection of their country of nationality or of habitual residence. Similarly the reasons for the cessation of refugee protection in article 1C are based on the protection of a country becoming available. Article 1E is to the same effect. And article 1D as well turns on protection or assistance being available from a United Nations body other than the UNHCR.[3]

It quoted the Supreme Court of Canada (quoting Professor Hathaway) on the backup, surrogate or substitute character of the Convention protection, given the state's inability to protect.[4] It continued:

> The various references to and tests for "reasonableness" or "undue harshness" (a test stated by Linden JA in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [(1993) 109 DLR (4th) 682] must be seen in context or, to borrow [the English Court of Appeal's] metaphor, "against the backcloth that the issue is whether the claimant is entitled to the status of refugee" [*R v Home Secretary ex parte Robinson* [1998] QB 929, 940]. It is not a stand alone test, authorising an *unconfined inquiry into all the social, economic and political circumstances of the application including the circumstances of members of the family.*
>
> ...
>
> Rather than being seen as free standing (as more recent decisions of the Authority appear to suggest), the reasonableness test must be related to the primary obligation of the

[2] *Butler* at 213.
[3] *Butler* at 216-217.
[4] *Canada (Attorney-General)* v *Ward* [1993] 2 SCR 689, 709.

country of nationality to protect the claimant. To repeat what Professor Hathaway said in the passage relating to relocation quoted earlier, *meaningful* national state protection which can be *genuinely accessed* requires provision of basic norms of civil, political and socio-economic rights. To the same effect Linden JA in the Canadian case cited above, [1994] 1 FC at 598-99, stresses that it is not a matter of a claimant's convenience or of the attractiveness of the place of relocation. More must be shown. The reasonableness element must be tied back to the definition of "refugee" set out in the Convention and to the Convention's purposes of original protection or surrogate protection for the avoidance of persecution. The relocation element is inherent in the definition; it is not distinct.

The question is whether, having regard to those purposes, it is unreasonable in a relocation case to require claimants to avail themselves of the available protection of the country of nationality. It follows from the above discussion that we see no error of law in the Authority's determination in the present case. Its members did include a reasonableness element in their decisions that Mr Butler was not a refugee within article 1A(2) of the Convention, in a manner which was appropriate in the circumstances of the appeal.

As well, there was no basis arising from those circumstances and the definition of "refugee" for an argument that the rights and interests of the family as referred to in the relevant international texts had to be considered.[5]

2. JUDICIAL APPROACHES TO THE INTERPRETATION OF THE CONVENTION

The task of interpreting an international convention should not in my view be seen as sharply different from interpreting other legal documents such as national legislation. The task is one of finding meaning by reading the terms of the Convention in their context and by reference to its purpose, to use the terms of the Vienna Convention on the Law of Treaties article 31(1), a provision which is now reflected in the interpretation legislation of a number of Australian jurisdictions and the New Zealand Interpretation Act 1999 s5. Courts in several jurisdictions have expressly cited the provisions of the Vienna Convention when interpreting the 1951 Convention.[6]

In the process of interpretation there can be a danger in attempting to distinguish precisely between the words (which ones are being interpreted?), the context (how wide?), and the purpose (where is it to be found?). What too is the role of the scheme of the Convention, relevant principles of law, effective or restrictive approaches to interpretation and the full range of "rules" of in-

[5] *Butler* at 218.

[6] Eg *Pushpanathan v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 193, paras 51-74 (see also *Ward* n3 above : the Supreme Court makes extensive use of the preparatory work and subsequent practice in conformity with the Vienna Convention but never mentions it); *R v Home Secretary, ex parte Robinson* [1998] QB 929, 939 (CA); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 240, 252-256 and 294.

terpretation. And how are the various components to be ranked? A related but different question is in which order are they to be approached? There is value, I suggest, in returning to US Supreme Court Justice Felix Frankfurter's "Some reflections on the reading of statutes" (1947) 47 Columb L R 527. As he says, the interpretation or reading of legal texts is as much a matter of art as of science. More is to be gained by observing the masters' works (for him Holmes, Cardozo and Brandeis) than the critics' commentaries. But Justice (or former Professor) Frankfurter, as commentator, does valuably emphasise two propositions (among others) : while interpreters are confined *by* the text they are not confined *to* it, and their task is "the proliferation of purpose".

The use made by national courts of the principle, "general rule" or approach stated by the Vienna Convention increases the likelihood that the provisions of the 1951 Convention will be interpreted uniformly by the national courts of all states. As the House of Lords has said in a recent case, that is of course highly desirable.[7] Lord Hope also made the point in that case that the choice of wording in the Convention must be taken to have been the product of the inevitable process of negotiation and compromise and states what he says is the commonly drawn consequence that it is not right to construe its language with the same precision as with an Act of Parliament. I might raise a small question about that point which was also made by Erika Feller in her excellent opening address at this conference. Negotiation and compromise are of course not unknown in the preparation of national legislation - nor is general wording. Cases coming to our court often involve broad wording, such as "unreasonable search and seizure", various tests concerning "the public interest" and "limits justified in a free and democratic society", the kind of wording to be found in human rights and bill of rights instruments and indeed often copied from related international texts. Possibly more importantly, the suggested difference in the origin of the text does not appear in any event to have significant consequences for the methods of finding meaning or for determining and assessing the material or texts relevant to those processes.[8]

The primary text is of course the Convention itself – beginning with the critical few lines of article 1A(2) defining "refugee". (They are set out in para 14 below). It is important to keep going back to the text. There is perhaps an additional consideration in the case of treaties. It is that treaty text that sovereign states have signed up to. Courts or other interpreters have to be careful to ensure that they are finding the meaning of that agreed document. As appears later, other provisions of the Convention may also help the process of finding the meaning. So too, as many judgments have indicated, will the purposes the Convention is designed to serve.[9] The references to other provisions of the

[7] Eg Lord Hope in *Horvath* v *Secretary of State for the Home Department* [2000] 3 All ER 577, 580 (HL).

[8] But then see Brennan CJ and McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-231, 252-256.

[9] Eg *Horvath* at 580j-581g; discussed in *Butler* at 216-217 in terms of "the basic concept of protection".

Convention can be seen either as a reference to the context of the particular words being interpreted or as a direct part of their interpretation. But context might also be provided by other human rights conventions or more general legal principle. It is well established that interpreters are not confined *to* the text, to repeat Felix Frankfurter's words.

Attention to material extrinsic to the Convention is to be seen as well when courts consider its drafting history or subsequent state practice relevant to its interpretation. Again both those processes are recognised, subject to certain limits, by the Vienna Convention on the Law of Treaties. They are also to be observed in the work of courts interpreting the 1951 Convention.

Such references raise critical issues about finding the meaning of texts. The issues are of both principle and practice. If the task is to find the meaning of *the text* how can this extrinsic material possibly be relevant? In particular how can the view expressed by one of many state delegations involved in the preparation of a text be represented as a view of the parties? Similarly, how can the subsequent practice of states (some of them not original parties or involved in the preparation of the Convention) give meaning to the text – in effect retrospectively? And how is a meaning indicated by the drafting history to be measured against a different meaning indicated by subsequent practice? Is the meaning to be determined by "original intent" or is the document to be seen as a "living tree", capable of future growth? And as courts and tribunals engage in these wider processes what attention are they giving to the questions : to what obligations have sovereign states formally consented and what obligations have they implemented through their national law? Consider the position of my own country. In 1951, or about ten years later when New Zealand was considering acceding to that text, it was of course a backward looking document. The time bar meant that in practice status determination was not really a major issue. This point is made in the passage quoted at Note 20 of the paper. But after 1967, article 1A(2) has a very different role even if its central words have not changed. It has to be understood against a changing context, including, where appropriate, new human rights instruments.

To those questions of principle are to be added the practical ones: how are those who are to implement the Convention to get access to that extensive range of extrinsic material – including here the drafting history of the Convention, the earlier treaties replaced by the 1951 text, the practice of states, the practice and decisions of the UN High Commissioner for Refugees and the executive committee, and judicial decisions? Is there not a danger of the essential text being lost? To return to the quip, repeated by Felix Frankfurter, is there not the prospect of the authoritative legal text being resorted to only when the other material does not give an answer?

Against that background, I return to particular issues relating to the internal flight alternative or internal protection.[10] An initial point is that *internal* flight is not an obvious element of the definition in article 1A(2) of refugee:

> 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 ... (emphasis added)

The claimant for refugee status who is stateless is similarly to be "outside the country of his former habitual residence". A multiple national is also to be outside "each of the countries of which he is a national". And, as the *Butler* judgment also recalls, article 1C is about the protection afforded by the country of nationality – that is as a whole.[11]

To state the obvious, the Convention is about people who are seeking asylum in another country (to use the language of article 14 of the Universal Declaration of Human Rights). They have fled or wish to remain outside their own country which they say is no longer protecting them, and they seek surrogate protection. The Convention is not about internal displacement.

To introduce the idea of "internal flight" is also to introduce a fiction and to create a timing problem. On the former, the expression suggests that the decision making body is to inquire whether the claimant could have relocated rather than leaving or staying outside the country of nationality (which is of course not what the Convention says); and, on the latter, the assessment to be made about status is an assessment to be made contemporaneously with the claim : "*is* [the claimant] unable or unwilling to avail himself of the protection of ... that country"? The claim might of course be made by reference to dangers arising in the country of nationality *after* the person has left : the Convention does not require that the person left because of the fear; the definition does not require *flight*, even if that is the more common situation. The provisions of article 1C(5) about losing refugee status because the circumstances in the country of nationality have changed are equally about the present.

To move to the expression "internal relocation" and again at the level of the words of the Convention, the questions are also to be asked whether the word "relocation" adds anything to the concept of "protection" and whether with either noun, the adjective adds anything. The Convention is about the protection afforded by the country of nationality – a protection which is to be accorded within that country's territory and in principle anywhere within the territory. That follows from the emphasis in the Convention, judicial decisions, the UNHCR work and the commentaries on the protective purpose of the Convention.

[10] For further discussion see G de Moffarts, „Refugee Status and the 'Internal Flight Alternative'" in the papers of the *Second Conference of the IARLJ*, Nijmegen, 1997; UNHCR Position Paper, Relocating Internally as a Reasonable Alternative to Seeking Asylum (February 1999); and James C Hathaway "International Refugee Law : the Michigan Guidelines on the Internal Protection Alternative" (1999) 21 Mich JIL 131.

[11] *Butler* at 215-216.

I say "in principle anywhere within the territory" to introduce the reasonableness element and to return to the protection purpose. There would be, let us assume, no real chance of persecution for a Convention reason were the claimant to return to the country of nationality and live in a remote desert or on top of a mountain. But in that situation is the country of nationality providing the "protection" which the Convention envisages and can it really be said that the claimant is not "unable to avail himself of the protection of [the] country" of nationality? While the convention does not give a direct answer a fair reading of the words in context would suggest that such a physically dangerous or untenable existence would not satisfy the Convention.[12]

That reading is also strongly supported by the rights that the surrogate, substitute or back up protector – the country of asylum or refuge – must accord : it can be assumed that they would not exceed the rights which the Convention contemplates will be available in the country of nationality. Those rights include, for instance, rights of association, freedom of religion, access to the courts, rights in respect of property, the same rights and opportunities to engage in employment and to engage in the liberal professions as aliens, rights in respect of housing, public education, labour legislation and social security, and the right to freedom of movement.

The question also arises whether the "protection" to be afforded by the state of nationality is now to be measured by reference to the generally accepted human rights treaties adopted since 1951, particularly the International Covenants on Human Rights, the Convention against Torture[13] and the Convention on the Rights of the Child. Courts are increasingly being asked that question. Support for that wider reading can indeed be related directly to the reference in the preamble to the 1951 Convention to the Charter of the United Nations and the Universal Declaration of Human Rights : they "have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination" – either, we must assume, in their country of nationality or if that is not available in the country of refuge.[14]

The suggested separate requirement that internal relocation must meet a test of reasonableness can be put in the context of that expanding understanding of "protection". As indicated in *Butler,*[15] the Court considered that any reasonableness requirement is to be tied back to the protection element. It also quoted the view of Professor Hathaway that meaningful national state protection which can be genuinely accessed requires the basic norms of civil, political and socio economic rights. That proposition is also to be found repeated in

[12] Eg *Karanakaran* v *Secretary of State for the Home Department* [2000] 3 All ER 449, 456.
[13] Compare *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291.
[14] See also the use of drugs treaties in giving content to "the purposes and principles of the United Nations" in the exclusion provisions of article 1F(c) of the 1951 Convention in the *Pushpanathan* case, n6 above.
[15] *Butler* at 217.

the Michigan Guidelines which have been largely adopted by the New Zealand Refugee Status Appeals Authority.[16]

It does not follow of course that national law might not itself establish a separate reasonableness requirement, for instance, as a result of the introduction of broader immigration law considerations, but on my understanding the Convention does not require that. I am reassured that the Michigan Guidelines appear to be to the same effect.

Possibly relevant subsequent material is to be found not only in new human rights instruments such as those mentioned in note 4 above, but even more in the elaboration of understandings of the interpretation and application of the Convention through the office of the UN High Commissioner for Refugees and the Executive Committee for the High Commissioner. In terms of article 31(3)(b) of the Vienna Convention on the Law of Treaties "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be taken into account with the context. Courts do not always have regard to the strict requirements of that provision. Those requirements

- require that the practice be relevant to the particular Convention issue
- distinguish between practice which purports to interpret the Convention and those which do not
- distinguish between texts which are only hortatory or recommendatory and those which take a declaratory form.[17]

The material considered so far has come into existence subsequent to the preparation of the text. What of earlier material, in particular the drafting history of the Convention? Again the Vienna Treaties Convention provides guidance : as a supplementary means of interpretation "the preparatory work of the treaty and the circumstances of its conclusion" may be resorted to, to confirm the meaning decided by the general rule or when the meaning reached under that rule is ambiguous or obscure or manifestly absurd or unreasonable (article 32).

Again there are instances of courts finding assistance from that extrinsic material. So in a recent judgment the New Zealand Court of Appeal, in rejecting an argument that temporary detention pending the determination of refugee or temporary immigration status was not a "penalty" prohibited by article 31.1, said this:

> The record of the meeting of 25 July 1951 of the conference of states which prepared the Convention similarly made it abundantly clear that the provision had no application to the right of States to keep claimants in custody pending determination of status. A prohibition against such a course would seem difficult to justify, whereas punishment

[16] *Refugee Appeal No 71684/99* (29 October 1999) paras 64-66.

[17] See eg *Attorney-General v E* [2000] 3 NZLR 257, 268-269 and *Butler* at 214 referring to a cautious position adopted by Mason CJ in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392.

of claimants merely because they have entered the country unlawfully is something quite different.[18]

3. THE IMPLEMENTING OF THE 1951 CONVENTION AND 1967 PROTOCOL IN NEW ZEALAND LAW

This matter arises from the actions taken by the New Zealand authorities since 1960 when it acceded to the 1951 Convention to give effect in New Zealand law to that Convention and its 1967 Protocol. In *Butler*,[19] the Court of Appeal raised the question whether it could test the actions of the Refugee Status Appeals Authority against the Convention since its provisions had not at that time been given effect to as part of New Zealand law. Because the Court held that the Authority had not in any event breached the Convention as a matter of law, it did not resolve the question of the place of the Convention in New Zealand law. I mention the matter since the careful preparation of legislation relating to the substantive law of the Convention and setting up robust institutions, procedures and appeal systems is critical for the day to day operation of the Convention at the national level, in particular in deciding questions about protection.

The Court began by recalling the basic principle that the executive cannot change the law by entering into treaties. It continued:

> Legislation, such as that enacted in Australia, Canada and the United Kingdom (or in New Zealand in respect of other immigration matters) would remove any doubts about reviewability and could be expected as well to regulate aspects of the Courts' powers, for instance by way of rights of appeal to them.
>
> The facts also suggest the value of legislative attention, especially the changes in them since 1960 when New Zealand acceded to the 1951 Convention. The absence of legislative action at that time is perhaps to be explained first by the fact that the only people the Convention covered were identified through the processes of the UN High Commissioner for Refugees largely followed in refugee camps in Europe by reference to events that had occurred at least ten years earlier. As well, the means of travel to New Zealand then available reduced the prospect of disputes about refugee status arising in New Zealand. Finally, the substantive rights to which duly admitted refugees were entitled under the Convention were presumably considered as already being guaranteed under the law of New Zealand (subject to one reservation which New Zealand made).

[18] *Attorney-General v E* n17 above, 271.

[19] [1999] NZAR 205, 218-220. I should disclose two earlier involvements with this process. In 1960 as a junior member of the legal division of the New Zealand Department of External Affairs, I had a small hand in the process leading to New Zealand's accession to the 1951 Convention and in 1991 as President of the New Zealand Law Commission I unsuccessfully recommended that the immigration legislation of that year should provide a statutory base for refugee decision making.

> Refugees continue to come to New Zealand under such resettlement programmes (the quota since 1987 has been 800 per year). 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 Mr Butler arrived and in 1992 when his application was considered and appeal heard, 1977 refugee status applications were made in New Zealand, R P G 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 regularise the position in respect of review or appeal. It would also (as with the statutory immigration tribunals) provide binding 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.[20]

The executive government and Parliament, perhaps in response to that suggestion, introduced and enacted the Immigration Amendment Act 1999 to create a statutory framework for determining refugee status under the Refugee Convention. A new part, Refugee Determinations, was included in the Act. Persons claiming refugee status are now to have their claims determined under the Convention[21] and refugee status officers and the Refugee Status Appeal Authority, now set up as the statutory body, are to act consistently with the Convention. Further, persons who have been recognised as refugees in New Zealand or are claiming refugee status may not be removed or deported unless article 32.1 (the national security/public order exception to the prohibition on expulsion) or article 33.2 (the limit to the non refoulement provision) allow removal or deportation. In addition, immigration officers are to have regard to the Convention in carrying out their functions under the Act – such as the grant or refusal of temporary permits or residence permits and powers in respect of removal from New Zealand and the associated power of detention.
The Court of Appeal in a decision given earlier this year and referred to earlier (n17) rejected the submission that that provision did not require that regard to be had to the Convention when the power to grant a temporary permit to the claimant is in issue. The Solicitor-General

> contended that the provision was confined in its operation to the question of removal or deportation, and was to be read restrictively in that way. We are unable to accept the

[20] *Butler*, 219-220.
[21] Part 6A, ss129C and 129D.

submission. The direction is clear in its terms. It covers all the functions of *immigration* officers being carried out under all parts of the Act. Those functions must include consideration of applications for temporary permits, and their grant or refusal, and the exercise of powers to require the removal of persons unlawfully in New Zealand and associated powers of detention. Under the subsection the officer is required to have regard not only to Part VIA of the Act (Refugee Determinations and comprising ss129A-129ZB), but also to the Convention. There is no good reason to read down the opening words. When the temporary permit provisions of the Act are applied to claimants for refugee status, the immigration officers must have regard to relevant provisions of the Convention. Those provisions include the important protections of article 31. That plain general reading of s129X(2) is supported by s129A: "the object of this Part is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention".

4. CONCLUDING COMMENTS : A PLEA FOR THE GENERALIST

In the space of four years on the bench I have participated in just three cases about refugees. Those cases raised particular issues within the specialities of those participating in conferences like this. They also raised issues relating to legislative method, judicial method, international law making and application, and indeed legal method generally. I mention that wider context because too often there is a danger that we become so familiar with our speciality, believing it to be unique, that we lose the bigger picture and the ability to learn from what might be thought to be quite disparate areas of law and government, nationally and internationally.

I suggest some links to help make my point.

To begin with the parliamentary stage, it is increasingly important that members of parliament and those in the executive advising them appreciate the great extent of law being made elsewhere and especially through international law making bodies. Too often that source is ignored (it does not exist; it cannot be enforced) or stigmatised (who do those people in New York, Geneva, Vienna .. think they are?). It is obvious to participants in this conference that refugee law is significantly made elsewhere but so also, to take the two alphabetical ends of the New Zealand statute book, are the Abolition of the Death Penalty Act and the Weights and Measures Act; indeed on one calculation up to one third of New Zealand statutes give effect to or are affected by international obligations or standards.

That fact raises important questions of a constitutional kind, recently addressed in Australia, New Zealand and the United Kingdom and no doubt elsewhere, and the subject of protests in Seattle and (as I write) Prague, about parliamentary and public involvement in and possibly control over the execu-

tive in treaty making.[22] At the more mundane level there are also questions about whether legislation is needed and, if it is, the best form of drafting to give effect to the particular treaty. So the New Zealand refugee legislation is to be compared with, and was to varying extents informed by, recent legislation concerning international sale of goods, child abduction, international adoptions and maritime crimes, and also the experience of the operation of that legislation.

Such a comparative method is also available and helpful (or more) when the legislation and the related treaties come before the Courts to be interpreted. So the Vienna Convention on the Law of Treaties and its basic approach to interpretation are widely used, for instance, just to mention our small jurisdiction, in cases about air transport, child abduction, human rights, immigration, income tax, indigenous rights and tariffs.[23] Such cases throw up questions for instance about the use of authoritative and other interpretations by bodies set up under the relevant convention, subsequent practice and commentary and help highlight the need for care in moving too far from the agreed text.

That growing role of national courts as interpreters of a wide array of international texts is relevant to the suggestions made at this Conference about the resolution of differences concerning the interpretation of the 1951 Convention. One suggestion for instance was that a special international court should be established. I make five points about this broad issue.

The first is that this Convention is unusual in having the UN High Commissioner for Refugees and the associated bodies such as the executive committee with monitoring and commenting roles. We have the important documents that they issue and in particular the handbook which is frequently cited to, and used, by courts. There is in that context as well the role of article 35 of the Convention under which contracting states undertake to cooperate with the Office of the High Commissioner for Refugees. There may not be a committee like the Committee Against Torture, but there is fifty years of doctrine with government endorsement. As I have already said national courts could be helped by advice about the relative authority of some of the documents that issue through this process.

My second point is that the usual way in which these matters are resolved so far as the rights of individuals are concerned, thinking say of treaties and conventions prepared by the Hague Conference on Private International Law, the UN Commission on International Trade Law, the International Civil

[22] See eg The Treaty Making Process : Reform and the Role of Parliament (NZLC R45, Wellington, 1997).

[23] See eg New Zealand Air Line Pilots' Association Inc v Attorney-General [1997] 3 NZLR 269; Dellabarca v Christie [1999] 2 NZLR 548; Gross v Boda [1995] 1 NZLR 569; Quilter v Attorney-General [1998] 1 NZLR 532; Rajan v Minister of Immigration [1996] 3 NZLR 543; Commissioner of Inland Revenue v JFP Energy Inc [1990] 3 NZLR 536; New Zealand Maori Council v Attorney-General [1987] 1 NZLR 289; Elitunnel Merchanting Ltd v Regional Collector of Customs (2000) 1 NZCC 61,151.

Aviation Organisation or the International Maritime Organisation, is through national court litigation. Those decisions are the subject of law reports and of discussions in the reviews and journals. They are increasingly available on websites, and they are discussed at conferences like this.

A third point is that the International Court of Justice has jurisdiction under article 38 of the Convention to deal with disputes about the interpretation or application of the Convention.

Fourth, a question, is whether the Association might itself develop texts with broad support which might have authority in national courts because of their provenance.

Finally, at the broadest level, this area of law presents recurring essential challenges of the writing and reading of legal texts : how can the propositions of law best be stated in the treaty or statute and how is their meaning then to be determined? On the second matter, it may well be that I have over emphasised particular aspects of the readings given in particular judgments and that, read as a whole, they provide a different picture. To repeat, there is a great deal to be said for the proposition that judgments speak for themselves; and we should beware of thinking our area of law is unique.

THE MICHIGAN GUIDELINES ON THE INTERNAL PROTECTION ALTERNATIVE*

James C. Hathaway**

International refugee law is designed only to provide a back-up source of protection to seriously at-risk persons. Its purpose is not to displace the primary rule that individuals should look to their state of nationality for protection, but simply to provide a safety net in the event a state fails to meet its basic protective responsibilities.[1] As observed by the Supreme Court of Canada, "[t]he international community was meant to be a forum of second resort for the persecuted, a 'surrogate,' approachable upon the failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but . . . to provide refuge to those whose home state cannot or does not afford them protection from persecution."[2]

It follows logically that persons who face even egregious risks, but who can secure meaningful protection from their own government, are not eligible for Convention refugee status. Thus, courts in most countries have sensibly required asylum seekers to exhaust reasonable domestic protection possibilities before asserting their entitlement to refugee status. Where, for example, the risk of persecution stems from actions of a local authority or non-state entity (such as a paramilitary group, or vigilante gang) that can and will be effectively suppressed by the national government, there is no genuine risk of persecution, and hence no need for surrogate international protection.

Even though refugee law has always been understood as surrogate protection, state practice traditionally assumed that proof of a sufficiently serious risk in one part of the home country was all that was required. That is, an individual qualified for refugee status if there was a "well-founded fear of being persecuted for

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[1] "[T]he existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces external to the State": *Esshak Dankha*, Conseil d'Etat of France Decision No. 42.074 (May 27, 1983, unofficial translation).

[2] Attorney-General of Canada v. Ward, 103 D.L.R. (4th) 1, 38–39 (1993).

reasons of race, religion, nationality, membership of a particular social group or political opinion . . ."[3] in the town or region of origin. Until the mid-1980s, there was no practice of routinely denying asylum on the grounds that protection against an acknowledged risk could be secured in another part of the applicant's state of origin.

> To some extent, the traditional failure to explore the possibility of internal protection simply reflected both the predisposition of predominantly Western asylum states to respond generously (for political and ideological reasons) to the then-dominant stream of refugees from Communism arriving at their borders. With the arrival during the 1980s of increasing numbers of refugees from countries that were politically, racially, and culturally "different" from Western asylum countries, the historical openness of the developed world to refugee flows was displaced by a new commitment to exploit legal and other means to avoid the legal duty to admit refugees.[4] The so-called "internal flight" doctrine emerged from this context. As formulated by the United Nations High Commissioner for Refugees (UNHCR) in its *Handbook on Procedures and Criteria for Determining Refugee Status*,
>
> > The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.[5]

While framed by UNHCR as a constraint on the right of states to deny recognition of refugee status, the result in practice of the *Handbook*'s rule was to legitimate the refusal of refugee status to persons adjudged able to seek refuge within their own country. For example, Sikh activists clearly at risk in the Punjab have been denied refugee status and returned to other regions of India, Tamils to southern Sri Lanka, and Turkish Kurds to Istanbul.

In some cases, there may indeed be true protection options available inside the asylum seeker's country of origin. Particularly because most refugees today flee internal conflict rather than monolithic aggressor states, real safety and security may be plausible today in ways not imagined during the height of the Cold War. Yet the often radically disparate ways in which the duty to seek internal protection has been conceived and implemented by states suggested the need for a clear statement of the legal foundation for this limitation on access to refugee status, as well as for a relatively precise formulation of operational safeguards.

[3]Convention relating to the Status of Refugees, 189 UNTS 2545, Art. 1(A)(2).
[4]*See* J. Hathaway, "The Emerging Politics of Non-Entrée," 91 Refugees 40–41 (1992); also published as "L'émergence d'une politique de non-entrée," *in* F. Julien-Laferrière ed., Frontières du droit, Frontières des droits 65–67 (1993).
[5]United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 91.

This was the task set for the University of Michigan's first *Colloquium on Challenges in International Refugee Law*.

The methodology for the *Colloquium* was novel. Drawing on a framework I prepared in conjunction with the European Council on Refugees and Exiles, a group of nine senior Michigan law students undertook a comprehensive review of the relevant jurisprudence of leading asylum countries. They synthesized their collective research by substantive sub-topics, and framed a series of critical legal and policy concerns. These were shared with a distinguished group of leading refugee law academics from around the world, each of whom contributed a brief response paper. The students and academics then worked collaboratively for three days in Ann Arbor on April 9–11, 1999 to refine an analytical framework for adjudicating internal protection concerns in consonance with general duties under the Refugee Convention. The result of that effort is *The Michigan Guidelines on the Internal Protection Alternative*.

The *Guidelines* have been shared with policymakers, decision-makers, and advocates around the world, including with all members of the International Association of Refugee Law Judges. The first formal adoption of the *Guidelines* was by the New Zealand Refugee Status Appeals Authority, in its Decision No. 71684/99 of October 29, 1999.[6]

[6]This decision is reported at <www.refugee.org.nz/index.htm>.

FIRST COLLOQUIUM ON CHALLENGES IN INTERNATIONAL REFUGEE LAW

CONVENED BY
THE PROGRAM IN REFUGEE AND ASYLUM LAW
THE UNIVERSITY OF MICHIGAN LAW SCHOOL
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THE MICHIGAN GUIDELINES ON THE INTERNAL PROTECTION ALTERNATIVE

In many jurisdictions around the world, 'internal flight' or 'internal relocation' rules are increasingly relied upon to deny refugee status to persons at risk of persecution for a Convention reason in part, but not all, of their country of origin. In this, as in so many areas of refugee law and policy, the viability of a universal commitment to protection is challenged by divergence in state practice. These Guidelines seek to define the ways in which international refugee law should inform what the authors believe is more accurately described as the 'internal protection alternative.' It is the product of collective study of relevant norms and state practice, debated and refined at the First Colloquium on Challenges in International Refugee Law, in April 1999.

THE ANALYTICAL FRAMEWORK

1. The essence of the refugee definition set out in Art. 1(A)(2) of the 1951 Convention relating to the Status of Refugees ('Refugee Convention') is the identification of persons who are entitled to claim protection in a contracting state against the risk of persecution in their own country. This duty of state parties to provide surrogate protection arises only in relation to persons who are either unable to benefit from the protection of their own state, or who are unwilling to accept that state's protection because of a well-founded fear of persecution.

2. It therefore follows that to the extent meaningful protection against the risk of persecution is genuinely available to an asylum-seeker, Convention refugee status need not be recognized.

3. Both the risk of persecution and availability of countervailing protection were traditionally assessed simply in relation to an asylum-seeker's place of origin. The implicit operating assumption was that evidence of a sufficiently serious risk in one part of the state of origin could be said to give rise to a well-founded fear of persecution in the asylum-seeker's 'country.' Contemporary practice in most developed states of asylum has, however, evolved to take account of regionalized variations of risk within countries of origin. Under the rubric of so-called 'internal flight' or 'internal relocation' rules, states increasingly decline to recognize as Convention refugees persons acknowledged to be at risk in one locality on the grounds that protection should have been, or could be, sought elsewhere inside the state of origin.

4. In some circumstances, meaningful protection against the risk of persecution can be provided inside the boundaries of an asylum-seeker's state of origin. Where a careful inquiry determines that a particular asylum-seeker has an 'internal protection alternative,' it is lawful to deny recognition of Convention refugee status.

5. A lawful inquiry into the existence of an 'internal protection alternative' is not, however, simply an examination of whether an asylum-seeker might have avoided departure from her or his country of origin ('internal flight'). Nor is it only an assessment of whether the risk of persecution can presently be avoided somewhere inside the asylum-seeker's country of origin ('internal relocation'). Instead, 'internal protection alternative' analysis should be directed to the identification of asylum-seekers who do not require international protection against the risk of persecution in their own country because they can presently access meaningful protection in a part of their own country. So conceived, internal protection analysis can be carried out in full conformity with the requirements of the Refugee Convention.

6. We set out below a summary of our understanding of the circumstances under which refugee protection may lawfully be denied by a putative asylum state on the grounds that an asylum-seeker is able to avail himself or herself of an 'internal protection alternative.' Our analysis is based on the requirements of the Refugee Convention, and is informed primarily by the jurisprudence of leading developed states of asylum. No attempt is made here to address the additional limitations on removal of asylum-seekers from a state's territory that may follow from other international legal obligations, or from a given state's domestic laws. In particular, state parties to the Organization of African Unity's *Convention governing the specific aspects of refugee problems in Africa* have obligated themselves to protect not only Convention refugees, but also persons at risk due to '... external aggression, occupation, foreign domination or events

seriously disturbing public order *in either part or the whole* of [the] country of origin or nationality . . . (emphasis added)"

7. More generally, state parties are under no duty to decline recognition of refugee status to asylum-seekers who are able to avail themselves of an 'internal protection alternative.' Because refugee status is evaluated in relation to conditions in the asylum-seeker's *country* of nationality or former habitual residence, and because no express provision is made for the exclusion from Convention refugee status of persons able to avail themselves of meaningful internal protection, state parties remain entitled to recognize the refugee status of persons who fear persecution in only one part of their country of origin.

GENERAL NATURE AND REQUIREMENTS OF 'INTERNAL PROTECTION ALTERNATIVE' ANALYSIS

8. There is no justification in international law to refuse recognition of refugee status on the basis of a purely retrospective assessment of conditions at the time of an asylum-seeker's departure from the home state. The duty of protection under the Refugee Convention is explicitly premised on a prospective evaluation of risk. That is, an individual is a Convention refugee only if she or he would presently be at risk of persecution in the state of origin, whatever the circumstances at the time of departure from the home state. Internal protection analysis informs this inquiry only if directed to the identification of a present possibility of meaningful protection within the boundaries of the home state.

9. Because this prospective analysis of internal protection occurs at a point in time when the asylum-seeker has already left his or her home state, a present possibility of meaningful protection inside the home state exists only if the asylum-seeker can be returned to the internal region adjudged to satisfy the 'internal protection alternative' criteria. A refugee claim should not be denied on internal protection grounds unless the putative asylum state is in fact able safely and practically to return the asylum-seeker to the site of internal protection.

10. Legally relevant internal protection should ordinarily be provided by the national government of the state of origin, whether directly or by lawful delegation to a regional or local government. In keeping with the basic commitment of the Refugee Convention to respond to the fundamental breakdown of state protection by establishing surrogate state protection through an interstate treaty, return on internal protection grounds to a region controlled by a non-state entity should be contemplated only where there is compelling evidence of that entity's ability to deliver durable protection, as described below at paras. 15–22.

11. The evaluation of internal protection is inherent in the Convention's requirement that a refugee not only have a well-founded fear of being persecuted, but also be "unable or, owing to such fear, [be] unwilling to avail himself of the protection of [her or his] country."

12. The first question to be considered is therefore whether the asylum-seeker faces a well-founded fear of persecution for a Convention reason in at least some part of his or her country of origin. This primary inquiry should be completed before consideration is given to the availability of an 'internal protection alternative.' The reality of internal protection can only be adequately measured on the basis of an understanding of the precise risk faced by an asylum-seeker.

13. Assessed against the backdrop of an ascertained risk of persecution for a Convention reason in at least one part of the country, the second question is whether the asylum-seeker has access to meaningful internal protection against the risk of persecution. This inquiry may, in turn, be broken down into three parts:

(a) Does the proposed site of internal protection afford the asylum-seeker a meaningful 'antidote' to the identified risk of persecution?

(b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?

(c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention's minimalist conceptualization of 'protection'?

14. Because this inquiry into the existence of an 'internal protection alternative' is predicated on the existence of a well-founded fear of persecution for a Convention reason in at least one region of the asylum-seeker's state of origin, and hence on a presumptive entitlement to Convention refugee status, the burden of proof to establish the existence of countervailing internal protection as described in para. 13 should in all cases be on the government of the putative asylum state.

THE FIRST REQUIREMENT: AN 'ANTIDOTE' TO THE PRIMARY RISK OF PERSECUTION

15. First, the 'internal protection alternative' must be a place in which the asylum-seeker no longer faces the well-founded fear of persecution for a

Convention reason which gave rise to her or his presumptive need for protection against the risk in one region of the country of origin. It is not enough simply to find that the original agent or author of persecution has not yet established a presence in the proposed site of internal protection. There must be reason to believe that the reach of the agent or author of persecution is likely to remain localized outside the designated place of internal protection.

16. There should therefore be a strong presumption against finding an 'internal protection alternative' where the agent or author of the original risk of persecution is, or is sponsored by, the national government.

THE SECOND REQUIREMENT: NO ADDITIONAL RISK OF, OR EQUIVALENT TO, PERSECUTION

17. A meaningful understanding of internal protection from the risk of persecution requires consideration of more than just the existence of an 'antidote' to the risk identified in one part of the country of origin. If a distinct risk of even generalized serious harm exists in the proposed site of internal protection, the request for recognition of refugee status may not be denied on internal protection grounds. This requirement may be justified in either of two ways.

18. First, the asylum-seeker may have an independent refugee claim in relation to the proposed site of internal protection. If the harm feared is of sufficient gravity to fall within the ambit of persecution, the requirement to show a nexus to a Convention reason is arguably satisfied as well. This is so since but for the fear of persecution in one part of the country of origin for a Convention reason, the asylum-seeker would not now be exposed to the risk in the proposed site of internal protection.

19. Second, the legal duty to avoid exposing the asylum-seeker to serious risk in the place of internal protection may be derived by reference to the Refugee Convention's Art. 33(1), which requires state parties to avoid the return of a refugee '. . . in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . .' for a Convention reason. Where the intensity of the harms specific to the proposed site of internal protection (such as, for example, famine or sustained conflict) rises to a particularly high level, even if not amounting to a risk of persecution, an asylum-seeker may in practice feel compelled to abandon the proposed site of protection, even if the only alternative is return to a known risk of persecution for a Convention reason elsewhere in the country of origin.

THE THIRD REQUIREMENT: EXISTENCE OF A MINIMALIST COMMITMENT TO AFFIRMATIVE PROTECTION

20. The denial of refugee status is predicated not simply on the absence of a risk of persecution in some part of the state of origin, but on a finding that the asylum-seeker can access internal protection there. This understanding follows from the *prima facie* need for international refugee protection of all asylum-seekers whose cases are subjected to internal protection analysis. If recognition of refugee status is to be denied to such persons on the grounds that the protection to which they are presumptively entitled can in fact be accessed within their own state, then the sufficiency of that internal protection is logically measured by reference to the scope of the protection which refugee law guarantees.

21. Good reasons may be advanced to refer to a range of widely recognized international human rights in defining the irreducible core content of affirmative protection in the proposed site of internal protection. In particular, one might rely on the reference in the Refugee Convention's Preamble to the importance of '... the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.' Yet the Refugee Convention itself does not establish a duty on state parties to guarantee all such rights and freedoms to refugees. Instead, Arts. 2-33 establish an endogenous definition of the rights and freedoms viewed as requisite to '... revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and *the protection accorded by* such instruments ... (emphasis added).' These rights are for the most part framed in relative terms, effectively mandating a general duty of non-discrimination as between refugees and others.

22. At a minimum, therefore, conditions in the proposed site of internal protection ought to satisfy the affirmative, yet relative, standards set by this textually explicit definition of the content of protection. The relevant measure is the treatment of other persons in the proposed site of internal protection, not in the putative asylum country. Thus, internal protection requires not only protection against the risk of persecution, but also the assimilation of the asylum-seeker with others in the site of internal protection for purposes of access to, for example, employment, public welfare, and education.

'REASONABLENESS'

23. Most states that presently rely on either 'internal flight' or 'internal relocation' analysis also require decision-makers to consider whether, generally or in

light of a particular asylum-seeker's circumstances, it would be 'reasonable' to require return to the proposed site of internal protection. If the careful approach to identification and assessment of an 'internal protection alternative' proposed here is followed, there is no additional duty under international refugee law to assess the 'reasonableness' of return to the region identified as able to protect the asylum-seeker.

24. Assessment of the 'reasonableness' of return may nonetheless be viewed as consistent with the spirit of Recommendation E of the Conference of Plenipotentiaries, that the Refugee Convention "... have value as an example exceeding its contractual scope and that all nations ... be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

PROCEDURAL SAFEGUARDS

25. Because the viability of an 'internal protection alternative' can only be assessed with full knowledge of the risks in other regions of the state of origin (*see* paras. 15–16), internal protection analysis should never be included as a criterion for denial of refugee status under an accelerated or manifestly unfounded claims procedure.

26. To ensure that assessment of the viability of an 'internal protection alternative' meets the standards set by international refugee law, it is important that the putative asylum state clearly discloses to the asylum-seeker that internal protection is under consideration, as well as the information upon which it relies to advance this contention. The decision-maker must in all cases act fairly, and in particular ensure that no information regarding the availability of an 'internal protection alternative' is considered unless the asylum-seeker has an opportunity to respond to that information, and to present other relevant information to the decision-maker.

These Guidelines reflect the consensus of all the participants at the First Colloquium on Challenges in International Refugees Law, held at Ann Arbor, Michigan, USA, on April 9–11, 1999.

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LES RECOMMANDATIONS DE MICHIGAN SUR L'ALTERNATIVE DE PROTECTION INTERNE

James C. Hathaway

Dans beaucoup de juridictions à travers le monde, les règles de «fuite interne» ou de «réinstallation interne» sont de plus en plus utilisées pour refuser le statut de réfugié aux personnes qui risquent une persécution pour une raison visée à la Convention de Genève dans une partie, et non dans la totalité de leur pays d'origine. En celui-ci, comme dans beaucoup d'autres domaines de la politique et du droit des réfugiés, le caractère universel de la protection est mis à l'épreuve par les divergences entre les pratiques des États.

Les recommandations cherchent à définir les voies par lesquelles le droit international des réfugiés pourrait guider ce que les acteurs pensent être plus précisément décrit comme l'«alternative de protection interne». Le présent document est le fruit d'une étude collective des règles pertinentes et de la pratique des États, débattue et affinée au premier colloque sur les défis en droit international des réfugiés tenu en avril 1999.

LE CADRE DE TRAVAIL ANALYTIQUE

1. L'essence de la définition du réfugié contenue dans l'article 1 (A) (2) de la convention relative au statut des réfugiés («Convention de Genève») est l'identification des personnes qui sont en droit de demander la protection dans un État partie contre le risque de persécution dans leur propre pays. Cette obligation des États parties de fournir une protection substitutive s'énonce seulement en relation avec les personnes qui sont soit incapables de bénéficier de la protection de leur propre État, soit ne veulent pas accepter cette protection étatique à cause d'une crainte fondée de persécution.

2. Il en résulte que, dans la mesure où une protection suffisante contre le risque de persécution est réellement à la disposition d'un demandeur d'asile, le statut de réfugié au sens de la Convention de Genève ne doit pas être reconnu.

3. Aussi bien le risque de persécution que la disponibilité d'une protection substitutive ont été traditionnellement évalués simplement en rapport avec le lieu d'origine du demandeur d'asile. L'hypothèse opérationnelle implicite était que la preuve d'un risque suffisamment sérieux dans une partie de l'État d'origine donnait lieu à une crainte fondée de persécution dans l'ensemble du «pays» du demandeur d'asile. La pratique contemporaine dans les États d'asile

les plus développés a, cependant, évolué vers la prise en compte des variations régionales de risque à l'intérieur des pays d'origine. Dans le cadre de ce qui est appelé règles de «fuite interne» ou de «réinstallation interne», les États refusent de plus en plus de reconnaître la qualité de réfugié au sens de la Convention de Genève aux personnes dont le risque de persécution est localisé sur une partie de territoire du pays d'origine, en raison du fait que la protection aurait pu être ou peut être demandée ailleurs à l'intérieur de l'État d'origine.

4. Dans certaines circonstances, une protection suffisante contre le risque de persécution peut être fournie à l'intérieur des frontières de l'État d'origine du demandeur d'asile. Là où une investigation approfondie détermine qu'un demandeur d'asile particulier dispose d'une «alternative de protection interne», il est conforme au droit de refuser la reconnaissance du statut de réfugié au sens de la Convention de Genève.

5. En droit toutefois, la recherche sur la réalité d'une «alternative de protection interne» ne peut se limiter à vérifier si le demandeur d'asile aurait pu éviter le départ de son pays d'origine («fuite interne»). Elle ne peut davantage se limiter à s'assurer que le risque de persécution peut présentement être évité autre part à l'intérieur du pays d'origine du demandeur d'asile («réinstallation interne»). En revanche, l'analyse de l'«alternative de protection interne» devrait être orientée vers l'identification des demandeurs d'asile qui n'exigent pas une protection internationale contre le risque de persécution dans leur propre pays parce qu'ils peuvent avoir accès à une protection suffisante dans une autre partie de leur propre pays. Ainsi conçue, l'analyse de protection interne peut être utilisée en pleine conformité avec les exigences de la Convention de Genève.

6. Nous présentons ci-dessous un résumé de notre interprétation des circonstances dans lesquelles la protection de réfugié peut légalement être refusée par un État d'asile potentiel en raison du fait que le demandeur d'asile est en mesure de se réclamer d'une «alternative de protection interne». Notre analyse est basée sur les exigences de la Convention de Genève, et s'appuie principalement sur la jurisprudence des principaux États d'asile développés. Elle ne tente pas de rencontrer les limitations additionnelles relatives au déplacement des demandeurs d'asile du territoire d'un État, qui peuvent résulter d'autres obligations juridiques internationales ou des lois nationales d'un État donné. En particulier, les États parties à la Convention de l'Organisation de l'Unité africaine *régissant les aspects propres aux problèmes des réfugiés en Afrique* se sont engagés à protéger non seulement les réfugiés au sens de la Convention de Genève, mais aussi les personnes qui courent un risque du fait d'une «... agression, d'une occupation extérieure, d'une domination étrangère ou d'événements troublant gravement l'ordre public dans *une partie ou dans la totalité* [du] pays d'origine ou de nationalité ... (c'est nous qui soulignons)».

7. Plus généralement, les États parties ne sont pas obligés de refuser la reconnaissance du statut de réfugié aux demandeurs d'asile qui peuvent se prévaloir d'une «alternative de protection interne». En ce que le statut de réfugié est évalué en relation avec les conditions dans le pays de nationalité ou de

l'ancienne résidence habituelle du demandeur d'asile, et que les clauses d'exclusion de la Convention de Genève ne visent pas expressément les personnes en mesure de se réclamer d'une protection interne suffisante, les États parties demeurent en droit de reconnaître le statut de réfugié aux personnes craignant des persécutions dans une partie seulement de leur pays d'origine.

NATURE GENERALE ET EXIGENCES DE L'ANALYSE DE L'«ALTERNATIVE DE PROTECTION INTERNE»

8. En droit international, il n'existe aucune raison pour refuser la reconnaissance du statut de réfugié sur la base d'une évaluation purement rétrospective des conditions prévalant au moment du départ du demandeur d'asile de l'État d'origine. Sous la Convention de Genève, le devoir de protection repose explicitement sur une évaluation prospective du risque. Aussi, quelles qu'aient été les circonstances au moment de son départ de l'État d'origine, une personne est un réfugié au sens de la Convention de Genève si elle y encourt présentement un risque de persécution. L'analyse de protection interne guide cette investigation seulement si elle porte sur l'identification d'une possibilité actuelle de protection suffisante à l'intérieur des frontières de l'État d'origine.

9. L'analyse prospective de protection interne survenant à un moment où le demandeur d'asile a déjà quitté son pays d'origine, une possibilité actuelle de protection suffisante à l'intérieur de son pays d'origine n'existe que si le demandeur d'asile peut être rapatrié vers la région interne considérée comme répondant aux critères d' «alternative de protection interne" Une demande de reconnaissance du statut de réfugié ne sera pas refusée pour des raisons de protection interne, sans que l'État d'asile potentiel ne soit en mesure d'assurer en pratique et dans la sécurité requise le retour du demandeur d'asile vers le lieu de protection interne.

10. En droit, une protection interne appropriée devrait en principe être offerte par le gouvernement national de l'État d'origine, aussi bien directement que par délégation de compétences à un gouvernement régional ou local. En considérant l'engagement fondamental de la Convention de Genève de répondre à l'absence de protection de l'État d'origine par l'établissement d'une protection étatique de substitution à travers un traité inter-étatique, le retour pour des raisons de protection interne vers une région sous contrôle d'une entité non étatique ne devrait être envisagé que lorsqu'il existe une preuve convaincante de l'aptitude d'une telle entité à fournir une protection durable, telle que décrite aux paragraphes 15-22 ci-dessous.

11. L'évaluation de la protection interne est inhérente au prescrit conventionnel selon lequel un réfugié est non seulement celui qui a une crainte fondée d'être persécuté, mais aussi celui qui «... ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de [son] pays».

12. La première question qui mérite d'être considérée porte sur le point de savoir si le demandeur d'asile éprouve une crainte fondée de persécution au sens de la Convention de Genève dans quelque partie au moins de son pays d'origine. Cette investigation préliminaire devrait être complétée avant de considérer la disponibilité d'une «alternative de protection interne» La mesure de la protection interne ne peut être adéquatement estimée que sur la base d'une compréhension du risque précis encouru par le demandeur d'asile.

13. Examinée contre la toile de fond d'un risque établi de persécution pour une raison au sens de la Convention de Genève dans une partie au moins du pays, la seconde question consiste à savoir si le demandeur d'asile a accès à une protection interne suffisante contre le risque de persécution. Cette investigation peut, en revanche, être subdivisée en trois parties :

a) Le lieu de protection interne proposé offre-t-il un «antidote» sérieux au demandeur d'asile contre le risque de persécution identifié?
b) Le lieu de protection interne proposé est-il exempt d'autres risques qui reviennent ou équivalent à un risque de persécution?
c) Les conditions locales sur le lieu de protection interne rencontrent-elles au moins la conception minimale de la «protection» au sens de la Convention de Genève?

14. Compte tenu de ce que cette investigation sur l'existence d'une «alternative de protection interne» se base sur l'existence d'une crainte fondée de persécution pour une raison conventionnelle dans une région au moins de l'État d'origine du demandeur d'asile, et de ce qu'il en résulte un droit au statut de réfugié au sens de la Convention de Genève, la charge de la preuve de l'existence d'une protection interne disponible, telle que décrite au paragraphe 13, incombe, dans tous les cas, au gouvernement de l'État d'asile potentiel.

LA PREMIERE EXIGENCE : UN "ANTIDOTE" AU RISQUE DE PERSECUTION DE BASE

15. Premièrement, l' «alternative de protection interne» doit être un lieu où le demandeur d'asile n'éprouve plus de crainte fondée de persécution pour une raison au sens de la Convention de Genève qui a justifié son besoin de protection contre le risque de persécution dans une région de son pays d'origine. Il ne suffit pas simplement de découvrir que l'agent original ou l'auteur de la persécution n'est pas encore présent sur le lieu de protection interne proposé. Il doit y avoir une raison de penser que le lieu de protection interne restera hors d'atteinte de l'agent ou de l'auteur de la persécution.

16. Il devrait par conséquent exister une forte présomption contre la recherche d'une «alternative de protection interne» quand l'auteur ou l'agent du risque de persécution original est le gouvernement national ou est soutenu par ce dernier.

LA SECONDE EXIGENCE : PAS DE RISQUE SUPPLEMENTAIRE OU EQUIVALANT A LA PERSECUTION

17. Une interprétation constructive de la protection interne à partir du risque de persécution postule plus d'attention que la seule existence d'un «antidote» au risque identifié dans une partie du pays d'origine. Si un demandeur d'asile se prévaut d'un risque spécifique, distinct des dommages généraux liés au lieu de protection interne proposé, sa demande de reconnaissance du statut de réfugié ne sera pas refusée pour raison de protection interne. Cette exigence se justifie doublement.

18. Premièrement, le demandeur d'asile peur voir une demande de statut de réfugié indépendante, en rapport avec le lieu de protection interne proposé. Si le préjudice redouté est d'une gravité suffisante que pour correspondre à une persécution, l'exigence d'établir un lieu avec une raison conventionnelle se trouve, par le fait même, valablement satisfaite. S'il en est ainsi de la crainte de persécution dans une partie du pays d'origine pour une raison conventionnelle, le demandeur d'asile ne devrait pas se trouver maintenant exposé au même risque dans le lieu de protection interne proposé.

19. Deuxièmement, l'obligation légale qui interdit d'exposer le demandeur d'asile à un risque sérieux sur le lieu de protection interne peut être inféré de l'article 33 (1) de la Convention de Genève qui impose aux États parties de s'abstenir de refouler un réfugié «... de quelque manière que ce soit, sur les frontières des territoires où sa vie ou sa liberté serait menacée...» pour une raison conventionnelle. Quand l'ampleur des préjudices spécifiques au lieu de protection interne proposé (comme, par exemple, famine et conflit durable) atteint un niveau particulièrement élevé, même si elle ne correspond pas à un risque de persécution, un demandeur d'asile peut, dans la pratique, se sentir contraint d'abandonner le lieu de protection proposé, quand bien même la seule alternative demeure le retour à un risque de persécution connu pour une raison conventionnelle dans les autres parties du pays d'origine.

TROISIEME EXIGENCE : L'EXISTENCE D'UN ENGAGEMENT MINIMAL A UNE PROTECTION AFFIRMATIVE

20. Le refus du statut de réfugié se fonde non seulement sur l'absence de risque de persécution dans une certaine partie de l'État d'origine, mais sur la conclusion que le demandeur d'asile peut y bénéficier d'une protection interne. Cette interprétation découle, prima facie, du besoin de protection internationale des demandeurs d'asile dont les cas sont sujets à l'analyse de protection interne. Si la reconnaissance du statut de réfugié devrait être déniée à de telles personnes en raison du fait que la protection à laquelle elles ont a priori droit

peut, en pratique, être accessible dans leur propre État, dans ce cas l'étendue de la protection interne devrait logiquement être évaluée par référence à la portée de la protection garantie par le droit des réfugiés.

21. Il existe de bonnes raisons de se référer à une variété des droits de l'homme reconnus dans divers instruments internationaux pour définir le contenu irréductible de la protection affirmative sur le lieu de protection interne. En particulier, on pourrait invoquer la référence du préambule de la Convention de Genève à l'importance du «... principe que les êtes humains sans distinction, doivent jouir des droits de l'homme et des libertés fondamentales». Toutefois, la Convention de Genève elle-même n'impose pas aux États parties de garantir tous ces droits et libertés aux réfugiés. Par contre, les articles 2-33 établissent une définition autonome des droits et libertés, considérés comme nécessaires pour «réviser et codifier les accords internationaux antérieurs relatifs au statut des réfugiés et étendre l'application de ces instruments et la protection qu'ils constituent ... (c'est nous qui soulignons)» Exprimés pour la plupart dans des termes relatifs, ces droits énoncent effectivement une obligation générale de non discrimination entre les réfugiés et les autres.

22. Au minimum, les conditions sur le lieu de protection interne proposé devraient repondre aux critères affirmatifs, bien que relatifs, établis par cette définition contextuellement explicite du contenu de la protection. L'échelle de mesure demeure le traitement dont bénéficient d'autres personnes dans le lieu de protection interne proposé, non dans le pays d'asile potentiel. Ainsi, la protection interne exige non seulement la protection contre le risque de persécution, mais aussi l'assimilation des demandeurs d'asile avec les autres personnes sur le lieu de protection interne, par exemple en matière d'accès à l'emploi, à la santé publique et à l'éducation.

AVEC RAISON

23. La plupart des pays qui recourent actuellement soit à l'analyse de «fuite interne» soit à la «réinstallation interne» exigent aussi des décideurs qu'ils considèrent si, de façon générale ou à la lumière des circonstances particulières, il serait «raisonnable» d'exiger le retour vers le lieu de protection interne proposé. Si l'approche adéquate d'identification et d'évaluation de l' «alternative de fuite interne» proposée ici est suivie, il n'y a aucune obligation supplémentaire, en droit international des réfugiés, d'évaluer le caractère «raisonnable» du retour vers la région considérée comme susceptible de protéger le demandeur d'asile.

24. L'évaluation du caractère «raisonnable» du retour peut néanmoins être considérée comme conforme à l'esprit de la Recommandation E de la Conférence des plénipotentiaires selon laquelle la Convention de Genève «... aura valeur d'exemple, en plus de sa portée contractuelle, et qu'elle incitera tous les États à accorder dans toute la mesure du possible aux personnes se trouvant

sur leur territoire en tant que réfugié et qui ne seraient pas couvertes par les dispositions de la Convention, le traitement prévu par cette Convention».

GARANTIES PROCEDURALES

25. Parce que la viabilité d'une «alternative de protection interne» peut uniquement être évaluée sur la base d'une connaissance complète des risques dans les autres régions de l'État d'origine (voir paragraphes 15-16), l'analyse de protection interne ne devrait jamais être considérée comme un critère pour soumettre le refus du statut de réfugié à une procédure accélérée ou de demande manifestement infondée.

26. Pour garantir que l'évaluation de la viabilité de l' «alternative de protection interne» rencontre les standards du droit international des réfugiés, il est important que l'État d'asile potentiel fasse clairement comprendre au demandeur d'asile que la protection interne est sous examen, et lui fournisse toute l'information qui soutient cette démarche. Dans tous les cas, le décideur doit agir promptement, et en particulier s'assurer qu'aucune information relative à la disponibilité d'une «alternative de protection interne» n'est prise en considération sans que le demandeur d'asile n'ait eu l'opportunité d'y répondre et de présente toute autre information pertinente.

Ces recommandations reflètent le consensus de tous les participants au premier colloque sur les défis en droit international des réfugiés, tenu du 9 au 11 avril 1999 à Ann Arbor, Michigan, États-Unis.

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E. CRIMES AGAINST HUMANITY AND GENOCIDE

E. CRIMES CONTRE L'HUMANITÉ ET GÉNOCIDE

WAR AND PEACE IN REFUGEE LAW JURISPRUDENCE

Hugo Storey* and Rebecca Wallace**

How should refugee decision makers evaluate claims from individuals fleeing civil wars and armed conflicts?[1] Assessing the risk of persecution in such situations is particularly complex: human rights abuses are being committed on a wide scale. And, as was noted in a recent New Zealand decision, *Refugee Appeal No.71462/99* p.5, they are being committed:

> "not only by the combatants on the different sides (the state and the opposing group(s), but also by other groups and individuals who may have no connection with either the state or any of the warring factions. Very often the reasons for the commission of the human rights abuses will be mixed. As far as the victims, or potential victims of the abuses are concerned, the identity of the agent of persecution and the reasons for the persecution matter little".

In addition to their complexity, such claims pose at least two major problems. The first is that refugee jurisprudence has tended to view them as falling outside the 1951 Refugee Convention save in exceptional circumstances (the "exceptionality" approach). Expressed in its starkest form, this approach sug-

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The authors acknowledge with thanks the helpful comments of Professor John P Grant, Emeritus Professor University of Glasgow, Visiting Professor Lewis and Clark School of Law, Portland, Oregon and Visiting Professor Napier University, Edinburgh.

[1] That refugee law often uses the terms civil war and armed conflict interchangeably is an index of its lack of sustained attention to international law developments that relate to war, civil war and internal strife . Much of international humanitarian law has been codified so as to apply not only to civil wars but to international armed conflicts and to a broader range of internal armed conflicts. It applies even if internal wars in which the parties have not attained the status of belligerents. Common Art 3 ,for example, is applicable to all internal wars and applies wherever there is a sustained military response beyond normal police action that is taken against organised insurgent armies holding substantial territory. Expanding on this framework, the Rome Statute of the International Criminal Court adopted on 17 June 1998 defines [in relation to war crimes] armed conflicts not of an international character in the following way: the term "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organised armed groups or between such groups". A more precise classification is given in the body of this article.

gests a somewhat dubious syllogism: persecution in peacetime, the 1951 definition; persecution in wartime, no 1951 Convention. This article seeks to reject any notion that the 1951 Convention is mainly for the protection of claimants from countries of origin in a state of peace.

The second problem concerns identification of the relevant international law framework. Applying a contemporary approach, whereby assessment of persecutory harm is made by reference to international human rights law (IHRL) norms[2], is a more debatable matter when the country of origin is in a state of civil war or armed conflict. Here it is much less clear that the relevant norms to be applied can be confined to those contained in major international human rights instruments. Attempts to so confine them are arguably misguided attempts to apply norms designed for countries in a *state of peace* to countries in a *state of war*. This article contends (in Part III) that when dealing with claims from persons fleeing civil wars and armed conflicts the relevant norms must encompass the international standards set out in the corpus of international humanitarian law (IHL).

Recent decisions from the U.S., the U.K., Australia and New Zealand[3] have brought these interrelated problems to the fore in dramatic fashion and underlined the need for them to be addressed in a more comprehensive way. Drawing on the discussions therein, this article seeks (in Parts II and III) to resolve some of the principal inconsistencies raised and to postulate clearer, more readily identifiable criteria[4] to assist refugee decision-makers in knowing what international humanitarian law consists in and in being able to identify when and in what circumstances it is necessary to have regard to international humanitarian law[5]. This paper also seeks to go further than previous

[2] See e.g. James Hathaway, Law of Refugee Status, (Butterworths,1991).

[3] *Matter of Medina* 18 I &N Dec.734(1988); *Adan v Secretary of State for the Home Department* 1 A.C. 293 [1998]; 2 WLR 702; [1998] 2 All ER 453(HL); *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 162 ALR 105 (FC: FC); Refugee Appeal No. 71462/99 New Zealand Refugee Status Appeal Authority, decision of 27 September, 1999 (hereinafter referred to as Appeal 71462/99 – the reason being that no names are attached to decision of the New Zealand Authority).

[4] See para [29] Appeal No 71462/99 emphasises "... the need to provide a hopefully coherent exposition of the basic principles."

[5] We are indebted to the pioneering work done in this area by Michael G Heyman, "Redefining Refugee: A Proposal for Relief for Victims of Civil Strife", San Diego Law Review, Vol.24, 1987,449;Walter Kalin, `Refugees and Civil Wars: Only a Matter of Interpretation", 3 IJRL 435,450 (1991); Suzanne J. Egan, Civil War, Refugees and the Issue of "Singling Out" in a State of Civil Unrest (Toronto: The Centre for Refugee Studies, 1991); T. Alexander Aleinikoff, "The Meaning of Persecution" in U.S. Asylum Law", Refugee Policy – Canada and the United States (Toronto: York Lanes Press Ltd.,1991) 292; David Matas, "Innocent Victims of Civil War as Refugees", Vol.22, Fall 1993, Manitoba Law Journal, p.1; Mark Von Sternberg, "Political Asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns, 5 IJRL 153(1993) and "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status" 9 IJRL169 (1997). The most comprehensive attempt to provide workable criteria has been the Canadian IRB "Civil War Guidelines" issued in March 1996: "Civilian Non-Combatants Fearing Persecution in Civil War Situations". This article is also indebted to the lucid analysis of the relevance of IHL norms applicable to children given in Guy Goodwin-

treatments by identifying (in Part IV) the relevance of international humanitarian law norms to the core elements of the 1951 Refugee Convention definition. Clearer criteria are essential if the theoretical advantages of a combined human rights and international humanitarian law perspective are to be of real practical use to decision-makers. The paper in Part V offers a short checklist of pertinent questions that need to be raised in civil war and armed conflict cases and then concludes with some suggestions as to how general country information needs to be augmented in order to further realise this objective.

I

1. THE CURRENT "EXCEPTIONALITY" APPROACH

According to what we shall call the "exceptionality" approach the 1951 Convention relating to the Status of Refugees[6] and the 1967 Protocol[7] does not cover persons fleeing armed conflicts or civil wars or situations of "generalised violence". The *locus classicus* of this approach is paragraph 164 of the UNHCR Handbook which states that:

> "[p]ersons compelled to leave their country of origin as a result of international or armed national conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol".

Whilst the Handbook goes on to qualify this proposition, it does so by reference to "special cases", thereby highlighting their exceptionality[8].
Under the widely-held "exceptionality" approach such persons must rely instead on the common but not universal state practice of nevertheless affording some type of *extra-Convention* protection against *refoulement* to people fleeing hostilities of one sort or another. The criteria governing such *extra-Convention* protection, nowadays referred to as *complementary or subsidiary*

Gill and Ilene Cohn, Child Soldiers: The Role of Children in Armed Conflicts Clarendon Press Oxford 1994.

[6] 189UNTS 150; UKTS 39 (1954), Cmd 9171.

[7] 606 UNTS 267; UKTS 15(1969), Cmnd 3906.

[8] Para 164 is the opening paragraph of Ch V which deals with "Special Cases". Those specified are A. War refugees, B. Deserters and persons avoiding military service, and C. Persons having resorted to force or committed acts of violence. Earlier at para 91 dealing with cases in which the fear of being persecuted need not extend to the whole territory of the refugee's country, the two examples given are "ethnic clashes or in cases of grave disturbances involving civil war conditions". Concerning these the paragraph observes that "persecution of a specific ethnic or national group may occur in only one part of the country". In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances, it would not have been reasonable to expect him to do so. For further analysis, see Hugo Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined", 10 IJRL 499 (1988).

protection, are variously stated in a number of sources, e.g. Recommendation E of the Final Act of the United Nations Conference of Plenipotentiaries, U.N. General Assembly Resolutions [9], documents dealing with UNHCR`s "good offices" remit[10] and UNHCR position statements such as its Note on International Protection 1985 which identifies to its extra-Convention responsibilities for:

> "persons who have fled their home country due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights"[11].

Further legitimising the notion that persons fleeing armed conflicts and civil war could not be included in the 1951 Convention definition was the explicitly divergent step taken in the OAU to "complement" the 1951 Convention definition[12] with a broader clause stating that

> "[t]he term `refugee` shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (Art.1.2 OAUR69).

Underpinning the international community`s resistance to applying the 1951 Refugee Convention protection system as such to civil war and armed conflict cases is an anxiety that any general inclusion of armed conflict and civil war cases within the 1951 definition of refugee would open the floodgates. As expressed in *Isa v S.S.C.* (1995), 28 Imm.L.R.(2d)68 (F.C.T.D.), a leading Canadian case dealing with the situation in Somalia:

[9] UNCHR, The State of the Worlds Refugees: In Search of Solutions (Oxford U.P., 1995).

[10] J Hyndman and B Nylumd,"The UNHCR and the Status of Prima Facie Refugees in Kenya", 10 IJRL.21 at 32(1998). See further B.G. Ramcharan, Humanitarian Good Offices in International Law, International Studies in Human Rights, Martinus Nijhoff Publishers, Boston, 1983; G. Goodwin-Gill, The Refugee in International Law, Clarendon Press, Oxford, 2nd ed. 1996, 7-18.

[11] Note on International Protection 1985: UN doc.A/AC.96/660,6.

[12] Reproduced at Art 1.1.OAUR69.See also 1984 Cartagena Declaration on Refugees (OAS/Ser.L/V/II.66,doc.10,rev.1,pp.190-3) Conclusions II.3: "To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention(art 1, para 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition of concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order." See also ExCom No.22 (XXXII) – 1981 Protection of Asylum Seekers in Situations of Large-scale Influx at 1.1. "The refugee problem has become particularly acute due to the increasing number of large-scale influx situations in different areas of the world and especially in developing countries. The asylum-seekers forming part of these large-scale influxes include persons who are refugees within the meaning of the 1951 Convention and the Protocol relating to the Status of Refugees or who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their country of origin or nationality are compelled to seek refuge outside that country".

"Many, if not most, civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for Convention refugee status, then, all individuals on either side of the conflict will qualify. The passages quoted by the board from [paragraph 164] of the United Nations Handbook (supra) indicate that this is not the purpose of the 1951 Convention."

A similar anxiety is perceptible in the recent House of Lords decision *Adan v. Secretary of State for the Home Department,* which held that a risk of persecution could only arise in such contexts where the risk faced was shown to be over and above the normal incidents of civil war. [13]

2. CRITICISMS OF THE "EXCEPTIONALITY" APPROACH

The "exceptionality" approach has been the subject of growing criticism. Amongst the most forceful critiques has been the *1996 Canadian IRB Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations.*[14]

These Guidelines are based on the premise that there is nothing in the refugee definition as contained in the Convention which excludes its application to persons caught up in a civil war. The Guidelines espouse the following statement of principle as set out in the Canadian Federal Court of Appeal case of *Salibian v M.E.I.*[1990] 3 F.C. 250(C.A.):

"3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition."

In seeking to refute the argument that persons fleeing civil wars cannot by virtue of that fact demonstrate a nexus with a Convention ground, the Guidelines further cite with approval the comments made by Dr. Joachim Henkel, Judge, German Federal Administrative Court with respect to the "general consequences" of civil war:

"The general rule that the Geneva Refugee Convention does not provide protection against the general consequences of civil war is correct, but is often applied too broadly. Certainly, the danger of being caught up in the fighting and thus losing one`s life more or less by accident is a general consequence of civil war Furthermore, the danger of loosing [sic] a limb by treading on a land mine is a general consequence of civil war. Lack of food and water, lack of electricity and heating, lack of medical treatment and many other sufferings are general consequences of civil war. But, in my view, it amounts to persecution if one of the waring[sic] parties as part of its strategy subjects the femal[e] members of the enemy community to wide-spread rape; if the waring[sic] parties resort to the practice of "ethnic-cleansing"; if the waring[sic] parties

[13] 1 A.C. 293 [1998]; 2 WLR 702; [1998] 2 All ER 453 (HL)

[14] Guidelines issued by the Immigration and Refugee Board, Ottawa, Canada, March 7, 1996. See also M.R Von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status", IJRL.Vol.9 No.2April 1997 pp.169-195.

> detain all male members of the enemy community in concentration camps in which they are abused and ill-treated; if one of the waring[sic] parties after having captured a city takes to killing even civilian members of the enemy community. Even though such atrocities may be common in today`s civil wars they clearly are directed against persons as individuals; they are not just the unavoidable more or less anonymous consequences of a war. Thus, if one of the waring[sic] parties singles out a person or a group of persons for reasons of race, political opinion or one of the other elements enumerated in the refugee definition and subjects it to serious human rights violations this clearly constitutes persecution..."[15].

Rendering more difficult resolution of these divisions of opinion is the fact that they have become entangled with a major debate concerning the validity of a "differential risk analysis". There is the additional difficulty at least for certain analyses of atrocities (such as Henkel`s) that it is not clear how some atrocities qualify as manifesting persecutory intent whereas others do not. There is an absence of established objective legal standards explaining such characterisations.

The continuing division of opinion over civil war cases as exemplified by the fierce debate over the "differential risk analysis" poses a particularly serious obstacle to the achievement of a more coherent refugee jurisprudence.

It is hoped that a careful analysis of this debate will demonstrate that its resolution can only come about through adoption of a broader international law approach. Once this is done, the contentious issues may be tackled much more decisively.

II

1. THE RIFT BETWEEN "DIFFERENTIAL RISK ANALYSIS" AND "NON-COMPARATIVE ANALYSIS

The case law is hugely split between the "differential risk" (or comparative analysis") and the "non-comparative analysis" approach.

The differential risk analysis. This encapsulates the view that the targeting has to be *differential* in character. According to this approach, in order to show a Convention ground the claimant (either as an individual or as a member of a group) has to demonstrate a differential risk when compared to other individuals or groups in the country from which refugee status is sought. This approach would appear to be founded on two premises. First, there is the proposition that there can be no differential risk if the political, racial, religious, etc. motivation behind the harm feared simply arises out of the conflict

[15] Excerpt from contribution to the International Judicial Conference on Asylum Law and Procedures, London, England, November 1995, "Who is a refugee? (Refugees from civil war and other internal armed conflicts)", in section titled "Persecution versus "general consequences" of civil war" at pp.3-4.

itself. Secondly, there is the proposition that there is no differential risk if the risk involved affects all alike.
Reliance upon this approach is clearly reflected in the Canadian Federal Court decision of *Isa* (dealing with Somalia) [16] in which the Court pointedly stated that:

> "Many, if not most, civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for Convention refugee status, then, all individuals on either side of the conflict will qualify".[17]

Likewise in *Adan*, a case also dealing with Somalia, the House of Lords held that that killing and torture incidental to a clan and sub-clan based civil war did not give rise to a well-founded hear of being persecuted within the meaning of the Refugee Convention where the asylum-seeker was at no greater risk of such ill-treatment by reason of his/her clan or sub-clan membership than others at risk in the war. The majority of the Law Lords endorsed the view of Lord Lloyd of Berwick that it is not necessary for a claimant to show that (s)he is more at risk than anyone else in his/her group, if the group as a whole is subject to oppression. But that, Lord Lloyd continued, did not "touch on the more difficult questions which arise when a country is in a state of civil war."[18] In the latter context fighting between the groups gave rise to a fear of death or injury or loss of freedom but not of persecution[19].

In such circumstances, concluded Lord Slynn, it was for each individual or group to demonstrate a well-founded fear of persecution *over and above* the risk of life and liberty inherent in civil war[20].

2. CRITICISM OF THE DIFFERENTIAL RISK ANALYSIS

The differential risk (or comparative) approach can be criticised on a number of counts. Firstly, the refugee definition itself makes no reference to any different approach being adopted when the claim to persecution arises in a civil war context. Secondly it would appear highly artificial to accept on the one hand that many civil wars are fought for discriminatory motives of *inter alia* race, religion, political opinion yet on the other to conclude that persecution in many civil war situations is too indiscriminate to be persecution based on a Convention ground. Thirdly, the differential risk analysis applied in civil war cases seems to rely too heavily on some notion of the "normal incidents" or "general consequences" of civil war. Such a notion overlooks the fact that the

[16] *Isa v. S.C.C.* (1995), 28 Imm.L.R. (2d) 68 (F.C.T.D.) at 72.
[17] *Isa v. S.C.C.* (1995), 28 Imm.L.R. (2d) 68 (F.C.T.D.) at 72.
[18] *ibid* at 310B;712B;462e
[19] *ibid* at 302C;704H;455f
[20] see also Lord Lloyd's conclusion that "...where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if her were returned to his country. He must be able to show a differential impact. In other words he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare." [*ibid* 311B;713B;463e].

term "civil war" covers a wide range of types of conflict, some of which violate international humanitarian law norms and some of which do not. Fourthly, at least in some forms it also appears to rest on the doubtful proposition that persecution cannot be persecution if it affects all people. This is difficult to square with the fact that in some civil wars what one finds is really a multiplicity of discriminatory acts of persecution.

The first major court case to point out the flaws in the differential risk analysis was the Australian Federal Court in *Minister for Immigration and Multicultural Affairs v. Abdi*[21] (1999) 162 ALR 105 (FC:FC). It raises the first three points of criticism. At para 37, for example, it observed:

> "[37] In approaching the question of persecution in the context of a civil war, it is important to keep firmly in mind the wording of the Convention definition. The definition makes no reference to any different approach being adopted where the persecution exists in the context of civil war. There is no exclusion. The relevant question raised by the language of the definition requires a determination, on the evidence, of whether the harm or detriment is for a Convention reason."

And at para [39]

> "[I]t is difficult, ... to see the basis on which a super-added requirement of 'greater risk', 'differential risk' or risk over and above that arising from clan warfare' can be derived as a criterion for application of the Convention where the war is based on race or religion rather than, for example a quest for property, power or resources .... Given the purpose of the Convention and the well settled principle that a broad, liberal and purpose of interpretation must be given to the language, it is difficult to see the reason why a 'second tier' of 'differential' or super-added persecution should be imposed on an applicant for refugee status."

In preferring the approach of the Australian Federal Court in *Abdi* to that of the English House of Lords in *Adan*, The New Zealand Refugee Status Appeals Authority in Appeal No. 71462/99 developed a further point of criticism very similar to the fourth point just outlined. It saw the "differential risk analysis" as an approach apt to confuse "*equality of reason for the harm*" with "*equality of risk of the harm*". As illustration the Authority cited a civil war situation subsisting between two opposed religions, with every citizen of the state involved because he or she belongs to one religion or the other. Taken from one perspective all citizens in such circumstances face an identical risk of persecution – there is no differential risk. However from an alternative perspective any specific refugee claimant would be able to demonstrate a fear of persecution "for reason of his or her religion". Accordingly the persecution risk demanded by the Convention would be satisfied. The Authority stressed that it was important not to confuse equality of *risk* of harm with the equality of *reason* for that harm and continued:

> "[T]he well-foundedness element (i.e., the risk issue) is a separate inquiry to that of the "for reason of" element (i.e., the nexus issue). So while it is convenient to speak in the short-hand of a differential risk in order to emphasis the specific focus of the "for reason of" element, the very phrasing of the short-hand expression can, unfortunately, lead

[21] (1999) 162 ALR 105 (FC:FC)

to a conflation of the risk element with the "for reason of" or nexus required If this happens, a person at real risk of serious harm for reason of his or her religion will be required to establish that he or she is more at risk of serious harm for reason of his or her religion than others who are equally at real risk of serious harm for reason of their religion. This is a requirement to establish a double-differential risk. Such approach, ..., amounts to a misdirection in law". [22]

As yet this powerful critique has not led to the United Kingdom or Canadian courts abandoning use of "differential risk analysis" as a general tool[23]. From an international perspective it would seem that in relation to assessment of the same country (Somalia) senior courts in different countries deploy different analytical tools. It is difficult to see how the conflict between leading judgments can be resolved unless consensus can be achieved about the proper criteria to govern such assessments.

3. THE NON-COMPARATIVE ANALYSIS

Diametrically opposed to the "differential risk" approach is the view that targeting will amount to Convention-grounded persecution so long as persecutory intent can be identified - whether arising out of the conflict or not and whether or not the persecution affects all alike. All that is required is that there is a link between the serious harm and the protected ground.

The Canadian Guidelines endorse the non comparative approach and identify the essence of such an approach as being whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war. The Guidelines emphasis that the issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason and that a claimant should not be labelled as a "general victim" of civil war without full analysis of her personal circumstances and that of any group to which she may belong. The non–comparative approach focuses on the claimant's fear of persecution on account of a combination of a Convention enumerated ground.

The non-comparative approach, however, can also be criticised on a number of counts. Arguably it fails to recognise that the 1951 Convention is not concerned with all cases of persecution, even if they involve systematic denials of human rights and war crimes on a large scale, but with persecution which is based on discrimination[24]. It could also be noted that even authors who have urged a non-comparative approach at a general level still maintain that the situation of civil war alters the equation. Passages from Professor James

[22] Refugee Appeal No. 71462/99 para. 52.

[23] E.g. *Murugasu v MIEA*(unreported Federal Court of Australia, Wilcox J, 28/7/87cited in *Fong Hoi Tihia v Minister for Immigration and Multiethnic Affairs* Federal Ct. of Australia, Tamberlin, Jni35 of 1999,24.8.99).

[24] Lord Hoffman in *Islam v Secretary of State for the Home Department* [1999] Imm AR 300-301.

Hathaway`s book, *Law of Refugee Status* are cited[25] as an example. Despite advocating the non-comparative approach at p.97, Hathaway appears to modify it in relation to civil war when he goes on to make two essential points as follows:

> "Victims of war and conflict are not refugees unless they are subject to differential victimisation based on civil or political status"(p.185).

and:

> "None the less, the Convention today remains firmly anchored in the notion of elevating only a subset of those at risk of war and violent conflict to the status of refugee. This very general proposition is well-established in Canadian law by a variety of cases involving the victims of violence in Lebanon, Ethiopia and Chile. Moreover, as the decision in Elias Iskander Ishac makes clear, the mere fact that the conflict escaped is based on religion or politics is not relevant unless persons of a particular religion or political perspective are differentially at risk. In this case the Board found the risk to be roughly equivalent for persons of all beliefs, and hence refused the claim of a citizen of Lebanon attempting to escape the civil war in his country, and not a refugee protected by the Convention... A civil war, even on religious grounds, is not persecution as contemplated by the Convention"(p.186-7).

Another difficulty is that it is not entirely clear how "persecutory intent" needs to be assessed in the context of civil war and armed conflicts, albeit Von Sternberg`s analysis[26] sheds some light on this. But perhaps the most telling of all difficulties is that whilst it does demand reference to IHL norms it does so incidentally: it is not made clear that such reference is a necessity nor is it made sufficiently clear what is the broader framework to such reference. This last difficulty also largely explains why, despite the pioneering work done by Von Sternberg and others, their insights continue for the most part to be ignored by refugee decision-makers.

Two main conclusions emerge from a review of the opposed approaches to civil war cases. Firstly, there is a need for a clearer framework in which to make assessments. Furthermore that framework must be a widely accepted one otherwise different refugee determination bodies will arrive at different assessments of the same situation and render determination too much of a lottery. The Australian Court`s departure in *Abdi* from the Canadian Court`s decision in *Isa* and the Lords' decision in *Adan* stems in part from a different characterisation of the situation prevailing in Somalia[27]. This raises the ques-

[25] E.g. by the House of Lords in *Adan* [1998] Imm AR 338 at 347.

[26] Mark Von Sternberg,"The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status" 9 IJRL 169 (1997).

[27] This was acknowledged by the Authority itself in para [73] The Authority's perception of the country conditions in Somalia accorded more with the findings of the Committee Against Torture as expressed in *Elmi v Australia* (Communication No. 120/1998, 14 May 1999) and with the reports of the independent expert on the Situation of Human Rights in Somalia: Report of the Special Rapporteur, Ms. Mona Rishmawi, Submitted in Accordance with the Commission on Human Rights Resolution 1998/59. E/CN.4/1999/103 (18 February 1999). It should be noted that the issue before the Authority in Appeal No 71462/99 concerned a Tamil from Sri Lanka. In *Adan* the Somali claimant and his family were granted exceptional leave to remain in the United Kingdom on humanitarian grounds.

tion as to the nature of the inquiry which should be embarked upon: this is addressed below.

The second conclusion is that the main shortcomings of both approaches can be overcome by more systematic reference to IHL norms.

In the case of the non-comparative approach, much of the groundwork for placing it on an IHL basis has already been done by Von Sternberg. He argues that the IHL conceptualisation of armed conflicts creates a presumption that severe violations of IHL norms are motivated by persecutory intent and cites the Canadian case, *Matter of S-P* in which it was stated that "...the severity of the violations of the Geneva Convention [sic] may support an inference that the abuse is grounded in one of the protected grounds under the asylum law". In support he develops two examples, one based on the 1992 war in the former Yugoslavia, the other based on the civil conflict in El Salvador. In the former he recites evidence to the effect that Bosnian Serb forces had deliberately targeted civilian objects in Sarajevo:

> "This evidence manifests a deliberate policy underlying the violations and completely disallows any inference that those injured in the bombardment could have suffered as the result of a random `cross-fire` or other indiscriminate violence. The specific targeting of civilian sites, in turn, must be taken in conjunction with the broad purposes for which the war was fought ... On the issue of whether the `harm or suffering` can be related to a refugee ground, the deliberate targeting of civilian sites, the gravity of the violation and the general policy of ethnic cleansing underlying the war give rise to an inference that the injury imposed has been on account of an imputed `characteristic or belief`. In this case, the protected ground could be classed as attributed political opinion (based on perceived opposition to the political programme of the Bosnian Serbs), or imputed membership in a `particular social group`(namely Bosnian nationals who are viewed as hostile to Serbian hegemony and to the policy of ethnic cleansing)".

In the El Salvador context, he points to documented evidence that the Salvadoran government, beginning in the 1980s, pursued a policy of forced migration aimed at `emptying out` pockets of potential guerrilla resistance within El Salvador, contrary to Additional Protocol II whose commentary explains that "... it would be prohibited to move a population in order to exercise more effective control over a dissident group". On the basis of the background evidence confirming the flushing-out policy of the Salvadorian government Von Sternberg concludes:

> "Hence, in this case, the very feature which makes the depopulation programme an international humanitarian law violation (political inspiration) also makes it a basis for refugee status... The very circumstances in which the civilian objects are targeted in such situations makes clear the appropriateness of a presumption that resulting serious humanitarian violations are not the product of random violence, but have been committed because of a perceived political affiliation on the part of the population involved..."

Even if one considers overstated Von Sternberg`s idea that there is a *presumption* of persecutory intent in severe violations of IHL norms, it still seems clear enough that IHL norms circumscribe the situations in which one can conclude that acts of violence are simply random or indiscriminate or anonymous or symptomatic of general violence. The IHL principle of propor-

tionality furnishes a particularly telling indicator for examining the objectives behind armed conflicts. This principle dictates, *inter alia*, that military actions must be proportionate and pursued for legitimate military objectives. By thus placing focus on objectives, this principle allows breaches to be identified where there is a lack of proportionality between means and objectives. In such circumstances the objectives in question must stand as illegitimate. It will often be only a short step from a finding of disproportionality to a finding that such objectives harbour persecutory motives (political, racial, ethnic or religious motives, for example).[28] . Effectively incidences of serious IHL violations are evidence that more is involved than "common victimisation".

Against the notion of indicated or presumptive persecutory intent, it may be argued that governments or warring parties, even in politically or racially charged contexts, may commit seemingly random violence, often without discovering, or even caring, whether the victim is truly a dissenter[29]. Illegitimate conduct is not always informed by illegitimate motives. It may be that in fact X will turn out to face just random violence. But if the evidence shows a continuing and systematic pattern of severe IHL or human rights violations in X`s country against the background of racial, ethnic, religious or political animosities, it might well be against the evidence to conclude that random violence is *all* that X would face. The possibility of (or the co-existence of) random violence is not the same thing as its reasonable likelihood.

But von Sternberg`s analysis leaves far too unclear for decision-makers what IHL norms are and when and how they are to be applied.

[28] Von Sternberg at op.cit. 191 n.80 notes similar conclusions drawn by Walter Kälin using a general human rights perspective in Walter Kälin, `Refugees and Civil Wars: Only a Matter of Interpretation`, 3 IRLJ 435, 450(1991): "In determining whether State measures in a civil war situation have a legitimate military character or whether they constitute political persecution, the German Federal Constitutional Court has followed exactly the same approach as is used by international Courts and similar organs in international human rights and economic law. *Limitations of rights of individuals are only legitimate if they serve a legitimate goal and if, in their actual extent, they do not go further than necessary in order to achieve that goal.* If either they do not in fact serve the invoked interest or are disproportionate, they constitute political, racial or religious persecution if they take place in the context of a political, ethnic or religious conflict"[Emphasis in original]

[29] See D.P.Fagliardi, `The Inadequacy of Cognisable Grounds of Persecution as a Criterion for According Refugee Status`, 24 Stanford J.Int`l L 259, 279(1987) cited in Von Sternberg, p.192 n.82.

III

1. TOWARDS A BROADER INTERNATIONAL LAW FRAMEWORK

To properly situate the significance of IHL norms for refugee determination it is necessary to go back to basic principles. Objective assessment of refugee claims requires reference to international standards. Accordingly it is essential to have a clear idea of the scope and contents of these standards and to subject them to a contemporary definition. Under contemporary international law there are essentially two distinct but overlapping sets of relevant standards: international human rights law (IHRL) and international humanitarian law (IHL). In recent years a relatively broad consensus has emerged as to the scope and contents of the former. It is accepted as consisting of the standards embodied in the major international human rights treaties[30]. By contrast the latter's scope and contents has received scant attention from refugee decision makers. Not least because there is a considerable hesitancy as to the appropriate application of international humanitarian standards in particular claims. Before endeavouring to overcome these deficiencies the contents of international humanitarian law must be identified albeit in broad terms.

2. THE CORPUS OF INTERNATIONAL HUMANITARIAN LAW (IHL)

Doubtless an initial difficulty confronting refugee decision-makers in applying IHL norms is knowing what they consist in and where they can be found. The majority of IHL is embodied in the principal international instruments governing what was previously referred to as the "laws of war": *viz.* the Declaration of Paris 1856[31], the Geneva Convention 1864 for the Amelioration of the Condition of Wounded in Armies in the Field[32], the Declaration of St Petersburg 1868[33], the Hague Conventions of 1899[34] and 1907[35], the Geneva Gas and Bacteriological Warfare Protocol 1925[36], as supplemented by the Convention of 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their De-

[30] James Hathaway, Law of Refugee Status, *supra* n.2.
[31] 115 C.T.S. 1.
[32] 129 C.T.S.361.
[33] 138 C.T.S. 189.
[34] 187 C.T.S. 410; 429; 443; 456.
[35] 205 C.T.S 263;277; 299; 305; 319; 331; 345; 359; 367; 395; 403.
[36] 94 L.N.T.S. 65

struction[37], the Submarine Rules Protocol 1936[38], the four Geneva Red Cross Conventions 1949, namely those dealing with prisoners of war, sick and wounded personnel of armies in the field and of forces at sea, and the protection of civilians[39], and Protocols I and II of 1977[40] on, respectively, international armed conflicts and non-international armed conflicts, adopted as instruments additional to the latter Geneva Conventions of 1949. This body of treaty law is regularly developed by way of new treaties and case law. The 1980 Convention on Conventional Weapons and its three Protocols[41] was recently supplemented by the 1996 Mines Protocol[42].

Various instruments exist which define or elaborate on the notion of "crimes against peace, war crimes and crimes against humanity", one of the most comprehensive being the 1945 Charter of the International Military Tribunal (the London Charter)[43].The establishment of the *ad hoc* tribunals to deal with events in Rwanda[44] and the former Yugoslavia,[45] has led to some important decisions relevant to international humanitarian law, the *Dusko Tadic* case in particular[46]. There are also a number of instruments that deal with terrorism[47].

[37] 1972 11 ILM 310.
[38] 173 L.N.T.S. 353
[39] 75 U.N.T.S. 36
[40] 1977 16 I.L.M. 1391
[41] I.e. the U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be excessively Injurious or to Have Indiscriminate Effects.
[42] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.
[43] Others include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; the 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity and the Rome Statute of the International Criminal Court adopted on 17 June 1998.
[44] International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandian Citizens Responsible for Genocide and Other Such Violation Committed in the Neighbouring States, between January 1, 1994 and December 31, 1994(I.C.T.R.) The I.C.T.R was established November 1994 U.N.S.C. Resolution 955.
[45] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (I.C.T.Y) The I.C.T.Y. was established May 1993 U.N. Security Council Resolution 827 32 I.L.M. 1192 (1993)
[46] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in *the Matter of Prosecutor v Dusko Tadic, Case* No. IT-94-1-AR-72 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Dusko Tadic was found guilty on 7 May 1997 on nine counts, guilty in part on two counts, and not guilty on 20 counts of the charges brought against him. He was sentenced on 11 November 1999. International Criminal Tribunal for the former Yugoslavia: *Prosecutor v. Tadic* (Sentencing Judgment) 2000 39 ILM 117. The sentence was reduced from twenty five to twenty years on 26 January 2000.
[47] For a summary of the thirteen instruments see Peter J.van Krieken(ed) Refugee Law in Context: The Exclusion Clause,
pp.37-8.

However, as has been acknowledged[48] this body of treaty and case law has been supplemented by various international human rights instruments (and case law thereunder), including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[49], the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[50], the 1966 International Convention on the Elimination of All Forms of Racial Discrimination[51], the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid[52] and the 1989 Convention on the Rights of the Child[53]. It has been largely due to the impact of these human rights instruments as well as the denunciation of law as a legitimate weapon of national policy that the term "laws of war" has come to be replaced by the term "international humanitarian law". Customary law norms[54] are a further vital source of IHL.

Having clarified the contents of international humanitarian law in outline, it is next necessary to demonstrate why reference to it is essential to refugee decision-makers.

3. WHY REFERENCE TO INTERNATIONAL HUMAN RIGHTS LAW (IHLR) NEEDS COMPLEMENTING WITH INTERNATIONAL HUMANITARIAN LAW (IHL)

That refugee law really requires reference to IHL as well as IHRL is far from self-evident. Nor is it self-evidently practical, since it could be said that it simply makes more onerous the tasks facing the refugee decision-maker. In *Matter of Medina* the point was made that such reference can in fact distort refugee law, at least if violations of the 1949 Geneva Conventions are seen to

[48] E.g. I.A. Shearer, Starke's International Law (11th ed.) 1994, p 499.
[49] 78 U.N.T.S. 277.
[50] 1984 23 ILM 1027 and 1985 24 ILM 535.
[51] 60 U.N.T.S 195.
[52] 1974 13 ILM 50.
[53] 1989 28 ILM 1448.
[54] Additional Protocol I embodies the long-standing Martens clause as follows: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience". Rules that bind every State as a matter of `peremptory` customary international law are generally referred to as jus cogens.See further Avril McDonald, "Introduction to International humanitarian Law and The Qualification of Armed Conflicts", in Peter J van Krieken, Refugee Law in Context: The Exclusion Clause (The Hague 1999) pp.79-104.
In *Nicaragua v United States*, the International Court of Justice considered that Common Article 3 codified `customary international law`; it therefore applies whether or not a State has ratified the Geneva Convention: ICJ Reports, 14,113-4(1986).

create an independent basis for asylum[55]. It is also argued that in essence all the norms contained in IHL are embraced in the former[56] and that, as the latter has a much more developed case law (through the ECHR organs, the Inter-American Court of Human Rights and UNCAT and the HRC in particular), it is expedient to assimilate the former to the latter. There is some virtue in this argument. The acts prohibited in common Article 3 in relation to non-combatants, for example would all seem equally contrary to fundamental human rights, in particular the right to life, the prohibition against torture, cruel, inhuman and degrading treatment and punishment and the right to liberty and security of the person[57]. It is also increasingly the case that IHRL case law has begun to elaborate more specific criteria relating to conflicts as part of repeated encounters with claims from victims of large-scale atrocities of various kinds[58].

However, direct and particular reference to IHL has compelling and essential advantages. First it reflects modern public international law which has found it necessary to differentiate between the two bodies of law. Consider, for example, the distinction made in one of the most recent human rights treaties, the U.N. Convention on the Rights of the Child which at Art 38 explicitly recognises the distinct function of State obligations under IHL[59]. Consider also the recognition within IHRL jurisprudence of the more specific nature of IHL norms in identifying relevant criteria in cases of generalised violence. In the ground-breaking case of *Tablada* in 1997 the Inter-American Commission on Human Rights, noting that the American Convention was largely silent on situations of war and internal conflict, held that, in order to fully discharge its supervisory functions under human rights law in relation to such situations, it

[55] See.e.g. U.S. case of *Matter of Medina* 19 I & N Dec.734(1988), although this has since been qualified in *Matter of S-P-Interim* Decision 3287(BIA 1996). See further von Sternberg, op.cit. at p.171.

[56] Von Sternberg (op.cit.185 n.61 cites Sylvie-Stoyanka Junod, International Committee of the Red Cross,`Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of non-International Armed Conflict (Protocol II), in Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,1340-1 (Y.Sandoz et al.eds.,1987) (hereinafter Commentary to Additional Protocol II) on the incorporation of all ius cogens norms protected under the International Covenant on Civil and Political Rights, which constitute the basic protection mentioned in the paragraph under consideration here.

[57] For a IHRL approach to civil war claims, see Walter Kälin, `Refugees and Civil Wars: Only a Matter of Interpretation`, 3 IRLJ 435, 450 (1991).

[58] Many of the leading cases dealt with by the Human Rights Committee under the ICCPR and the Inter-American Commission and Court of Human Rights under the American Convention on Human Rights have concerned claims brought by persons from Latin-American states afflicted by internal wars. In the European context the leading cases concerned have mainly concerned Turkey: see e.g. *Akdivar & others v Turkey*, European Court of Human Rights judgment of 16.9.96

[59] See Art 38(I) " States Parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child" and Art 38(4) "In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care *of children who are affected by an armed conflict*".

had to apply humanitarian law norms[60]. Secondly, most of the corpus of modern human rights law addresses societies in peacetime. As noted by Greenwood:

> "Human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based on power rather than law".[61]

Thirdly, whereas IHRL has not always identified violations of international obligations when non-state entities have been responsible, the IHL relating to internal armed conflicts applies equally to government armed forces and dissident armed groups, that is, `parties to the conflict`[62]. Fourthly, IHL addresses the common realities of war in far more specific ways, identifying, for example the circumstances under which the use of landmines is reprehensible or the instances where violence is specifically directed at groups, as happens with collective punishments for example. If a claimant maintains that return would expose him/her to a real risk of participation in an armed conflict in which chemical weapons are likely to be used, then it would be circuitous to analyse this in human rights terms, when it is known that the use of chemical weapons is proscribed by several international humanitarian law treaties[63]. Fifthly, a wide range of IHL provisions have an unequivocal status as peremptory norms[64]. By contrast, the major human rights instruments` lists of non-derogable rights are more confined, excluding for example, the right to liberty and security of person and the right to a fair trial. The derogability clauses to be found in most major human rights instruments[65] hinge precisely on whether or not there is a war or "public emergency which threatens the life of a nation...". It is true that within human rights law States can only derogate from derogable rights if they fulfil certain conditions (e.g. official proclama-

[60] *Tablada v Argentina*, IACHR Report No.55/97, Case No.11.137, Argentina, OEA/Ser/L/V/II.97,Doc.38 October 30, 1997.

[61] C. Greenwood , "Scope of Application of Humanitarian Law" in Handbook of Humanitarian Law in Armed Conflicts C.Dieter Fleck (ed) 1995.

[62] See G Goodwin-Gill and I.Cohn, Child Soldiers: the role of children in armed conflicts. Clarendon Press, Oxford, 1994 56. This difference between the two legal regimes has been considerably reduced by developments in human rights case law: see e.g. Ahmed v Austria judgment of the European Court of Human Rights (1996) 24 EHRR 278.

[63] As was recognised by McGuigan, J in the Canadian case of an Iranian paramedic during the Iran-Iraq war: *Zolfagharkhani v Canada* 3 F.C. 540 at 549 FCA No.584.

[64] The Vienna Convention on the Law of Treaties at Art 35 defines a peremptory norm of general international law as "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Used interchangeably with ius cogens the term has been identified to mean "principles that the legal conscience of mankind deem(s) absolutely essential to coexistence in the international community"(UN Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Subcommittee of the Whole at 294: UN doc.A/CONF./39/11(1969) (statement of Mr Suarez (Mexico).See further T. Meron, Human Rights and Humanitarian Norms as Customary Law, 1989 (Clarendon Press).

[65] Albeit not the U.N. Convention on the Rights of the Child.

tion, taking steps only to the extent strictly required by the exigencies of the situation). However, for the refugee law decision-maker seeking to apply human rights norms in civil war cases, this commonly entails having to examine the specifics of the public emergency, how for instance it was pronounced, as well as whether the pronouncement was *inter alia* proportionate to the exigencies of the situation.[66] This often complex type of examination[67] is not necessary if direct reference is made to IHL norms. Sixthly, IHL norms would seem in some respects to go further than IHRL: e.g. Art 13 of Protocol II stipulates, *inter alia,* that the civilian population, as well as individual civil-

[66]J.M. Fitzpatrick, Human Rights in Crisis, University of Pennsylvania Press, Philadelphia 1994; J Oraa, Human Rights and States of Emergency in International Law, 1992 (Clarendon Press), N.Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency UN Doc.E/CN.4/Sub.2/1982/15 and his final report UN Doc E/014/Sub.2/1997/19.

[67] Interesting in this regard is the U.K. case of *Sandralingham and Ravichandran v SSHD* [1996] Imm AR 97 in which the Court of Appeal had to consider whether a sequence of arrests and detentions on suspicion of participation in Tamil terrorism amounted to persecutory harm. In response to submissions made by Counsel Ian Macdonald Simon Brown LJ saw it as relevant to consider the claims by reference to Article 9(1) and 4(1) and 4(3) of the ICCPR; he further made reference to para 51 of the UNHCR Handbook. His judgment further ruled that Article 1A2 test and the Article 33(1) tests raised not two separate but a "single composite question". Looking thus at matters "in the round" he stated that "I know of no authority inconsistent with such an approach and, to my mind, it clearly accords both with para 51 of the UNHCR Handbook and with the spirit of the Convention". His own conclusions on the facts were that the practice of arrests and detentions of young male Tamils were actions against Tamils were "directed to the maintenance of public order..." and further, that even if unlawful under Sri Lankan law or the twin 1966 UN human rights Covenants , these did not make good the appeals.

In relation to assessment of whether violations of human rights constitute persecution in states of emergency, Hathaway says of his second category rights:

"(b) The second category consists of those rights enshrined in the UDHR and carried forward in the ICCPR but from which states may derogate during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed". These include , inter alia, the right to be free from arbitrary arrest and detention, the right to equal protection for all, the right to a fair hearing, the protection of personal and family privacy and integrity, the right to internal movement and choice of residence, the freedom to leave and return to one`s country, the right to freedom of expression, the right to freedom of assembly and the right to freedom of association, the right to form and join trade unions, and the ability to partake in government, access to public employment without discrimination, and the right to vote in periodic and genuine elections.

A threat to these rights may amount to persecution if the state cannot demonstrate any valid justification for their temporary curtailment".

In the refugee determination context this analysis would seem, therefore, to require deciding whether, e.g., a state of emergency in Sri Lanka including Colombo renders non-persecutory violations in the form of arbitrary detentions which fall under the emergency derogation. Yet how does one decide that the emergency in questions is compatible with the derogation criteria? Hathaway`s elaboration is:

"The failure to ensure any of these rights will generally constitute a violation of a state`s basic duty of protection, unless it is demonstrated that the government's derogation was strictly required by the exigencies of a real emergency situation, was not inconsistent with other aspects of international law, and was not applied in a discriminatory way. Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted" (p.110).

ians, shall not be the object of attack. It also proscribes punishments inflicted without proper judicial guarantees relating to fair trial and due process[68]. Whereas under IHLR the nonderogable rights are essentially prohibitive provisions[69], IHL includes detailed and express rules regarding positive obligations of the State, e.g. to ensure that the wounded and sick "shall be collected and cared for". It is also noteworthy that the 1951 Refugee Convention itself draws directly on IHL, not IHRL, concepts in setting out its criteria underlying its exclusion clauses at Art 1(F). That this is so is further underlined by various provisions of the 1979 UNHCR Handbook dealing with these clauses (paras 144-163 and Annexes V (Excerpt from the Charter of the International Military Tribunal) and Annex VI (International Instruments Relating to Art 1 F(a) of the 1951 Convention).

4. THE CLASSIFICATION OF ARMED CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW (IHL)

Having established in principle that IHL norms should be applied to refugee-decision–making in civil war and armed conflicts situations, the question remains as to whether they furnish a coherent and sufficiently clear framework of reference. To answer it is necessary to take note of the proscriptive character of IHL as well as addressing two of the principal arguments against greater use of IHL norms in refugee determination.

IHL proscribes in bare outline a variety of forms of conduct as impermissible and, in the course of so doing, enumerates the circumstances in which the conduct of hostilities, including the use of weapons, will give rise to violations of international humanitarian law norms. IHL applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for initiating the conflict. IHL is thus a compromise between military and humanitarian requirements. Acts of war are permissible if they are directed against military objectives. Against this background, IHL dictates that a belligerent may only apply the level of and kind of force necessary to defeat the enemy. IHL imposes the duty in all military operations to distinguish between military objectives, on the one hand, and civilians and civilian objects, on the other. It prohibits the use of weapons, projectiles or materials of a nature to cause unnecessary suffering.

Doubtless why refugee law has fought shy of applying IHL norms to refugee determination has been the latter`s seeming lack of a unified structure and secondly the latter`s reputation as "soft law", honoured more in the

[68] See also Art 130 of Geneva Convention II and Art 147 of Geneva Convention IV. See further Oraa, op.cit. pp.202-206.

[69] Albeit they have been construed as giving rise to positive obligations, see e.g. on right to life under the ECHR, *McCann v UK*(1995) 21 EHRR 97 ECtHR.

breach than in the enforcement.[70] Yet insofar as these norms relate to refugee determination, neither reason is apt. *Whilst there is no single set of IHL rules covering all types of conflict, it is possible - as shall be demonstrated - to identify and spell out a set of universally applicable minimum standards.* Weak implementation is a major problem, but it is not one which dilutes their validity as international standards against which to assess the seriousness of harms facing asylum-seekers and to gauge whether they face them on account of 1951 Convention grounds.

To what extent does IHL yield a coherent classification framework? The current IHL classification of armed conflicts is not straightforward. This is due at least in part to a concern that the characterisations given to armed conflicts takes sufficient cognisance of the variations in the way such conflicts are fought on the ground. Conflicts fall into five categories:

i) traditional international armed conflicts: These are defined in common Art 2 as "all cases of declared war or any other armed conflict between two or more High Contracting Parties, even if the state of war is not recognised by one of them". This provision also applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". The Fourth Geneva Convention deals in detail with occupation and the treatment of the inhabitants.

ii) armed conflicts in the context of racist and colonial regimes and alien occupation: Art 1(4) of the Additional Protocol I of 1977 expanded the concept of international armed conflict described in common Art 2 of the 1949 Conventions to include "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

iii) armed conflicts between a State and organised armed groups under responsible command: Additional Protocol II applies a limited range of international standards to situations of internal confrontation that reach a certain level of intensity. However, its obvious application to civil wars is limited by the requirement that it only cover conflicts where the organised armed groups meet the criteria of responsible command, control over territory and capacity to implement the Protocol.[71]

[70] See Geoffrey Robertson, Crimes Against Humanity: the Struggle for Global Justice, Allen Lane The Penguin Press 1999 ch.5 on War Law which begins with a quotation from Bert Rolling, The Law of War and National Jurisdiction since 1945 (Hague Academy, Recueil des Cours, 1960)p.445: "The road to hell is paved with good Conventions".

[71] Additional Protocol II, art.1(1), i.e. conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed

iv) Common Article 3 conflicts under the 1949 Conventions (on which see further below).

v) riots, internal disorder and tensions subject to national law and minimum international law standards (the "internal strife threshold"): This final category marks as it were the threshold below which common Art 3 does not apply, because the level of internal violence is insufficiently high .

Albeit this five-fold classification is not simple, it is possible for refugee law purposes to simplify its applicable provisions in the following way. *Whenever internal armed conflict is above the internal strife threshold, it is subject to the peremptory norms set out in Common Art 3. More extensive norms may apply in the case of conflicts falling within the first three categories.*

It is therefore relatively easy to treat certain fundamental core provisions of international humanitarian law as part of the corpus of public international law applicable to refugee determination procedures, in particular Common Article 3[72] but also Articles 4[73], 13[74] and 14[75] of Protocol II to the Geneva

groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol!".

[72] Common Art 3 of each of the four Geneva Conventions of 1949 sets out the minimum conduct of each party to an armed conflict of a non-international character in all circumstances of the conflict as follows: "3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.".

[73] All persons who do not take a direct part of who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
collective punishments;
taking of hostages;
acts of terrorism;

Convention Relative to the Protection of Civilian Persons in Time of War of 12 August, 1949[76].

IV

1. THE RELEVANCE OF IHR NORMS TO THE CORE ELEMENTS OF THE REFUGEE DEFINITION

Armed with a clearer picture of the rules of IHL applicable to contemporary civil wars and armed conflicts, it is now proposed to examine how such norms should inform the assessment of refugee status in relation to the core elements of the definition. Pivotal to this examination are the analyses set out in recent leading cases identified earlier[77]. It is useful to follow recent United Kingdom and New Zealand decisions[78] in simplifying the main core elements (apart from the need to show a Convention ground) in terms of the following formula: Serious Harm + Lack of State Protection = Persecution.

outrages on the personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
slavery and the slave trade in all their forms;
pillage;
threats to commit any of the foregoing acts.
3. Children shall be provided with the care and aid they require, and in particular:
...
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;...

[74] Article 13 relates to the protection of the civilian population – e.g prohibits civilians be the object of attack.

[75] Relating to the protection of objects indispensable to the survival of the civilian population, such as agricultural areas for the production of foodstuffs, and drinking water installations.

[76] Avril McDonald, "Introduction to International Humanitarian Law and the Qualification of Armed Conflicts in Peter J van Krieken, Refugee Law in Context: The Exclusion Clause at pp. 84-5 summarises the current law applicable in non-international armed conflicts as consisting in Common Art 3 of the 1949 Geneva Convention; Protocol II of 1977 Additional to the Geneva Conventions of 1949; The provisions of the 1954 Cultural Property Convention which relate to respect for cultural property; the 1997 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; Amended Protocol II of 1996 to the 1981 Certain Conventional Weapons Convention; The Chemical Weapons Convention; The Landmines Treaty, together with the prohibitions of crimes against humanity and genocide and some customary international law.

[77] Refugee Appeal No 71462/99 given on 27th September 1999 and the reference therein to *Adan v. Secretary of State for the Home Department* and *Minister for Immigration and Multicultural Affairs v. Abdi.*

[78] Horvath v Secretary of State for the Home Department judgment of 6 July 2000 to be published in W.I.R. and All E.R. ; NZ decision of 16 August 2000 Refugee Appeal No. 71427/99.

In general, IHL as well as IHRL helps elucidate what harms feared are sufficiently serious to constitute persecution. Both help map out the dividing-line between forms of conduct which are persecutory and those which are not, by reference to internationally permissible and impermissible forms of conduct. However, only IHL delineates in detail these dividing-lines in relation to armed conflicts and civil war[79].

Recognition of the relevance of IHL norms to civil war and armed conflict cases, does not mean that it is necessary to apply them in the case of every claimant from a country facing civil war. Obviously some claimants from a war-torn country may be able to show that they would face persecutory harm, e.g. a basic attack on their nonderogable human rights unrelated to the civil war, because for example of a government`s dislike of a particular religious or ethnic grouping. Such cases can be determined – and indeed many are determined - within normal parameters and without reference to any IHL framework, although one would expect that in general country terms, the backdrop of civil war will often require questions to be raised about the IHL context when assessing risks .

However, in many other cases it will be relevant, indeed necessary, to examine whether there is a real risk of persecutory harm by reference to the likely position the claimant would find himself/herself in relation to the ongoing civil war or armed conflict. His or her only objective fear may be that as a civilian he or she would face return to an area where one or more sides in the conflict are deliberately attacking the civilian population, contrary to Art 13(2) of Protocol II to the CCPTW49. Or the only basis of his/her claim may be fear of return to an area in which starvation of civilians is being deployed as a method of combat, contrary to Art 14 of this same instrument. In such circumstances application of IHL norms demonstrate that (s)he faces a real risk of serious harm simply by virtue of being a civilian. In this example IHL norms help distinguish between cases in which the requirement of individual

[79] In the *Tablada* case IACHR Report No 55/97, Case No.11.137, Argentina, OEA/Ser/L/V/II.97, Doc.38, October 30, 1997, the Inter-American Commission on Human Rights held that it should apply IHL because this enhanced its ability to respond to situations of armed conflict. It found that the American Convention, although formally applicable in times of armed conflict, was not designed to regulate situations of war and did not contain rules governing the means and methods of warfare. At para 161 it noted: "[B]oth common Art 3[of the 1949 Geneva Conventions] and Art 4 of the American Convention protect the right to life and, thus, prohibit, inter alia, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission`s jurisdiction. But the Commission`s ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Art 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations". For a critique of this case see Liesbeth Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case, International Review of the Red Cross no 324, p.505-511.

risk is essential and cases where (because of the nature of the IHL violations involved) individual risk does not have to be shown. To use a different phraseology, IHL norms can help distinguish between cases in which the personal nature of the risk must be shown and cases where it need not be shown - because the magnitude of human rights abuses directed against people because of their religious or ethnic identity etc., extends to severe violations of IHL norms.

Not all armed conflicts manifest a clear distinction between civilians and combatants. But where they do, IHL provisions help in determining whether the conduct of hostilities by combatants - or the authorities who direct them - is likely to stay within or outside international parameters. Clearly general country information will be a more important source of evidence than usual, in ascertaining whether for example acts or threats of violence by one side or another are legitimately directed at each others armies or whether, contrary to Protocol II Art 13, their primary purpose is to spread terror among the civilian population.

Obviously the characterisation of particular conflicts going on around the world today must be done in the context of objective general country information. This is particularly important if the assessment of a refugee claim is not to be reduced to a "lottery" dependent on what factors of relevance to the characterisation of a particular situation are deemed to be pertinent and relevant[80]. Such studies may not always be available (a point discussed further below) but where they are, they may not always be able to draw clear lines. But historical studies indicate that some civil wars largely conform with IHL norms, others do not. The American Civil War did, the Spanish Civil War did not, the civil war in the former Belgian Congo did, the civil war in the Yemen did not[81].

As with IHRL norms, IHL norms help establish dividing-lines. If a claimant is likely to take a direct part in hostilities, then he can no longer point to a violation of Art 13(2) of Protocol II and will not be able to rely on IHL norms unless he can show that as a combatant he would be forced against his will into committing or being party to the committing of breaches of IHL rules governing the situation of combatants. What is important is that there is a risk of the claimant suffering violations of human rights or international humanitarian law norms of sufficient degree and importance to constitute persecution. As explained in the Canadian Guidelines, the fact that the treatment feared by a claimant *arises from* the ongoing hostilities does not exclude the possibility that it could constitute persecution. Much will depend on the nature of the civil war or armed conflict in progress, a point made very forcibly in the Australian case of *Abdi* cited earlier[82].

[80] See below re the different approach adopted by the Australian Federal Court in *Abdi* from that taken by the UK in *Adan* in respect of the situation in Somalia.
[81] E.g. E.Firmage in Falk, The International Law of Civil War, 415 ff.
[82] See above n.3.

1.2 WELL-FOUNDED FEAR AND EFFECTIVE PROTECTION

Another core element of the refugee definition still to be examined is effective protection. It will be recalled that we earlier made use of the formula adopted in recent United Kingdom and New Zealand case law: Serious Harm + Lack of State Protection = Persecution[83]. Whether or not the test of effective protection is seen as part of the test of well-founded fear or as a separate test to be applied after a well-founded fear is made out[84], one would expect in general terms that a country afflicted by civil wars would be less able to protect its citizenry than a country enjoying peace. Curiously, however, some lines of refugee case-law have seen extreme types of civil war to be fatal to a claim to refugee status, on the basis that where there is a complete breakdown of state authority there can be no agents of persecution, since there is no state that is accountable[85]. Without entering into debate on the efficacy of these lines of argument, one can delineate at least five different types of situation, which cover a disorder/order continuum running from the complete absence of protection to protection in full.

1.2.1 Complete breakdown of state authority

Insofar as it arises under the protection test, this situation describes a country where protection is simply unavailable, by virtue of the absence of any group able to impose its authority on either part or whole of the territory[86]. It should be unnecessary in such a situation for a claimant to show in any specific way that he had tried to avail himself of the protection of his state or to have to justify why any attempt at availment upon return would fail.

1.2.2 Intermediate situation(s)

Here the defining feature is the presence of more than two groups able to exercise authority over a certain section of the population and in relation to a distinct area of territory. In such situations, protection will be rendered more difficult, both in terms of access to it and its durability, but it may nevertheless be both available and effective[87].

[83] Supra n. 75.
[84] For discussion see *Horvath* supra n.78.
[85] This question is discussed by the U.K. Court of Appeal in *Adan and Aitsegeur*[1999] Imm AR 521.
[86] This is the situation which was held to obtain in relation to the civil war in *Lebanon in Zalzali v M.E.I.*
[87] As recognised in *Zalzali* at p.615. In *Sami,Sami Qowdan v M.E.I*(F.C.T.D., no.A-629-92), Simpson, June 1, 1994 and *Saidi, Ahmer Abrar v M.E.I* (F.C.T.D., no. A-749-92) Wetston, September 14, 1993 the Court in each case upheld the Refugee Division's finding that protection was available in northern Somalia.

1.2.3 Classic Dual Power situation(s)

This covers situations in which there are two distinct sources of authority able to impose their will on a section of the population in relation to a distinct area of territory. Unless the evidence shows that one side or the other is likely to gain the upper hand[88], protection will still be difficult but more feasible in general terms, especially where the two sides have secure and demarcated areas of territory under their control.

1.2.4 One-sided situation (s)

Here armed conflicts continue but one side has decisively gained the upper hand and is thus on the one hand in a position to protect its own supporters but on the other hand to oppress its enemies more easily. Depending on whether a refugee claimant is from one side or the other, the answer to the protection question may be very different.

1.2.5 Protection in full

In this situation, exemplified by democratic states, the state is able to protect all its citizens. When the state is fully in control it can of course still fail to effectively protect its own citizens and some asylum claims bear out just this. But in principle this is the only situation in which there is the potential for complete protection.

In *Ward* the Supreme Court of Canada held that except in relation to the first type of situation, states must be presumed capable of protecting their citizens. For this presumption to be rebutted there had to be "clear and convincing " evidence of the state`s inability to protect. The IHL perspective demonstrates that in situations towards the complete breakdown end of the continuum it would be draconian to apply such a presumptive test. One-sided conflicts may give rise to one-sided protection.

Thus in analysing protection IHL norms are a useful, objective and sometimes a corrective reference-point. It remains that the test of effectiveness or sufficiency of protection is one that should be informed by international law standards[89], but in civil war situations as we have seen, the most relevant, pal-

[88] This issue also closely affects the assessment the viability of any internal flight alternative. The Canadian Guidelines at n.47 note that in *Irene, Steve Albert v M.C.I.*(F.C.T.D., no.IMM-6275-93), Rothstein, October 6, 1994, the Court in considering an IFA in an area controlled by one of the groups to the conflict, did not disagree with the applicant`s submission that the group was not internationally recognised, had lost territory, was not an established force in the country (Liberia) and the applicant could not reasonably claim protection from that group. In those circumstances, the Court rejected the Refugee Division1s finding that an IFA existed.

[89] See the U.K. case of *Debrah*[1998]INLR 383 at 385: "...we believe that it is indeed the responsibility of the decision-maker to ascertain whether the systems of domestic protection which are in place are *sufficient from the perspective of international law*". This was not disapproved in

pable and detailed set of standards are not international human rights norms dealing with core entitlements, but IHRL *and* IHL norms. What one will need to examine, for example, is whether the established authority is able to provide the claimant with protection from the acts prohibited by common Art 3 of the 1949 Convention or other relevant peremptory norms of IHL[90]. If for example a claimant under the age of 15 years faces conscription or enlistment into armed forces or groups using them to participate actively in hostilities, the lack or protection is established by reference to the fact that such a prospect, being defined in IHL as a war crime, would disclose a plain failure of the state to protect its citizenry under the age of 15.

1.3 Whether persecution is based on a Convention ground

As is evident from the earlier analysis of the "differential risk" approach and the "non-comparative approach", it is plain that the divisions turned largely on the issue of Convention grounds. In this regard as well, it is possible to utilise IHL norms to overcome the main differences between the two and also, once again, to reformulate some of the guiding principles. This devolves initially into pointing out the common ground between two approaches. The following propositions would seem to be accepted by both.

i) If a person facing return to a civil war or armed conflict situation is *individually* targeted by reason of his race, political opinion etc. then his claim may well succeed.

ii) However, he may still qualify even if he is targeted not individually, but *collectively*. Really this proposition is just one particular expression of the more general principle that a claimant does not have to show that he or she will be "singled out" for adverse attention. But in civil war cases it will often be central as it is in the nature of war and "generalised violence" that acts of violence are often directed against groups, such that individuals are attacked not for who they are individually, but by virtue of their perceived membership of a group[91].There may be situations where all persons on either side of the conflict in questions may be at risk of persecutory harm for a Conven-

Horvath v Secretary of State for the Home Department (HL) judgment of 6 July 2000 to be published in W.L.R. and All ER.

[90] See Canadian Guidelines (op.cit.) n. 39 and references therein to *M.E.I v Villafranca* (1992),18 Imm, L.R.(2d) 130 (F.C.A.); *Velarde-Alvarez v S.S.C.*(1995), 27 Imm. L.R.(2d) 88(F.C.T.D.); *Bobrik, Iouri v M.C.I.*(F.C.T.D., no. IMM-5519-93), Tremblay-Lamer, September 16, 1994, *Smirnov v. S.S.C.*[1995] 1 F.C. 780(T.D.).

[91] In *Adan* [1998]INLR 325, approving *Salibian v Canada* (Minister of Employment and Immigration)(1990) 3 FC 250, and an earlier English High Court judgment in *ex parte Jeyakumaran* [1994] Imm AR 45, QBD, the House of Lords held that it was not necessary for a claimant to show that he is more at risk than anyone in his group if the group as a whole is subject to persecution because the 1951 Convention encompassed the persecution of groups as well as individuals.

Do these definitions help, however, with the scenario where there is (as it were) a multiplicity of intentionally directed attacks against one or more other groups? It is important to ask this question because, as noted earlier, a frequent conclusion reached by those who adopt the "differential risk" approach is that in such circumstances there can be no Convention ground. The reference to the IHL framework highlights the dilemma involved in any conclusion that in a civil war all are equally at risk. IHL norms indicate that one cannot invoke such a conclusion when the evidence shows that the civil war in question involves widespread or systematic "crimes against humanity". In such a context the notion of the "normal incidents of civil war" has little or no place. In such a context the incidents of civil war are heavily laden with malice aforethought. [98].

1.3.2 The internal strife threshold

Different types of IHL helps in another way to delineate the *limits* under both the "differential analysis" approach and the "non-comparative" approach towards Convention reasons in situations where there are atrocities on a significant scale but where the perpetrators are insufficiently organised. In the Rome Statute treatment at Art 8 of war crimes insofar as they related to armed conflicts not of an international character, the Statute notes at Art 8(2)(f) that this treatment "applies to armed conflicts not of an international character, and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups[99].

In the light of the foregoing analysis, it is possible to redraw in basic outline the dividing lines between two basic types of civil war or armed conflict.

A. One concerns those in which the dangers facing the claimant do not entail exposure to genocide, crimes against humanity, war crimes and crimes of aggression.

In such situations the claimant will not succeed in showing a Convention ground where the well-founded fear amounts simply to being caught up in fighting or in a danger of injury from landmines or in exposure to the danger of a lack of basic necessities (food, water, electricity, heating, medical treatment etc.). Neither will rape or detention or ill-treatment show a Convention ground if such incidences are simply random.

[98] It would not, however, seem necessary in all circumstances for crimes against humanity to be committed with a discriminatory intent, although it is necessary for the *crime* of persecution as defined in the Rome Statute; see Herman von Hebel, "Crimes Against humanity Under the Rome Statute" in Peter J Van Kreiken(ed) Refugee Law in Context: The Exclusion Clause,pp.105-118 at 108.

[99] Although there is no comparable proviso made to the definition of crimes against humanity, the latter's emphasis on attacks that are systematic and organised create analogous limitations.

B. However, a claim *will* succeed in showing a Convention ground if the fighting involved is marked by organised attacks on particular civilian populations or the landmines are being put in the area as part of measures to direct these weapons against the civilian population, contrary to Art 3(2) 1980 Mines Protocol. In the same way, a claim based on lack of basic necessities will show a Convention ground if the risk is of starvation of civilians as a method of combat, contrary to Art 14 of Protocol II. The danger of rape will also show a Convention ground if the evidence shows it is being used, for example, as an organised strategy to demoralise the enemy. So will detentions if they are used as part of a systematic campaign to terrorise the civilian population. Ethnic cleansing, by its very nature, represents a deliberate policy directed against an enemy for racial or ethnic purposes.

In short, what differentiates the two situations is not so much the precise types or violence or instruments of violence (e.g. bombing, land-mines); it is rather the amount and kind of force involved and the intentions of the parties who are using force. Typically the violence involved is not just incidental and may even, in some situations, be structural[100].

Summarising the survey of core elements of the refugee definition, it can be seen that recourse to IHL norms should not only be an essential step in civil war and armed conflicts cases. It can also serve to overcome specific divergencies in leading cases as between one country and another and also to help ensure that refugee law does not become an isolated *lex specialis* on the outer margins of public international law. Under the approach adopted here, application of IHL norms does not require any choice between a differential risk analysis or one based on a wholly non-comparative analysis. Both can be redeemed so as to overcome their main drawbacks by making more direct and fuller reference to international humanitarian law norms and applying in particular the IHL characterisation of armed conflicts.

2. NATURE OF THE INQUIRY TO BE UNDERTAKEN

What implications does the foregoing have for the nature of the inquiry to be undertaken in refugee cases concerning applicants from areas of hostilities? Can more practical guidelines be given as to what questions should be raised?

The views expressed in *Minister for Immigration and Multicultural Affairs v. Abdi* [101] on this question are instructive. The Court was unequivocal in holding that the decision maker is required to look behind the hostilities and consider the objectives of the war being waged. The underlying causes should

[100]Structural violence has been defined as "violence committed on behalf of or with the support of a social structure such as apartheid or systematic discrimination against a minority," Everett M. Ressler, Children in War: A Guide to the Provision of Services,UNICEP, New York 1993,p.20 cited by Goodwin-Gill and Cohn op.cit.,p.32 n.23.

[101] (1999) 162 ALR 105 (FC:FC)

be identified. It had to be asked, was the war being waged with a view to securing power, property and/or accessing resources or are individuals and groups of individuals being targeted on grounds of race, religion or group membership? In other words are they being targeted for a Convention ground? As well as evaluating the reasons for the war the inquiry had also to examine the way hostilities are conducted and the objectives which are sought. The responsibility incumbent on the decision maker "cannot be curtailed by a conclusion that there is a state of war." [102]

On the basis of the groundwork set out in this paper, it is possible to build on the insights of *Abdi* and elaborate a checklist for refugee decision-makers when examining claimants fleeing from hostilities. Its contents is not definitive. However, it is proposed as a starting-point that at least a certain number of questions be asked under the following heads:

- *IHL compliance.* Is the harm feared persecution as understood in the light of objective international standards as prescribed not only in international human rights instruments but also in the fundamental principles of international humanitarian law?
- *Nature of the civil war or armed conflict as viewed in the light of the IHL classification of armed conflicts.* What is the context of the fear of persecution? Is it related to the civil war? What are the reasons why the parties are fighting each other? Is the civil war specifically targeting a particular group? How is the civil war in question to be characterised in terms of the IHL classification of armed conflicts?
- *The availability of state protection in the context of the nature of the armed conflict.* At what point along the continuum of disorder/order can the conflict be located? Is it such that protection will ipso facto unavailable to the claimant or the claimant's group? Or is there an alternative authority capable of providing protection? Or is the situation one in which it can still be presumed that the state can protect all its citizenry?
- *Nature of the Convention grounds and whether they disclose the incidence of international crimes* (war crimes, crimes against peace, crimes against humanity etc.). Is there a nexus between the fear of persecution and one or a combination of the grounds enumerated in the Convention? In this context factors to be considered should include the persecutor's intention, the degree of proportionality between the objectives sought and the means deployed and the impact of the persecutor's actions on the claimant or his/her group Is the persecutor's intention of a type which would bring it within the scope of either war crimes, crimes against humanity or crimes against peace? Or is it random violence that does not cross the "internal strife" threshold?
- *The impact of the civil war or armed conflict on the possibility of an internal flight alternative (IFA)?* In a civil war situation factors relevant to such an assessment will not only include the stability of the infrastructure,

[102] *Ibid* para [37]

economy and governing authority in the IFA region. Also relevant will be the extent to which the alternative site of protection is not likely to become the theatre of atrocities committed against the other side. Particularly crucial also may be questions of access: if a claimant needs to travel across his strife-affected country to get to the IFA region, how safe is it for him to do so if, for example, he has to negotiate cross-fire or landmines. Paragraph 91 of the Handbook specifies that in situations of ethnic clashes or grave disturbances involving civil war conditions a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country if in all the circumstances it would not have been reasonable to expect him to do so[103].

As already highlighted these do not purport to be a list of all the relevant IHL questions which refugee decision-makers will have to make. Neither does the reference to such a list lessen the burden of proof on the claimant demanded under the Convention. But it would more effectively ensure that those who can demonstrate a real risk of persecution for a Convention reason, notwithstanding the existence of a civil war, are afforded the protection of the Convention.

2.1 General country information and IHL issues

It is necessary to acknowledge before decision-makers can fully adopt and utilise the IHL framework advocated in this article a number of practical obstacles will have to be overcome. One is the chronic difficulty in obtaining reliable general country information. As was noted in the New Zealand case cited earlier,

> "... the very nature of civil war situations will often preclude access to the facts .... More often the decision-maker will, of necessity, be forced to make a broad and general assessment".[104]

The burden of proof remains with the claimant to demonstrate through credible and reliable evidence that Convention refugee status is warranted. But it may be that in civil war situations more weight has to be attached to the UNHCR Handbook guideline at paragraph 196 that:

> "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application".[105]

Obviously relatively up-to-date information can often be gleaned from country reports produced by *inter alia* the U.S. State Department, Human Rights Watch and Amnesty International. However these reports are largely mod-

[103] For further discussion of the IFA, see H.H. Storey, supra n.8 and also case reference at n.87.
[104] Refugee Appeal No. 71462/99 at para [51].
[105] UNHCR Handbook para 196

elled around the standard state-monitoring analyses confined to human rights indices of performance.

In terms of the analysis undertaken in this article, reports in this human rights format have serious lacunae from the point of view of refugee decision-makers. This is not a criticism of the reports themselves; obviously they are written for purposes unrelated or obliquely related to the needs of refugee decision-makers. It may be that the current IHL lacunae need to be filled by a separate or supplementary "Red Cross" – type report.

In any event what is required in substance is a readily accessible internationally authoritative checklist against which a country's compliance with the *minimum international humanitarian standards* could also be readily assessed. Just as such reports currently evaluate and classify by reference to human rights indices (e.g. rule of law, freedom of religion, assembly, expression etc.), so there is a need for reports that can identify, e.g. what type of armed conflict is involved by reference to the five-fold IHL classification (see earlier). There would remain, of course a need for regular updates particularly on those areas of the world in "strife" and turmoil.

THE CRIMINALITY PERSPECTIVE

Erik Møse*

1. INTRODUCTION

1. Both Human Rights Law ("HRL") and International Humanitarian Law ("IHL") contain a comprehensive set of international norms. The legal sources are mainly conventions and customary law. In relation to HRL, the task of international organs is to establish whether States implement at the national level their legal obligations to respect and ensure human rights. The main issue is the responsibility of States and whether there are within their jurisdiction violations of human rights.

2. Written and unwritten rules in the field of IHL also lay down obligations for States. However, as the organisers have asked me to address the "criminality perspective" of IHL, the present paper will focus on the criminal responsibility of individual perpetrators. Such responsibility can be established by national and international courts. In this context, focus should be on international responsibility. Following the developments since the Nuremberg and Tokyo Tribunals, there are now two United Nations *ad hoc* Tribunals in full activity, and the new International Criminal Court is soon to be a reality.

3. By Resolution of 827 (1993) of 25 May 1993, the Security Council of the United Nations established the International Criminal Tribunal for the former Yugoslavia ("ICTY") to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[1] The ICTY's mandate covers offences of Grave Breaches of the 1949 Geneva Conventions (Article 2 of its Statute), Violations of the Laws or Customs of War (Article 3), Genocide (Article 4) and Crimes against Humanity (Article 5). So far, the ICTY has rendered 12 judgements against individuals after trials and four after appeal. Two individuals pleaded guilty. No one has been convicted for Genocide.

4. In the year following the creation of the ICTY, in Resolution 955 (1994) of 8 November 1994, the Security Council expressed its grave concern at the reports indicating that genocide and other systematic, widespread and

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[1] This includes, for instance, events which occurred in Kosovo in 1999.

flagrant violations of international humanitarian law had been committed in Rwanda. Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, and having received a request from the Government of Rwanda to this effect, the Security Council, under Chapter VII of the United Nations' Charter, established the International Criminal Tribunal for Rwanda ("ICTR").

5. The ICTR is mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994. More specifically under its Statute, the ICTR deals with violations of Genocide (Article 2), Crimes against Humanity (Article 3) and Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4). To date the ICTR has rendered seven judgements, and convicted eight persons. Each judgement represents an important stepping-stone in the development of international criminal and humanitarian law.

6. Discussions are underway between Member States of the United Nations as regards the creation of special courts mandated to prosecute individuals responsible for violations of IHL in Sierra Leone and Cambodia.[2] These tribunals, unlike the ICTY and the ICTR, would be "mixed courts". Their Chambers would be constituted of both national and international judges, and the applicable laws would cover national legislation and IHL. Moreover, in East-Timor, the UN has set up a transitional administration (UNTAET) which has overall responsibility for the administration of East Timor. It is empowered to exercise legislative and executive authority, including the administration of justice. The UN has dispatched a number of personnel to investigate violations of IHL and human rights which occurred in 1999.

7. An important event occurred in the summer of 1998, when Member States overwhelmingly voted in support of the treaty establishing the permanent International Criminal Court ("ICC"). Its Statute, commonly known as the "Rome Statute", has to date been signed by 114 countries.[3] The ICC will be operational once 60 States have ratified it. So far, 21 States have deposited their instrument of ratification with the Secretary-General.

8. The ICC will have jurisdiction over individuals, not States, who violate norms of IHL, such as genocide, war crimes, and crimes against humanity, including widespread killing of civilians, torture and mass rape. Unlike the ICTR and the ICTY, its mandate is not geographically limited, but the Court's jurisdiction only extends to crimes committed after the entry into force of the Statute for the State concerned.

[2]For Sierra Leone, see *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (UN Doc. S/2000/915).

[3]Calls for a permanent international criminal court originated shortly after Nuremberg. Lengthy negotiations followed after the adoption of the Genocide Convention of 1948, in particular in the International Law Commission.

9. Below follows an overview of the development of international criminal responsibility and some illustrations from the vast jurisprudence in the field of IHL, with specific reference to the case law of the ICTR (see II and III). An attempt will then be made (IV and V) to illustrate how the Statutes of the Tribunals and case law may be of relevance in the decision making process under the Convention Relating to the Status of Refugees of 1951 ("the Refugee Convention").

2. DEVELOPMENT OF INDIVIDUAL CRIMINAL RESPONSIBILITY

10. The ICTY and the ICTR have confirmed that international customary law entails that persons are individually liable for violations of international humanitarian law covered by the Tribunals' respective jurisdictions. However, in December 1994, this question was yet to be resolved as regards breaches within internal armed conflicts, and as such formed the basis of extensive discussions both during the creation of the ICTR and in early jurisprudence of the two Tribunals.

11. On 3 December 1994, the Commission of Experts on Rwanda transmitted its final report to the Secretary-General of the United Nations. The Experts presented their conclusions on the evidence of grave violations of international humanitarian law, including genocide, committed in Rwanda in 1994.[4] In their report, the Experts noted that the attribution of responsibility to the individual is not entirely new and that "military trials of individuals for war crimes dates back to at least 1419". After recalling the advances made, thanks to the Nuremberg Tribunal, they concluded that "[t]he principle that the individual shall be held responsible for serious violations of human rights, firmly enforced by the Nuremberg Tribunal and today universally recognized by the international community, is the same principle that guides the operation of the International Criminal Tribunal for the former Yugoslavia and of the present Commission of Experts on Rwanda [...]".[5]

12. By contrast, the Secretary-General, in his report on practical arrangements for the effective functioning of the ICTR, was not convinced that the principle of individual criminal responsibility was universally recognised for

[4]See *Letter from the Secretary-General to the President of the Security Council transmitting the final report of the Commission of Experts* (UN. Doc. S/1994/1405, 9 December 1994). Annexed thereto is the *Final report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*. The Commission of Experts had been requested by the Secretary-General, on the basis of the terms of reference set out in Security Council Resolution 935 (1994), *inter alia*, to review and update information from all sources; to carry out its own investigations in Rwanda; to draw its own conclusions concerning evidence of specific violations of international humanitarian law and in particular acts of genocide; and to determine whether and to what extent certain individuals might be held responsible for having committed those violations.
[5]*Ibid*, Annex at 169-172.

all violations of international humanitarian law said to have occurred in Rwanda. In particular, as regards the inclusion of violations of Article 3 common to the four Geneva Conventions, as more fully elaborated in Article 4 of Additional Protocol II, the Secretary General noted that:

> "[...] the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions."[6]

13. In a footnote to the above statement, the Secretary-General added:

> "Although the question of whether common article 3 entails the individual responsibility of the perpetrator of the crime is still debatable, some of the crimes included therein, when committed against the civilian population, also constitute crimes against humanity and as such are customarily recognized as entailing the criminal responsibility of the individual."[7]

14. The position in February 1995 was therefore that individuals could generally, as a matter of custom, incur individual criminal responsibility for violations of international humanitarian law, as originally stated by the Nuremberg Tribunal. However, doubt subsisted as regards common Article 3 and Additional Protocol II.

15. On 2 October 1995, in the *Duško Tadic* case, the ICTY Appeals Chamber ruled on the question as to whether individuals incurred criminal responsibility for breaches committed in internal armed conflicts. [8] Its findings were limited to violations of common Article 3, Additional Protocol II not falling under the jurisdiction of the ICTY. The Chamber first recalled the conclusions at Nuremberg that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." It then ruled that, as regards, *inter alia*, violations of common article 3:

> "[...] they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition".

[6]See *Comprehensive report of the Secretary General on practical arrangements for the effective functioning of the International Tribunal for Rwanda, recommending Arusha as the seat of the Tribunal* (UN Doc. S/1995/134, of 13 February 1995) at 11-12.
[7]*Ibid* at Fn 8.
[8]*Prosecutor v. Duško Tadic a.k.a. 'Dule':* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" of 2 October 1995 before the Appeals Chamber, at 128–136.

16. The Appeals Chamber, after finding support for this proposition in international practice, national legislation designed to implement the Geneva Conventions, and UN Security Council Resolutions, concluded:

> "All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."

17. The question of whether individuals incurred individual criminal responsibility for breaches of Additional Protocol II to the Geneva Conventions was dealt with in September 1998 with the rendering by the ICTR of the *Akayesu* Judgement.[9] The Trial Chamber limited itself to making a finding specifically with respect to article 4 of Additional Protocol II, and did not rule on the Protocol as a whole:

> "Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law."[10]

18. The Chamber, finding the reasoning of the above ICTY Appeals Decision convincing, ruled that individuals, and not only States and Parties to a conflict, could be tried for serious violations of common article 3 and Additional Protocol II.[11]

3. SOME ISSUES ARISING FROM ICTR CASE LAW

19. So far, the ICTR has rendered the following judgements:

- On 2 September 1998, Jean Paul Akayesu, a *bourgmestre*/mayor was sentenced to life imprisonment, after full trial. The appeals are pending.
- On 4 September 1998, Jean Kambanba, the ex prime minister of the interim government in Rwanda from April to July 1994, was sentenced to life imprisonment, after a guilty plea. This sentence was confirmed by the Appeals Chamber on 19 October 2000.[12]
- On 5 February 1999, Omar Serushago, a businessman and *Interahamwe* leader, was sentenced to fifteen years imprisonment, after a guilty plea. This sentence was confirmed by the Appeals Chamber on 15 February 2000.[13]

[9] *The Prosecutor v. Jean Paul Akayesu* (Case No. ICTR-96-4), Judgement of 2 September 1998.
[10] *Ibid* at 610.
[11] *Ibid* at 615.
[12] Case No. ICTR-97-23.
[13] Case No. ICTR-98-39.

- On 21 May 1999, Clément Kayishema, a prefect, and Obed Ruzindana, a businessman, were sentenced to life and twenty-five years imprisonment respectively, after full trial. The appeals are pending.[14]
- On 6 December 1999, Georges Rutaganda, a businessman and second vice-president of the *Interahamwe za MRND*, was sentenced to life imprisonment after full trial. The appeals are pending.[15]
- On 27 January 2000, Alfred Musema, a director of a tea factory, was sentenced to life imprisonment after full trial. The appeals are pending.[16]
- On 1 June 2000, Georges Ruggiu, a broadcaster with *Radio Télevision Libres des Mille Collines* in Rwanda, was sentenced to two twelve year sentences to be served concurrently.[17]

20. Each of the accused mentioned above was found criminally responsible under Article 6 (1) of the Statute of the Tribunal, which states that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute, shall be individually responsible for the crime."

VIOLATIONS OF IHL

21. The judgements each represent a further development in the field of international humanitarian law. They have provided necessary precedents with the first interpretation of the 1948 Genocide Convention, with the application of the Geneva Conventions of 1949 and their Additional Protocol II of 1977 to the armed conflict which raged in Rwanda in 1994, and have produced more jurisprudence on crimes against humanity.

22. The *Akayesu* judgement presented the first legal definitions of the crimes of genocide[18], direct and public incitement to commit genocide[19] and complicity in genocide.[20] In the same case, a progressive approach was

[14]Case No. ICTR-96-5.
[15]Case No. ICTR-96-3.
[16]Case No. ICTR 96-13.
[17]Case No. ICTR-97-32.
[18]*Akayesu* Judgement at 520: "With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group."
[19]*Ibid* at 559: "In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication."
[20]*Ibid* at 545: " [...] the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though

adopted by the Chamber in including rape and sexual violence in the definition of genocide.[21]

23. In *Musema*, the Chamber defined the crime of conspiracy to commit genocide and held that an accused cannot be convicted of both genocide and conspiracy to commit genocide.[22]

24. In *Akayesu*, the Chamber proposed a definition for crimes against humanity as covered by Article 3 of the Statute of the ICTR.[23] The Trial Cham-

the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

[21] *Ibid* at 687-688: "The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute."

[22] *Musema* Judgement, in particular at 191: "The Chamber notes that the constitutive elements of conspiracy, as defined under both systems, are very similar. Based on these elements, the Chamber holds that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide". See also 198: "In the instant case, the Chamber has adopted the definition of conspiracy most favourable to Musema, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts. Such a definition is in keeping with the intention of the Genocide Convention. Indeed, the "*Travaux Préparatoires*" show that the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide. The converse implication of this is that no purpose would be served in convicting an accused, who has already been found guilty of genocide, for conspiracy to commit genocide, on the basis of the same acts."

[23] *Akayesu* Judgement at 578: "The Chamber considers that Article 3 of the Statute confers on the Chamber the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. This category of crimes may be broadly broken down into four essential elements, namely : (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the act must be committed as part of a wide spread or systematic attack; (iii) the act must be committed against members of the civilian

ber in the *Kayishema* and *Ruzindana* judgement favoured a similar definition.[24] It should be noted that unlike the ICTY, under the ICTR Statute, there is no requirement of an armed conflict, whether international or internal in character, for acts to constitute crimes against humanity. Instead, it suffices that it is established that there was a widespread or systematic attack against any civilian population.

25. Also in the *Kayishema* and *Ruzindana* Judgement, there are many *dicta* on the concept of cumulative charges and the overlap of the constitutive elements of genocide and crimes against humanity. The Chamber moved away from ICTY and ICTR precedents which all dealt with cumulative charges at the punishment stage. Instead, it found that "in the peculiar factual scenario in the present case, the crimes of genocide, extermination and murder [as crimes against humanity] overlap. Accordingly, there exists a *concur d' infractions par excellence* with regard to the three crimes within each of the four crime sites, that is to say these offenses were the same in the present case".[25] Consequently, the Chamber deemed it untenable in law to convict persons for genocide and crimes against humanity (extermination/murder) for the same set of facts. For the Chamber, such counts should be charged in the alternative.[26]

26. Both Article 3 common to the Geneva Conventions and Additional Protocol II have been found to be applicable to the conflict in Rwanda in 1994.[27] It has been stated that civilians could incur criminal responsibility for

population; (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds."

[24] *Kayishema* and *Ruzindana* Judgement at 574 and 575: "Pursuant to Article 3 of the Statute, the Trial Chamber shall have the power to prosecute persons for a certain number of crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The offences which constitute crimes against humanity when committed in such a context include, inter alia, murder, extermination, deportation, torture, rape, and other inhumane acts. Under this Article the Prosecution charged the accused only for three crimes: murder, extermination and other inhumane acts committed as part of a widespread or systematic attack against the civilian population on discriminatory grounds."

[25] *Ibid* at 647.

[26] *Ibid* at 648-650.

[27] *See* in particular the *Akayesu* Judgement at 621: "Evidence presented in relation to paragraphs 5-11 of the Indictment, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions". See also 627: "In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the

war crimes if they "were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts."[28] However, to date, no accused has been found guilty of war crimes under Article 4 of the Statute. In most cases the Prosecutor either failed to establish a nexus between the armed conflict and the culpable acts, or that there was a link between the accused and the "armed forces".

4. THE EXCLUSION CLAUSE

27. Turning now to fields where IHL may be of interest to decision-makers in refugee law, reference is first made to Article 1 (F) of the Refugee Convention. The provision reads as follows:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes [...]".

28. It is clear that where an international tribunal has convicted an individual for violations of IHL, Article 1 (F) will be applicable if that person applies for refugee status. However, the provision does not require that there be a judicial determination as to whether there have been breaches of IHL. Consequently, it may be useful to describe the procedure of bringing a suspect before the ICTR. This process starts with the submission, review and confirmation of an indictment.

29. Under Rule 47 (Submission of Indictment by the Prosecutor) of the Rules of Procedure and Evidence of the Tribunal ("the Rules"),[29] the Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the ICTR, shall prepare and forward to

one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment."

[28] *Ibid* at 631.

[29] On 29 June 1995, pursuant to Article 14 of the Statute, the Judges adopted Rules of Procedure and Evidence for the purpose of the conduct of the proceedings from the pre-trial stage to the appeals proceedings, including the admission of evidence and witness protection. These Rules can be amended by the Judges if agreed to by not less than ten Judges at a Plenary Meeting, or in writing by unanimity.

the Registrar an indictment for confirmation by a Judge, together with supporting material. In the indictment, the Prosecutor sets out the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

30. The indictment is presented to a Judge who examines each of the counts, and any supporting materials the Prosecutor may provide, to determine whether a case exists against the suspect. If satisfied, as required under Article 18 of the Statute of the Tribunal[30], that a *prima facie* case has been established by the Prosecutor, the Judge confirms the indictment. The Judge may then issue, at the request of the Prosecutor, such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

31. Although the exact meaning of a '*prima facie* case' is still subject to discussion, it represents a high standard, and, if it is satisfied, then the 'serious reasons' requirement under Article 1 (F) of the Refugee Convention will be met. A matter for discussion could be whether this requirement would also be met without there being an indictment so long as the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the ICTR.[31]

5. THE DEFINITION

32. Under Article 1 (A) of the Refugee Convention:

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

PERSECUTION

33. Leaving aside the issue of how to assess the "well-founded fear" of an individual, the question of what constitutes "persecution" is in itself important in the decision making process of granting refugee status to individuals. The UNHCR has given a wide definition of this term, stating that "[...] it may be inferred [from Article 33 of the Convention] that a threat to life or freedom on

[30]Annexed to Resolution 955 of the Security Council.

[31]See Goodwin-Gill G. S., *The Refugee In International Law* (2nd edition) at Chapter 2, section 4.1.2 where, in relation to Article 1 (F), it is stated that: "Excluded are those 'with respect to whom there are *serious reasons* for considering' that they have committed a crime against peace, a war crime or a crime against humanity, which has been interpreted to require a lower standard of proof on matters of fact than balance of probabilities."

account of race, religion, nationality, political opinion membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution".[32] National jurisprudence and international discussion have clarified the term further.

34. However, for the purposes of imposing criminal responsibility on an individual for acts of persecution in violation of IHL, any definition needs to be precise. This was recognised by the ICTY Trial Chamber in the *Kupreskic* Judgement when seeking to define persecution as a crime against humanity under Article 5 (h) of the ICTY Statute.[33] In so doing, the Chamber made reference to HRL precedents and to the 1951 Refugee Convention, yet stated that:

> "[...] It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of "persecution" is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here."[34]

35. Consequently, the Chamber relied primarily on rules of customary international law and general principles of international criminal law. Having cited precedents from Nuremberg, US Military Tribunals and the ICTY, the Chamber concluded that "persecution included crimes such as murder, extermination and determination" and that "a narrow interpretation of persecution, excluding other sub-headings of Article 5, is therefore not an accurate reflection of the notion of persecution which has emerged from customary international law". For the Chamber, the distinguishing element of persecution is that it is committed on discriminatory grounds.[35]

36. In the ICTR *Ruggiu* Judgement, the Chamber cited *Kupreskic* and ruled that radio broadcasts could also constitute persecution:

> "In *The Prosecutor v. Zoran Kupreskic*, the ICTY has summarized the elements that comprise the crime of persecution as follows: "a) those elements required for all crimes against humanity under the Statute, b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, c) discriminatory grounds.

[32] UNHCR Handbook at 51.

[33] *The Prosecutor v. Zoran Kupreskic*, Judgement of 14 January 2000 (Case No. IT-95-16-T) at 586-627.

[34] *Ibid* at 589.

[35] *Ibid* at 605–607. The other offences under Article 5 of the ICTY Statute are murder; extermination; enslavement; deportation; imprisonment; torture; rape; and other inhumane acts.

> The Trial Chamber considers that when examining the acts of persecution which have been admitted by the accused, it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself."[36]

37. The IARLJ conference may wish to discuss to what extent there really is any difference between the present IHL definition of persecution and that put forward in the UNHCR Handbook.

PROTECTED GROUPS

38. Under Article 1 (A) of the 1951 Convention the fears of persecution stem from the 'belonging' to one of the groups, rather than from the *persona* of the individual. Decision-makers in the field of refugee law may find it useful to take into account legal texts and case law in IHL, in particular concerning the constitutive elements of genocide and crimes against humanity.

39. The acts enumerated under Article 2 of the Statute of the ICTR may constitute Genocide if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[37] An individual can only be found guilty of genocide if, when perpetrating the culpable acts, he or she possessed the necessary *dolus specialis* to destroy such a group in whole or in part. The acts must be perpetrated against one or more persons, not because of their individual identity but because of the belonging to one of the four groups.[38]

40. One of the difficulties which faced the Trial Chamber in the *Akayesu* judgement was how and whether to define the groups enumerated under Article 2 of the Statute, there not being, on the face of it, agreement as to the set characteristics of each group. Rather than embarking upon the exercise of defining each of the groups, the Chamber noted:

> "On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its mem-

[36] *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement of 1 June 2000 at 21-22.

[37] The enumerated acts are: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

[38] *Akayesu* Judgement at 498-499.

bers, who belong to it automatically, by birth, in a continuous and often irremediable manner."[39]

41. For the Chamber, therefore, to define each group in itself was unnecessary. Rather, it was sufficient to find that which was common to all four, namely the stable and permanent nature of the groups. In its opinion, the generally accepted definitions of national, ethnic, racial and religious groups all presented this commonality.[40]

42. Under Article 3 of the Statute, for an offence to be considered a crime against humanity it must be committed against any civilian population on "national, political, ethnic, racial or religious grounds". The crime of persecution as a crime against humanity does not cover political or ethnic grounds. Whether someone belongs to a specific group and what constitutes a group receive less consideration under Article 3 of the Statute than under Article 2. Rather, the key element lies in intent, as "inhumane acts committed against persons not falling within any one of the discriminatory categories could constitute crimes against humanity if the perpetrator's intention was [...] to further his attacks on the group discriminated against one or more of the grounds mentioned in Article 3 of the Statute."[41]

6. NON-STATE ACTORS

43. It follows from Article 5 of the Statute that the ICTR's jurisdiction is limited to natural persons.[42] By restricting the competence of the ICTR to acts committed only by individuals, theoretically prevents the prosecution of not only States, but also non-State actors, such as para-military civilian "militias" and the media. As a consequence of this limitation, only individuals can been tried by the two Tribunals.

44. That said, the trial of individuals *per se* could also cast light on the responsibility of non-State actors. For example, the Judgement in the case of Georges Rutaganda, who was the second vice-president of the *Interahamwe za MRND*, being the official youth wing of the *Mouvement Républicain Na-*

[39] *Ibid* at 511.

[40] *Ibid* at 512–514: "Based on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. An ethnic group is generally defined as a group whose members share a common language or culture. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors. The religious group is one whose members share the same religion, denomination or mode of worship."

[41] *Akayesu* Judgement at 583-584. The issue of where lies the discriminatory element in crimes against humanity is still subject to discussion. See, for instance, on the one hand, the *Rutaganda* Judgement at 75-76, and, on the other, *The Prosecutor v. Duško Tadic*, Appeals Judgement of 15 July 1999 at 305.

[42] This provision is also found in the Statute of the ICTY.

tional pour le Développement et la Démocratie in Rwanda 1994, brought to the fore the role of the *Interahamwe*, before and during the 1994 massacres. Although the Chamber in its Judgement restricted its factual and legal findings to the specific acts of the accused, a number of statements can be found as to the role and structure of the *Interahamwe*.[43]

7. FINAL REMARKS

45. International humanitarian law is now in a period of development. Judicial bodies, for the first time in over 40 years, are again setting precedents. The interpretation of some of the key concepts within that field may also be of relevance to decision-makers in the area of refugee law. There is reason to believe that the relationship between humanitarian and refugee law will gradually become clearer. The discussions at the IARLJ Conference is one important step forward.

[43]For instance at paragraphs 439 and 440: "[...] The expert witness, Mr. Nsanzuwera, testified that the *Interahamwe* militia served two roles during April, May and June 1994, on the one hand, they supported the RAF war effort against the RPF, and on the other hand, they killed Tutsi and Hutu opponents. Moreover, as testified by Mr. Nsanzuwera, there is merit in the submission of the Prosecutor that, considering the position of authority of the Accused over the *Interahamwe*, and the role that the *Interahamwe* served in supporting the RAF against the RPF, there is a nexus between the crimes committed and the armed conflict. In support thereof, the Prosecutor argues that the *Interahamwe* were the instrument of the military in extending the scope of the massacres."

REFUGEE CLAIMS BASED ON VIOLATION OF INTERNATIONAL HUMANITARIAN LAW: THE "VICTIM'S" PERSPECTIVE

Bonaventure Rutinwa*

1. INTRODUCTION

Increasingly, refugee exoduses are occurring as a result of armed conflict. Especially in civil wars, refugees are forced to flee because of conduct that amounts to a violation of the humanitarian law of armed conflict. As recent research found out, "[p]erhaps by far the most important modern cause of refugee flows is civil wars and other forms of communal violence".[1] A question which has arisen as a consequence is whether victims of violent conflicts and civil wars are victims of "persecution" as interpreted by refugee law under Article 1A(2) of the 1951 Refugee Convention. This question has been given opposing answers both in judicial interpretations and academic discourses. Whether it has been answered positively or negatively seems to depend on the extent which one thinks the evolution of refugee law should be influenced by international criminal law.

Taking the "victims" perspective, this paper argues that claimants of refugee status fleeing armed conflicts and civil wars should be regarded as refugees within the meaning of the 1951 Convention. Three arguments are advanced. First, international humanitarian law and its international criminal law component proscribe and punish the causing of forcible population displacement itself as well as other conduct that forces people to flee in armed conflicts (such as war crimes and crimes against humanity). As such, it is illogical for refugee law not to protect the victims of those very same acts. Second, properly construed, the circumstances behind the flight of many refugees from situations of armed conflict would qualify the majority of them as refugees within the meaning of Article 1A(2) of the 1951 Convention. Third, assuming that the present content of the term "persecution" does not cover victims of civil wars, there is no reason why it should not be expanded to cover them.

* D. Phil, Oxon.

[1] B. Rutinwa, *Obligations of Countries of Origin and Third States in Refugee Situations under Public International Law*, a Thesis for the Degree of Doctor of Philosophy, Oxford University, Michaelmas 1999, p. 6 and Schmeidl, S., 'Causes of Forced Exodus: Five Principal Explanations in the Scholarly Literature and Six Findings From Empirical Research' in Schmid, A.P. (ed.), *Whither Refugees? The Refugee Crisis: Problems and Solutions* (1996) 15-43, 20.

2. PROHIBITION OF POPULATION DISPLACEMENT UNDER INTERNATIONAL HUMANITARIAN LAW NORMS

The term ` humanitarian law' has been defined as comprising "all those rules of international law which are designed to regulate the treatment of the individual - civilian or military, wounded or active - in international armed conflicts".[2] The purpose of humanitarian law is to minimize the humanitarian problems caused by armed conflict on individuals and property actually or potentially affected by armed conflict.[3] The principal sources of humanitarian law are custom and the Geneva Conventions of 1949[4] and the Additional Protocols of 1977[5], as well as earlier agreements, such as the Hague Conventions of 1907[6], and subsequent treaties such as the Inhumane Weapons Convention of 1980.[7] Within these sources, there are a number of rules which not only prohibit forcible population displacement, they also proscribe other conduct that could lead to such an eventuality before, during and even immediately after wars.

2.1 General Prohibition of Population Displacement in the Course of War

The Hague Convention IV concerning the Laws and Customs of War on Land of 1907 which contains a comprehensive codification of the conduct of land warfare does not contain provisions relating population displacement in the course of war. According to one authoritative commentary, "this was probably because the practice for deporting persons was regarded at the beginning of [the 20th] century as having fallen into abeyance".[8] Nevertheless, it is not unreasonable to argue Article 46 para. 1 of the Hague Regulations which provides that "family honour and rights, the lives of persons, and private property as well as religious convic-

[2]Greenwood, C., `Historical Development and Legal Basis' in Fleck, D., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1995) 1-38, 9. For expository works on humanitarian law see also Pictet J. (ed.), *The Geneva Conventions of 12 August 1949, Commentary* (1987); Pictet, J., *Development and Humanitarian Law* (1985); Meron, T., *Human Rights and Humanitarian Norms as Customary Law* (1989) and Green, L.C., *The Contemporary Law of Armed Conflict* (1993) esp. chapters 12, 15, 18 and 19.

[3]Zemmali, A., 'Reparations for Victims of Violations of International Law' in T. van Boven *et al.* (eds.), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1992) 61-74 and Meindersma, C., `Legal Issues Surrounding Population Transfers in Conflict Situations', *Netherlands International Law Review* XLI (1994) 31-83, 45.

[4]For text of the Geneva Conventions see Roberts A., and Guelff, R. (eds.), *Documents on the Laws of War*, (2nd ed. 1989) 169-337.

[5]For texts of the Protocols of 1977 see id., 387-468.

[6]For the Hague Conventions and Declarations see id., 35-135.

[7]For text of the Convention and the Protocol see id., 471- 489.

[8]Pictet, J. (ed.), *Commentary to the IV Geneva Convention Relative to the Protection of the Civilian Persons in Time of War* (1958) 279.

tions and practices... must be respected" offered general protection against deportation[9], for these rights can hardly be realised in situations of exile. Interpreting a similar but more expansive Article 27 para. 1 of the Fourth Geneva Convention, Greenwood does not expressly read in it prohibition of population displacement, which he regards as addressed elsewhere by the Conventions. However, some of the implications of this provision which he points out may have a bearing on the legality of forcible population displacement. For example, according to Greenwood, the family's right to protection, enshrined in that provision, includes the right of all family members to continue to live within the family unit. A typical feature of forced migration is the dispersal of families resulting from various members fleeing in different directions and some losing their lives. Similarly the requirement for manners and customs of the individuals to be respected which implies that "the adversary has no right to tear a civilian out of his or her social surroundings or to destroy those surroundings through fundamental alteration" [10] would inevitably be violated by forcible exile.

Perhaps the most comprehensive and specific prohibition of population displacement in the course of war is found under the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War. The basic prohibition is found under Article 49(1) which provides that

> individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Henckaerts notes the following salient features in Article 49(1): first, both transfers (i.e., relocation within the occupied territory) and deportations (i.e., relocation outside the occupied territory) are prohibited; second, unlike under human rights instruments, no distinction is made between individual and mass deportations; third, only "forcible" deportations are prohibited. This means deportations of voluntary nature are lawful; fourth, no distinction is made as to the destination of the deportees. Any deportation is forbidden, whether to the territory of the occupant or to any other country, occupied or not; fifth, if read in conjunction with Article 49(6), no distinction is made between deportation of enemy civilians and the transfer of nationals of the Occupying Power into the occupied territory; and, sixth, nothing can justify a deportation, except in certain evacuations which are in conformity with the provisions of Article 49(2).[11] Article 49(1) is complemented by Article 49(6) which prohibits the Occupying Power from deporting or transferring parts of its own civilian population into the territory it occupies.

There are two exceptions found under Article 49 para. 2, where total or partial evacuation of protected persons is permitted. The first is where "the security

[9]Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law* (1992) 55-57 and Meindersma, op. cit., 46.

[10]Gasser, H., "Protection of the Civilian Population" in D. Fleck, op. cit., 211-213.

[11]Henckaerts, J., *Mass Expulsion in Modern International Law and Practice*, (The Hague, Martinus Nijhoff, 1995) 144-145.

of the population" so requires. This exception is aimed at protecting the inhabitants of an occupied territory in situations where their lives would be endangered by military operations. Indeed, parties to a conflict have an obligation under Article 58 of the First Additional Protocol to the Geneva Conventions to "without prejudice to Article 49 of the fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives".

The second situation, where transfer of protected persons is permitted is when "imperative military reasons so demand". The purpose of this exception is to strike a balance between "the two counterveiling and guiding principles which lay at the heart of humanitarian law: humanity versus military necessity".[12] The general principle is that a belligerent should not apply an amount and kind of force that is more than necessary to defeat the enemy.[13] This principle is found under Articles 14-16 of the Lieber Code, as well as more modern official war manuals such as the United States Naval Commanders' Handbook, which provides that as a general principle of law,

> (1) Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with minimum expenditure of time, life and physical resources may be applied. (2) The employment of any kind or degree of force not required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources is prohibited." [14]

A similar provision is found under Article 120 of the Joint Service Regulation for the German armed forces of August 1992.

As a rule of construction, the notion of "military necessity" has to be narrowly interpreted because considerations of military necessity are already taken into account in framing the rules of humanitarian law. "A state cannot, therefore, be allowed to invoke military necessity as justification for upsetting that balance by departing from those rules".[15]

Even where there are grounds for invoking the exceptions, further conditions still apply. The same para. 2 of Article 49 provides that evacuations on account of security of the population or military reasons " may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement". In other words, the evacuees should not be removed from their normal residences to places farther away than is necessary. The same paragraph requires the persons evacuated to be transferred back to their homes as soon as hostilities in the area in question have ceased. This means that evacuation is lawful only if it is temporary. Permanent internal displacement and exile are prohibited.

The Hague Conventions and the Geneva Conventions are treaties and therefore are, in principle, binding only on parties thereto. However, many of their

[12]Meindersma, op. cit., 48.
[13]Greenwood, op. cit., 30.
[14]Quoted at ibid.
[15]Id., 33; Meindersma, op. cit., 48-49 and sources cited in ftnt. 58.

provisions reflect State practice before and after their adoption. For example, provisions relating to protection of civilians have their antecedents in Article 23 of General Order No. 100 of the U.S. Army, issued in 1863 which provided that "private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war". General Order No. 100, commonly known as the Lieber Code, was the first instance in Western history by a State to regulate its conduct towards civilians in the conduct of war.[16] The Lieber Code has had a great influence on the drafting of major instruments of humanitarian law, including the Hague Convention No. IV and the Geneva Conventions, as well as on customary international law.[17]

During the Gulf War, the United Nations Security Council passed several resolutions in which it affirmed the illegality of population displacement in the course of war, making specific reference the Geneva Conventions. In Resolution 647 of 29 October 1990 [18], the Security Council condemned the deportations of Kuwaitis to Iraq, while in Resolution 677 of 28 November 1990 the Security Council specifically condemned Iraq's attempt to change the demographic composition of Kuwait by combining deportation and relocation.[19] In Resolutions 670 [20] and 674[21] the Security Council reaffirmed the applicability of the Fourth Geneva Convention to the situation in Kuwait and required Iraq to comply with it.

At the time of their adoption, the Geneva Conventions of 1949 contained provisions which were declaratory of existing law as well as those which represented progressive development of the law. On the status of provisions of Article 49(1) then and now Professor Meron opines that:

> the central elements of Article 49(1), such as the absolute prohibition of forcible mass and individual transfers and deportations of protected persons from occupied territories stated in Article 49(1), are declaratory of customary law even when the object of setting of the deportations differ from those underlying German World War II which led to the rules set forth in Article 49. Although it is less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law.[22]

Henckaerts also takes the view that deportations were prohibited under the Hague Regulations and the prohibition became part of customary international law which was merely clarified in the Fourth Geneva Convention.[23] It is submitted that the views of these authors reflect the correct position of the law.

[16]Hartgan, R., *Lieber's Code and the Law of War* (1983) 1.
[17]Meron, op. cit., 49, ftnt. 217.
[18]29 *ILM* (1990) 1561.
[19]See id., 1564.
[20]Id., 1334-1337.
[21]Id., 1562, 1563.
[22]Meron, op. cit., 48-49 and Henckaerts, op. cit., 153.
[23]Henckaerts, op. cit., 153-154.

2.2 Population Displacement as a War Crimes and/or a Crime against Humanity

The *locus classicus* for the definition of war crimes and crimes against humanity is Article 6 of the 1945 Charter of the International Military Tribunal (IMT)[24], annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter). Article 6(b) of the Charter provided that "war crimes" "shall include violations of the laws or customs of war, but not limited to, namely, murder; ill-treatment or *deportation to slave labour or for any purpose of civilian population* ..."[emphasis added]. "Crimes against humanity" on the other hand were defined in Article 6(c) as "murder, extermination, enslavement, *deportation*, and other inhumane acts committed against any civilian population *before or during the war* ..." [emphasis added].[25] Under Article 5(b) of the Charter of the International Tribunal for the Far East,[26] "war crimes" were much more restrictively defined as "violations of the laws or customs of war" while the definition of "crimes against humanity" under Article 5(c) was the same as that found under Article 6(c) of the London Charter of the IMT.

During the trials before both international and national tribunals, it was argued by the defendants that there was no legal basis for regarding the acts they had been charged with as crimes and, accordingly, their trials had violated the principle of *nullum crimen sine lege* . The tribunals uniformly rejected this defence. In Fritz Sauckel's case, the IMT condemned the deportation of populations as a "defiance of well established rules of international law" and "a complete disregard of the elementary dictates of humanity".[27] The IMT also held that the acts declared as war crimes under Article 6(b) were also already recognised as such under international law. Accordingly, they were binding on all States whether or not they were party to the 1907 Hague Regulations.[28]
The status of crimes against humanity expressed in Article 6(c) of the Nuremberg Charter was considered in, among other cases, *United States v. Otto Ohlendorf*, in which the Military Tribunal said:

> Although the Nuernberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offence, this does not ... mean that a new offence has been added to the list of the transgressions of man. Nuernberg has only demonstrated how humanity can be defended in court, and it is inconceivable that with this precedent extant, the law of humanity should ever lack for a tribunal.[29]

[24]For text see Dinstein, Y., and Tabory, M. (eds.), *War Crimes in International Law* (1996) 379-397.
[25]On war crimes, crimes against peace and crimes against humanity see id., *passim.*
[26]Text in id., 399-406.
[27]1 *Trial of the Major War Criminals Before the International Military Tribunal* (1971) 227.
[28]Id., 253-245.
[29]4 *Trial of War Criminals* 499 (1949-53).

The Nuremberg principles were subsequently affirmed by the international community, including the recognition of crimes against humanity as crimes under international law.[30]

The provisions of humanitarian law which criminalize forcible population displacement in the course of war have been reinforced by a spate of instruments which include deportation and transfer of population in the category of "grave breaches" of humanitarian law. Under Article 147 of the Fourth Geneva Convention of 1949 , "unlawful deportation or transfer ... of a protected person constitutes a 'grave breach'". The term "grave breaches" under the Geneva Conventions carries more or less the same meaning as "war crimes" under customary and conventional law.[31] The equivalence between "grave beaches" and "war crimes" is confirmed by Protocol I to the Geneva Conventions. While Article 85(4)(a) of the Protocol describes deportation or transfer by the Occupying Power of all or parts of the population of the occupied territory within or outside the territory in violation of Article 49 of the Fourth Convention as a "grave breach," Article 85(5), makes any grave beaches outlined in Article 85(4) a "war crime".

Another relevant instrument is the Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991(the Yugoslavia Statute) [32] under which the competence *ratione materiae* of the Tribunals includes grave breaches of the Geneva Conventions, including unlawful deportation or transfer of civilians[33] and crimes against humanity, in which deportation is expressly mentioned[34]. Similarly, under the Statute of the International Tribunal for Rwanda[35], the jurisdiction of the Tribunal extends to crimes against humanity, including deportation[36]. Unlike its Yugoslavian counterpart though, the Rwanda Statute has no provision which grants the Tribunal jurisdiction over violations of the laws of war (war crimes). This reflects the generally accepted view which denies war crimes a place in internal conflicts.[37] However, unlike Article 5 of the Yugoslavia Statute, which restricts the competence of the Tribunal with respect to crimes against humanity to acts committed in armed conflicts of an international or internal character, Article 3 of the Rwanda Statute makes no allusion to the international or non-international

[30]See, e.g., Affirmation of the Principles of International Law Recognised by the Charter of the Nuernberg Tribunal, UNGA Res. 95(1), 16 February 1946 and Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, UNGA Res. 2712(24), 15 December 1970.

[31]Draper, G.I.A.D., "The Modernity of War Criminality" in: Dinstein & Tabory, op. cit., 141-182, 156-157.

[32]Adopted by the Security Council on May 25, 1993. S.C. Res. 827, 25 May 1993, 32 *ILM* 1203 (1993), Articles 2 and 5.

[33]Art. 2(g).

[34]Art. 5(d).

[35]Annex to S.C. Res. 955 (1994), 8 November 1994; Text in Statute of the International Tribunal for Rwanda, Annex, Article 3. Full text of the Statute in (1994) 6 *RADIC* , 670-682; Article 3.

[36]Art. 3(d).

[37]Meron, T., `International Criminalisation of Internal Atrocities' in (1995) 89 *AJIL* 554-577, 574.

character of the conflict. This, according to Professor Meron, "enhances the possibility of arguing in the future that crimes against humanity ... can be committed even in peace time".[38]

Commenting on the present status of grave breaches, Tomuschat writes:

> Notwithstanding the dearth of relevant practice - not to be taken for a total absence of such practice! - the requirements of customary law, as set out in Article 38(1)(b) of the Statute of the I.C.J. are met if the actual cases demonstrate that a broad and overwhelming consensus exists as to the lawfulness of the measures of prosecution taken by the State concerned. In fact, no discordant voices have ever been heard as a matter of principle in instances where persons were charged with, and convicted of, committing war crimes in the traditional sense as reflected in the Nuremberg rules and the four Geneva Conventions. [39]

However, as far as Article 85 of the 1977 Protocol 1 Additional to the Geneva Conventions is concerned, none of its provisions, with perhaps the exception of paragraph 3, can be said to be declaratory of existing customary law. [40] Indeed, in his explanatory report on the Yugoslavia Tribunal, the Secretary General of the United Nations refrained from characterising the entire Article 85 as one of the provisions declaratory of existing customary law.

Forcible population displacement has also been treated as a crime under two important documents produced by the International Law Commission namely the ILC Draft Articles on State Responsibility and the Draft Code of Crimes Against Peace and Security of Mankind. Article 19 of Part I of the former document introduces the concept of "international crimes" defined as follows:

> (2) An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole, constitutes an international crime.
>
> (3) Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia,* from
>
> (a) ...
>
> (b) ...
>
> (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid;*

In Article 19(3)(c) , "slavery, genocide and *apartheid*" are cited only for illustrative purposes and other acts could fall within this category of "international crime". According to Principle 4 of the International Law Association's Declaration of Principles of International Law on Mass Expulsion, "in view of the violation of all human rights of citizens who are expelled en masse, the acts of

[38]Id., 557.
[39]Tomuschat, C., "Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State" in: Dinstein & Tabory, op. cit., 41-63, 46.
[40]Ibid.

mass expulsion partakes of the attributes of 'international crime', with all the consequences that go with it".[41]

Article 1 of the Draft Code of Crimes against Peace and Security of Mankind provides that "the crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind". The crimes are defined in Articles 15-26. Notable in the context of this work is Article 21, which deals with "systematic or mass violations of human rights". The article includes in this category "deportation or forcible transfer of populations", irrespective of the context of such measures, be it in an armed conflict of an internal or international character or other situations of anarchy or disorder. Article 22(3) of the Code introduces a category of "exceptionally serious war crimes", defined as an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

> (a) acts of inhumanity, cruelty or barbarity directed against life, dignity or physical or mental integrity of persons [in particular willful killing, torture, mutilation biological experiments, taking of hostages, compelling a protected person to serve in forces of a hostile power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, *deportation or transfer of civilian population* and collective punishment. [emphasis added]

The most significant innovation of the Draft Code, according to Green, "is the clear affirmation [under Article 12] of personal liability of those who commit any of the acts declared to be criminal in the eyes of international law, together with the Nuremberg principles of liability of every person involved, regardless of status and the rejection of the defence of superior orders".[42] Article 12 also reiterates the principles with regard to the liability of a superior as found under Article 86 of Protocol 1, 1977 Additional to the Geneva Conventions of 1949.

Articles 1, 22(3) and 12 read together imply that forcible population displacement is a crime against peace and security of mankind and entails individual criminal responsibility of its perpetrators.

2.3 Population Displacement and the Crime of Genocide

The term "genocide" is defined under Article II of the Convention on the Crime of Genocide of 1948[43] as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

[41]See also Meindersma, C, `Legal Issues Surrounding Population Transfers in Conflict Situations' in (1994) XLI *NILR* 31-83, 74-76. But this view is not accepted by many other distinguished legal scholars. For a review of contracting positions see Rutinwa B., op. cit., 69-74.

[42]Green, op. cit. 30.

[43]Text in Evans, M.D., *International Law Documents*, (3rd ed. 1996), 36.

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

(d) forcible transfer of children of the group to another group.

The most important element in the above definition is the object. To amount to genocide, an act must be directed toward the destruction of a group *as such*. Thus homicide, however numerous the victims , is not genocide unless it can be shown that there was *intent* to destroy the target group in whole or in part. Article I provides that genocide may be committed in time of peace or in time of war.

Under Article III, actual commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are all punishable as acts of genocide. Article IV individualises responsibility for genocide and related offences and excludes the defence of *respondeat superior* by requiring all persons committing genocide or any other acts enumerated in Article III to be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

In Article I of the Genocide Convection, the Contracting parties `confirm' that genocide "is a crime under international law". The phrasing of this Article, particularly the use of the word 'confirm' signified that the crime of genocide might have been an existing wrong to which the Convention merely gave expression.[44] This matter was confirmed by the International Court of Justice in its advisory concerning *Reservations to the Genocide Convention* where the Court stated that "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation".[45] Even though this statement was admittedly by way of an aside, it is so widely quoted that "it is probably now safe to say that acts aimed at the deliberate destruction of all or part of a national, ethnic, racial, or religious group ... are today prohibited by customary international law, independently of any treaty obligations".[46] The prohibition of genocide is also an obligation *erga omnes*.[47]

Under Principle 3 of the ILA Declaration of Principles of International Law on Mass Expulsion, mass expulsion of nationals was described as falling under the purview of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. But, an attempt to include a similar provision in the ILA Declaration on Principles of International Law on Compensation to Refugees and Countries of Asylum was rejected by members

[44]Brownlie, I., *Principles of Public International Law* (4th Ed, 1990) 563.
[45][1951] *I.C.J. Reports*, 15, 23.
[46]Sieghart, P., *The Lawful Rights of Mankind* (Oxford, Oxford University Press, 1985) 61. See also Tomuschat, C., "Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State" in: Dinstein, Y., and Tabory, M. (eds.), *War Crimes in International Law*, (The Hague, Martinus Nijhoff, 1996) 41-63, 48; Beyani, C., "State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law", *International Journal of Refugee Law* (Special Issue), (1995) 134.
[47]*Barcelona Traction Case*, [1974] *ICJ Reports*, 32.

of the working session. Although the reasons advanced varied, most related to the doubt of many members as to whether the notion that refugee generation was a State crime of any sort was compatible with exiting norms of international law.[48] Most shared Professor Yoshio Kawashima's view that "while a refugee-generating act is considered an internationally wrongful act, a refugee is not always forced out, ... with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such".[49] In the end, the compromise position as expressed in Principle 3 of the final version of the Draft Declaration was that "the act of generating refugees in some situations may be analogised to genocide if it is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...".[50]

The debate over whether refugee generation could amount to genocide arose again in the 1990s with the emergency of the practice of "ethnic cleansing". In the wake of the conflict in the former Yugoslavia, the Security Council passed Resolution 780[51] of 6 October 1992, which established a Commission of Experts to deal with the issue of "ethnic cleansing." In its Interim Report[52], the commission, referring specifically to the situation in the former Yugoslavia, defined "ethnic cleansing" as an act of "rendering an area ethnically homogeneous by using force or intimidation to remove persons or given groups from the area".[53] On the basis of many reports from the Former Yugoslavia, the Commission enumerated the series of acts falling within the definition of ethnic cleansing as including

> murder; torture; arbitrary arrests and detention; extra-judicial executions; rape and sexual assaults; confinement of civilian population in ghetto areas; *forcible removal, displacement and deportation of civilian population*; deliberate military attack or threats of attacks on civilian and civilian areas; and wanton destruction of property [emphasis added].[54]

The commission pointed out that the above acts amounted to crimes against humanity and in some cases they could also fall within the meaning of the Genocide Convention. The Genocide Convention was mentioned as one of the international instruments applicable to the problem of ethnic cleansing.

According to Lerner, the concept of "ethic cleansing" as defined by the Commission of Experts is susceptible to two interpretations. To the extent which the definition includes several major offences already defined as such by international law and sanctioned by the respective international instruments, "ethnic cleansing" could be the *purpose,* the *motivation* behind such crimes. In this

[48]See ILA, *Report of the Sixty-Thirty Conference,* held at Warsaw, August 21 – 27, 1988, esp. interventions by Professor J. Sztucki, p. 715; Professor D. Martin, p. 716; and Professor J.A. Nafziger, p. 716.

[49]Id., p. 716.

[50]See Principle 3 of Draft Articles on Principles of International Law on Compensation to Refugees, in ILA, op. cit., 429.

[51]For text see 31 *I.L.M.* 1470 (1992).

[52]Annex I to the letter from the UN Secretary-General to the President of the Security Council, 9 February 1993, Doc. S/25274 (193).

[53]Para. 55 of the Interim Report.

[54]Para. 56 of the Interim Report.

sense, "ethnic cleansing" can be regarded as *intent* , which is the most essential ingredient in the crime of genocide. On the other hand, by limiting the definition to the special circumstances of the former Yugoslavia and thus avoiding a more theoretical and universal approach, the Commission left the way open for "ethnic cleansing" to be viewed as an *aggravating circumstance* justifying a more severe treatment of the offence. [55] Lerner leans towards the former interpretation of the concept of "ethnic cleansing", thus indicating support for the view that "ethnic cleansing could amount to genocide.[56] Among the writers who take a more positive view that ethnic cleansing could amount to genocide within the meaning of the 1948 Genocide Convention are Dr. McCourbey[57], and Professor Eli Lauterpacht[58].

Other writers, however, have taken a more cautious view. Noting the definition of Genocide under Article II of the Genocide Convention, Henckaerts goes further to say:

> It is not entirely self-evident that mass forcible expulsions, deportations of civilians and the uprooting of civilians in general, the destruction or *de facto* expropriation and/or codification of property as part of an ethnic cleansing campaign constitute acts of genocide. On the one hand, ethnic cleansing seems to be aimed at removing people from a certain area, not really at annihilate them. On the other hand, the commission of the barbarous acts of which ethnic cleansing consists seems to indicate that the cleanser may also wish to annihilate the group (leave or be killed). As with all claims of genocide, proof of the intent to destroy is crucial in this case.[59]

The process of ethnic cleansing, no doubt, may involve conduct falling within Article II (a)-(c) of the Genocide Convention. However, as Henckaerts rightly points out, whether such conduct is accompanied by the requisite intent is not always self evident. In the end, it is submitted, the question whether a depurative campaign amounts to genocide depends on demonstrating that the campaign was not only intended to get rid of unwanted populations, but was also calculated to bring about the destruction of that population in whole or in part. Given the importance attached to the element of "intent" in the offence of genocide, the requisite intent must be the one held by the perpetrators of the depurative acts

[55]Lerner, N., "Ethnic Cleansing" in: Dinstein & Tabory, op. cit., 107-122, 111-112.

[56] On the possibility of the logic of the Genocide Convention being applied to "ethnic cleansing" Lerner writes:

The acts considered illegal must be directed toward elimination, from a given territory, of people who do not belong to a particular ethic or religious or linguistic group. Such acts are in any case violations of international law; they should be described as "ethnic cleansing" when, irrespective of result, they lead toward such a "cleansing" or depuration, or homogenisation of the population of a given area. .... In this approach, "ethnic cleansing" would not be considered a new or a different crime. It would be *intention*, the motivation, or the objective to induce the commitment of some offences. ..."
See Id., 116.

[57]McCourbey, H., "The Armed Conflict in Bosnia and Proposed War Crimes Trials", 11 *International Relations*, (1993) 411-433, 424.

[58]Opinion given while acting as judge *ad hoc* in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Request for Provisional Measures). See Order on Application, 8 April, (1993), 87 *AJIL*, 505-21; Order of September 1993.

[59]Henckaerts, op. cit., 164.

prior to carrying them out - it cannot be inferred *ex post facto* from the mere consequences of ethnic cleansing, however grave. In sum, it is hypothetically possible for ethnic cleansing to amount to or to be accompanied by a genocidal intent. However, this must be established by concrete evidence. Given the manner in which ethnic cleansing campaigns are carried out, this evidence may not be easy to produce.

From the above review of legal literature, it is clear that forced population displacement and other conduct that may lead to its occurrence in armed conflicts are criminalized and punishable under international humanitarian law. The whole purpose of this law is to protect innocent victims from the vagaries of war. This being the case, it is submitted that it would be illogical for refugee law, which protects victims of persecution, to refuse to accord protection to victims of violation of norms of international humanitarian law. This point is expanded further in the following section.

2.3.1 Victims of Violation of Humanitarian Law Norms as Conventional Refugees

So far the paper has argued for the inclusion victims of violation of international criminal law within the purview of the 1951 Convention as a matter of policy and logic. But it is also possible to demonstrate that such persons should be regarded as victims of persecution within the meaning of refugee law because, as noted in the preceding section, in many, if not most, cases they meet and even surpass the accepted criteria of persecution under the latter branch of international law.

Take the example of war crimes and crimes against humanity which have now been systematically dealt with under the Draft Code of Offenses against the Peace and Security of Mankind (which is itself a codification of the Nuremberg principles). As noted above, the Code deals with, among other things, "systematic violations of human rights". Now, such violations are already recognised as an independent and sufficient basis for a grant of refugee status.[60] Moreover, the Code is intended to cover not all crimes but " only the most serious among the most serious of crimes".[61] When an act that already falls within this category qualifies as well under Article 22 - which proscribes forcible population displacement and many other of its causes - as an "exceptionally serious war crime", the risk to civil and political rights or any harm involved arguably surpasses the threshold required for "persecution" under Article IA(2) of the 1951 Refugee Convention.

[60]For a good exploration of the relevant jurisprudence see Carlier, J., *et al* (eds.), *Who is a Refugee? A Comparative Case Law Study*, (The Hague, Kluwer Law International, 1997) and Hathaway, *The Law of Refugee Status* (Butterworth 1996).

[61]Draft Code of Offences against the Peace and Security of Mankind, *U.N.* Doc. A/CN.4/L. 464/Add. 4, July 1991 p . 30.

Often, where a claim for refugee status is made by persons fleeing from civil wars, the existence in such cases of certain elements under the 1951 Convention is not disputed. These include genuine fear of harm and lack of protection. The one element on which there appears to be no consensus is *whether persons fleeing civil wars can by virtue of that fact demonstrate a nexus of their fate with a Convention ground.*

There exist two competing views on the above issue. According to one view, which Storey and Wallace[62] have christened "the "exceptionality approach", a person cannot claim to be a refugee within the meaning of the 1951 Convention and its 1967 Protocol if he is fleeing armed conflicts or civil wars or situations of "generalised violence". Such a person must demonstrate that he was specifically targetted or he was "differentially at risk": i.e., he faced the kind of risk which was over and above that faced by others. This view was most recently expressed in the famous (or infamous?) case of *Adan v. Secretary of State for the Home Department*[63], where it was held that a risk of persecution could only arise in the context of armed conflicts or civil wars where the risk faced by the claimant was shown to be over and above the normal incidents of civil war.

The second view, which may be regarded as the "victim's perspective", holds that "targeting will amount to Convention-grounded persecution so long as persecutory intent can be identified - whether arising out of conflict or not and whether or not the persecution affects all alike". This perspective has been called by Storey and Wallace as the "non-comparative analysis approach."

There are a number of criticisms that can be made against the "differential risk approach". The first, which is amply elucidated by Storey and Wallace (with support of authorities) is that neither the express words of the Convention nor the rules of statutory interpretation would support the application of the differential risk rule. The second, also alluded to by Storey and Wallace, is that even if there was a general rule that the Geneva Refugee Convention does not provide protection against the general consequences of civil war, it is often applied too broadly. Certain risks arising in situations of generalised violence may still amount to persecution. One example is where the kind of suffering facing the claimants was over and above the normal incidents or consequences of civil war.[64]

Another example is where persons are at risk because they are members of a particular social group against which the civil war in question is directed. Thus, in *Tekeste Kifletsion*[65], in which an Etritrean from Ethiopia sought refuge on the basis of a genocidal conflict directed against members of his race by the Ethiopian government, it was held that " a civil war against a minority race inside a country, verging on genocide, is without doubt evidence of racial persecution". "Here", as Professor Hathaway points out, "it could not truly be said that the

[62]Storey, H., & Wallace, R., *War and Peace in Refugee Jurisprudence*, paper prepared for IAJ, Bern 2000 Conference.
[63]1A.C. 293 [1998]; 2 WLR 702; [1988] 2 All ER 453 (HL).
[64]A number of such incidents is given by Storey and Wallace, citing Dr Joachim Henkel.
[65]Immigration Appeal Board Decision Decision 79-1136, C.L.I.C. Notes 20.3, February 29, 1980.

claimant was at risk only of an undifferentiated harm affecting all members of his society, but was rather specifically at risk by reason of his race".[66] Also, "even within the context of generalised violence or war, there may exist a risk of serious harm specific to a person defined by a particular form of civil and political status".[67] Professor James Hathaway gives an example of the case of *Zahirdeen Rajudeen v Minsiter of Employment and Immigration* [68] in which it was held that a Sri Lankan Tamil, whose need for protection from Sinhalese thugs had been ignored by the authorities, had been mistreated not because of civil unrest in Sri Lanka but because he was a Tamil and a Muslim. As such, the harm he suffered was in fact due to the unwillingness of the authorities to protect him because of his race and religion. Professor Hathaway sums up the discussion of this point as follows:

> Thus, while the general proposition is that the victims of war and violence are not by virtue of that fact alone refugees, it is nonetheless possible for persons coming from a strife-torn state to establish a claim to refugee status. This is so where the violence is not simply generalized, but is rather directed towards a group defined by civil or political status; or, if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disfranchisement within the society of origin. [69]

If this proposition was to be applied to many refugee generating conflicts today, it is quite possible that many, if not the majority, of victims of war crimes and crimes against humanity would also qualify as refugees under the 1951 Convention. For example, on the above criteria, forced migrants from the Balkans in the early 1990s who fled from war crimes and crimes against humanity were conventional refugees as the atrocities were carried out against them because of their membership of specific national, ethnic or religious groups. Yet many states were not inclined to accord them Conventional status. Instead, they gave them the so called "extra-Convention protection" also known as " complementary" or "subsidiary" protection.

The same point could be said of potential victims of genocide. It is very hard to find a situation which can be properly be described as involving genocide but whose targeted victims cannot qualify for conventional refugee status. As we may recall, the 1951 Convention recognises as a refugee any person who is outside his country and who has a *well founded fear* of *persecution* due to his *political or civil status* and who, as a result of such fear, is unable or unwilling to avail himself the protection of his state or country of origin (*alienage*). Applying this to genocide situations, no one would doubt that a person who faces genocide is not a refugee within the meaning of the 1951 Convention. By its very definition, genocide has to be committed with intent to destroy, in whole or in part, a national ethnic, racial or religious group. Therefore any person who belongs to any of the target groups and flees from a country where such group

[66]Hathaway, op. cit., 187.
[67]Id., 188.
[68](1985) 55 N.R. 129 (F.C.A.).
[69]Hathaway, op. cit., 188.

is being attacked not only has a well founded fear of being a victim, his fear also is of genuine, if not the highest form of, persecution (total destruction). Also, the element of persecution, in this narrow sense of an element of a definition of refugeehood, may be supplied by the nature of the act by which destruction is sought to be achieved. Thus, where repeated rape is used as a weapon of genocide, the very act of repeated rape is persecutory conduct on its own, regardless of the motive.

Where there is a genocidal act, the condition of *political or civil nexus* is automatically fulfilled. This is because the cognisable grounds under the Genocide Convention are of civil and political character. Thus in one case, a view was expressed that "a civil war directed against a minority race inside a country, verging on genocide, is without doubt, evidence of racial persecution".[70] On the same reasoning, acts of sexual violence against Tutsi women of the Taba Commune in Rwanda, which the International Criminal Tribunal for Rwanda in the case of *The Prosecutor v Jean Paul Akayesu*[71] "found to have formed an integral part of the process of destruction, specifically, targeting Tutsi women and contributing to their destruction and the destruction of the Tutsi group"[72], would also amount to racial/ethnic persecution. In sum, a crime of genocide is persecutory within the meaning of the 1951 Convention and victims ought to receive protection under the Convention.

2.3.2 Is the Concept of Persecution Expandable?

One of the arguments advanced against accommodating those fleeing indiscriminate violence in the course of armed conflicts and civil war under the 1951 Convention on Refugees is that the Convention was not designed to protect such persons. Even if this was true, the position need not still be the same some 50 years on. The Convention must be interpreted in the light of today's problems if it is to have continuing relevance. As Stephen Sedley put it, "unless (the Convention) is seen as a living thing adopted by civilised countries for humanitarian ends, constant in motive but mutable in form, the Convention will eventually become an acrotism".[73]

The suggestion to adapt the concept of "persecution" to the needs of the time is not a new or radical one. Indeed, the concept itself has been changing with time in the same spirit as suggested above. According to Grahl-Madsen, "the term 'persecution' as part of a definition of the concept of 'refugee' is of rather

[70]Immigration Appeals Board Decision 79-1137, C.L.I.C. Notes 20.3, March 21, 1980, at 3 per R. Trembley. Quoted in Hathaway, op. cit., 112, ftnt. 108.
[71]Case No. ICTR-96-4-T, Decision of September 1998.
[72]Id., para. 731.
[73]Quoted by Erika Feller, Director of International Protection, *Alternative Futures: Developing Agenda for Legal Research in Asylum* (2000) 6.

recent origin".[74] And when it was first used in the various instruments adopted to deal with the aftermath of the Second World War, such as those by the United Nations Relief and Rehabilitation Administration (UNRRA) and the various Memoranda issued by the Allied military authorities in their areas of jurisdiction, the term "persecution" was a criteria for eligibility for assistance rather than for refugee status.

The first time the term "persecution" was used as a criterion for eligibility for refugeehood was in the Constitution of the IRO. Part I section C, paragraph 1(a)(i) of Annex I of the IRO constitution instituted "persecution, or fear based on reasonable grounds of persecution as a valid ground for objecting to return to the country of origin". Two years after the IRO Constitution was adopted by the General Assembly of the United Nations, the same body included the term 'persecution' in Article 14 of the Universal Declaration of Human Rights. As understood here, the term "persecution was used as contradistinguished from 'prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'".

It is more or less this sense of "persecution" which was shortly thereafter incorporated in the drafts for the UNHCR Statute and the Refugee Convention.[75]

And ever since, the definition has not stood still. It has been constantly expanded to meet changing needs. This has been achieved though interpretative devices and recourse to other development in related fields such as human rights in order to enable more people to receive international protection. Notable developments in this regard include broadening the edges of some of the grounds of persecution such as "membership of social group" to include women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live[76] and the reconception by scholars[77] and judicial tribunals[78] of the concept of "persecution" more broadly to embrace most forms of gross violation of human rights. In many regions, supplementary definitions have been adopted to complement the definition under the 1951 Convention.[79]

[74]Grahl-Madsen, A., *The Status of Refugees in International Law*, vol 1 (A.W. Sijthoff-Leyden, 1966) 188.

[75]Id., 189.

[76]On "gender-based persecution" see UNHCR Division of International Protection 'Gender-Related Persecution: An Analysis of Recent Trends' (1997) *IJRLaw Special Issue* 79-113. This issue also included other papers presented and the discussion at the UNHCR Symposium on Gender-Based Persecution, Geneva, 22-23 February 1996.

[77]See, e.g., Hathaway, op. cit, *passim*, and Hathaway, J., "Reconceiving Refugee Law as Human Rights Protection" in: Gowlland, V. & Samson, K. (eds.), *Problems and Prospects of Refugee Law* (1992) 9-30.

[78]See Carlier, J., *et al*, *Who is a Refugee? A Comparative Case Law Study*, (1997) which gives a survey of jurisprudence on refugee status in thirteen West European countries, Canada and the United States.

[79]For example, Article I(2) of the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa. U.N.T.S. 14691, entered into force June 20, 1974, and the Cartagena Declaration.

As a result of the above developments, the kind of persons entitled or receiving international in countries of asylum has expanded considerably. The present recapitulation by Professor Goodwin-Gill suffices to state who is entitled to refugee protection today:

> In short then, even though the formal scope of the 1951 Convention/1967 protocol has *not* changed, the extent of protection has developed *in the practice of States*. No doubt, this is due not only to self-evident humanitarian need, but also to the impact of increasingly extensive human rights schemes. ... The *principle of refuge* in general international law thus includes not only those with a well-founded fear of being persecuted, but also those who face substantial risk of torture, or who would risk suffering relevant harm if returned to their country of origin. This protection springs from objective conditions, where the facts indicate the risk of harm for valid reasons including war, violence, conflict, and massive violation of human rights.[80]

It is clear from the foregoing that the concept of "persecution" has been changing to meet the needs of the times. And today there is no greater humanitarian imperative than to accord protection to victims of conduct which the international community has described as crimes, and some even as "exceptionally serious crimes".

See Annual Report of Inter-American Commission on Human Rights 1984-85, OEA/Ser.L/II.66, doc. 10, rev. 1, at 190-193.

[80]Goodwin-Gill, G.S., "Asylum; The Law and Politics of Change", Inaugural Lecture upon being installed as Professor of Asylum Law, University of Amsterdam, 19 October 1994, and published as Editorial to (1995) 7(1) *IJRL* 1-18, 7; Zieck, M., *UNHCR and Voluntary Repatriation of Refugees, A Legal Analysis* (1997) 452-454.

F. PANEL: „THE FUTURE OF INTERNATIONAL PROTECTION“

F. PANEL: „L'AVENIR DE LA PROTECTION INTERNATIONALE“

THE FUTURE OF INTERNATIONAL PROTECTION

Ahmed Arbee*

As the sole representative of the African continent on this panel, I would like to address the ways in which Africa perceives the future of international refugee protection, both in terms of the changing nature of refugee crises and new strategies to address refugee issues in the new millennium. Africa hosts almost one-third of the world's 21 million refugees and internally displaced people. Further, five of the world's top ten refugee-producing countries are in Africa. While these numbers are tragic, the generous African spirit of hospitality has resulted in the creation of a regional refugee convention that is the world's only example of a genuine effort to effectively address post-World War II refugee flows. As a result of these occurrences, both positive and negative, the African continent can, by virtue of its own experiences, shape the future of international refugee protection.

As the theme of this conference suggests, root causes as well as the nature of refugee flows have changed dramatically since the creation of the 1951 United Nations Convention Relating to the Status of Refugees. We are all aware that the 1951 Convention only intended to provide protection to individuals fleeing persecution by the Nazi regime in Germany and by communist states in Eastern Europe. This was a European-focused response to human rights abuses arising in Europe. As I will elaborate further, elements of this Euro centric focus still remain in the international refugee protection regime. However, in the 1960's, the international community began to recognize that there were events occurring outside of Europe that required international protection efforts. The 1967 United Nations Protocol Relating to the Status of Refugees extended the mandate of the international refugee protection regime beyond the temporal and geographic limitations of the 1951 Convention. However, the "well-founded fear of persecution" definition of a refugee, with its individualistic focus, remained.

Tragically, the African continent clearly illustrates the flaws of this individualized definition of a refugee. The last few decades have seen not only repressive regimes that fail to respect human rights and democracy, but also numerous violent conflicts that create mass refugee flows. In the last few years, we have seen countless examples of both dictators and warlords who have been responsible for refugee crises. Some countries, including Somalia, Sudan, Sierra Leone, and Angola, have been subject to the human rights

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abuses of both rebel forces or warlords and the governments that are unable to control these factions. Other nations, such as Rwanda, Burundi, Ethiopia, and Eritrea, have seen mass violence and war perpetrated in the name of ethnic divisions that barely existed a few years earlier. Many African states, namely Liberia, Uganda, and Ethiopia, have been run by dictatorial leaders who refuse to share power and show respect for the basic values of democracy and human rights. While the latter two problems are similar to the refugee-producing situations envisioned by the 1951 Convention, the first type of crisis is inadequately addressed by the Convention. Further, many individuals fleeing the second type of conflict may not fit neatly within the Convention definition of a refugee but are still individuals in need of protection.

Africa has also seen problems in its role as host to over six million refugees. Despite the generous vision of the Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, many refugees have faced personal security problems and xenophobia in their host countries. Most refugees in Africa are housed in camps, as a result of the large numbers of African refugees. In the Great Lakes region, we have seen vicious attacks on refugees by individuals housed within these camps. This is a large dilemma facing the international refugee protection regime – how, faced with the onslaught of a mass refugee flow, do we separate genuine refugees from combatants who intend to perpetrate violence on others? In northern Uganda, Kenya and the Southern Sudan, we have seen refugees brutally abducted from camps in which they have sought protection. How, in a world of limited resources, are we to protect refugees from the violence that they left just across the border? This is a serious issue to be addressed by the international protection regime.

Xenophobia is not an issue unique to Africa. Indeed, over the past decade, North America and Western Europe have witnessed a disturbing rise in xenophobia, from the French National Front Party to immigrant bashing in Germany and other states, to restrictive new immigration laws. We in Africa have also seen xenophobia increase, in my home country of South Africa as well as Kenya, Tanzania, and numerous other states. We must protect refugees from such abuses in their country of asylum.

Thus far I have painted a very bleak picture of the causes of refugee flows in Africa as well as protection problems that refugees in Africa face. However, these dilemmas are not without solutions. A genuine effort in international protection must address these obstacles on three different levels: international, regional, and local. I am pleased to say that Africa generally and South Africa in particular are responsible for progressive trends in international refugee protection. However, we cannot move forward in this regard without the assistance of the international fraternity of nations.

There are many ways in which the international community should involve itself in the future of international refugee protection, both in Africa and in other developing nations. First, as a prophylactic measure, programs of sustainable development must be implemented in these countries. The success

of democracy depends in no small part on the economic stability of a nation. Individuals who feel enfranchised and successful in their nation are less likely to fall prey to nationalist and tribalist influences, and more likely to prevent the breakdown of nations that we have seen throughout Africa. Individuals must be educated in order to eradicate prejudice and xenophobia, and to create capable leaders to strengthen African nations. At a very broad, basic level, the international community must involve itself in the creation of sustainable development in Africa.

The international community (and I include other African states, including my own, in this term) must emphasize respect for human rights and democracy in its dealings with Africa and all nations. We have seen Western nations and corporate companies condoning human rights abuses in Nigeria in order to obtain access to oil wealth. Africans and Westerners alike have enriched themselves on the diamond trade that fuels most of the wars in Africa. Even more perniciously, individuals earn large sums of money selling arms to warring countries despite United Nations bans and sanctions (e.g. Angola). Over four million illegal arms are circulating in the Southern Africa region alone, many of which are remnants from the apartheid regime. Such instances of arms dealing and illegal trading must be investigated and eradicated. The international community must take responsibility for speaking out against human rights violations. The future of international refugee protection depends on international involvement in ensuring human rights and democratic practices. As a measure of last resort, we must be prepared for international assistance and intervention in refugee-producing crises. The UN as well as the OAU must be amply equipped by member states to protect refugees from violence in refugee camps. We must come up with creative solutions designed to separate genuine refugees from combatants. The international community must be able to intervene in conflicts such as the Great Lakes crisis, be it militarily, as the French forces did in Rwanda, or on a political level, as former President Mandela is currently doing in Burundi. While I am not advocating thoughtless intervention in the affairs of sovereign nations, severe human rights abuses must be addressed through international means.

On a regional level, Africa can be proud of its achievements in the refugee field. The OAU Convention is a landmark in refugee protection. This document extends protection to, "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality." This generous definition represents a marked improvement on the UN Convention definition in terms of modern refugee flows and the future of international refugee protection. This is one way in which Africa points us towards the future, providing food for thought for other regions. Modern refugees are not always individually persecuted, but may be forced to flee their country due to civil war and mass violence. These individuals are, as deserving of state protection as UN Con-

vention refugees, and the international community must recognize this by expanding protection as the OAU states have done.

Regional refugee protection schemes have become a trend throughout the world. While there are positive benefits to ensuring that neighbouring countries meet the standards set out in international refugee law, we must be careful not to create regional "fortresses." Illegal immigration is a legitimate concern for sovereign states, but most states have bound themselves to protect refugees by signing the 1951 UN Convention. Structures must be created to ensure that the rights of refugees are upheld in any program to reduce illegal immigration. "Safe third country" programs that send refugees back to a transit country should only be undertaken with reliable guarantees that refugees will not be *refouled*. If implemented properly, regional refugee protection programs in Africa and elsewhere could strengthen the rights of refugees while reducing irregular movement and illegal immigration.

Further, Africa could benefit greatly from regional institutions to protect human rights. One promising mechanism for the enforcement of human rights in Africa is the proposed African Court of Human and People's Rights. This body could play a role similar to the European Court of Human Rights, acting as a court of last resort for individuals who have suffered human rights abuses and are denied justice in the legal systems of their own countries. Shamefully, as of May 2000, only three countries (Burkina Faso, the Gambia, and Senegal) have ratified the court's protocol, despite a June 1998 agreement signed by thirty countries to establish the court. African countries must take a strong stance in favour of this court, which could play a major role in strengthening democracy and respect for human rights in Africa.

To conclude, I would like to discuss some positive changes made by the new Refugees Act, which was implemented in South Africa on 1 April 2000. This Act provided a much-needed revision to the Aliens Control Act, the prior refugee legislation, which was a legacy of the apartheid regime. South African refugee law now provides protection to refugees as defined both under the UN Convention and the OAU Convention. This means that asylum seekers from war-torn countries such as the Democratic Republic of Congo, Somalia, and Angola can be granted refugee status almost as a matter of course. The government may in the future be able to implement an "affirmative fast-track" system, the sister to the "manifestly unfounded" program. This fast-track could allow for the speedy processing of refugees from countries in a state of civil war.

Another exciting innovation in the new South African law is the progressive definition of "social group." The Refugees Act states that, "'social group' includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste." This provision expands the bases for a well-founded fear of persecution, updating the UN Convention to comport with modern human rights jurisprudence. Other countries have engaged in similar projects, creating specific guidelines for gender-based asylum claims and expanding the "social group" definition through progressive case law. This is a

trend that should continue into the future. While the drafters of the 1951 Convention were visionaries in their time, the international human rights movement has progressed immeasurably over the past fifty years. We should continue to update the refugee definition provided by the convention to keep pace with changes in international human rights law. Above all, we must uphold the vital systems of determination and not allow it to erode under any circumstance.

A final point that should be adopted on a national level is the integration of refugees into the society of the host country. Such a scheme must include efforts to reduce xenophobia and programs to facilitate the naturalization of refugees in their host country (as recommended in the UN Convention). The South African Human Rights Commission is host to the Roll Back Xenophobia Campaign, a national program to educate the South African population about the rights of refugees. This type of program is vital in combating xenophobia and violence against refugees. Further, while most refugees would prefer to return to their country of origin once the situation has improved, it is crucial to allow refugees to naturalize in their host country. The new South African law allows for application for permanent residence after five years of refugee status, providing refugees with the option of permanent protection.

The future of international refugee protection depends on the international community's ability to adapt to the modern realities of refugee-producing crises. Refugee issues must be addressed on an international, regional, and national level in order to reduce refugee flows and provide adequate protection to refugees. Africa can provide us with both positive and negative examples of the most important issues concerning the future of international protection. If we can expand international refugee law to include the laudable efforts of Africa and put international and regional efforts into fighting the negative aspects of refugee flows in Africa and elsewhere, the future of international refugee protection will be bright.

May I, in conclusion, extend my deep sense of gratitude to the President of IARLJ, the organizing Committee as well as the Swiss Asylum Appeal Commission for the opportunity in addressing this conference. I am indeed profoundly honoured.

L'AVENIR DE LA PROTECTION INTERNATIONALE

Roger Errera*

Nous sommes ici pour réfléchir à l'avenir de la protection internationale des réfugiés. Cette protection a une histoire, un passé, dont nous sommes tous les héritiers. Y a-t-il, pour cet héritage, un testament qui puisse guider nos réflexions et notre action? C'est à cette question que je voudrais tenter de répondre.

I

Le XXème siècle a inventé la protection juridique internationale des réfugiés. Il ne l'a pas fait d'un coup: certes, en 1951, on s'est beaucoup fondé sur la pratique antérieure. Mais tout sépare le système mis en place en 1951 de ce qui l'a précédé, d'abord de 1921 à 1939, puis de 1944 à 1951.

De 1921 à 1939, que voit-on? Un grand homme, Nansen, une série de conventions particulières s'appliquant à tel ou tel groupe, une esquisse timide de protection internationale. Mais aucun juge, aucun tribunal ne traite du statut des réfugiés: celui-ci n'existe pas. Les crises et la menace de la guerre mettent fin au peu qui existe. La conférence d'Évian, en 1938, illustre le refus des États, notamment non européens, de faire plus. Les premiers camps s'ouvrent. D'autres camps les suivront.

Tout différencie le système mis en place en 1951 – après l'âge héroïque de l'U.N.R.R.A. et de l'O.I.R. – de cette préhistoire.

- Une convention très bien rédigée, norme universelle et multilatérale établit – enfin – un statut des réfugiés. Ce statut a pour seul but leur protection.
- Les pays qui l'ont ratifié, 140, mettent en place les mécanismes administratifs et juridictionnels destinés à appliquer cette convention.
- La mission du H.C.R. est précisée.

50 ans se sont écoulés. Notre héritage aujourd'hui, à nous juges du droit des réfugiés, se résume en un mot: il y a, aujourd'hui, un droit international et national des réfugiés. Cet héritage est vivant: il consiste, dans quatre éléments.

(1) Le premier est l'accumulation des jurisprudences et des pratiques internationales et nationales concernant

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- la procédure d'examen des demandes,
- la définition du réfugié: les notions de persécution, et d'origine des persécutions,
- les motifs de persécution énoncés à l'article 1er A de la Convention.

Les juges du droit des réfugiés sont les co-auteurs permanents de cette jurisprudence.

(2) Le deuxième élément est constitué par l'action et la réflexion, indissociables, du H.C.R.. Les documents qui viennent de lui contiennent, sur l'application et l'interprétation de la Convention de Genève des réflexions de qualité, et irremplaçables: le H.C.R. est le seul organisme international en mesure de le faire, dans le monde actuel c'est une tâche souvent ingrate, mais nécessaire.

(3) Le troisième élément est l'ensemble de la littérature juridique consacrée au droit des réfugiés. Sa richesse atteste l'importance du sujet.

(4) Le quatrième élément est l'action des organisations non gouvernementales, très utiles et très actives dans ce domaine.

II

Sur l'avenir de la protection, la situation actuelle conduit à formuler trois remarques.

(1) La première n'incite guère à l'optimisme. Que voyons-nous, depuis des années, autour de nous?

- La multiplication des conflits internes, souvent mêlés à des conflits internationaux, des guerres et des violences comme instruments de persécution, créateurs de masses de réfugiés, de déplacements forcés de populations.
- La politisation du problème de l'immigration, traité de plus en plus en même temps que celui des réfugiés: la lutte légitime contre l'immigration illégale, devenue l'objet d'un commerce (celui des hommes) international conduit beaucoup d'États à rendre plus difficile l'accès à leur territoire et à la procédure même de demande de titre de réfugié.
- L'apparition de notions inconnues de la Convention de Genève: celles de pays sûr d'origine, de pays sûr d'accueil, de demande manifestement infondée.
- Le caractère spécifique, et souvent tragique, de la situation de certains demandeurs d'asile (les mineurs isolés par exemple).
- Autre constat, et non le moindre: le niveau et la qualité très variable de la protection accordée par les États, lorsqu'ils l'accordent.
- Dernier point: A moyen terme, dans l'Union européenne, de nouvelles normes internationales obligatoires viendront, en vertu du traité d'Amsterdam, s'ajouter à la Convention de Genève. Ce contenu devra être observé de près.

THE FUTURE OF PROTECTION – THE ROLE OF THE JUDGE*

Justice A M North**
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1. INTRODUCTION

In her celebrated essay on the refugee condition, Hannah Arendt, herself a refugee from Nazi Germany, described the loss inflicted by enforced exile

> "We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We lost our relatives in the Polish ghettos and our best friends have been killed in concentration camps, and that means the rupture of our private lives"[1].

The experience of Jewish refugees from Nazi persecution, and of persons fleeing totalitarian regimes before and immediately after World War II were the kinds of forced migration envisaged by the 1951 Convention's model of protection. The remedy offered by the Convention to persons meeting the definition of refugee aimed to redress the loss of involuntary dislocation and exile by giving protected persons the chance to rebuild a life in a new national community[2]. For fifty years, our understanding of international protection has been shaped by this ideal. The definition of a refugee as someone outside their country who has a "well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" has been accepted by 138 states as the touchstone for protection obligations, and is perhaps the only generally accepted legal test for refugee status. The Convention inaugurated a new era of protection entitlements for persons fleeing certain kinds of human rights violations, transforming a sov-

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[1] Hannah Arendt, "We Refugees" (1943) 31 *Menorah Journal*.

[2] Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, "Crisis and Cure: A Reply to Hathaway/Neve and Schuck" (1998) 11 *Harvard Human Rights Law Journal* 295.

ereign discretion to shelter exiles into an international treaty norm based on the cardinal human rights principles of non-discrimination and freedom of conscience[3]. The question in this concluding panel is whether the Convention, and the principles underlying it, can continue to define the future of international protection. In Part I, this paper addresses the current context and the challenges which it presents to the continuing relevance of the Convention, and in Part II we examine how the future relevance of the Convention will depend upon creative interpretation by independent judges. In conclusion, we make some suggestions concerning modifications to structures which might encourage further development of that creativity and independence.

2. PART I

2.1 THE CURRENT CONTEXT – CHALLENGES TO THE PRESENT SYSTEM

It has become a commonplace in scholarly literature and contemporary commentary that the Convention is showing its age[4]. Two leading scholars in this field suggest that international refugee law is "in crisis"[5], failing to "achieve its fundamental purpose of balancing the rights of involuntary migrants and those of the states to which refugees flee"[6]. Another scholar similarly asserts that "the current refugee regime is 'broke' – in ... the ... sense that it fails to afford adequate protection to the enormous and growing number of people fleeing from ... intolerable conditions."[7]. Even those who demur at alarmist assessments of the current state of international protection accept that there are "a series of weaknesses in the existing protection regime"[8].

It is a truism that the 1951 Convention definition reflects the preoccupations of the historical context of its genesis. Its authors were attempting to deal with an *existing* refugee problem, generated by the Second World War and its aftermath. The historical specificity of the protection needs contemplated by the drafters is evidenced in the early drafts of the refugee definition, which enumerated distinct categories of eligible refugees by reference to the

[3] Daniel Steinbock, "Interpreting the Refugee Definition" (1998) 45 *UCLA Law Review* 733, 770 ff

[4] Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention" (1996) 9 *Harvard Human Rights Law Journal* 229; James Hathaway and Alexander Neve, "Making Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection" (1997) 10 *Harvard Human Rights Law Journal* 115; Frances Nicholson and Patrick Twomey, "Introduction" in Frances Nicholson and Patrick Twomey, eds, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge, 1997); Susan Musarat-Akram, "The World Refugee Regime in Crisis: A Failure to Fulfil the Burden-sharing and Humanitarian Requirements of the 1951 Refugee Convention" (1999) 93 *ASIL Proceedings* 213.

[5] Hathaway and Neve, above n 4, 114.

[6] *Ibid* 115.

[7] Peter H. Schuck, "Refugee Burden-Sharing: A Modest Proposal" (1997) *Yale Journal of International Law* 243, 247.

[8] Anker, Fitzpatrick and Shacknove, above n 2.

particular events that displaced them. While this highly particularised draft was not adopted, the *travaux* and commentary on the *travaux* clearly indicate that the Convention definition was formulated with two recent experiences in mind: Nazi persecution of the Jews from 1933 to 1945, and the developing exodus of persons in flight from the Communist regimes of central and eastern Europe[9]. The latter experience of forced migration was, of course, premised on the geopolitical reality of a Europe rigidly divided into two ideologically opposed blocks: capitalist and communist. The Cold War added another historically specific dimension to the meaning of protection under the Convention because of the strategic concern of Western states to "give priority to persons whose flight was motivated by pro-western political values"[10]. The Cold War context of the Convention's development and application had significant consequences: first, that the interpretation of protection obligations depended in part upon the political capital to be gained by conferring the refugee label on persons fleeing "enemy" states, and; secondly, that the scenario likely to "fit" the common perception of the refugee definition was that of a flight across state borders from the "peacetime persecution inherent in the 'normal' functioning of oppressive regimes as they were known and perceived at the time of the adoption of the Convention"[11].

To the extent that the Convention definition remains constrained by the presumptions concerning protection needs evidenced in the *travaux*, it is unsurprising that its suitability to present and future realities is in question. Several factors have contributed to expose the limits of the current system of protection. First, the causes and nature of forced migration have changed dramatically in the last half century – and the changes themselves have undergone change. UNHCR's 1997 Report on the *State of the World's Refugees* records that between 1987 and 1997 alone, the number of persons of concern to UNHCR increased from 12 million to 22 million. The report goes on to highlight several trends which have contributed to an increase in the scale and speed of forced displacement:

- The emergence of new forms of warfare, entailing the destruction of whole social economic and political systems;
- The phenomenon of failed states and the proliferation of intra-state armed conflict;
- The use of mass evictions and expulsions as a weapon of war and as a means of establishing culturally or ethnically homogeneous societies.

The displaced persons uprooted by these causes do not easily fit the refugee profile upon which the Convention definition is predicated. Many may be internally displaced – perhaps the most rapidly increasing kind of forced migration in the last fifteen years – and thus not outside their country of nation-

[9] Steinbock, above n 3, 765-766; James Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 6-10

[10] Hathaway , *ibid*, 6 and 99-101.

[11] Jerzy Sztucki, "Who is a refugee? The Convention definition: universal or obsolete ?" in Nicholson and Twomey, above n 4, 57.

ality for the purposes of international protection. Indeed, UNHCR has estimated that the level of refugees in the Convention sense has fallen from 18 million to 13 million between 1993 and 1997, while the number of internally displaced persons is put at 30 million. All those driven beyond national borders by civil conflict or expulsion may have difficulty in satisfying the Convention definition, in light of the need to establish a cause or nexus between the persecution suffered and the Convention reason. Civil conflicts, communal violence, or the disorder characteristic of failed states blur the boundaries between combat, crime and persecution, leaving persons fleeing such situations unable to clearly establish the reasons for the harm they have experienced[12]. For example, the European Council on Refugees and Exiles notes in its *Country Report* for 1999 that, even though Afghanis and Somalis constitute the largest group of asylum seekers in Europe, they rarely qualify as refugees under the 1951 Convention. Afghanistan and Somalia are, of course, territories in which the state has collapsed entirely.

Thus, it does not necessarily follow from the fact of increased displacement that states' responsibilities under the Refugees Convention have increased. Nevertheless, the widespread perception that the world is "awash" with refugees trying to enter developed states has contributed to the second factor challenging the current system of protection: states' retreat from their protection obligations. Her Excellency the High Commissioner for Refugees captured this trend succinctly in her speech this year at the University of Havana, where she observed:

> "Confronted with an upsurge of people knocking at their doors, whom they have less capacity to absorb than in the past and intimidated by xenophobic calls, governments build barriers to keep people out. The focus has shifted from the protection of refugee to the control of all those seeking entry, refugees and migrants."

The incentive provided by Cold War geopolitics for Western states to adopt expansive interpretations of protection obligations has gone,[13] and the end of the "golden age" of post-war economic expansion has contributed to a climate of hostility towards asylum seekers and migrants. Most central and western European states have in fact seen steady increases in asylum applications, with an 18 per cent rise in new applications between 1998 and 1999. While several states experienced small declines in new applications, others, including Austria, Belgium and the United Kingdom, received over 40 per cent more applications than in 1998. The absence of a burden sharing mechanism between European states at different levels of development is well illustrated by the sharp disparities in total asylum application numbers across 25 European countries[14]. Developed states point to the difficulties in keeping pace with these asylum applications as evidence that the protection obligations

[12] Daniel Steinbock, "The refugee definition as law: issues of interpretation" in Nicholson and Twomey, above n 4, 34.

[13] Anker, Fitzpatrick and Shacknove, above n 2, 22

[14] European Council on Refugees and Exiles, *Country Report 1999*, available at http://www.ecre.org/publications/countryintro.html

mandated by the Convention are ill suited to the present context of forced migration. None have actually renounced their treaty obligations openly, but most have implemented measures inconsistent with the Convention's objects and purposes, if not its letter. These measures range from efforts to prevent asylum seekers invoking the state's protection obligations by denying them entry into the state's territory, through to discouraging them from seeking protection once they are within the state's territory. The former include policies such as carrier sanctions[15], safe-third country provisions[16] and the creation of detention centres deemed not to be national territory. Asylum seekers who do succeed in entering a state's territory are likely to face a number of disincentives to pursuing a refugee application: mandatory detention, movement restrictions, withdrawal of social security entitlements and restrictions on work rights[17].

States are able to introduce such policies on the one hand, and profess continued adherence to the letter of the Convention on the other, in part because the Convention lacks substantive protections for asylum seekers[18] and leaves the process for determining refugee claims largely to the signatories' discretion. Where states have lost the political will to implement the Convention in good faith, they may remove procedural safeguards in refugee determination in order to reduce the cost and perceived delay of individualised refugee determination. Similarly, what Joan Fitzpatrick described as "the vagueness and manipulability" of the refugee definition allows states considerable latitude in narrowing their protection obligations. As will be discussed below, the elasticity of the Convention definition allows adaption to new protection needs, but is also susceptible to restrictive interpretations by states parties. The most well-known example is the adoption in 1996 by the European Union Justice and Home Affairs Council of a uniform interpretation of the Convention definition that excluded victims of non-state persecution[19] - a position entrenched in the domestic asylum laws of several EU states. "Convention fundamentalism", as one scholar labels it,[20] inhibits the adaption of the Convention to the new context of international protection and, if widely pursued, would freeze the future of protection and render the Convention redundant.

Proposals to ameliorate the weaknesses of the current system of protection are numerous. Some are far reaching, recommending (as Hathaway and

[15]European Council on Refugees and Exiles, "Research Paper on Carrier Liability", February 1999.

[16] European Council on Refugees and Exiles, "Safe Third Countries: Myths and Realities", February 1995.

[17] See, e.g., Ryszard Cholewinski, "Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights" (1998) 10 *International Journal of Refugee Law* 462

[18] Fitzpatrick, above n 4, 245.

[19] European Legal Network on Asylum (ELENA), "Research Paper on Non-State Agents of Persecution", November 1998,

[20] Stzucki, above n 11.

Neve do) a collectivised protection framework in which the burdens and costs of protection are shared between "interest convergence groups" of states, and temporary protection plays a greater role. Responses such as these entail policy shifts that can only be resolved at the level of deliberative politics in the public sphere. The future of international protection may well lie in these sweeping reform proposals, but their formulation and implementation are matters for politicians, not judicial decision-makers. Hence, we will reflect on the role that refugee decision-makers might play in ensuring that the present system of international protection has a future.

3. PART II

3.1 Judicial Independence, Interpretation and the Future of the Convention Definition

In her speech to the inaugural meeting of the IARLJ's Australian and New Zealand Chapter in March this year, Ms Erika Feller (Director of International Protection, UNHCR) noted that an international refugee jurisprudence is emerging across different courts and legal systems charged with the common task of interpreting and applying the Convention definition.[21] This evolving jurisprudence has the potential to adapt the Convention to some of the challenges outlined in Part 1, but its evolutionary promise depends upon the interpretative approach taken by asylum adjudicators who, through their day-to-day application of refugee law, are shaping the future of protection. Benjamin Cardozo, a Judge of the New York District Court, and well known proponent of the Legal Realist School of legal method, observed that judges develop law by filling in the many interstices and lacuna of an existing legal framework[22]. Where a new situation arises, or novel doctrinal questions are considered, judges are faced with several interpretive possibilities, from which they must consciously choose in order to reach a solution.

As we have seen, the elasticity of the Convention definition presents us with numerous choices: it allows adjudicators to be pragmatic and responsive to new realities on the one hand, or to insist on a fixed understanding of forced migration on the other. The future of protection depends on the adjudicators taking the first, rather than the second approach. Such an interpretive endeavour is necessarily constrained by the text of the Convention, read in light of the well-settled principles of treaty interpretation. The Convention's

[21] Erika Feller, Director, Department of International Protection, UNHCR, "The Role of Adjudicators and Judges in International Refugee Protection", paper presented to the Inaugural Meeting of the Australia/New Zealand Chapter of the International Association of Refugee Law Judges, Auckland, 10 March 2000, available at http://www.knowledge-basket.co.nz/refugee/IARLJ3-00Feller.html.

[22] Benjamin N. Cardozo, "The Nature of the Judicial Process" (1921) in William Fisher, Morton Horwitz and Thomas Reed, *American Legal Realism* (Oxford, 1993) 172-177.

plain meaning must be applied but recourse may be had to its "object and purpose" where the text is ambiguous[23].

Created two years after the Universal Declaration on Human Rights, the Refugee Convention is an early document in the development of international human rights protection after World War II[24]. The elements of the refugee definition reflect a preoccupation with themes central to post-war human rights law: non-discrimination, the illegitimacy of collective punishment and freedoms of conscience and opinion[25]. It provides a concrete human rights remedy for particular human rights violations, that is to say, it gives persons meeting the Convention definition the opportunity to live with greater freedom and dignity than in their country of origin. International human rights law has grown exponentially in the last fifty years and now comprises a large part of customary and treaty-based international law. Instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of a Child and the Convention on the Elimination of Discrimination Against Women are subscribed to by the overwhelming majority of states, and provide detailed articulations of the content of human rights found in general or incipient terms in the Universal Declaration or the Refugees Convention[26]. The 1951 Convention coincides with the birth of the modern human rights movement and encoded its nascent principles; fifty years on, the interpretation of protection obligations should reflect the advances in human rights consciousness that have occurred, consistently with the text, object and purpose of the 1951 treaty. Sir Stephen Sedley captured the consequences of this interpretive approach when he observed in *Ex parte Shah*:

> "In this highly specialised field of adjudication, a great deal depends upon the expertise of the Immigration Appeal Tribunal itself. Its adjudication is not a conventional 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."[27]

It has already been noted that some governments have reacted to the new realities by retreating from their protection duties. In a context where the Executive or Legislature resists the implementation of refugee law in good faith, an international refugee jurisprudence true to the object and purpose of the Convention will only emerge if the asylum adjudicators are formally independent and independent-minded. The bureaucratic emphasis on "control" over "protection", referred to in the speech of the High Commissioner quoted above, occasionally threatens the principled interpretation and application of

[23] Vienna Convention on The Law of Treaties, Article 31

[24] Steinbock, above n 12, 21.

[25] See *Attorney-General (Canada) v Ward* [1993] 2 SCR 689, 731

[26] Rodger Haines QC, "International Law on Refugees in New Zealand" [1999] *New Zealand Law Review* 119 at 146.

[27] [1997] Imm AR 145 at 153.

refugee law standards. An independent judiciary is necessary to ensure that refugee *policies* are not applied at the expense of national and international refugee *law*. For example, British courts referred to 'fundamental human rights' standards when they invalidated regulations that severely restricted asylum-seekers' access to basic social benefits.[28] Application of the rule of law sometimes brings courts into conflict with the executive. Then judicial independence is the safeguard of the rule of law. In Australia, governments have reacted to unwelcome judicial decisions in the immigration area by restricting the review role of the courts.

The tension between executive policy on refugees and judicial review of asylum applications has a long history in Australia, a history that underscores the need for independent review of executive decision-making in this area. Immigration policy in Australia has, since Federation, been characterised by strict supervision of limits on entry. From 1900 to the early 1960s, the policy was explicitly racist, designed to prevent non-white migrants.[29] The end of the white Australia policy and internal reforms of the department responsible for migration decision-making in the 1970s coincided with a new regime of judicial review of Federal government decisions. The creation of the Federal Court was an integral part of this new order, along with a comprehensive statutory framework for judicial review which streamlined the procedures for reviewing administrative decisions on common law grounds, including unreasonableness and denial of natural justice.[30] Judicial review of immigration decisions "imposed levels of accountability and scrutiny which, prior to 1980, were absent from both Australian immigration,"[31] and was arguably one of the most influential "external" agents for change. A prominent Australian scholar of immigration studies has characterised the Court's approach as "liberal [and] permissive ... cutting across the strict control agenda pursued by the immigration bureaucracy."[32] The author traces this approach to the increasing influence of human rights ideals, and the "body of international case law influenced by such ideals."

In 1994, the Australian parliament legislated to restrict curial supervision of refugee determinations. This was to be the first of several amendments in the last six years that substantially narrowed the grounds upon which judicial review can be sought. The 1994 changes were in part a consequence of the

[28] *R v Secretary of State for Social Security, ex parte JCWI and ex parte B*, [1996] 4 All ER 385, 401; *R v London Borough of Hammersmith and Fulham and others, ex parte M and others*, 30 HLR 10, *The Times*, 19 February 1997.

[29] Mary Crock, *Immigration and Refugee Law in Australia* (Federation Press, 1998), Ch 2.

[30] See the *Administrative Decisions (Judicial Review) Act 1977*. Migration-related decisions – as one form of administrative decision – were reviewable under this legislation until 1993. Since then, the review grounds for migration-related decisions (including refugee applications) have been set out in the *Migration Act 1958* (Cth).

[31] Andrew Langham, "The Erosion of Refugee Rights in Australia: Two Proposed Amendments to the Migration Act" (1999) 8 *Pacific Rim Law and Policy* 651, 657; Crock, *ibid*, 40-41.

[32] Robert Birrell, "Immigration Control in Australia" (1994) 534 *Annals of the American Academy of Political and Social Science* 106, 111, cited in Langham, *ibid*, n 34.

executive's view that Federal Court was undermining immigration policy objectives through its interpretation of review grounds such as "unreasonableness" and "taking into account irrelevant considerations".[33] These were removed as grounds for the review of migration decisions, which were made subject to a special review regime set out in Part 8 of the *Migration Act 1958* (Cth).

The second major change in the Court's review powers occurred in 1996, when a newly-elected government removed further review grounds from the *Migration Act*. In particular, the Court no longer has the power to consider an application if it alleges apprehended bias or breach of the requirements of natural justice. Under the current legislation, a decision is reviewable only on the bases of actual bias or fraud, an incorrect application of law to the facts, failure of jurisdiction, a complete lack of evidence upon which to make the finding, or an improper purpose in the exercise of power.[34] This prompted one judge to commence his judgment by saying:

> "The fact that it is the direct Parliamentary intention ... to pursue the most curious course of ensuring that this Court can not interfere, even where a decision is so unreasonable that no reasonable decision-maker could reach it, where the decision is based on irrelevant considerations, is affected by ostensible bias or reached even where there is a denial of natural justice is hard to accept in what one would like to think of as a liberal democracy, let alone one which had committed itself to the international obligations to refugees reflected in the United Nations Convention and Protocol relating to the Status of Refugees."[35]

Yet even the current restraints are inadequate in the view of the present government, and in 1997 it introduced a bill to completely remove the review jurisdiction of the Federal Court in migration cases.[36] The bill remains in the Parliament, but if passed it would leave only the High Court – the highest court in Australia with only seven judges – with its constitutionally entrenched (although narrow) review powers in respect of any decision made by an "officer of the Commonwealth."[37] The Australian legal scholar Mary Crock has observed that in recent years governments have "become obsessed with controlling both immigration into Australia and the role played by courts in the review of migration decisions".[38] Nonetheless, because Federal Court judges (who are responsible for finally determining most migration cases that come to the Court) have tenure to age 70 guaranteed by the Constitution, they are truly independent, and hence there is a strong tradition in the Federal Court of principled interpretation of the Convention.

Australia's refugee determination process provides for comprehensive merits review of Departmental refugee status determinations by the Refugee

[33] Crock, above n 29, 291

[34] Improper purpose is given a narrow statutory definition : see *Migration Act 1958* (Cth), s 476.

[35] *Applicant N 403 of 2000 v Minister for Immigration and Multicultural Affairs* [2000] FCA 1088, par 3.

[36] *Migration (Judicial Review) Bill 1999* (Cth).

[37] See *Constitution Act 1901*, s 75.

[38] Crock, above n 29, 296.

Review Tribunal (RRT). The RRT is an administrative tribunal comprised of persons with expertise in the refugee field, which is able to hear afresh an asylum-seeker's application if it has been rejected by the Department decision-maker.[39] Those advocating the abolition of the Federal Court's review powers insist that the RRT provides sufficient safeguards of applicants' rights.[40] However, some concern has been expressed about whether Tribunal members have sufficient structural independence from the Executive. Members are appointed for 5 year terms and are subject to monthly audits that include scrutiny of cases decided by each member, and the rate at which the member is affirming or overruling Departmental decisions.[41] The current Minister has sometimes criticised Tribunal decisions with which he disagrees, and on one occasion threatened that decision-makers who "stretch" the Convention should be concerned about job security.[42] Under these circumstances, there is a special need for independent judicial review of refugee claims in Australia.

Judges with independence both in mind and in the formal structure of their office have available a "human rights-conscious" interpretive method which can make the Convention definition more responsive to the changing nature of forced displacement Two examples, namely, persecution by non-state agents and the meaning of "particular social group", demonstrate the choices available to judges in construing the Convention.

3.1.1 II A Persecution by non-state agents and the "unwillingness or inability" to seek protection

Since the mid-1980s, there has been a proliferation of "failed states," where extant state structures collapse entirely (Somalia, Afghanistan), or where endemic civil conflict renders the government incapable of asserting territorial control (Colombia, Sierra Leone, Democratic Republic of the Congo). Persons fleeing these situations often have a well-founded fear of persecution by non-state actors (militias, guerillas, criminal gangs), and may also be able to es-

[39] For an overview of the RRT's procedure, see : Susan Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?" (1998) 5 *Australian Journal of Administrative Law* 78; Dr Peter Nygh, "The Refugee Review Tribunal", paper presented to the International Association of Refugee Law Judges Australasian Branch Conference and Inaugural Meeting, March 2000.

[40] Senate Legal and Constitutional Reference Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* (June 2000), referring to submissions made to it by the Department of Immigration and Multicultural Affairs, at p 72.

[41] Law Council of Australia, *Submission to Legal and Constitutional Legislation Committee: Migration Legislation Amendment (Judicial Review) Bill 1998* (January 1999) p 12. The proposed "Administrative Review Tribunal", which will replace the Refugee Review Tribunal, is likely to have the same structural relationship with the Government departments whose decisions it is reviewing : see P Bayne, "The Proposed Administrative Review Tribunal – Is There A Silver Lining in the Dark Cloud?" (2000) 7 *Australian Journal of Administrative Law* 86, 88.

[42] Editorial, "Ruddock's Threats to Refugee Body", *The Canberra Times*, 27 December 1996, 14.

tablish a Convention reason for the persecution. Their state of origin is, in an obvious sense, unable to protect them as it has effectively ceased to function in most or all of the territory. State protection has not failed because of a discriminatory motive or intent by state authorities, but simply because the state apparatus has lost all coercive power.

Asylum-seekers from failed states are among the most numerous applicants for refugee status in developed countries. Their claims lie within a penumbra of uncertainty in the application of the Convention definition. As mentioned above, they are likely to fear harm from agents whose conduct may lack an easily recognisable "persecutory" focus. More significantly, asylum-claimants whose states are unable to protect them have been denied refugee status in some receiving states because of an interpretation of the Convention which requires that the state of origin tolerates or encourages the persecution by non-state agents. On this view, the mere incapacity of the state to protect against "private" persecution is insufficient: there must be some kind of deliberate failure to protect for a discriminatory motive. Where a state no longer exists, this requirement cannot be satisfied and the asylum claim fails.[43] This interpretation of the Convention was formalised in the European Union by the "Joint Position in the Harmonised Application of the Definition of the Term 'Refugee'", adopted on 4 March 1996. Point 5.2 of this Position states :

> "Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate."

The Position reflected attempts by the Justice and Home Affairs Council to accommodate the views of Germany, France and Italy,[44] whose determination bodies had adopted interpretations that emphasised "state responsibility" as a precondition for refugee status. For example, in its decision of 23 July 1991, the *Bundesverwaltungsgericht* (Federal Administrative Court) denied refugee status to Turkish citizen of Kurdish ethnicity because "[w]hen the provision of protection by the state against threat or infliction of harm by a third party outreaches its forces, a state's responsibility cannot be involved."[45] The underlying rationale seems to be that, unless the state is in some way responsible for the persecution or the lack of protection, the persecution is merely a "private" affair that is not within the scope of the Convention. Hence, the Swiss Asylum

[43] See, e.g., Verwaltungsgerichtshof, 11 March 1993, 93/18/0083 (Austria); Verwaltungsgerichtshof, 14 November 1996, 95/18/1135 (Austria); Conseil d'Etat, 22 November 1996, case 167.195 (France); Commission des recours des refugies, 28 February 1995, case 270.619 (France); Swiss Asylum Appeals Commission, 6 June 1995, EMARK 1996/28; Swiss Asylum Appeals Commission, 10 January 1995, EMARK 1995/2; Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman and Carlos Pena Galiano, eds, *Who is a Refugee ? A Comparative Case Law Study* (Kluwer, 1997), pp.705, 706.

[44] Fitzpatrick, above n 4, 240.

[45] 9 C 154.90, cited in ELENA, above n 19.

Appeals Commission has found that only where a state has indicated that it is *not intending* to protect its citizens is there "persecution" in a Convention sense.[46]

The focus on whether responsibility for persecution can be attributed to the state of origin represents a "state-centric" interpretation of the Convention. Such an interpretation perhaps derives from the Cold War presumption that "real" refugees are victims of totalitarian states, and that the state must in some way be complicit (and thus blameworthy) in the feared persecution. However, the "state-centric" interpretation fails to give sufficient attention to the notion that the function of international refugee law is *protective*, and the role of the international community (through the receiving state) is not to condemn the country of origin but to substitute international protection for that which is lacking from the state.[47] So much is clear from the UNHCR's *Overview of International Protection Issues* (1995):

> "[T]he essential element for the extension of international protection is the absence of national protection against persecution, irrespective of whether this absence can be attributed to an affirmative intention to harm on the part of the state ... Clearly, the letter, object and purpose of the Convention would be contravened and the system for the international protection of refugees would be rendered less effective if it were to be held that an asylum-seeker should be denied protection unless a state could be held accountable for the violation of his/her fundamental rights by a non-government actor."

This standpoint is consistent with regarding the Convention as providing a human rights remedy in defined circumstances. It is an accepted principle in human rights law that states are not only prohibited from actively violating recognised human rights, but must also "ensure and promote" the observance of human rights within their territory. Permitting human rights violations to be committed with impunity by non-state actors is still regarded as a failure of protection for the purposes of international human rights law, and this principle could inform our understanding of whether a claimant is "unable" to avail her or himself of state protection. An approach concentrating on protection needs rather than state complicity has been taken in the United Kingdom,[48] Australia,[49] Denmark, the Netherlands and Sweden.[50] In *R v Secretary of State for the Home Department, ex parte S Jeyakumaran*[51], the UK High Court accepted that "persecution by a faction of the population which is tolerated by the government or persecution which the government is unable to prevent

[46] See Swiss Asylum Appeals Commission, 11 March 1996, I/N 250 200; Swiss Asylum Appeals Commission, 6 June 1995, EMARK 1996/28.

[47] *Ibid.*

[48] *R v Secretary of State for the Home Department, ex parte S Jeyakumaran*, 28 June 1985, QBD CO/290/84.

[49] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 430; *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28; *Perampalam v Minister for Immigration and Ethnic Affairs* [1999] FCA 165; RRT Reference V94/02582 (1994), par 41, 88, 91-92; RRT Reference V94/02160 (1995), par 76-8.

[50] For these countries, see ELENA, "Research Paper on Non-State Agents of Persecution", above n 19.

[51] 28 June 1985, QBD CO/290/84.

supports a claim for refugee status." Decisions of the Australian Refugee Review Tribunal have expressly adopted Hathaway's view that persecution

> "may also consist of either the failure or inability of a government effectively to protect the basic human rights of its populace" and "...the state which ignores or is unable to respond to legitimate expectations of protection fails to comply with its most basic duty thereby raising the prospect of a need for surrogate protection."[52]

The Co-ordinating Chamber of the Hague District Court similarly held that Article 1A(2) of the Convention included situations where no central or de facto government existed. The Co-ordinating Chamber expressly rejected the approach of French and German Courts and that of the EU Joint Position, stating that its interpretation accorded both with the plain meaning and the object and purpose of the Convention.[53]

3.1.2 II B Meaning of Membership of A Particular Social Group

"Membership of a particular social group" is another concept which, depending on how it is applied, allows adaption to new protection needs. It is the second example of where the Convention definition leaves adjudicators many choices, because (as Goodwin-Gill observes) "there is probably no single coherent definition, but rather a range of permissible descriptors."[54]

A concern in the interpretation of 'social group' is that it could become a "catch all" category that embraces any person with a well-founded fear of persecution relating to their personal status, irrespective of whether there is an identifiable 'group' to which the persecution is directed. The "catch-all" thesis is advanced forcefully by scholars such as Arthur Helton,[55] but encounters the objection that it allows social groups to be defined by their fear of persecution,[56] eliminating the textual requirement to establish a link between the fear of persecution and the Convention ground.[57] At the other end of the spectrum is a restrictive interpretation which hypothesises that when they included the phrase, the drafters had in mind persons persecuted by Communist regimes because of their status as landowners or businessmen.[58] By analogy, beneficiaries of the social group ground should be confined to a "collection of people, closely affiliated with each other, who are actuated by some common impulse or interest."[59]

[52] Hathaway, above n 9, 127-30, cited in RRT Reference V94/02582 (1994), pars 91-92.
[53] Rechtseenheidskamer, 27 August 1998, AWB 98/3068 en AWB 98/3072.
[54] Guy Goodwin-Gill, *The Refugee in International Law* (2nd ed, Oxford, 1996), 365-6.
[55] Arthur Helton, "Persecution on Account of Membership in a Particular Social Group as Basis for Refugee Status" (1983) 15 *Columbia Human Rights Law Review* 39, 41-2, 45.
[56] See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 242-243 (Dawson J), 259 (McHugh J).
[57] Hathaway, above n 9, 159.
[58] Goodwin-Gill, above n 54, 46.
[59] *Sanchez-Trujillo v INS*, 801 F 2d 1571, 1576.

United States' authorities have endeavoured to give "particular social group" a fixed and precise denotation, focusing on elements such as "voluntary association", "common impulse or interest" or "immutable characteristic".[60] By contrast, UK and Australian courts have been less preoccupied with establishing a rigid linguistic definition, and more willing to adopt a *social* approach to the meaning of social group; that is to say, to consider the way in which groups may be constituted *in society* through social perceptions, policies and practices. Fundamental to this analysis of social group is a recognition that the common experience of discrimination and denial of fundamental human rights by the state or society as a whole can contribute to the crystallisation of a distinct group. In *Applicant A v Minister for Immigration and Ethnic Affairs*,[61] McHugh J of the High Court of Australia accepted that:

> "[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they are persecuted because they are left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception they were a particular social group."

The common experience of discrimination, prejudice or denial of human rights is thus accepted as part of what gives a "social group" the requisite "internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals", and also creates the *external perception* that a distinct group exists.

In *Islam v Secretary of State for the Home Department*,[62] the House of Lords begins with an inquiry into the social practices of the relevant society when determining whether "women" are a particular social group in Pakistan.[63] In the leading majority opinion, Lord Hoffman begins with the premise that the Convention is a human rights instrument,[64] and hence, "the concept of discrimination in matters affecting fundamental human rights and freedoms is central to an understanding of the Convention."[65] Requirements of cohesiveness, cooperation or common interest are rejected as unnecessary to finding that a social group exists. Lord Hope of Craighead similarly held that :

> "the word 'social' means that we are being asked to identify a group of people which is recognised as a particular group in society. As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person's nationality ...
>
> [A social group] may have been created quite contrary to the wishes of the persons who are comprised in it, by society. Those persons may have been set apart by the norms or

[60] See, e.g., *ibid* and *In re Acosta*, Int. Dec. No. 2986, 1 Mar. 1985.
[61] (1997) 190 CLR 225, 264
[62] [1999] 2 AC 629.
[63] *Ibid* 653 (Lord Hoffman).
[64] *Ibid* 651.
[65] *Ibid.*

customs of that society ... This will almost certainly be because they are being discriminated against by the society in which they live ..."[66]

Their Lordships examined the social context of the treatment of women in Pakistan and interpreted the term in light of the objects and purposes of the Convention, the upholding of the cardinal human rights principle of non-discrimination, and the protection of individuals against discriminatory human rights violations. This approach is an example of a purposive, human rights-conscious interpretive method that gives conceptual coherence and social realism to the social group ground, without rendering it a "catch-all" category.

4. CONCLUSION – THE WAY FORWARD

The definitional conundra that sometimes confound efforts to apply the Convention to new situations have led some to call for a rewriting of Article 1A to include new grounds. A comprehensive rewriting has the attraction of cutting the gordian knot of conflicting approaches, but entails the risk that, in the current climate of states' retreat from protection, we will be left with a narrower definition than we currently have.

My brief reference to case law concerning certain issues shows that there remain significant divergences in the interpretation of the refugee definition. This is understandable in light of specific local needs and practical pressures, but it would nevertheless be desirable to have some harmony in the interpretation of the principles underlying refugee jurisprudence.

One way of narrowing divergences in interpretation may be the establishment of an international panel of experts charged with giving authoritative interpretations of the Convention. Article 38 of the treaty allows for disputes *between states* concerning the meaning or application of the Convention to be referred to the International Court of Justice, but this provision has never been invoked. The mechanism of using an Optional Protocol to create a committee, which reviews states' compliance with treaty obligations and adjudicates individual complaints, may have application. States could thus consent to having particular interpretive questions referred to the panel. Whether the panel's conclusions would be binding on domestic institutions would depend on the terms of the protocol, and also upon the interrelationship between international and domestic law within the particular legal system. The ideal model would have the decisions of the interpretative body accepted as binding. Even if non-binding, the opinions may be a force for greater uniformity and consistency in the interpretation of protection obligations.

As noted above, the Convention currently contains no substantive protections for asylum-seekers, and leaves the process of refugee determination to the discretion of states parties. It is a part of ensuring the continuance of a

[66] *Ibid*.

strong system of international protection that states agree to a core minimum framework for refugee determination, so that the procedural rights of asylum-seekers can be guaranteed. A centrepiece in the specification of minimum requirements for a legitimate asylum assessment model must be final review by a body of independent judges. The ideal model would specify that the decision-making relating to refugee status is conducted by persons with sufficient independence from the political pressures surrounding the area to guarantee that determinations are made in accordance with the rule of law. The formulation and advocacy of minimum standards is the function of a body such as UNHCR. This Association may also be able to contribute to the process.

In my view, the future of the Convention definition must be linked to the future of international law, and calls for a principled and intellectually creative interpretation by adjudicators. The careful use of refugee law learning from other jurisdictions is already contributing to a transnational refugee law jurisprudence, and there is value in creating an accessible and comprehensive international database of refugee decisions. The existence of such a resource and information as to the means of accessing it could be pursued by the Association.

THE FUTURE OF REFUGEE LAW: THE CATEGORIES OF PERSECUTION ARE NEVER CLOSED

Allen Linden*

Any discussion about the future of refugee law, must begin by recognizing the limited role we Judges play in the solution to the enormous world problem of refugees - some 40 million of them, both internal and external, a problem that does not seem to diminish over the years but to enlarge. We all know that the best solution is reducing the need for refugee determination systems, by advancing peace and prosperity in the world and respect for human rights in countries that have not yet recognized the wisdom of tolerance and respect for their minority groups.

As the world works toward this ultimate goal, less ideal but necessary solutions must be fostered. Special efforts by countries to protect large groups of people being persecuted (and threatened in other ways) are being employed to offer temporary, safe havens. Such efforts, as recently engaged in by Switzerland in Kosovo, will and must continue, and be developed creatively.

But, despite these dreams for the future and worthy new kinds of solutions, there are still multitudes of individuals who escape from persecution by their own efforts, or with the help of others, and seek asylum in our various countries. We, the refugee Judges of the world, are left to do our best to decide, in individual cases, whether to accept their claims or to send them back home. It is a difficult task, for we have to work with a definition of Convention refugee that is a half-century old, designed for a different period in history. Although it has been shown to be relatively flexible, the words used have limits to their meaning. Compassion cannot blind us to our legal duty to interpret the language fairly; but neither should blind adherence to the original intent keep us from adding new forms of persecution and new social groups to the sphere of potential protection.

For me, the Convention refugee definition should be allowed to continue to develop in the future in accordance with the needs of our times, but always paying due regard to the language and the spirit of the law. I must confess that I prefer a „kinder, gentler" approach to interpretation that fosters compassionate decisions rather than strict constructionist analysis that excludes too many and includes too few.

We Canadian Judges, who inhabit a land populated largely by immigrants and refugees, have understandably been at the forefront of the development of

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refugee law, in part because of our new *Charter of Rights and Freedoms*[1] enacted in 1982, which has influenced many progressive decisions. The Canadian *Charter* applies to any „foreign national" who arrives on our shores. Some 25,000 refugee claimants per year manage to travel to Canada, where they are entitled to legal aid and the full panoply of constitutional rights upon their arrival. (In addition, Canada accepts 250,000 or so immigrants each year and has done so for many years.) Consequently, there has been much litigation concerning refugee law, as our *Charter* is interpreted as a „living tree", not a dead stump.

One of the early decisions promoting this movement was *Singh* v. *Canada (Minister of Citizenship and Immigration)*,[2] in which Bertha Wilson, the first woman on the Supreme Court of Canada, decided for the Court that oral hearings in refugee cases were required by the *Charter*. As a result, we have established a Board, The Refugee Determination Division, of some 250 members to decide these cases at first instance. Millions of dollars in legal aid expenses are furnished to these individuals. My Court, the Federal Court of Canada, hears thousands of cases each year on appeal from RDD.

For us Canadians, the categories of persecution are never closed, as Lord Macmillan said in *Donoghue* v. *Stevenson* many years ago about the categories of negligence. Neither are the categories of particular social groups limited in number. If our Courts are persuaded that a new way of invading personal security is persecution, it will be so recognized. Similarly, our Courts have been open to protecting new types of social groups. To us, legal reasoning can be tempered by compassion. We are not circumscribed, as are some other Courts, to narrowly interpret the term social group. In furtherance of our broader view of social group, based perhaps on our constitutional jurisprudence surrounding equality and discrimination, our Supreme Court led by Justice La Forest in *Ward* v. *Canada (Attorney General)*,[3] has opined that the meaning assigned to particular social group should take into account the underlying themes of human rights and anti-discrimination that form the basis for the international refugee protection efforts and should include at least 3 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 its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[2] [1985] 1 S.C.R. 177.
[3] [1993] 2 S.C.R. 689.

This list is meant to be only a „working rule", not an „unyielding deterministic approach" to the issue.[4]

In my view, in determining whether a new social group should be recognized, there is no need to prove „cohesiveness" as some cases have held. Nor does such a group have to be composed of people based on their status alone. It is unwise to insist that the social group must be created by something *entirely unrelated* to the persecution or to say, as some do, that persecution *by itself* cannot create a social group. It is better to leave open to the Courts, as Sedley, J. stated in *Shah* v. *Secretary of State for the Home Department*,[5] the task of analyzing all the factors present in order to decide whether someone is being persecuted on the basis of a violation of human rights related to his or her human dignity, as we now do in Canada for the *Charter's* „analogous groups".[6] This does not mean that any individual who is harshly treated by someone can automatically become a refugee, for that would be to do violence to the language of the Convention. But to interpret the words of the Convention too rigidly would equally do violence to the spirit of the Convention and the human rights norms embedded in it.

Among the new forms of persecution and new social groups recognized in Canada, in accordance with these principles, have been:

- A man in China who was to be forcibly sterilized pursuant to their one-child policy.[7]
- A woman in China who was to be sterilized (or to have an abortion) under the one-child policy.[8] „Cloaking persecution into a veneer of legality does not render it less persecutory. Brutality in furtherance of a legislative end is still brutality".
- Second children in China being severely discriminated against.[9]
- Women in Kenya forced to enter marriages against their will.[10]
- Women subject to domestic abuse.[11]
- Women who are subject to genital mutilation.[12]
- Individuals who are persecuted because of their sexual orientation (homosexuals).[13]
- Children denied primary education.[14]
- Victims of rape.[15]

[4] See *Chan* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at 642, per La Forest J.
[5] [1997] Imm. A.R. 145.
[6] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
[7] *Chan* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.
[8] *Cheung* v. *Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), aff'd in *Ward*, *supra* note 4.
[9] *Cheung*, *ibid.*
[10] *Vidhani* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 F.C. 60 (T.D.).
[11] *Mayers* v. *Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 154 (C.A.); *Rodionova* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 681 (T.D.).
[12] *Annan* v. *Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.).
[13] *Pizarro* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 320 (T.D.).
[14] *Ali* v. *Canada (Minister of Citizenship and Immigration)* (1996), 119 F.T.R. 258 (T.D.).

I note with pleasure that the more expansive meaning of social group has now been adopted by the House of Lords,[16] consistent with the trial decision of Sedley J., in *Shah*,[17] where it was said that women in Pakistan were a social group, so that women adulterers, who might be stoned to death, could be treated as refugees. Lord Hope, loyal to Lord Macmillan, his scottish countryman, stated that social group was an „open-ended" term,[18] while Lord Hoffman said the term „cannot be confined to those social groups that the framers had in mind"... but should include „whatever group came within the anti-discriminatory objective" of the Convention.[19] So, once again, the House of Lords is wisely following the leadership of the Supreme Court of Canada and other humanitarian jurists.

As for the future, our Court and, I am sure, the Canadian RDD will continue to demonstrate humanity and compassion, ensuring that our law continues to evolve so as to cover new forms of persecution and social groups as they appear. Our Parliament,[20] in contrast to many others, is moving in the same direction, creating a new class of „refugee" - „person in need of protection" - which would include those persons, not regular refugees, who would be at risk of torture, whose life would be at risk, or who would be subject to cruel and unusual treatment or punishment. The risk will have to be personal to that individual and faced in every part of the country (IFA). The risk to the person in need of protection cannot be of ordinary criminal sanctions nor because of a country's inability to provide adequate health care. While this proposed amendment is not as broad as some would like, it does provide some hope to the plight of a considerable group of people, not now protected by the Convention.

While great strides have been taken in treating refugees more fairly, real problems have arisen and must be confronted in the future. Dark clouds are blocking the sun over Canadian skies. Too many unworthy people, under the guise of being refugees, have sought to take advantage of Canada's generous asylum system in the same way as they have poured into many other countries in Europe and elsewhere. Not only are many of these people merely faking refugee status, but some of them are war criminals, gangsters, terrorists, drug traffickers, members of organized crime syndicates and others. Unscrupulous enterprisers are trafficking in desperate human beings, promising to get them into Canada in return for large fees, sometimes paid by enforced slavery, forcing them to take great risks to their lives, and seldom delivering what they promise. Many of the worst of these people clutter our legal system with unmeritorious procedural manoeuvres, stalling their deportation, too frequently for many years. Often these people disappear illegally, have children in Canada, only to be deported

[15] *W.R.I. (Re)*, [2000] C.R.D.D. No. 43.
[16] [1999] 2 All E.R. 545.
[17] *Supra* note 5.
[18] *Supra* note 16, at page 569.
[19] *Ibid.*, at page 567.
[20] Bill C-31, *An Act Respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 2nd Sess., 35th Parl., 1999 (1st reading 6 April 2000).

years later. Public opinion in Canada, as it has elsewhere, has hardened against these people particularly, but this negative attitude is also spilling over to encompass all refugees and even immigrants, threatening to undermine all we have achieved over the years. We must find ways of dealing with these unscrupulous people so that the progress we have made will not be jeopardized for legitimate refugees.

There are many other complex matters to address in the years ahead. How would you handle this case, which made the headlines of a leading Canadian newspaper? A person came to Canada twenty-two years ago from Chile and was excluded on the basis that he had been involved in the Pinochet secret police.[21] Numerous procedural appeals were taken to the Deportation Order and are still going on. In the meantime, this person has established himself in a successful business, raised two children who were born in Canada and are now in their 20's. He has behaved responsibly over the years. Yet after all these 22 years, he is still here and has recently won a rehearing of his previously rejected claim to be allowed to stay on „compassionate and humanitarian grounds". This person offered assistance to Amnesty International in bringing to justice some of his fellow Chileans, who had been involved in murder during the Pinochet years. What can be done to reduce the long delays in these kinds of cases? Should a person such as this remain an outlaw forever, or should he be pardoned for past wrongdoing at some point? If so, who would do it? And on what basis?

Another problem we have is with the standard of proof we use in dealing with exclusion of people accused of war crimes and crimes against humanity. The standard of proof in such a case is „ reasonable grounds for believing", hardly a heavy onus of proof for such a heavy charge. While I understand the reasons for it, I have been concerned about cases in which we have excluded such people on evidence that would be insufficient to convict a person, but was nevertheless sufficient to supply reasonable grounds for believing that they were guilty. In the future we should be thinking about confronting this problem of possibly innocent claimants being excluded on thin evidence. One possible response might be to develop means to cooperate with the new International Criminal Court, once it is generally available, to transfer to its jurisdiction these alleged war criminals in order to have their alleged crimes proved or not. Following that, they might renew their refugee claims, which may succeed or not, depending on the decision of the International Criminal Court on the evidence as to their guilt or innocence. Or should they be tried criminally in the country where they seek asylum?

While we are usually generous, and should be, there are times where we are too slow to remove dangerous undesirables from our midst. Dangerous foreign nationals left at large in a country can cause physical harm to our people leading to civil law suits against Immigration Authorities. In a recent Canadian case,[22] a woman was sexually assaulted by a foreign national after he was released from

[21] *Naredo* v. *Canada (Minister of Citizenship and Immigration)* (1995), 96 F.T.R. 240 (C.A.).
[22] *Martin* v. *Canada (Minister of Employment and Immigration)* (1999), 166 F.T.R. 35 (T.D.).

prison where he had served a criminal sentence for sexual assault. He had been ordered deported but things moved too leisurely. She sued the government civilly for its negligence in leaving her assailant at large, that is, for deporting him too slowly. That very civil case is before our Court right now, and whatever the outcome, it demonstrates the difficulties caused when, because resources are limited and procedural rights may be too ample, we are too dilatory in removing dangerous foreign nationals who then injure our citizens.

Another problem for the future is the standard of complicity we use in deciding whether someone is „involved" in organized crime or terrorist activities. Is a movie actor from Hong Kong to be excluded because he makes movies for a movie company controlled by a Triad? Is he a „member" of a criminal organization by virtue of his close association with the Triad in movie business enterprises? Is a fund-raiser for the Tamil Tigers to be excluded, even though he claims he has nothing to do with the atrocities committed by them in name of freedom in Sri Lanka?

These and other tantalizing questions await us Refugee Judges in the years ahead. I know that we shall confront them, as in the past, with compassion, where it is indicated, and with firmness, where that is warranted.

G. CONTRIBUTIONS FROM WORKING PARTIES

G. CONTRIBUTIONS DE GROUPS DE TRAVAIL

"HUMAN RIGHTS NEXUS" WORKING PARTY

Rapporteur's Report

James C. Simeon*

1. HUMAN RIGHTS NEXUS WORKING PARTY'S ACTIVITIES SINCE THE 1998 IARLJ CONFERENCE IN OTAWA, CANADA

This report provides a brief summary of the activities of the Human Rights Nexus Working Party (HRNWP) since my last report to the International Association of Refugee Law Judges' (IARLJ) presented at the last Conference held two years ago in Ottawa, Canada. At the 1998 IARLJ Conference the HRNWP presented a Human Rights Conference Report and Rapporteur's Report, with recommendations. The HRNWP participants played an active role at the 1998 IARLJ Conference and were successful in having a resolution passed at the association's General Meeting. The resolution encouraged refugee law judges and decision-makers to utilize international human rights instruments to interpret the term persecution when determining refugee claims.[1] Following the 1998 IARLJ Conference, the number of participants on the HRNWP expanded.[2]

Over the last two years, the activities of the HRNWP have changed in a number of important ways. Communications among and between participants has been almost exclusively by e-mail, rather than by mail, telephone and fax machine, which was the case prior to the Ottawa Conference. Further, rather than concentrating its efforts on a single endeavour the HRNWP participants have been engaged in a number of the association's sponsored activities. Two, in particular, stand out. On December 6, 1999, Hugo Storey, IARLJ Inter-

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[1] The resolution, as amended, and passed reads, *"The Human Rights Nexus Working Party recommends that the International Association of Refugee Law Judges encourages that the term persecution be interpreted by reference to accepted international human rights instruments."*

[2] Although there has been the inevitable turnover of members on the Human Rights Nexus Working Party, the original core group of participants has remained largely unchanged. The core active participants include: Lori Disenhouse, Canada, Adriana van Dooijeweert, The Netherlands, Goran Hakansson, Sweden, Paul Millar, New Zealand, James C. Simeon, Canada, Hugo Storey, United Kingdom.

Conference Working Parties Co-ordinator and Council member, presented an outline paper at an IARLJ Symposium on Complementary Protection in London.[3] The HRNWP participants were asked to provide their comments and suggestions on this topic. On May 18-19, 2000, there was a Nordic-Baltic Seminar in Sweden hosted by Judge Goran Hakansson, Director-General, Aliens Appeal Board, on child refugee claimants. In addition, Lori Disenhouse, Legal Advisor with the Immigration and Refugee Board of Canada, was asked to assist in planning the programme for this year's IARLJ Conference. She assisted in the development of the theme for the International Human Rights and Protection of Refugees session that will have Professor Jean-Yves Carlier, l"Universite catholique de Louvain, Judge Matti Pellonpaa, European Court of Human Rights, and Professor Peter Burns, Faculty of Law, University of British Colombia and member of the Committee Against Torture, commenting, hopefully, on the HRNWP 1998 Ottawa Conference paper.

As noted, the HRNWP participants, both individually and collectively, have made a number of contributions to the activities of the IARLJ in the last 24 months. On the other hand, it has also proved difficult for the HRNWP to carry out a set programme of work during this period. In this regard, the experience of the HRNWP has been typical of other Working Parties. Hugo Storey noted some months ago that IARLJ Council members,

> have found that in practice the main inter-Conference activities around issues run by the association have involved fluctuating rather than fixed groups of interested members, as happened for example in relation to The Netherlands meeting on *prima facie* refugees and the London, U.K., meeting in November 1999 on complementary protection. Although, as in both these examples, Working Parties played a part, it has not proved practical for Working Parties to carry out a set programme of work. We lack a permanent secretariat with research support. Most of us are simply too busy.[4]

When the call went forward for the Working Party participants to indicate their preference for holding a Bern Conference Working Party meeting and/or providing a discussion paper for the Conference, the participants of the HRNWP expressed their willingness to attempt to do both. Nonetheless, it was quickly evident that given the practical limitations facing participants on the HRNWP a major reworking or updating of the 1998 Ottawa Conference report was not feasible in advance of the Bern Conference. It was agreed, subsequently, that any major revision of the 1998 Ottawa Conference paper would have to wait until after the Bern Conference. A distinct advantage being that the any update of the paper would benefit from the Bern Conference proceedings. What was seen as feasible, prior to the Bern Conference, was to have HRNWP participants provide brief summaries of the most significant developments and/or changes in their respective country's jurisprudence since the presentation of the Ottawa Conference report in 1998. Accordingly, the

[3] International Association of Refugee Law Judges, *Newsletter*, Issue 4, February 2000, "IARLJ Symposium on Complementary Protection," p. 2.

[4] Ibid., "Workshop News," "To all IARLJ Working Party Participants - a memo from Hugo Storey, Co-ordinator, Working Party process," p. 6.

HRNWP received update reports and case law citations from participants from The Netherlands, New Zealand, the U.K., Canada, and Sweden. These update reports on developments since 1998 are included as appendices to this report.

What follows is a brief synopsis of each of these reports and a comparison of the developments in each of these countries since the HRNWP's 1998 Ottawa Conference report.

2. PARTICIPANTS' UPDATE REPORTS

2.1 THE NETHERLANDS

Judge Mariette van den Bergh, District Court of the Hague, provided four "highlights" of Dutch jurisprudence involving the application of human rights since 1998. The cases are decisions of the Chamber for Unity of Law (Chamber) in The Netherlands.[5] Of the four judgements of the Chamber, three dealt with the granting of temporary residence permits and one with *prima facie* refugee status for the Reer Hamar, a group in Somalia.

In its March 11th ruling, the Chamber found that neither international case law nor national legislation required the State Secretary to consider Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* before granting temporary residence permits.[6]

On March 20, 2000, the Chamber ruled that when the State Secretary decides to issue a temporary residence permit on humanitarian grounds it must consider whether the putative internal flight alternative (IFA) can guarantee the applicant, in the short and medium term, actual access to basic facilities.

The Chamber ruled, on April 27, 2000, that the Reer Hamar do not suffer group persecution in Somalia. In considering this case, the Chamber decided that when a group is recognized as being persecuted that the individual asylum seeker, who is a member of this particular group, no longer has the burden of establishing a well-founded fear of persecution. Assuming that the asylum seeker's personal facts and circumstances are such that the request for refugee status is justified, the asylum seeker has *prima facie* refugee status. The burden of proof will then be on the Secretary of State to show that the asylum seeker is not a refugee.[7]

These cases support the conclusion the HRNWP reached on The Netherlands in its 1998 Ottawa Conference report, that "there is reference to human rights instruments for Convention refugee status, but not to the same extent as

[5] The full summaries of the judgements are found in Appendix I.

[6] Article 8 deals with the non-interference of the right to family life.

[7] For a further elaboration of *prima facie* refugee status see, Irma van den Berg, "Fifth Anniversary of the Aliens Courts in The Netherlands," IARLJ Newsletter, February 2000, pp. 3-4.

for secondary status,"[8] that is, in the issuance of temporary residence permits.

2.2 New Zealand

Paul Millar reports that a recent decision by the New Zealand Refugee Status Appeals Authority (RSAA) states, as follows:

> refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard. That is, core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution. In his text at 106, Professor Hathaway initially identified the relevant core human rights as those contained in the so-call Bill of Rights, but to the Bill of Rights should now be added the Convention of the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. ... We respectfully agree with this analysis and would only add that while the hierarchy of rights found in these instruments is not to be rigidly or mechanically applied, it does assist a principled analysis of the persecution issue.[9]

Paul Millar provided numerous other examples where the RSAA made reference to international human rights law in determining whether someone had or would suffer persecution.

2.3 United Kingdom

In a recent e-mail, Hugo Storey suggested the following additions to the section in the Ottawa Conference report covering the U.K. jurisprudence.

> The Immigration Appeal Tribunal opened the way to a more comprehensive human rights approach in the case of *Gashi* [delete line and a half].
>
> [next paragraph amend as follows:]
>
> The approach in *Gashi* has now received a ringing endorsement by the House of Lords in two cases. In *Shahana Islam* [1999] Imm AR 283 which held that women in Pakistan constituted a "particular social group", Lord Hoffman stated:
>
> "In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involved denials of human rights, but with persecution which is based on discrimination. And in the context of human rights instruments, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect."
>
> In the case of *Horvath* v. *Secretary of State for the Home Department*, judgment of 6th July 2000, which concerned whether Roma gypsies in the Slovak Republic were adequately protected by the authorities of the state against attacks from non-state agents (skinheads in particular), the judges were unanimous in accepting the necessity for a human rights approach to both the concepts of persecution and protection. In defining persecution as serious harm against which the state cannot protect a person, the judges in effect laid to rest reliance upon the dictionary definition in isolation.

[8] Human Rights Nexus Working Party, Human Rights Conference Paper, October 1998, p. 17.
[9] Refugee Appeal No. 71427/99 (16 August 2000), paragraph 51.

> It remains the case, however, that at both the level of the Tribunal and the courts, there is still reluctance to base assessment on the Hathaway hierarchy in detail. It is likely, however, that one of the main effects of the new *Human Rights Act* 1998, which came into force on 2 October 2000 will be to make U.K. judges more comfortable with human rights analyses in detail, although this will be in respect of the *European Convention on Human Rights*, not the *International Bill of Rights*.[10]

It appears that there have been significant changes in the U.K. since the HRNWP's Ottawa Conference report was released in 1998. For instance, in *Doymus, Mustafa* v. *Secretary of State for the Home Department*, Immigration Appeal Tribunal, Appeal No. HX/80112/99, July 19, 2000, that dealt with the question of whether an isolated incident of ill-treatment can amount to persecution, the Tribunal took an exhaustive look at the issue and concluded:

> In the opinion of the Tribunal a person who has been found likely to face a limited episode of ill-treatment sufficiently severe to be contrary to the absolute prohibition of such ill-treatment in international human rights provisions can succeed in showing a well-founded fear of persecution on that basis alone.[11]

The Tribunal arrived at this conclusion after considering the *International Bill of Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *European Convention on Human Rights and Fundamental Freedoms*. The Tribunal noted that, "The international human rights case law concerning such absolute rights does not require persistency as a universal criterion [for persecution]".[12]

This decision suggests that the human rights approach is now being more fully applied in the U.K. than in 1998.

2.4 CANADA

Three judgements rendered by the higher courts in Canada since 1998, have dealt with the interpretation or application of international human rights instruments in Canada.

In *Pushpanathan*[13], the Supreme Court of Canada ruled that drug trafficking in narcotics is not excludable under Article 1F(c) of the 1951 Convention. The Supreme Court stated that when considering exclusion under Article 1F(c),

> The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable.[14]

More specifically, the Supreme Court set out two categories of acts that fall within this exclusion clause. The first is where there is "a widely accepted

[10] E-mail to James C. Simeon from Hugo Storey, September 18, 2000.
[11] Immigration Appeal Tribunal, Appeal No. HX/80112/99, paragraph 50.
[12] Ibid., paragraph 25.
[13] *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982.
[14] Ibid., at 1029.

international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations."[15] The second category is "those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution."[16] The minority judgement is also instructive since it clearly acknowledges that a contemporary interpretation of international human rights instruments is required by necessity.

> The interpretation of international legal instruments is a dynamic process which must take into account the contemporary conditions. To put another way, the interpretation must respond to the contemporary context.[17]

In *Baker*[18], the Supreme Court ruled that federal immigration authorities are required to take into consideration the "best interests" of children in assessing their parent's humanitarian and compassionate (H&C) applications for admission to Canada under subsection 114(2) of the *Immigration Act*.

Even though the Supreme Court acknowledged that international treaties and conventions are not binding unless they have been incorporated into domestic legislation, nevertheless, it took the position that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[19] Indeed, Madame Justice L'Heureux-Dube, writing for the majority opinion, states, as follows:

> The values and principles of the Convention (*Convention on the Rights of the Child*) recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protection for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.[20]

The Federal Court of Appeal in *Suresh*[21], dismissed the appellant's appeal from a ruling that subjected him to removal to Sri Lanka, on the grounds that even though he was a Convention refugee, he constituted "a danger to the security of Canada".[22] One issue that the Federal Court of Appeal had to ad-

[15] Ibid., at 1030.
[16] Ibid., at 1032
[17] Ibid., paragraph 126/129.
[18] *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193.
[19] Ibid., paragraph 70.
[20] Ibid., paragraph 71.
[21] *Suresh, Manickavasagam* v. *M.C.I.* (F.C.A., no. A-415-99), Robertson, Decary, Linden, January 18, 2000.
[22] The Minister of Citizenship and Immigration and the Solicitor General of Canada had issued, "based on security or criminal intelligence reports received," a security certificate under section

dress was "whether under international law there is a non-derogable right against refoulement to a country where the person being returned will be at risk of torture. If so, then it remains to be decided whether this non-derogable right has become a peremptory norm of *jus cogens* and therefore, binding on Canada, notwithstanding the provisions of the *Immigration Act*".[23] In deciding this question the Court considered the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and Article 33 of the 1951 Convention.

Mr. Justice Robertson, writing the unanimous decision of the Court, states that these three Conventions complement each other and since the 1951 Convention "expressly permits derogation from the prohibition against refoulement, it is permissible for a state to rid itself of those who pose a security risk without being in breach of its international obligations".[24] In addition, he notes that the appellant only presented one case to support his argument, *Chahal* v. *The United Kingdom*, E.Ct.H.R., File: 70/1995/576/662, November 15, 1996. In this case, the European Court of Human Rights held that Article 3 and Article 15.2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* allow for no exceptions.[25] Thus, no one in the European Community can be returned to a country were the person can be subjected to torture or to inhuman or degrading treatment or punishment. Hence, the European Court of Human Rights found that the protection accorded under Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* to be wider than that found under the 1951 Convention.[26] Mr. Justice Robertson rightly notes that Canada is not bound by the decisions of the European Court of Human Rights nor is it subject to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

With respect to the appellant's argument that the prohibition against torture is a norm *jus cogens* and, hence, is a norm from which no derogation is permitted, Mr. Justice Roberston states that while the principles of customary international law may be "recognized and applied in Canadian courts as part of the domestic law, this is true only in so far as those principles do not conflict with domestic law."[27] In this particular instance, "the alleged peremptory norm conflicts with Canada's domestic law as evidenced by paragraph 53(1)(b) of the *Immigration Act*, which itself is a replication of Article 33 of

40.1 and an opinion under section 53(1)(b) of the *Immigration Act* that the appellant was a person who "constitutes a danger to the security of Canada".

[23] Ibid., paragraph 15.

[24] Ibid., paragraph 28.

[25] Article 3 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 15.2 provides that there can be no derogation from Article 3 even in times of national emergency.

[26] Ibid., paragraph 29.

[27] Ibid., paragraph 32.

the *Convention Relating to the Status of Refugees*".[28] Hence, the Court dismissed the peremptory norm argument with respect to the appellant's appeal of the "opinion letter" issued by the Minister of Citizenship and Immigration that the appellant is "a danger to the security of Canada."

The *Suresh* decision is currently on appeal before the Supreme Court of Canada.

The Supreme Court's ruling in *Baker* is, undoubtedly, a landmark decision. It is perhaps the clearest expression from the Supreme Court of Canada that it endorses the use of the values and principles of international human rights instruments to the statutory interpretation of domestic law as it pertains to administrative decisions involving matters of humanitarian and compassionate consideration.

2.5 SWEDEN

Goran Hakansson provides two cases to update the jurisprudence in Sweden since the 1998 IARLJ Conference. The first deals with a Rwandan citizen who sought asylum at the Swedish Embassy in Kenya. His application for asylum and a residence and work permit were rejected by the Migration Board [formerly the National Immigration Board] because he had been resident in Kenya since at least the middle of March 1997 and he could apply for asylum in Kenya. The Migration Board noted in its decision that, "It is possible for A to receive the protection he seeks in Kenya. Therefore A cannot be regarded in need of protection in Sweden. His application for asylum shall consequently be rejected. If A wishes to renew his application he should do so through the channels of the UNHCR in Kenya".

The applicant then sought an appeal of this decision with the Aliens Appeals Board (AAB) on December 22, 1997. The question the Aliens Appeals Board considered was to what extent is Sweden obliged to give protection to aliens seeking asylum from outside Sweden, and what rules are applicable in such cases. It is interesting to note that the AAB clearly states in this decision that,

> The [1951] Convention as well as the [1967] Protocol are legally binding for the nations which have signed them. Sweden has signed both.

However, the AAB also states that the 1951 Convention does not contain rules for either granting asylum or residence permits, nor does it obligate contracting states to grant refugees asylum. The AAB quotes Grahl-Madsen (*The Status of Refugees in International Law*, Vol. II, p. 94), as the authority, when it notes that the Convention "does not obligate the Contracting States to admit any person who has not already set foot on their respective territories." The AAB further notes that there is no rule in the Swedish Aliens Act that gives a

[28] Ibid.

refugee an unconditional right to a residence permit or asylum. For these reasons, the AAB rejected the applicant's appeal.

The second case is a decision of the European Court of Human Rights dated September 12, 2000.[29] The application was from a United States national, living in Sweden, who alleged that because of his work in exposing police brutality and other misconduct he was being persecuted in the United States.

> Allegedly, there had been serious attempts to injure him, he had been subjected to surveillance, his property had been destroyed and he had been attacked with chemical substances. His reports to the police authorities had been to no avail.[30]

The Migration Board in Sweden rejected his application for asylum on September 24, 1997. The AAB upheld the Migration Board's decision not to grant the applicant asylum, finding that the applicant's alleged maltreatment in the United States was "the result of criminal acts committed by individuals and was not attributable to the State."[31] There was no further appeal from this decision. The applicant made another appeal to the AAB in September 1998 and was again rejected. Again, there was no appeal against this decision.

The complaints brought to the European Court of Human Rights were that if the applicant returned to the United States he would be subjected to torture or to inhuman or degrading treatment or punishment and, as a consequence, invoked Article 3 of the *European Convention on Human Rights and Fundamental Freedoms*. The applicant further claimed that he was "denied the right to an effective remedy in respect of the alleged violation of Article 3 of the Convention because he was not granted public legal counsel and because the examination of the asylum issue was not conducted in a proper manner."[32]

On the first complaint, the Court found that the ill treatment in the United States alleged by the applicant did not "stem from any public authority or other organ of the State."[33] Nor did the Court find that the applicant had "substantiated that the remedies at his disposal within the domestic legal system of that country could not provide appropriate protection."[34] The Court, thus concluded, "the case does not disclose any appearance of a violation of Article 3 of the Convention."[35]

On the second complaint the applicant invoked Article 13 of the *European Convention on Human Rights and Fundamental Freedoms*.[36] The Court found that Article 13 does not guarantee a right to legal counsel paid by the

[29] *Goldstein* v. *Sweden*, ECtHR, File: 46636/99, September 12, 2000.
[30] Ibid., p. 2.
[31] Ibid., Aliens Appeals Board decision, January 30, 1998.
[32] Ibid., p. 3.
[33] Ibid.
[34] Ibid.
[35] Ibid., p. 4.
[36] Article 13 states, "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

State. Furthermore, the Court found that there was "no indication of any special reason calling for the granting of free legal aid in order for the applicant to take effective advantage of the available remedy."[37] As a consequence, the Court decided that "the case does not disclose any appearance of a violation of Article 13 of the Convention."[38]

The Court ruled that the applicant's complaints were manifestly ill-founded within the meaning of Article 35 & 3 of the Convention.

These cases do not alter the findings of our 1998 Ottawa Conference report on Sweden. With respect to Sweden, the Ottawa Conference report stated,

> In Sweden, as well, there is a two-tier system of determination in which references to human rights are largely with respect to being granted the right to stay in Sweden as opposed to being granted Convention refugee status.[39]

The general conclusions reached with respect to European countries with multi-level determinations, that is, granting Convention refugee status or temporary residence permits, etc., is that there is a tendency to use international human rights instruments for deciding secondary status. However, as one would expect, the use of the *European Convention on Human Rights and Fundamental Freedoms* prevails, particularly in continental European countries, over the use of other international human rights instruments.[40]

3. CONCLUSIONS

The human rights approach presented by the HRNWP in its 1998 Rapporteur's Report and Ottawa Conference report is consistent with recent developments in refugee case law in the countries reviewed above. There have been significant developments in the U.K. and Canada. New Zealand continues to refer to international human rights law in determining whether persecution has been or would be suffered by the claimant.

The HRNWP will continue to monitor developments in this area and continue to attempt to implement its programme of study outlined in the 1998 Rapporteur's Report. When called upon, it will, as well, continue to play a role in the broader programmes and activities of the IARLJ.

[37] *Goldstein* v. *Sweden*, ECtHR, File: 46636/99, September 12, 2000, p. 4.
[38] Ibid., p. 5.
[39] Human Rights Nexus Working Party, Human Rights Conference Paper, October 1998, p. 18.
[40] Ibid., pp. 19-20.

APPENDICES

1. Four "Highlights" of Dutch Jurisprudence on Human Rights Since the 1998 Ottawa Conference Report, **Mariette van den Bergh, Judge, District Court of the Hague**

2. Recent Developments in the use of Human Rights to Define Persecution in New Zealand, **Paul Millar, New Zealand Refugee Status Appeals Authority**

3. Canadian Jurisprudence Update: Post-1998 IARLJ Conference Report in Ottawa, Canada, **James C. Simeon, Immigration and Refugee Board of Canada**

4. Jurisprudence Update: Sweden, **Goran Hakansson, Director-General, Aliens Appeals Board, Sweden**

APPENDIX 1

FOUR "HIGHLIGHTS" OF DUTCH JURISPRUDENCE ON HUMAN RIGHTS SINCE THE 1998 OTTAWA CONFERENCE REPORT

Mariette van den Bergh, Judge, District Court of The Hague

a) Article 8 ECHR Judgements

On 11 March the Chamber for the Unity of Law (hereafter called 'the Chamber') passed, in three cases, judgement concerning Article 8 ECHR (*European Convention for Human Rights and Fundamental Freedoms*) in relation to the policy pursued with regard to temporary residence permits.

To the dissatisfaction of the respective appellants the respondent (the State of The Netherlands) had decided in two cases to grant temporary residence permits prior to checking whether the decision would be in accordance with Article 8 ECHR. The appellants were of the opinion that it should have

been checked first whether the decision was in accordance with Article 8 ECHR and that the question whether to grant a residence permit should only be answered at the end of the procedure.

The Chamber ruled that neither international case law nor national legislation force the respondent, prior to granting a residence permit, to check whether the decision is in accordance with Article 8 ECHR. Subsequently, the Chamber ruled, in both appeal cases, that there is no question of interference (in their family life) now that the respective appellants are in the possession of residence permits, which enable them to lead a family life.

In the third case the situation was exactly the opposite. A residence permit had been granted to the appellant in 1994. The appeal against the refusal to allow entry as a refugee as well as against the refusal to extend the residence permit were heard in the Chamber.

The Chamber had to judge, in particular, the opinion of the respondent that cancellation of the residence permit in this case meant no interference with the right to respect of family life, because the residence permit had not been granted with regards to leading a family life. The Chamber ruled that if the alien had in fact been able to lead a family life, as a result of the granted residence permit, cancellation or non-extension of the residence permit means interference with the right to respect of family life, which, therefore, merits a different weighing of interests than in cases where it should only be investigated whether the respondent's positive obligation is required.

b) The Chamber for the Unity of Law, 13 September 1999 Judgements: Iraq

On 13 September 1999 the Chamber passed judgement in three cases of Iraqi asylum seekers, who applied for admission into The Netherlands as refugees and for the granting of residence permits on humanitarian grounds. The Chamber ruled that, insofar as relevant to each case, the asylum seekers are not refugees.

When the cases were heard in the Chamber the main question was whether abolition of the residence-permit policy as of 20 November 1998 would pass judicial review. The Chamber ruled that the State Secretary of Justice, during the time of rejection could have reasonably formed the opinion that the general security situation in Northern Iraq was not such that forced removal of the rejected asylum seekers to Northern Iraq would be particularly harsh. The Chamber does not recognize a basis for the decision that the safety situation is such that no turned-down Iraqi asylum seeker could return to Northern Iraq. The Chamber based its opinion on official country reports of the Minister of Foreign Affairs and reports of Amnesty International and the UNHCR.

In two of the three cases, with the aliens in question coming from Central Iraq, there is no evidence that the respondents had investigated whether aliens have the alternative to settle in Northern Iraq. The State Secretary could not,

without substantiation, take for granted that they will be able to settle in Northern Iraq. These two appeals were therefore allowed. The appeal in the third case was dismissed. This case was about an alien from Northern Iraq. In the opinion of the Chamber, the State Secretary is rightly of the opinion that the alien can return to Northern Iraq. In the opinion of the Chamber, the alien did not bring forward evidence indicating that he cannot settle in Northern Iraq.

c) Iraq: Internal Flight Alternative

On 20 March 2000 the Chamber passed judgement in three cases of Iraqi asylum seekers, originating from Central Iraq. The State Secretary of Justice was of the opinion that these three asylum seekers did not qualify for a residence permit because Northern Iraq could be considered an internal alternative for settling for them.

The reason for the referral by the Chamber is as follows: As of 20 November 1998 the State Secretary has changed his policy with regard to Iraqi asylum seekers. Residence permits are no longer granted and Northern Iraq can, for certain groups of Iraqi citizens, be considered an internal alternative for settling. Taking into consideration the general local situation, forced repatriation of aliens to Central Iraq is still of an undue harshness.

When passing judgement on 13 September 1999 the Chamber accepted the changed policy of the State Secretary. In the judgement in question the Chamber established that the change of policy of 20 November 1998 has resulted in the following: contrary to what was the case in the past, when deciding whether a permit is to be granted without restrictions, it should be investigated whether individual facts and circumstances prevent the turned-down Iraqi asylum seeker from settling in Northern Iraq. The Chamber has also concluded in the aforementioned judgements that, according to the State Secretary, much importance should be attached to the factors mentioned by the UNHCR.

In fact, the Chamber states that an asylum seeker should be able to lead a dignified existence in an area which, in principle, can be considered an alternative for settling and that the respondent therefore cannot state that the area in question can be considered an alternative place for settling for the (turned-down) asylum seeker as long as he or she does not end up in an emergency situation.

In view of the above and with regard to Iraqi asylum seekers originating from Central Iraq, the Chamber considers it important that the UNHCR has indicated that such an asylum seeker can only be deemed to have an internal alternative for settling in Northern Iraq when he has family, community or political relations there. The point of view of the UNHCR is supported by a report of the 'Deutsches Orient Institut' and by country reports of the Minister of Foreign Affairs. It cannot be sufficiently concluded from a letter of the

Ministry of Foreign Affairs dated 12 January 2000 that, even with the help of international aid organizations working in Northern Iraq, accessibility to basic facilities that are deemed essential, is guaranteed for everybody.

In view of the above the Chamber has come to the conclusion that the State Secretary in his assessment of the decisions, has used the wrong criteria. As a result, the State Secretary has taken the wrong decisions. Before deciding whether or not an asylum seeker from Central Iraq is entitled to a residence permit on humanitarian grounds, the State Secretary shall have to get a clear understanding of the actual options open to the person in question for establishing, in the short or medium term in Northern Iraq, a life whereby actual access to basic facilities which are deemed essential, is guaranteed.

d) *Prima Facie* Refugee Status for the Reer Hamar

Are the Reer Hamar being persecuted as a group in Somalia? This was the main issue during the hearing of the Chamber of 27 April 2000. The Chamber is of the opinion that the Reer Hamar in Somalia do not suffer from group persecution. The Chamber reached this conclusion on the following grounds: First, the Court is of the opinion that granting of refugee status should, in principle, only be based on individual grounds. Belonging to a certain (population) group is normally not sufficient to lay claim to refugee status. Under special circumstances, however, it can be sufficient for refugee status. When it has been established that a group is persecuted, the asylum seeker does not have burden of proof. Normally he will have to give *prima facie* evidence that his personal facts and circumstances are such that his request for refugee status is justified. With regard to group persecution, the State has burden of proof; refugee status is the starting principle and the State shall have to support its statement that the alien is not a refugee with facts and circumstances. Furthermore, the Chamber is of the opinion that group persecution is a fact when there are serious indications that in principle all members of a group (shall) suffer from persecution. With regard to the Reer Hamar the Chamber considers that it has not reached the conclusion that this particular group is persecuted as a result of its ethnic background or as a result of its origins in combination with (alleged) riches. In doing so the Chamber recognizes that a civil war is going on in Somalia with (possible) ensuing undifferentiated violence. Furthermore weaker groups in society suffer sooner and more than stronger groups. Although the documents do show that the Reer Hamar are in a vulnerable position, there is insufficient proof to come to the conclusion that they are suffering from group persecution.

APPENDIX 2

RECENT DEVELOPMENTS IN THE USE OF HUMAN RIGHTS TO DEFINE PERSECUTION IN NEW ZEALAND

Paul Millar, New Zealand Refugee Status Appeals Authority

The most recent decision on this issue is in Refugee Appeal No. 71427/99 (16 August 2000) where the Authority (at paragraph 51) stated:

> ... refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard. That is, core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution. In his text at 106, Professor Hathaway initially identified the relevant core human rights as those contained in the so-called Bill of Rights, but to the Bill of Rights should now be added the Convention of the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. ... We respectfully agree with this analysis and would only add that while the hierarchy of rights found in these instruments is not to be rigidly or mechanically applied, it does assist a principled analysis of the persecution issue.

Please also note from paragraph 74-80 that the Authority discusses international human rights laws that have been violated in this particular case.

Since the publication of the Human Rights Nexus Working Party Conference Report in October 1998 there have been a number of other decisions of the Authority where international human rights law was referred to in assessing whether the appellant had or would suffer persecution. They are as follows:

1. Refugee Appeal No. 71163/98 (31 March 1999)
2. Refugee Appeal No. 70770/98 (17 December 1998)
3. Refugee Appeal No. 71404/99 (29 October 1999) [a decision mainly concerned with an analysis of the risk of persecution for ethnic Chinese from Indonesia. However, at page 31 there is a discussion of whether discrimination amounts to persecution, containing a discussion of human rights law and from pages 36-40 a discussion of whether psychological harm amounts to persecution, again, containing a discussion of human rights law].
4. Refugee Appeal No. 71253/99 (8 July 1999)
5. Refugee Appeal No. 71687/99 (28 September 1999)

6. Refugee Appeal No. 71684/99 (29 October 1999) [a decision in which the Authority introduced its jurisprudence on the internal protection alternative (dealing with the subject formerly described in New Zealand as relocation) arising from "The Michigan Guidelines on the Internal Protection Alternative," the product of a collective study in April 1999 initiated by Professor James Hathaway and convened by the Programme in Refugee and Asylum Law, the University of Michigan Law School. Although the decision does not contain a discussion of human rights defining persecution it does contain a discussion of the rights to be afforded to asylum seekers to whom an internal protection alternative is available in their country away from the site of persecution.]
7. Refugee Appeal No. 70863/98 (13 August 1998) [containing a discussion on the 'right to work' and whether violations of that right amounted to persecution in that particular case.]

APPENDIX 3

CANADIAN JURISPRUDENCE UPDATE: POST-1998 IARLJ CONFERENCE REPORT IN OTTAWA, CANADA

James C. Simeon, Rapporteur,
Human Rights Nexus Working Party
And
Member of the Immigration and Refugee Board of Canada

There are perhaps three cases that should be considered in updating the Canadian jurisprudence in the area of international human rights instruments and their application to refugee determination in Canada. Two of these were rendered by the Supreme Court of Canada and the other by the Federal Court of Appeal.

a) Pushpanathan v. Canada (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982.
b) Baker v. Canada (M.C.I.) (S.C.C., no. 25823), L'Heureux-Dube, Gonthier, McLachlin, Bastarache and Binnie; Cory and Iacobucci, concurring in part, July 9, 1999.
c) Suresh, Manickavasagam v. M.C.I. (F.C.A., no. A-415-99), Robertson, Decary, Linden, January 18, 2000.

Since these are long and detailed judgements, I will only summarize briefly the most pertinent aspects of the decisions as they pertain to the concerns of the Human Rights Nexus Working Party.[41]

a) Pushpanathan

In *Pushpanathan*, the Supreme Court of Canada found that the appellant, who had been convicted in Canada for drug trafficking in narcotics, could not be excluded from the Convention under Article 1F(c), "Acts contrary to the purposes and principles of the United Nations." Mr. Justice Bastarache, for the majority, held that:

> ...the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.[42]

Moreover, the Supreme Court noted that in dealing with Article 1F(c),

> The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable.[43]

The Supreme Court set out two categories of acts that fall within this exclusion clause. The first category is "where a widely accepted international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations."[44] The Supreme Court specifically mentions that "determinations by the International Court of Justice may be compelling"[45] in deciding whether an act falls within 1F(c). The second category, and most relevant to the human rights approach to refugee determination, is the Supreme Court's judgement that acts which fall within the scope of Article 1F(c) are:

[41] The full text of these decisions are available at the following Internet websites: Supreme Court of Canada, *http://www.lexum.umontreal.ca*; and, the Federal Court of Canada, *http://www.fja.gc.ca*.
[42] *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. at 1032.
[43] Ibid., at 1029.
[44] Ibid., at 1030.
[45] Ibid., at 1032.

> those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution.[46]
>
> It is also important and relevant to note that the minority judgement held that,
>
> The interpretation of international legal instruments is a dynamic process which must take into account the contemporary conditions. To put another way, the interpretation must respond to the contemporary context.[47]

Pushpanathan is a relevant and an important judgement with respect to the application of international human rights instruments to the interpretation of cases involving Article 1F(c). It clearly directs refugee law decision-makers and judges to the consideration of international law and international human rights instruments to determine what constitutes persecution for the purposes of Article 1F(c). Further, the minority opinion was instructive in that it held that the interpretation of international legal instruments is a "dynamic process which must take into account the contemporary conditions." It is interesting to note that the human rights approach advocated by the Human Rights Nexus Working Party is consistent with the Supreme Court of Canada's approach in *Pushpanathan.*

b) Baker

In the *Baker*[48] decision the Supreme Court of Canada determined that federal immigration authorities are required to take into consideration the "best interests" of Canadian-citizen children in assessing their parent's humanitarian and compassionate (H&C) application under subsection 114(2)[49] of the *Immigration Act.* Madame Justice L'Heureux-Dube, writing for the majority, stated at paragraph 75, that,

> ...the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.[50]

In the *Baker* decision, the Supreme Court agreed that international treaties and conventions are not part of Canadian law unless they have been implemented by statute. Since the *Convention on the Rights of the Child* (Can. T.S. 1992 No. 3) has not been implemented by Parliament, therefore, it has no direct

[46] Ibid.
[47] Ibid., paragraph 126/129.
[48] *Baker* v. *Canada(Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193.
[49] *Immigration Act*, R.S.C., 1985, c. 1-2: 114...(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.
[50] Ibid., paragraph 75.

application within Canadian law.[51] Nevertheless, Madame Justice L'Heureux-Dube speaking for the majority opinion, states that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[52] She further goes on to state, as follows:

> The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.[53]

The concurring minority opinion, expressed by Mr. Justice Iacobucci, disagreed with "the approach adopted by my colleagues, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system."[54] The minority held that such an approach may "adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch."[55] In short, Mr. Justice Iacobucci states, the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation will result in the appellant being able "to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament."[56]

The Supreme Court decision in *Baker* is, undoubtedly, the high mark in the application of a human rights approach to the process of statutory interpretation in judicial review. It recognizes the importance of international human rights law as an aid to interpreting domestic law as well as the importance of the values and principles embodied in international treaties and conventions as an interpretative guide in the exercise of administrative discretion when deciding matters involving humanitarian and compassionate considera-

[51] Ibid., paragraph 69.
[52] Ibid., paragraph 70.
[53] Ibid., paragraph 71.
[54] Ibid., paragraph 79.
[55] Ibid., paragraph 80.
[56] Ibid.

tions. Again, it is interesting to note that the approach advocated by the Human Rights Nexus Working Party is consistent with the ruling of the majority of the Supreme Court in the *Baker* decision.

c) Suresh

The Federal Court of Appeal dismissed the appeal of Manickavasagam Suresh, who was determined to be a Convention refugee but who was subject to removal to Sri Lanka, because a security certificate (s. 40.1 *Immigration Act*) and a Minister's Opinion (s. 53(1)(b)) had been issued against him. The Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board of Canada (IRB) accepted Mr. Suresh's refugee claim in 1991, based on his fear of the Liberation Tigers of Tamil Eelam (LTTE). Mr. Suresh worked in Canada with the World Tamil Movement (WTM) as its fund raising co-ordinator and as the co-ordinator for the Federation of Associations of Canadian Tamils (FACT). A security certificate was issued by the Minister on the basis of the opinion of the Canadian Security Intelligence Service (CSIS) which advised that there were reasonable grounds to believe that the appellant is a member of the LTTE.
One of the issues decided in this case is directly relevant to the concerns and work of the Human Rights Nexus Working Party.

> The *first* issue is whether under international law there is a non-derogable right against refoulement to a country where the person being returned will be at risk of torture. If so, then it remains to be decided whether this non-derogable right has become a peremptory norm of *jus cogens* and therefore, binding on Canada, notwithstanding the provisions of the *Immigration Act*.[57]

Mr. Justice Robertson, writing the unanimous decision of Court, states,

> While this argument does not go to the constitutional validity of paragraph 53(1) (b) of the *Immigration Act*, but rather its inapplicability, I acknowledge that international conventions on human rights may inform our understanding of what qualifies as a fundamental principle of justice: see *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038. Nonetheless, I cannot accept the appellant's argument that the right under international law to be secure against torture is absolute and binding on Canada.[58]

The appellant argued that his deportation to Sri Lanka, where he faces a risk of torture, contravenes Canada's international obligations as outlined in Articles 4 and 7 of the *International Covenant on Civil and Political Rights*.[59] Mr. Justice Robertson acknowledges that "under this international *Covenant* there

[57] *Suresh, Manickavasagam* v. *M.C.I.* (F.C.A., no. A-415-99), Robertson, Decary, Linden, January 18, 2000, paragraph 15.
[58] Ibid., paragraph 22.
[59] Article 7 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

is a non-derogable obligation on a state to refrain from subjecting persons to torture."[60] However, he points out that,

> What is clear is that the prohibition against torture is restricted to conduct over which a state has control. The *Covenant* simply does not address the possibility of torture arising from refoulement. With one exception, comments published by the United Nations Human Rights Committee, which monitors compliance with this international covenant, affirm this interpretation.[61]

The conclusion the Court reaches, then, is that "*International Covenant on Civil and Political Rights* does not even purport to deal with the issue of refoulement let alone address the question as to whether a prohibition against refoulement of Convention refugees is a non-derogable right".[62]

Turning to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [1987] (Can. T.S. No. 36), Mr. Justice Robertson finds that even though Article 3.1 of the Convention clearly prohibits the refoulement of "a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture,"[63] it does not follow from this Article that "there is an express non-derogable right against refoulement even in cases where the 'substantial grounds' test can be satisfied".[64] Mr. Justice Robertson notes that Article 16.2 provides that the provision of the Convention "are without prejudice to the provisions of any other international instrument ... which relates to extradition or expulsion".[65] He points out that this provision is particular significant in light of Article 33 of the 1951 *Convention Relating to the Status of Refugees*.[66]

Mr. Justice Robertson states that these three Conventions complement each other and since the 1951 *Convention Relating to the Status of Refugees* "expressly permits derogation from the prohibition against refoulement, it is permissible for a state to rid itself of those who pose a security risk without being in breach of its international obligations".[67] In addition, he notes that the appellant only presented one case to support his argument, *Chahal* v. *The United Kingdom*, E.Ct.H.R., File: 70/1995/576/662, November 15, 1996. In this case, the European Court of Human Rights held that Article 3, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment," and Article 15.2, that provides that there can be no derogation from

[60] *Suresh*, paragraph 24.
[61] Ibid.
[62] Ibid., paragraph 25.
[63] *Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment*, Article 3.1.
[64] *Suresh*, paragraph 27.
[65] Ibid.
[66] Article 33.2 states, "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."
[67] *Suresh*, paragraph 28.

Article 3 even in times of national emergency, of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, allow for no exceptions. Thus, no one in the European Community can be returned to a country where the person can be subjected to torture or to inhuman or degrading treatment or punishment. Hence, the European Court of Human Rights found the protection accorded under Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* to be wider than that found under the 1951 *Convention Relating to the Status of Refugees*.[68] Mr. Justice Robertson rightly notes that Canada is not bound by the decisions of the European Court of Human Rights nor is it subject to the *European Convention for the Protection of Human Rights*.

With respect to the appellant's argument that the prohibition against torture is a norm of *jus cogens* and, hence, is a norm from which no derogation is permitted, Mr. Justice Roberston states that while the principles of customary international law may be "recognized and applied in Canadian courts as part of the domestic law, this is true only in so far as those principles do not conflict with domestic law."[69] In this particular instance, "the alleged peremptory norm conflicts with Canada's domestic law as evidenced by paragraph 53(1)(b) of the *Immigration Act*, which itself is a replication of Article 33 of the *Convention Relating to the Status of Refugees*".[70] Hence, the Court dismissed the peremptory norm argument with respect to the appellant's appeal of the "opinion letter" issued by the Minister of Citizenship and Immigration that the appellant is "a danger to the security of Canada."

The Suresh decision is important in showing the limitations of international human rights standards, such as the *International Covenant on Civil and Political Rights*, the *Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment*, and the *1951 Convention Relating to the Status of Refugees*, to those found to be a "danger to the security of Canada". In Suresh, the Federal Court of Appeal sought to balance the rights of the refugee from being returned to their country of persecution, the public interest, and Canada's international obligations. The Suresh decision is currently on appeal to the Supreme Court of Canada.

For the purposes of the work of the Human Rights Nexus Working Party, these three Canadian judgements show clearly the relevance and significance of international human rights values, principles, norms and laws to statutory interpretation in judicial review of refugee determinations. *Pushpanathan* is notable for delineating who is excludable under Article 1F(c) of the 1951 Convention and how this is to be determined. *Baker* is perhaps the clearest expression from the Supreme Court of Canada that it endorses the use of the values and principles of international human rights instruments to the statutory interpretation of domestic law as it pertains to administrative decisions

[68] Ibid., paragraph 29.
[69] Ibid., paragraph 32.
[70] Ibid.

involving matters of humanitarian and compassionate consideration. In *Suresh*, the Federal Court of Appeal dismissed the arguments that the prohibition against torture is a norm *jus cogens*, a peremptory norm of the international community, that prevents those who have been determined to be Convention refugees, but for whom the Minister has issued a danger opinion, from being returned to their countries of alleged persecution. However, this question is not yet resolved as *Suresh* is presently on appeal before the Supreme Court of Canada.

These Court decisions clearly indicate that international law and international human rights instruments must be considered in determining issues of immigration and refugee law but that they are not binding unless incorporated in domestic legislation. Nevertheless, a human rights approach is very much in evidence within the Canadian jurisprudence.

APPENDIX IV

JURISPRUDENCE UPDATE: SWEDEN

Goran Hakansson, Director-General,
Aliens Appeals Board, Sweden

APPLICATION HANDED IN AT A SWEDISH EMBASSY - STATUS AS A REFUGEE - NEED OF ASYLUM.

There is no special legal regulation in the Swedish Aliens Act for refugees outside Swedish territory. A prerequisite for the law to be applied is that a refugee has crossed the Swedish border before he makes his application. An application made from abroad has consequently been rejected.

A - a 53-year-old man, citizen of Rwanda - applied in February 1997 for asylum at the Swedish Embassy in Kenya.

In its decision The *Immigration Board* (as of 1st July 2000, The Migration Board) on 5th May 1997 stated: A claims that chiefly because he is a member of a certain religious sect and on account of earlier political activities in his home country, his life is at stake. Furthermore, he claims that also in Kenya his life is at stake as the present Rwandan government is making attempts at the lives of Rwandan citizens there.

The Immigration Board continues: According to information available to the Board A seems to have had his principal residence in Kenya where, at least until the middle of March 1997, he has had permission to stay. The events that made him leave his home country will not today lead to his running any serious risk in Kenya. Kenya has ratified the 1951 Convention relating to the Status of Refugees and A has the possibility of applying for asylum there. Whether A has applied for asylum in Kenya is not evident from the information available to the Board. Neither is it evident whether A is registered as a refugee with UNHCR. It is possible for A to receive the protection he seeks in Kenya. Therefore A cannot be regarded in need of protection in Sweden. His application for asylum shall consequently be rejected.

If A wishes to renew his application he should do so through the channels of UNHCR in Kenya.

Decision. A's application for residence and work permit is rejected.

A appealed to the *Aliens Appeals Board* and asked to be granted a residence permit.

The Aliens Appeals Board (two Chairmen and four lay members) made its decision on December 22nd 1997:

A has maintained his application and added as follows: Kenya has certainly ratified the Geneva Convention but stopped in 1992 to grant asylum to applicants. Therefore, there is no use applying for asylum there. As to the UNHCR this organisation in Kenya acts through the Jesuit Refugee Service (JRS), whose methods of work are unclear. The JRS seems to be more apt to treat applications from women more positively than applications made by men. In spite of that an application for refugee status made by A's wife has been rejected. The situation in Rwanda has not improved, priests are being killed and bishops are being maltreated and beaten. A and his family have on one occasion been visited by the police in their house in Kenya.

A has handed in a copy of the above mentioned decision as to his wife's refugee status.

Reasons. A, who is a Rwandan citizen, has applied for asylum in Sweden at the Swedish Embassy in Kenya.

In A's case the question has arisen as to what extent Sweden is obliged to give protection to aliens seeking asylum from outside Sweden and what rules are applicable in such cases. It is a known fact that the Migration Board through administrative measures can transfer refugees and other similar categories to Sweden within a certain quota the size of which is decided every year by the Government.

The nations of the world and UNHCR are responsible for the international protection of refugees. The rules of protection are formulated in international

conventions, of which the most important are the 1951 Convention and the 1967 Protocol relating to the Legal Status of Refugees. The Protocol contains an obligation to apply the Convention fully without the possible limitations mentioned in the Convention. The Convention as well as the Protocol are legally binding for the nations which have signed them. Sweden has signed both.
The Conventions contains basically rules of three kinds:

- rules defining the criteria of a refugee and the criteria for a person no longer being regarded as a refugee
- rules of the legal status of refugees and what their rights and obligations are in the country of refuge
- rules as to the enforcement of the Convention

The basic definition of a refugee is to be found in Article 1 of the 1951 Convention - a person is to be regarded as a refugee when he or she fills the criteria stated in the Article. The person does not become a refugee when he/she is acknowledged as such by a Contracting State or UNHCR but as soon as he fills these criteria. The acknowledgment is only a declaration that the person is a refugee.

The 1951 Convention contains no rules as to the granting of asylum or residence permits for a refugee. According to the Convention there is consequently no pronounced obligation to grant a refugee asylum. The articles of the Convention as to the protection of a refugee are instead to be found in Articles 32 and 33, which state the possibility of a Contracting State to expel or refuse a refugee. A Contracting State must not expel a refugee, who is allowed to stay in the territory, on other grounds than grounds relating to national security or public order (Article 32 Section 1). Furthermore, a Contracting State must not - with certain exceptions - reject or expel a refugee to the border of a territory within which his life or freedom are threatened on account of his race, religion, nationality, his belonging to a certain social group or his political views (Article 33 Section 1).

Grahl-Madsen (The Status of Refugees in International Law, vol. II, p 94) has commented on Article 33: "Finally, it may only be invoked in respect of persons who are already present - lawfully or unlawfully - in the territory of a Contracting State. Article 33 only prohibits the expulsion or return *(refoulement)* of refugees to territories where they are likely to suffer prosecution; it does not obligate the Contracting States to admit any person who has not already set foot on their respective territories."

The rules of protection of the Convention consequently aim at a situation when the refugee is already present in the territory of the Contracting Sate and cannot be invoked in other situations.

The Convention also contains a number of other articles which require that a refugee has already set foot on the territory of the country of protection.

The Board thus states that there is no obligation according to international law for a state to receive refugees applying for asylum and consequently no right based on international law for a refugee to be granted asylum. The fact that there is no obligation based on international law to grant refugees asylum does not prevent individual states to limit their freedom of action in this field by introducing national rules which give refugees a more or less unconditional right to asylum.

As to the Swedish Aliens Act there are rules which give a refugee an unconditional right to a residence permit/asylum. A prerequisite is however that the refugee has crossed the Swedish border. The Aliens Act does not include any rule regarding a refugee/applicant for asylum who has not set foot on Swedish territory.

In these circumstances the Board must reject A's appeal. Nor does the Board find any other reason for granting A a residence permit in Sweden.

Decision. The Aliens Appeals Board rejects A's appeal.

FIRST SECTION
DECISION
AS TO THE ADMISSIBILITY OF

Application no. 46636/99
by Richard Lee GOLDSTEIN
against Sweden

The European Court of Human Rights (First Section), sitting on 12 September 2000 as a Chamber composed of

Mrs W. Thomassen, *President*,
Mrs E. Palm,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr B. Zupancic,
Mr T. Pantîru, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 19 December 1997 and registered on 8 March 1999,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

1. THE FACTS

The applicant is a national of the United States of America, born in 1951 and living in Sweden. He is represented before the Court by Mr Sten De Geer, a lawyer practising in Stockholm.

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant arrived in Sweden on 4 July 1997 and requested asylum. During lengthy interviews by the Swedish authorities, he stated that since 1990 he had worked actively to reveal police brutality and other misconduct by the police in the United States. In 1990 he had founded an association called "The Commission on Police Ethics" and in 1995 he had started another organisation called "The Standing Committee on Law Enforcement Development". As a consequence of his activities, he had allegedly been subjected to systematic police persecution since 1993. By 1997 the persecution had reached serious proportions. Allegedly, there had been serious attempts to injure him, he had been subjected to surveillance, his property had been destroyed and he had been attacked with chemical substances. His reports to the police authorities had been to no avail.

On 19 August 1997 the National Immigration Board (*Statens invandrarverk*) refused the applicant public legal counsel in the proceedings before the Board. The applicant appealed against this decision to the Legal Aid Board (*Rättshjälpsnämnden*).

The applicant's asylum application was rejected by the National Immigration Board on 24 September 1997. The Board found that there was no evidence to show that the United States police authorities had been persecuting the applicant. Thus, he was not in need of protection in Sweden. The applicant appealed against this decision to the Aliens Appeals Board (*Utlänningsnämnden*).

On 20 October 1997 the Legal Aid Board upheld the National Immigration Board's decision not to award the applicant public legal counsel.

On 24 October 1997 the Aliens Appeals Board refused the applicant public legal counsel in the proceedings before the Board. It appears that this decision was not appealed against by the applicant to the Legal Aid Board.

The National Immigration Board's decision not to grant the applicant asylum in Sweden was upheld by the Aliens Appeals Board on 30 January 1998. The Board found that if the applicant had been subjected to the alleged maltreatment in the United States, it was the result of criminal acts committed by individuals and was not attributable to the State. No appeal lay against this decision.

Subsequently, against the same background as initially, the applicant submitted a new request for asylum to the Aliens Appeals Board and also applied for legal aid. On 4 September 1998 the Board refused the applicant public legal counsel and also rejected his new application for asylum. No appeal lay against either of these decisions.

2. COMPLAINTS

1. The applicant claims that he would be subjected to torture or to inhuman or degrading treatment or punishment if returned to the United States and invokes in this respect Article 3 of the Convention.

2. He also claims that he was denied the right to an effective remedy in respect of the alleged violation of Article 3 of the Convention because he was not granted public legal counsel and because the examination of the asylum issue was not conducted in a proper manner. The applicant invokes in this respect Article 13 of the Convention.

3. THE LAW

1. The applicant claims that, if returned to the United States of America, he would be subjected to torture or to inhuman or degrading treatment or punishment. He invokes in this respect Article 3 of the Convention, which reads as follows:

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

The Court recalls that Contracting States have the right to control the entry, residence and expulsion of aliens. The right to asylum is not protected in either the Convention or its Protocols (cf., e.g., *Vilvarajah and Others* judgment of 30 October 1991, Series A no. 215, p. 34, § 102). However, expulsion by a Contracting State of an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she is to be expelled (ibid., p. 34, § 103).

It is true, owing to the absolute character of the right guaranteed by Article 3 of the Convention, that this Article may apply also where the danger emanates not from public authorities but from persons or groups of persons who are not, or who are not acting as, public officials. However, it must then be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (cf., e.g., *H.L.R. v. France* judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 758, § 40).

The Court does not find it established that the risks alleged by the applicant of his being ill-treated in the United States stem from any public authority or other organ of the State. Furthermore, if the applicant upon his return to the United States were to be subjected to illegal acts, the Court does not find it

substantiated that the remedies at his disposal within the domestic legal system of that country could not provide appropriate protection.

Accordingly, the Court finds that no substantial grounds have been shown for believing that the applicant would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the United States, if he were to be returned there. Thus the case does not disclose any appearance of a violation of Article 3 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicant claims that he was denied the right to an effective remedy in respect of the alleged violation of Article 3 of the Convention because he was not granted public legal counsel and because the examination of the asylum issue was not conducted in a proper manner. He invokes in this respect Article 13 of the Convention, which reads as follows:

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

The Court recalls at the outset that, according to Article 35 § 1 of the Convention, it may only deal with a complaint after all domestic remedies have been exhausted. It appears that the applicant did not appeal against the Aliens Appeals Board's decision of 24 October 1997 to refuse him legal aid. However, the Court finds that it is not necessary to examine this issue further, because the complaint is in any event inadmissible for the following reasons.

Leaving aside the question whether the applicant has at all an arguable claim for the purposes of Article 13 of the Convention, the Court recalls that the effectiveness of a remedy under this provision does not depend on the certainty of a favourable outcome (cf., e.g., *Pine Valley Developments Ltd. and Others v. Ireland* judgment of 29 November 1991, Series A no. 222, p. 27, § 66).

The Court finds that the applicant had access to, and indeed also availed himself of, an effective remedy within the meaning of Article 13 of the Convention in respect of the alleged violation of Article 3 of the Convention, namely the right to appeal to the Aliens Appeals Board against the decision made by the National Immigration Board. No factual circumstances indicating the opposite have been established in the instant case as regards the manner in which the issues at hand were examined by the Board.

Furthermore, it is true that it is not enough under Article 13 of the Convention that an effective remedy is available in the national legal system; the applicant must also be able to take effective advantage of it. However, the said Article does not guarantee a right to legal counsel paid by the State when availing oneself of such a remedy. The Court finds no indication of any special reason calling for the granting of free legal aid in order for the applicant to take effective advantage of the available remedy.

Consequently, the case does not disclose any appearance of a violation of Article 13 of the Convention.

It follows also that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle	Wilhelmina Thomassen
Registrar	President

„ASYLUM PROCEDURES" WORKING PARTY

Consistency in Judgements or Decisions in Asylum Matters

Rapporteur's Report

Jacek Chlebny*

This paper is essentially based on the contributions made by members of the working group "Asylum Procedures". The reports were presented by **Geoffrey Care** (Immigration Appeal Authority, United Kingdom), **Edward R. Grant** (Member of the U.S. Board of Immigration Appeals,), **Cathy Major** (Member of the Immigration and Refugee Board, Canada), **Igor Belko** (Judge at the Supreme Court of the Slovak Republic), **Prisca Leu** (Judge of the Swiss Asylum Appeal Commission), **Anver Jeevanjee** (Immigration Appeal Authority, United Kingdom UK) and **Jacek Chlebny** (Judge at the Supreme Administrative Court of Poland).

I. INTRODUCTION

1.1 THE BORDERS OF THE TOPIC

At first view, the topic "Consistency in Judgements or Decisions" seems to be without clear borders and of no great importance. Obviously it is not the truth that it is a "technical" issue only. However, it is the truth that it does not have clear borders. It is easily noticed that the problem of "inconsistency" has two aspects. First, inconsistency of the judgements and decisions with binding law. It does not require any further justification that decisions or judgements must not violate binding law. Second, inconsistency in the judgements and decisions among themselves. The latter exists in cases of uncertainty of interpretations of law or facts, where the possible violation of law is not obvious and there are simply different interpretations. The decision-making process is often not a choice between "black and white" but a choice made in the blurred picture in which light and darkness overlap. Many times not only the facts but also the law is unclear. In our judges' lives we all often face such cases. In

* Judge at the Supreme Administrative Court, Poland.

these cases, the problem of consistency among judgements and decisions arises and it is the topic of this paper.

1.2 THE IMPORTANCE

The value of the achievement of a certain level of uniformity in the application of law at both the international and national levels is appreciated. Certainly it is valuable to have a certain degree of consistency among judgements and decisions made in different jurisdictions. Its value is recognized even though **Edward R. Grant** also accurately observes that part of the price for its implementation may be the independence of judges, adjudicators or decision-makers. **Geoffrey Care** started his report, significantly titled "The Refugee Lottery", with statements with which everybody can agree: *"[t]he asylum seeker faces multiple elements of chance in seeking protection out of his country"* and what follows later, that usually the asylum seeker does not have a choice of the country or the forum for his claim. It explains why, from the asylum seeker's point of view, the problem of consistency is not pure theory but a very practical issue. At the end of his report, **Edward R.Grant** speaking on the basis of the American system, drew the conclusion that consistency means that all applicants and participants in the system have access to the same system of laws guided by the same set of legal precedents. On the other hand, **Anver Jeevanje** rightly reminded us in his contribution that *"no two cases are absolutely alike and likewise nor are two decision makers or judges in their background, upbringing and prejudices"*.

1.3 THE APPROACH

It is possible to approach the problem of consistency in many ways. We can concentrate our attention on one hand on the reasons or effects of inconsistency and on the other on methods of ensuring consistency. **Geoffrey Care** describes the problem of consistency with reference to the decision making process. This "insight" view shows that there are many factors which can be identified as contributing to inconsistency in outcome. There are areas which the system in place is unlikely to correct and areas where the system is constructed to remedy errors and achieve consistency. There are also individual factors which can contribute to inconsistency.

On the other hand, in the view of **Anver Jeevanjee,** "[t]*he constant plea from politicians and administrators for consistency and speed is purely for financial reasons and not justice .... [T]he exercise of independent judicial decisions would make consistency difficult to achieve*".

II. DIFFICULTIES IN AND LIMITS ON CONSISTENCY OF JUDGEMENTS AND DECISIONS

2.1 INDEPENDENCE OF JUDGES

The question is if the judgements or decisions automatically have to follow previous ones. A complete impossibility of departing from the previous decisions and judgements could in the end result in a violation of the independence of judges or decision-makers in the application of law. It would give full priority to the case law over the Convention.

2.2 NATURAL LACK OF CLARITY IN LAW AND JUDGEMENTS

Edward R.Grant made an observation which is based on the US experience but which can be shared by everybody: even binding interpretations of law may leave unanswered questions related to facts that were not considered or not addressed in the precedent-setting case. The adjudicator must then use the precedent as guidance, but may not find it ultimately determinative. Different adjudicators, accordingly, may see the precedent as guiding their decisions to different conclusions.

III. WHAT ENSURES CONSISTENCY?

3.1 VERTICAL SYSTEM OF COURTS AND APPEALS. THE ROLE OF THE SUPREME JUDICIAL AUTHORITY

The final court's judgment is passed as a result of the appeals made within the administrative and judicial structure. Due to such a system of appeals, judicial control is exercised over the agencies and lower courts. At the top of the structure there is one court, usually it is the supreme court or the supreme administrative court. Agency decision-makers and judges of the lower courts always more or less take into consideration interpretations made by the court which is higher up in the hierarchy. Provided there is one court at the top of the pyramid, this court ensures uniformity in the case law and in interpretations of the law. The guarantee that every case may be tried by the one supreme court will ensure consistency of judgments and prevent contradictions in the final court's decisions.

A separate issue is the binding force of the judgments made by the higher courts. **Prisca Leu**, in her description of the Swiss system, shared her experience of leading judgements which have binding character for all judges. Swiss judges also have the possibility of submitting general questions of law together with a proposal of the solution to the Conference of Chamber Presi-

dents. The Conference may decide to submit the problem to the Plenary Commission (conference of all members of the Commission).

Jacek Chlebny described the special role which his administrative court plays in certain circumstances in Poland. Where the case is referred to the enlarged bench, the resolution of the enlarged bench is binding only for those judges who referred the case, but in practice it influences the line of jurisprudence and case law. This derives from the fact that such resolutions are adopted by an enlarged bench (at least seven judges) and are adopted in a special internal procedure which looks exclusively at the legal issue concerned. It is a generally accepted view that such resolutions are respected in the decision- (or judgement-) making process and also many times influence the legislative authorities.

3.2 Training of judges and decision-makers

The qualification of judges is an essential factor. It is not possible for a judge without sufficient access to case law to take into consideration the previous judgements.

The training of the first instance decision-makers is even more important. Usually most of the cases finish in one instance. The asylum seekers do not proceed further for many different reasons (for example, due to high court fees or because the parties are tired with the procedure which has already lasted long enough, etc.).

3.3 Procedural requirements, obligatory written reasons of judgements and decisions

From **Cathy Major's** report we learn that in Canada rendering written reasons is basically limited to negative decisions. However, if there is a significant regional variance (over 30%) in the determination of claims from certain countries, fully articulated reasons for positive decisions are also required. The list of countries to which the policy applies is amended from time to time by removing or adding countries for which written positive reasons are required as the regional variance drops. Further, decision-makers are advised to exercise caution in considering such claims in the expedited process.

Geoffrey Care underlined that deficiencies in the fact finding process may result in inconsistencies. The initial decision is basically based on information obtained from the asylum seeker during the first stage of the procedure. Inaccuracies in this phase may end up resulting in a different treatment of the same factual situations. Further possibilities of correction are limited and perhaps it is easier to introduce some uniformity on substantive law.

It is easier to ensure consistency if previous decisions and judgements are known by - or are at least available to - those who are involved in the decision-making process. The issue is the percentage of judgements which are published.

Edward R.Grant reported that in the United States, of the 25,000 to 30,000 decisions which are issued by the Board of Immigration Appeals each year, only a small number of them are designated as published precedents ("Interim Decisions"). The Interim Decisions are interpretations of law binding not only on the Immigration Courts, but also on the Immigration and Naturalization Service. In the United States, adherence to these precedents ensures a great degree of uniformity and consistency in the application of the provisions of the immigration statutes and regulations.

In **Prisca Leu's** paper we can read that Swiss Asylum Appeal Commission publishes those decisions selected by Publishing Committee (leading judgements, judgements of general interest). These decisions are also available on the internet.

WORKING PARTY ON "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP"

Protection against Persecution because of "Membership of a Particular Social Group" in German Law

Paul Tiedemann*

1. LAW SOURCES

The Convention Relating To The Status Of Refugees of 28 July 1951 – in the following: Geneva Convention (GC) – is not immediately valid in Germany. Rather these obligations under international law are converted in national statutes. Refugee status is stated or refused in a recognition procedure. In this procedure it is checked whether the asylum seeker is to be recognised as entitled to asylum pursuant to article 16a para. 1 (before 1993: article 16 para. 2) of the German Constitution (Grundgesetz - GG -) and whether he fulfills the prerequisites of article 51, para. 1 of the Ausländergesetz (Foreigner Law – AuslG). Article 16a para. 1 GG provides: "Persons persecuted on political grounds enjoy the right of asylum". Article 51 para. 1 AuslG provides: "A Foreigner may not be deported to a country, where his life or his freedom is threatened because of his race, religion, nationality, *membership of a particular social group* or political opinion." The legal consequences of recognition according to article 16a GG and the legal consequences of recognition according to article 51 AuslG are different in the detail.

It is obvious that article 51, para. 1 AuslG incorporates article 33 of the Geneva Convention of 1951 in the German law. Against this, article 16a, para. 1 GG does not tie to the wording of the Geneva Convention. However the Bundesverfassungsgericht (BVerfG)[1] has decided, that the concept of political persecution must be determined in accordance with the Geneva Convention and thus also presupposes a definite ground of persecution.[2] In most cases this ground is also a ground according to the Convention.

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[1] Federal Constitutional Court

[2] BVerfG, Beschluss v. 1.7.1987 - 2 BvR 478, 962/86 -, BVerfGE 76, 143, 157

2. JURISPRUDENCE CONCERNING THE CONVENTION GROUND "MEMBERSHIP OF A SOCIAL GROUP"

The German jurisprudence on the Convention ground "membership of a particular social group" is very sparse. In numerous cases, in which this question would have been relevant, the courts have held the question irrelevant because the asylum claim failed for other reasons. As to this it must be taken into account that the majority of the German Administrative Courts follow the opinion of the Bundesverwaltungsgericht (BVerwG)[3] which has ruled that the prerequisite for recognition under both article 16a GG and article 51 para 1 AuslG is the constituent fact of "political persecution".[4] However, *political* is persecution only where it is to be classed with the state. The persecution has to be classed with the state, if either the state is persecutor itself or if the state accepts the persecution by third parties, because it approves the persecution or it tolerates it for political reasons.

Therefore the question of persecution because of membership in a particular social group does not surrender in all countries in which the persecution does not stem from the state and is not tolerated by the state. In addition, political is the persecution only then, if it stands "in connection with the arrangement of the general order of the living together of people and therefore has a public regard". It must be the purpose of the measure to exclude the person affected from the public peace order.

However as soon as the state appears as persecutor, this usually happens because of the actual or suspected political opinion of the victims of persecution or because of the religion, race or nationality. In other cases, if e.g. the persecution consists of genital mutilation, often the state does not exist (Somalia) or the state prohibits the genital mutilation by law, but is not able to enforce the law (Nigeria). The few cases in which the courts do make a statement concerning the question of the social group ground are not illuminating. Mostly, it is only a single sentence without further detailed reasonings in writing. In other cases it is not clear whether the observation concerning the social group Convention ground is part of the leading reasons of the decision.

2.1 HESSISCHER VERWALTUNGSGERICHTSHOF – 13. SENAT

In a decision about provisional legal protection the 13th senate of the Hessische Verwaltungsgerichtshof (HessVGH)[5] has held that the "group of women who are not willing to observe the Islamic clothes regulations" in Iran represents a social group according to the Geneva Convention.[6] The state threatens them with public corporal punishment and with that persecution. Though the

[3] Federal Administrative Court
[4] BVerwG Urteil v. 18.1.1994 - 9 C 48.92 -, BVerwGE 95, 42
[5] Higher Administrative Court of Hessen in Kassel
[6] HessVGH, Beschluss v. 14.11.1988 - 13 TH 1094/87 -, InfAuslR 1998, 17

court thinks a political persecution has only then to be suspected, if the Iranian state sees in the rejection of Islamic clothing regulations an expression of a hostile attitude to the regime and therefore wants to inflict the political opponent with the punishment. It is unclear why the court at all subsumes the facts under the "social group"- ground. If it is decisive whether the Iranian state understands the rejection of Islamic clothes regulations as an expression of a political opinion, one can subsume the facts also under the "political opinion" ground.

2.2 VERWALTUNGSGERICHT FRANKFURT/M – 5. KAMMER

The 5th chamber of the Verwaltungsgericht[7] Frankfurt am Main has noted in a decision from the year 1996 that single women in Afghanistan form a social group because single women are without rights and must face at any time maltreatments and rapes.[8] Though the court also states, that Afghanian authorities assume that women who show themselves alone in public hurt the moral code for reason of political opposition. If this is correct, the women are persecuted primarily because of their (imputed) political conviction and not because of their membership in a particular social group.

2.3 VERWALTUNGSGERICHT MAGDEBURG

Some decisions deal with the topic of genital mutilation of girls. So the Verwaltungsgericht Magdeburg has held that girls and women from Côte d'Ivoire, who are threatened with genital mutilation, are politically persecuted, because the state tolerates this.[9] But the court says nothing about the question of the relevant Convention ground. It is unclear whether the following sentence touches the question of the Convention ground: "Persons affected by genital mutilation are degraded to a bare object in disregard of their religious and personal right of self-determination." It is unclear, how far a persecution because of religion can be accepted here. It is difficult to see any connection with the religion of the women who are been maltreated.

2.4 VERWALTUNGSGERICHT FRANKFURT AM MAIN – 9. KAMMER

In a verdict of 1999 the 9th chamber of the Verwaltungsgericht Frankfurt am Main also affirms the political persecution of women from Côte d'Ivoire because of threatened genital mutilation.[10] However this decision is particularly interesting because the court applies the above described concept of political

[7] Administrative Court
[8] VG Frankfurt/M, Urt. v. 23.10.1996 - 5 E 33532/94.A (3) -, NVwZ-Beilage 6/1997 S. 46
[9] VG Magdeburg, Gerichtsbescheid v. 20.06.1996 - 1 A 185.95 -, NVwZ-Beilage 2/1998 S. 18)
[10] VG Frankfurt/M, Urt. v. 29.03.1999 - 9 E 30919/97.A (2) -, NVwZ-Beilage I 7/1999 S. 71

persecution as persecution by the state only on the right of political asylum in accordance with article 16a GG but not on the right of political asylum in accordance with the Geneva Convention (article 51 AuslG). Therefore it would be expected that the court would deal with the question of the substantial Convention ground in this decision. Unfortunately, this question is not addressed. The court affirms the asylum claim in accordance with the Convention alone because a life-threatening intervention threatens the plaintiff which she cannot escape in her own country.

2.5 Verwaltungsgericht Trier

Opposite to this jurisprudence the Verwaltungsgericht Trier denies that threatening genital mutilation in Nigeria is relevant persecution but mentions that the "Convention ground of membership of a particular social group" comes into consideration.[11]

2.6 Hessischer Verwaltungsgerichtshof – 10. Senat – and Bundesverwaltungsgericht

The 10th senate of the HessVGH has inferred due to the fact that homosexual intercourse and the repetition of other homosexual practices in Iran are punished with death that homosexuals in Iran represent a social group according to the Geneva Convention.[12] Also here nearer grounds are missing.

The BVerwG has confirmed this decision, but left open the question of the Convention ground.[13] But the court doubted whether the case concerns the Convention ground of social group. Unfortunately, the federal judges did not explain clearly on what these doubts are based. They left the question open, because they have the opinion that in accordance with the German right of political asylum (articles 16a GG) a Convention reason is adequate but not necessary. Rather the right of asylum will always be granted in accordance with article 16a GG, if somebody is persecuted because of a personal characteristic which is unalterable for him. This must be a characteristic that is – with regard to the unalterability – comparable with that of race or nationality (or religious belief). Because the German right of political asylum would be based on the idea that no state shall have the right to impair a person's body, life or liberty because of qualities attaching to her unchangingly. In accordance with the opinion of the BVerwG, persecution because of homosexuality is an asylum ground under German asylum law. But the BVerwG does not answer the question whether homosexuality is also an asylum ground under the law of the Geneva Convention.

[11] VG Trier, Urt. v. 27.04.1999 - 4 K 1157/98 -, NVwZ-Beilage I 7/1999 S. 75
[12] HessVGH, Urt. v. 21.08.1986 - 10 OE 69/83 -, InfAuslR 1987, 24)
[13] BVerwG, Urt. v. 15.03.1988 - 9 C 278.86 -, BVerwGE 79, 143

3. LITERATURE TO THE CONVENTION REASON "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP"

The following section refers to the most important commentaries on the right of political asylum but not to the complete judicial literature. The statements on the question of "membership of a particular social group" in German juridical literature are also very sparse.

3.1 GÜNTER RENNER

Only a short note is found in the commentary of Günter Renner. This author is of the opinion that a social group is what is defined as a social group by the state of persecution.[14]

3.2 PETER SCHNÄBELE

Peter Schnäbele holds the opinion that it is possible to subsume all essential cases under the Convention ground of political opinion. Therefore the Convention ground of membership of a particular social group is not defined or discussed more exactly in his commentary.[15]

3.3 KAY HAILBRONNER

Kay Hailbronner does not deal with the social group ground in his commentary generally. He mentions it only in connection with the question whether women form a social group in woman specific situations of persecution. He denies that they can because members of a social group seem to him to be only persons "with the same social background, habits or social status". However, woman specific violence can be an instrument of political persecution because of another Convention ground (race, religion, nationality, political opinion).[16]

3.4 REINHARD MARX

In greater detail Reinhard Marx deals with this question in context with woman specific persecution.[17] He also holds the opinion, that in the majority

[14] Werner Kanein †/ Günter Renner, Ausländerrecht 6th ed. München [C.H. Beck] 1993 § 51 Rn 7.
[15] Peter Schnäbele in: Roland Fritz / Jürgen Vormeier (Hrsg.): Gemeinschaftskommentar zum Ausländerrecht (GK-AuslR) Neuwied 43.Lfg. Neuwied [Luchterhand] 1998 § 51 Rn 54f.
[16] Kay Hailbronner, Ausländerrecht. Kommentar Ordner II, 21. Erg.Lfg. Karlsruhe [C.F.Müller] 1999, B1 Art. 16a GG Rn. 65
[17] Reinhard Marx, Handbuch zur Asyl- und Flüchtlingsanerkennung, Neuwied [Luchterhand] 1995, §§ 76f.

of cases of persecution aimed at women it is possible to subsume the case under another Convention ground, so that it does not require the case to be considered on the ground of membership of a social group. Sexual violence against women is used as an instrument of persecution on the grounds of race, nationality or religion. Or women would be maltreated and raped because of the political conviction of their men and sons. History shows that sexual force is a war strategy. Also coercive kidnappings never aimed at women as such, but against Christian or Yezidian women etc. Marx sees problems in cases of female non-conformism against the commandments of the Sharia. Marx primarily has an eye on the situation in Iran. He comes to the conclusion that the disregard of clothes regulations is punished essentially because it is considered as an outer sign of a political conviction which is critical of the regime. Therefore the argument about the appreciation of woman specific persecution is shadow-boxing. Marx does not show any examples of a classification under the "social group" ground. He does not mention the question of genital mutilation in Africa. He seems however to hold the opinion that one can only speak of a social group, if the members of this group see themselves as group, i.e., if they are connected to each other by a consciousness of a common identity and a common practice.

4. SUMMARY

In the German jurisprudence and judicial literature there is great uncertainty as to the meaning of the Convention ground of social group. It is therefore attempted if possible to subsume cases under another Convention ground. In cases in which this is not possible the Convention ground of social group is consulted, however without close analysis. Therefore one may state: There is no established interpretation of the Convention ground of social group in Germany. Since most courts are of the opinion that political persecution can only be persecution by the state, no great need exists in Germany to clarify the meaning of the particular social group ground more thoroughly.

5. OWN CONSIDERATIONS

The different remarks show that one can understand the concept of particular social group in two ways namely according to a "participant theory"[18] or according to an "observer theory".[19] In accordance with the participant theory a

[18] This seems to be the opinion of Reinhard Marx, Handbuch zur Asyl- und Flüchtlingsanerkennung, Neuwied [Luchterhand] 1995, § 77 Rn 37, 38

[19] This seems to be the opinion of Günter Renner in: Werner Kanein †/ Günter Renner, Ausländerrecht 6th ed. München [C.H. Beck] 1993 § 51 Rn 7

social group is defined as a common group-consciousness of its members. This interpretation regards the point of view of the participants of the group as important. "Social group" is here understood as a community. In accordance with the observer theory the social group is defined from outside, that is not by its members but by observers of the group. The observers assign persons to a group who show a common characteristic. This interpretation regards the point of view of the observers as important. Substantial observer is the cause of the persecution. "Social group" is here understood as a quantity in the mathematical sense.

To be able to decide whether cases like that of genital mutilation come within the Convention ground of social group, one must decide in favor of one of these two interpretations. Provided one follows the participant theory women threatened with genital mutilation in their country of origin, do not constitute any social group. Because these women do not have the consciousness of special attachment. Women who are not circumcised are regarded by their tribe as outsiders who are disdained both by the other women and by the rest of the tribe. They do not have a feeling of identity but rather the feeling of exclusion and separation. From the participant point of view, there is no social group of the women threatened by genital mutilation.

From the observer point of view a woman, who still has not been circumcised, is assigned (by the observer) the quality of women who show this "defect" (of not being circumcised) and who therefore are the object of purposeful treatment which consists of damaging them by heavy bodily injury and to mutilate and to handicap them for life.

We must ask now which arguments speak in favour of the observer theory and which arguments speak in favour of the participant theory. If we have collected all arguments, we can evaluate and weigh them and get a result.

5.1 Arguments in favour of the observer theory

In favour of the observer theory there are certain features of so-called soft law. Pursuant to article 35 of the Convention the Contracting States are obliged to cooperate with the UNHCR. The UNHCR thinks that this cooperation extends also to questions with regard to the determination of refugee status. This opinion has followed the Council of the European Union in the Preamble to the Harmonized Application of 3-4-1996 relating to the definition of the term "Refugee" in article 1 of the Geneva Convention.[20] The Council describes there the Handbook of the UNHCR as "a valuable aid to Member States in determining refugee status". Therefore the point of view of the UNHCR is an important factor.

The UNHCR holds the opinion in the Handbook (para 77) that persons with similar background, habits or social position can form a "particular social

[20] ABl. EG Nr. L 63/2

group". A group consciousness of the group members does not matter. The UNHCR apparently supports the observer theory.

Still more clearly than the UNHCR, the Council of the European Union itself supports the observer theory. Pursuant to article 15 (article J.5) of the Treaty on the European Union the Council adopts "Harmonized Applications" (HA). In HAs the strategy of the Union is to give meaning to the definition. Member states take care that individual state policy stands in harmony with the HA. HAs oblige the governments if necessary to make changes to domestic law which is not in harmony with the HA. However, HAs do not have the quality of immediately binding law. Though they can be helpful in the interpretation of the law.

In HA of 3-4-1996[21] the Council has dealt with the refugee concept in article 1 of the Geneva Convention. In point 7.5 it speaks also to the concept of the "social group". In agreement with the Handbook of the UNHCR (para 77) it is noted here, that persons with similar background, habits and social position are a social group. Therefore this Convention ground partly overlaps with other Convention grounds like those of race, religion or nationality. Then follows an essential statement "Membership of a social group may simply be attributed to the victimized person or group by the persecutor. In some cases, the social group may not have existed previously but may be determined by the common characteristics of the victimized persons because the persecutor sees them as an obstacle to achieving his aims." With that the Council declares itself clearly in favor of the observer theory.

5.2 Arguments in favour of the participant theory

I find two arguments in favour of the participant theory:

1. The wording of the Convention, particularly the adjective "social". Sociality means a kind of alliance. If "Social group" would be thought as a bare quantity in the mathematical sense, there would not be any reason for the adjective "social". The Convention then also simply could have spoken about "membership of a definite group".
2. The purpose of the Convention reasons. Apparently not every persecution, that is every threat in life, liberty and other human rights, leads to refugee status. Otherwise the Convention could have done without the enumeration of special grounds of persecution. If one however understands "social group" as a quantity which can be defined by the persecutor, this leads to the conclusion that every persecution falls into the application field of the Convention. If the originator of the persecution persecutes people because they eat bananas or drive Porsche, then bananas eaters and Porsche drivers are each a social group.

[21] ABl. EG Nr. L 63/2

It would be helpful, if we knew, what the drafters of the Convention thought when they inserted the ground of social group into the Convention. The first draft of the resolution A/RES 429 (V), which was already accepted by the Plenum of the 5th UN General Assembly, did not contain this ground.[22] The General Assembly appointed a meeting of delegates to give further advice. In this meeting Sweden made the suggestion to include *membership of a particular social group* in the enumeration of the grounds of persecution. The suggestion was agreed to without discussion because all participants at the meeting were of the opinion that it would be without influence on the definition of the term "refugee". It would be interesting to know which reasons Sweden gave for its application. Unfortunately, we have only very sparse information concerning this question.

The Swedish representive Sture Petrén, gave only the following short reasoning: "*Such cases* (persons, who might be persecuted owing to their membership of a particular social group) *existed, and it would be as well to mention them explicitly.*"[23] Before the Swedish representive pointed out, that Sweden was a country of asylum in the past. He continued: "• *but the fact must be taken in account that its capacity for absorbing large numbers* (of refugees) *was limited and that, particularly in the present serious state of world affairs, considerations of national security must play a certain part.*"

It seems to be clear, that the Swedish idea was not, to open refugee status for all kinds of refugees. The limited capacities and the interest of national security demanded a restriction. On the one hand the social group ground should include a definite kind of refugees but on the other hand this ground should not devalue or cancel the limitation to definite grounds of persecution anyway. Nevertheless the official documents about the consultations concerning the draft of the Geneva Convention let the question open: What is meant by *membership of a particular social group*? What we can see is that the Swedish delegation did not disclose their understanding of a particular social group.

Unfortunately the internal documents of the Swedish government bring also not so much more clearness. What we know is that the Swedish proposal was motivated by the draft of the national alien act, which was just been drawn with the Geneva Convention simultaneously.[24] Among the Swedish

[22] Michael Marugg: Völkerrechtliche Definitionen des Ausdrucks "Flüchtling". Ein Beitrag zur Geschichte unter besonderer Berücksichtigung sogenannter de-facto-Flüchtlinge, Basel, Frankfurt/M [Helbing & Lichtenhahn] 1990, p. 142f.

[23] Alex Takkenberg / Christopher C. Tahbaz: The Collected Travaux Preparatoires of the 1951 Geneva Convention Relating To The Staus Of Refugees Vol. III Amsterdam [published by the Dutch Refugee Council] 1988 A/CONF.2/SR.19 p.14; many thanks to Mr. Nicolaus and Mrs. Sabourin, UNHCR Vienna for support to find out these sources.

[24] I owe the following information to a report of the Swedish Ministry of Foreign Affairs, which has been sent to me by the Swedish embassy in Berlin with letter of 10-12-2000. Special thanks to Mr Tommy Lindberg, Ministry of Foreign Affairs, Stockholm for this informations and for his effort.

documents concerning the considerations and drafts of the convention as well as the national alien act there is a letter from the Swedish representive Sture Petrén to the minister of foreign affairs dated of 28th June 1951. In this letter Mr. Petrén wrote that his proposal to introduce the social group ground in the draft of the Convention was motivated by the reason that the definition of the term "refugee" in the Convention should be in accordance with the definition in the planned national alien act (which came in force 1954). The considerations of this later alien act were given in a expertise which was published on 21st Nov. 1951. In the considerations to the later art. 47 of that alien act is written, that the definition of the term "refugee" is based on the former Swedish practice. This practice included that the Swedish government gave protection also to such people who were persecuted because of their membership of a particular social group. But unfortunately the Swedish documents of the 50ies seem not to give any example of that what was meant by a particular social group.

But what we know is that there is a very close connection between the Swedish proposal and the Swedish national alien law. If we have now a look at the present Swedish alien law, we can discover that the Swedish concept of *membership of a particular social group* was never based on the observer theory.This result is confirmed by the current Swedish alien act. This statute includes in chapter 3 art. 3, para 3[25] besides a definition of refugees as people persecuted because of membership of a particular social group a special regulation concerning people who are persecuted because of their homosexuality or because of gender. Such regulations would be superfluous, if these persons were included by the concept of the particular social group. Homosexuals as such are not a social group. The sex of people do not define them as members of a social group. The Swedish practice and legislation seem me to show, that

[25] For this information many thanks to Göran Håkansson, Director-General, Aliens Appeal Board, Stockholm. The wording of the regulation is:
Med skyddsbehövande i övrigt avses i denna lag en utlänning som i andra fall än som avses i 2 § lämnat det land, som han är medborgare i, därför att han
1. känner välgrundad fruktan för att straffas med döden eller kroppsstraff eller att utsättas för tortyr eller annan omänsklig eller förnedrande behandling eller bestraffning,
2. på grund av en yttre eller inre väpnad konflikt behöver skydd eller på grund av en miljökatastrof inte kan återvända till sitt hemland, eller
3. på grund av sitt kön eller homosexualitet känner välgrundad fruktan för förföljelse.
Som skyddsbehövande skall även anses den som är statslös...dit.
In Engish:
The term alien in need of protection otherwise used in this act refers to an alien who in cases other than those referred to in Section 2 has left the country of his nationality because he
1. has a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment,
2. due to an external or internal armed conflict he needs protection or, on account of an environmental disaster, he cannot return to his country of origin, or
3. because of his/her sex or homosexuality, he/she has a well-grounded fear of persecution.
A stateless person who...shall also be deemed to be an alien in need of protection.

the Swedish understanding of a particular social group means a group whose members have a consciousness of their common identity. Therefore the history of the making of the convention speaks for the participant theory.

Examples for membership of a particular social group are: aristocratic origin (memberhip of a aristocratic family), membership of a lingual minority or other minorities or membership of an association. Perhaps we can think on associations like trade unions or freemansions.

5.4 Arguments in favour of a modified observer theory

However, perhaps we can find a "middle way" between the participant theory and the observer theory. Perhaps we can understand the remarks of the UNHCR and the Council of the European Union also according to a "modified observer theory". In favour of this point of view is the fact that both authorities point out that the Convention ground of social group is able to overlap with the Convention grounds of race, religion or nationality. However in connection with this, both authorities do not mention the possibility of a coincidence with the Convention ground of political opinion. From this one can perhaps deduce, that the definition of a social group is not arbitrary; that it must be a characteristic which similarly like race, religion and nationality is not freely selectable or changeable by the person affected; that it must be a personal characteristic, which attaches to the person affected "without own assistance, so to speak fateful". This criterion would be identical with the one which regards the BVerwG as relevant for the German right of political asylum pursuant to article 16a GG.[26]

In accordance with this criterion Iranian women who refuse to wear the chador and who therefore are persecuted, are not members of a particular social group. However, the women from African countries where genital mutilation is threatened form such a group. The advantage of this interpretation matters in that the Convention grounds keep their restrictive function and are not made irrelevant by the Convention ground of social group. But we have to see the problem, that the modified observer theory demands a new interpretation of the Convention grounds: not as a closed enumeration but as a collection of examples. Perhaps we can notice that the practice of the states has in this respect led to an amendment of the meaning of the Convention grounds.

[22] BVerwG, Urt. v. 15.03.1988 - 9 C 278.86 -, BVerwGE 79, 143

PROGRAMME

PROGRAMME

WEDNESDAY, 25 OCTOBER 2000

1000 - 1500	Registration
1230 - 1400	Informal Working Lunch for Chairs and Speakers of Conference Sessions Chair: *Geoffrey Care*, President of the IARLJ
1500	**Official Opening of the 4th International Conference of the IARLJ**: *Walter Stöckli,* President of Chamber at the Swiss Asylum Appeal Commission and Vice-President of the IARLJ
1515 - 1545	**"The Changing Nature of Persecution"** Keynote Address by *Erika Feller*, Director, Department for International Protection, UNHCR
1545 – 1800	**Country Reports on the Conference Theme,** followed by plenary discussion Chair: *Geoffrey Care*, President of the IARLJ
1830 - 1930	Aperitif at the invitation of the President

THURSDAY, 26 OCTOBER 2000

0830 - 1015 **Persecution by Non-State Agents**

Chair: *Marieke Smit*, Judge, Court of Justice, Haarlem, NL

1. Non-state agents of persecution and the inability of the state to protect: *Walter Kälin*, Professor of Law, University of Bern
2. The German practice: *Dr. Reinhard Marx*, lawyer, Frankfurt
3. The French practice: *Michel Combarnous,* President of the Appeals Commission for Refugees, Paris

Panel discussion

1. Introduction by *Hugo Storey,* Vice-President, Immigration Appeal Tribunal, UK: International Humanitarian Law: the missing link
2. The Criminality Perspective: *Erik Møse*, Judge and Vice-President at the UN International Criminal Tribunal for Rwanda, Arusha, Tanzania
3. Founding a refugee claim on violations of international criminal and humanitarian law: the victim's perspective: *Dr. Bonaventure Rutinwa*, Lecturer, Faculty of Law and Centre for the Study of Forced Migration, University of Dar es Salaam, Tanzania

Panel discussion

1230 - 1345 Lunch

1345 - 1515 **Meeting of Working Parties**
Introduction by the W.P.-Coordinator *Hugo Storey*, Vice-President, Immigration Appeal Tribunal, UK
There will be Working Parties on:

1. Chain Refoulement (Rapporteur: Elizabeth Steendijk, Netherlands)
2. Asylum Procedures (Rapporteur: Jacek Chlebny, Poland)
3. Non-State Agents of Persecution (Rapporteur: Marieke Smit, Netherlands)
4. Membership of a Particular Social Group (Rapporteur: Rodger Haines, New Zealand)
5. Internal Flight Alternative (Rapporteur: Sharyn Joe, New Zealand)
6. Human Rights Nexus (Rapporteur: James C. Simeon, Canada)
7. Vulnerable Categories (Rapporteur: Edward R. Grant, USA)

Report of the Working Parties to Plenary
Chair: *Peter Showler,* Immigration and Refugee Board, Canada

1515 - 1530 Coffee Break

1530 - 1730 **Final Plenary Session: "Future of International Protection"**
Chair: Lord Justice *Stephen Sedley*, UK
Speakers:

- Dr. *Ahmed Arbee*, Chairperson Appeals Board, South Africa
- Conseiller *Roger Errera*, Conseil d'Etat, France
- Justice *Allen Linden*, Federal Court of Canada
- Justice *Anthony North*, Federal Court of Australia
- Justice *B.N. Srikrishna*, India

Panel Discussion

Walk to the Town Hall

1800 - 1900 Aperitif at the invitation of the Town and the Canton of Bern

PROGRAMME

MERCREDI, 25 OCTOBRE 2000

1000 - 1500	Enregistrement
1230 - 1400	Déjeuner de travail informel pour les présidents de session et *les conférenciers* Président de session: *Geoffrey Care*, Président de l'AIJDR
1500	**Ouverture officielle de la 4e Conférence internationale de l'AIJDR**: *Walter Stöckli,* président de Chambre à la Commission suisse de recours en matière d'asile et Vice-Président de l'AIJDR
1515 - 1545	**"La nature changeante de la persécution"** Discours-programme par *Erika Feller*, Directrice, Département de la Protection Internationale, HCR
1545 - 1800	**Rapport des pays sur le thème de la Conférence,** suivi d'une discussion en séance plénière Président de session: *Geoffrey Care*, Président de l'AIJDR
1830 - 1930	Apéritif offert par le Président

JEUDI, 26 OCTOBRE 2000

0830 - 1015	**Persécution par des agents non-étatiques** Présidente de session: *Marieke Smit*, Juge, Cour de justice, Haarlem, NL 1. Les agents de persécution non étatiques et l'incapacité de l'Etat à protéger: *Walter Kälin*, professeur de droit, Université de Berne

2. La pratique allemande: *Reinhard Marx*, avocat, Francfort
3. La pratique française: *Michel Combarnous*, Président de la Commission des recours des réfugiés, Paris

Débats

1015 - 1045 Pause

1045 - 1230 **Demandeuses d'asile et réfugiées**

Président de session: *Rodger Haines QC*, Autorité de recours néo-zélandaise sur le statut de réfugié, Auckland

1. Introduction générale au phénomène de la violence contre les femmes: *Regan Ralph*, directrice executive de la division pour les droits de la femme, Human Rights Watch, Washington/USA
2. Le statut de réfugié et la violence contre les femmes dans la sphère "domestique": la question de l'acteur non étatique: *Deborah Anker*, Professeur à la faculté de droit de Harvard, Boston/USA
3. Cas liés aux sexes – doutes et questions, *David A. Martin*, Professeur de droit, Université de Virginie/USA

Débats rejoints par *Göran Håkansson*, Directeur Général, Commission des appels du statut de réfugié, Stockholm.

1230 - 1345 Déjeuner

1345 - 1545 **Droits de l'homme et protection internationale des réfugiés**

Directeur de session: Lord Justice *George W. Kanyeihamba*, Uganda

1. Une lecture de la Convention de Genève du point de vue des droits de l'homme: La théorie des trois échelles: *Jean-Yves Carlier*, Professeur à la Université catholique de Louvain et avocat, Belgique
2. Jurisprudence de la CEDH en matière de réfugiés et de demandeurs d'asile: similitudes et différences: *Matti Pellonpää*, Juge à la Cour européene des droits de l'homme
3. Jurisprudence du CAT en matière de réfugiés et de demandeurs d'asile: similitudes et différences: *Peter Burns*, Président du Comité Contre la Torture et

professeur de droit, Université de Colombie britannique

Débats rejoints par *B.N. Srikrishna*, Juge, Inde

1545 - 1615 Pause

1615 - 1800 **Réunions régionales**

(Réunion des délégués des régions définies et examens de sujets régionaux)

- Asie/Pacifique (Rapporteur: Allan Mackey, Nouvelle Zélande)
- Afrique (Rapporteur: Praxidice Saisi, Kenya)
- les Amériques (Rapporteur: James C. Simeon, Canada)
- Europe I (Rapporteur: Bendicht Tellenbach, Suisse)
- Europe II (Rapporteur: Jacek Chlebny, Pologne)

Rapport en séance plénière
Président de session: *Eamonn Cahill SC.*, Irlande

1800 - 1830 **Allocution par Madame *Ruth Metzler-Arnold*, Ministre de la Justice, représentante du gouvernement suisse.**

1930 **Dîner officiel**
avec les allocutions de *Bruno Huber*, Président de la Commisssion suisse de recours en matière d'asile et Sören Jessen-Petersen, assistant Haut commissaire pour les réfugiés. Discours de remerciements par Monsieur le juge *Hubert Dunn QC*, GB.

VENDREDI, 27 OCTOBRE 2000

0830 - 1000 **Possibilité de fuite interne / Possibilité de Protection interne**
Président de session: *Gaëtan de Moffarts*, Président de chambre à la Commission permanente de recours des réfugiés

1. Les difficultés de la 'fuite interne' et du 'déplacement interne' comme cadre de l'analyse: Juge *Kenneth Keith*, Cour d'appel, Nouvelle-Zélande

2. Un nouveau paradigme: La possibilité de protection interne *James Hathaway*, Professeur de droit et Directeur, programme en matière de droit d'asile et de droit des réfugiés, Université du Michigan, USA

Débats

1000 - 1030 Pause

1030 - 1230 **Crimes contre l'humanité et génocide**

Président de session: *Edward R. Grant*, Officier exécutif, Cour d'appel en matière d'immigration, USA

1. Introduction par *Hugo Storey*, Vice-Président, Cour d'appel en matière d'immigration, GB: Droit international humanitaire: le lien manquant
2. L'approche criminelle: *Erik Møse*, Juge et Vice-Président au Tribunal Pénal des NU pour le Ruanda, Arusha, Tanzanie
3. Fonder une demande d'asile sur la base de violations du droit pénal et du droit humanitaire: L'approche de la victime: *Bonaventure Rutinwa*, Professeur, Faculté de droit et Centre d'études sur la migration forcée, Université de Dar es Salaam

Débats

1230 - 1345 Déjeuner

1345 - 1515 **Réunion des groupes de travail**

Introduction par le co-ordinateur des groupes de travail, *Hugo Storey*, Vice-Président, Cour d'appel en matière d'immigration, GB

Groupes de travail:

1. Renvoi successif (Rapporteur: Elizabeth Steendijk, Pays-Bas)
2. Procédures d'asile (Rapporteur: Jacek Chlebny, Pologne)
3. Agents de persécution non-étatiques (Rapporteur: Marieke Smit, Pays-Bas)
4. Appartenance à un groupe social particulier (Rapporteur: Rodger Haines, Nouvelle Zélande)
5. Possibilité de fuite interne (Rapporteur: Sharyn Joe, Nouvelle Zélande)
6. Relations avec les droits de l'homme (Rapporteur: James C. Simeon, Canada)

7. Catégories vulnérables (Rapporteur: Edward R. Grant, USA)

Rapport des groupes de travail en séance plénière
Président de session: *Peter Showler*, Commission de l'immigration et du statut de réfugié, Canada

1515 - 1530 Pause

1600 - 1730 **Session plénière finale: "L'avenir de la protection internationale"**
Président de session: Lord Justice *Stephen Sedley*, GB
Conférenciers:
- Dr *Ahmed Arbee*, président de la Cour d'appel, Afrique du sud
- Conseiller *Roger Errera*, Conseil d'Etat, France
- *Allen Linden*, Juge, Cour fédérale du Canada
- Justice *Anthony North*, Cour fédérale australienne
- *B.N. Srikrishna*, Juge, Inde

Débats

Déplacement à l'Hôtel de Ville

1800 - 1900 Apéritif offert par la Ville et le Canton de Berne

LIST OF PARTICIPANTS

LISTE DES PARTICIPANTS

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

1. Judges and quasi-judicial decision makers
(name and country)

AKHMETSHIEVA Meiramkhana, Ms., Kazakhstan
ALTUNTAS Ilknur, Ms., Turkey
AMANN Christina, Ms., Austria
AMOAH Felicity, Ms., Ghana
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ANTON Ion, Mr., Moldova
ARBEE Ahmed, Mr., South Africa
ARTEMIS Petros, Mr., Cyprus
BADDOO Samuel Glenn, Mr., Ghana
BADOUD François, Mr., Switzerland
BELIC Alenka, Ms., Slovenia
BELKO Igor, Mr., Slovakia
BATALLA Bonilla Alejandro, Mr., Costa Rica
BATLINER Andreas, Mr., Liechtenstein
BODART Serge, Mr., Belgium
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CASSON David, Mr., United Kingdom
CASTILLERO Alfredo, Mr., Panama
CATARINO Gabriel, Mr., Portugal
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MACKANJA Josephat, Mr., Tanzania
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MAGUIRE Peter, Mr., Ireland
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2. Other participants
(name, organisation, country)

ANAGNOST Stephan, Mr., UNHCR
ANKER Deborah, Ms., Harvard University, USA
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