The Asylum Process and the Rule of Law

International Association of Refugee Law Judges
Netherlands

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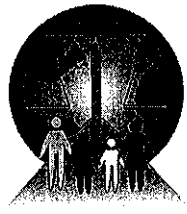

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PREFACE

The International Association of Refugee Law Judges held its sixth World Conference in Stockholm, Sweden between 21-23 April 2005. The theme was "The Asylum Process and the Rule of Law".

Three major topics of current concern in refugee jurisprudence were addressed by the speakers and panelists. The first was the topic of Judicial or Administrative Protection. The second was the Question of Proof and the third was Humanitarian Law, Human Rights and Refugee Law as "Three Pillars". Papers on each of these topics form the first part of this book. This book also contains brief reports of the Association's different "chapters": the American, Australasian, and European. The latter part of this book is comprised of reports of six of the eight IARLJ Working Parties, which were especially prepared for this Conference so as to contribute to a number of related issues. Their appearance is a sign of the growing effectiveness of the Association in providing materials to its members and the wider community which are of practical use when it comes to decision-making on refugee and asylum-related human rights claims.

Every previous IARLJ world conference has been published in book form. For a number of reasons it seemed this would not prove possible in respect of the Swedish conference proceedings. However, through the great perseverance of our life member Geoffrey Care, we were able to find a publisher, although having to organise this ourselves has led to some regrettable delay. As well as in book form it is also hoped that we will be able for the first time to publish the Conference proceedings in electronic form on the IARLJ website sometime in 2006.

We are extremely grateful to those who took so much time and trouble to prepare and deliver their papers and consenting to their

publication. We must apologise to them for the fact that the final versions are not free of typographical and editing errors and lack, for example, standardised footnotes, although we have tried to do the best we could with limited resources.

We must acknowledge a special thanks to Hugo Storey and Dr. Manoj K. Sinha, who on behalf of the Association's Publications Committee had unexpectedly to bear the responsibility of getting the conference proceedings published and to the four other people who helped with the very considerable labours of proofreading: Alicia Filopowich and Caleb Gilbert of the Refugee Studies Centre, Department of International Development, University of Oxford, Jamie Gilbert and Geoffrey Care.

From the list of names at the end of the book one can see that there were 175 participants from over 50 countries spread across every continent. This is eloquent testimony to the fact that the Association continues to prove itself one of the most active and creative international organisations of its type.

Under its new President, Mr Justice Tony North, I am confident the Association will go from strength-to-strength and in particular prove able to contribute to resolving the emerging problems posed for international comity by recent regional legal initiatives, such as in Europe, the Refugee Qualification Directive.

We hope that this publication will prove a valuable addition to emerging scholarship on refugee law issues as well as to the development of materials of practical assistance to all those involved in refugee decision-making.

Allan Mackey,
Immediate Past President of the International Association of Refugee Law Judges

I

INTRODUCTORY REMARKS

PROGRAMME

Thursday 21 April 2005

08.00-09.45 Registration

10.00-10.45 Opening of the Conference

— Welcome by Erik Lempert, Conference Chairperson and Allan Mackey, President IARLJ

— Barbro Holmberg, Minister for Migration and Asylum Policy

— Erika Feller, Director, Department of International Protection, UNHCR, Geneva

10.45-10.55 Pause

10.55-12.30 Introduction

— Report from Allan Mackey, President IARLJ

Chair: Justice Anthony North, Federal Court of Australia

— Presentation of the IARLJ Database by Dr. Iur. Paul Tiedemann, Judge of the Administrative Court Frankfurt am Main and Lecturer at the University of Saarland

— The Right Honourable Lord Justice Dyson, Deputy Head of Civil Justice, United Kingdom

— The interpretation of the Refugee Convention: idiosyncrasy v uniformity

— Presentation of the nominees for IARLJ officers/council (vote on Saturday)

12.30-13.45 Lunch

13.45-16.45 Judicial or Administrative Protection – Legal Systems within the Asylum Processes

14.45-15.15 Pause/coffee

Chair: Justice Anthony North, Federal Court of Australia

— Nicholas Blake QC, Barrister at Matrix Chambers, London
— Erika Feller, Director, UNHCR, Department of International Protection, Geneva
— Elspeth Guild, Professor of European immigration law at the Radboud University of Nijmegen
— Netherlands and partner at Kingsley Napley, London
— Rodger Haines QC, Deputy Chairperson of the New Zealand Refugee Status Appeals Authority
— Lori Scialabba, Chairman of the Board of Immigration Appeals, USA
— Vera Zederman, Chief of the Legal Department Refugee Appeals Board, France

18.00	Reception and buffet at Stockholm City Hall including a boat trip (transport is arranged from the Conference venue to the City Hall at 17.30)

Friday 22 April 2005

08.00-09.00	IARLJ Working Party Rapporteurs Business Meeting
09.00-11.00	The Question of Proof – Evidence, Credibility and Public Perception

Chair: Lord Justice Stephen Sedley, Royal Courts of Justice, United Kingdom

— The Honourable Allan Lutfy, Chief Justice, Federal Court of Canada
— Dr. Gregor Noll, Associate Professor of International Law, Faculty of Law in Lund, Sweden
— Dr. Jane Herlihy, Chartered Clinical Psychologist, Traumatic Stress Clinic, University College London
— Brian Gorlick, Regional Protection Officer, UNHCR Regional Office for the Baltic Nordic Countries, Stockholm, Sweden Presentation of Refworld
— Mignon van der Liet-Senders, Legal Officer, UNHCR Department of International Protection, and Protection Information Section, Geneva

11.15-11.30	Pause/Coffee
11.30-12.45	IARLJ Chapter meetings – Africa – America – Australia/New Zealand – Europe

12.45 – 14.00 Lunch

14.00-16.30 Humanitarian Law, Human Rights and Refugee Law – Three Pillars

Chair: Hans Corell, Ambassador, Former Legal Counsel of the United Nations, Sweden

— Roger Errera, Conseiller d'Etat Honoraire, Professor Central European University, Budapest

— Emanuela-Chiara Gillard, Legal Adviser, International Committee of the Red Cross, Geneva

— Göran Melander, Professor, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden

— Deborah Anker, Jeremiah Smith Jr. Lecturer on Law, Harvard Law School, Director, Harvard Immigration and Refugee Clinical Program, USA

— Jean-Paul Cavalieri, Head RSD Unit, UNHCR Department of International Protection, Geneva

16.30-16.45 Pause/Coffee

16.45-18.00 IARLJ Working Party Meetings (meeting rooms will be posted morning 22 April)

1. Asylum Procedures
   Rapporteur: Michael Creppy, USA
   Associate Rapporteur: Philip Williams, USA
2. Expert Evidence
   Rapporteur: Geoffrey Care, UK
   Associate Rapporteur: John Barnes, UK
3. Human Rights Nexus
   Rapporteur: Paulah Dauns, Canada
   Associate Rapporteurs: Anthony North and Rod Madgwick, Australia
4. Internal Protection/Relocation/Flight Alternative (IFA)
   Rapporteur: Kim Rosser, Australia
5. Non-State Agents of Persecution
   Rapporteur: Roland Bruin, The Netherlands
   Associate Rapporteurs: Muhammad A. Hassin and Tjerk Damstra, South Africa
6. Particular Social Group (PSG)
   Rapporteur: Juan Osuna, USA
   Associate Rapporteur: Michael Ross, Canada
7. Vulnerable Categories
   Rapporteur: Ed Grant, USA
   Associate Rapporteur: Lois Figg, Canada

EVENING

Dinner for members of the Women's Judges Forum at Näringslivets Hus

Saturday 23 April 2005

09.00 – 10.30 IARLJ Working Parties' Reports

Chair: James Simeon, Coordinator of the IARLJ Inter-Conference Working Party Process

— Peter Moulden (UK), Expert Evidence
— Hugo Storey (UK), Publications Committee
— Paulah Dauns (Canada), Human Rights Nexus
— Kim Rosser (Australia), Internal Protection/Relocation/Flight Alternative
— Other reports

10.30 – 11.00 Pause/coffee

11.00 – 12.30 IARLJ General Meeting and Chapter Reports

— Reports on the chapters
— Presentation of council members
— Election of officers/council members

12.30 – 14.00 Lunch

——————— Conference closes ———————

14.00-15.00 Council meeting

Evening Council dinner

MRS BARBRO HOLMBERG, MINISTER FOR MIGRATION AND ASYLUM POLICY, MINISTRY FOR FOREIGN AFFAIRS

Ladies and Gentlemen,

Mr Chairman,

Very warmly welcome to Stockholm and to this conference on the asylum process and the rule of law. I am very happy to see that so many of you have come from all over the world to share your experiences in this field.

Sweden has a long experience as a country of destination for many asylum seekers. In the last two decades almost half-a-million asylum seekers have come to Sweden.

Asylum policy is therefore a frequently debated topic, which has led to constant reforms in order to improve the system. It is hard to think of a better topic for a conference hosted by Sweden.

Today, I would like to take the opportunity to make some remarks on the issues that you are going to discuss the coming days. I will do it from the perspective of a changing reality – a reality that challenges the asylum policy, as well as the asylum process.

1. Let me start at the global level.

Migration is moving up on the international agenda.

Why is that? More people travel. Globalisation has made it easier. Better knowledge and lower travel costs make migration more global.

All countries are concerned. They are either countries of origin, transit or destination. Many are actually all three at the same time.

Migration brings an array of concerns: labour shortage, unemployment, brain-drain and brain-gain, remittances, human rights, xenophobia, illegal migration, human trafficking.

And one thing is clear. There is a huge common interest in governance when it comes to migration. Not only for the sake of those who flee or move, but also for the sake of those countries they leave behind, those they travel through, and those they migrate to.

The total amount of migrants grows. Today there are 180 million people that live outside their country of birth. The numbers of refugees are luckily going down. Today there are 17 million people under the mandate of UNHCR.

Migration in this broader perspective has an impact on the asylum process. We see an increasing amount of asylum seekers who don't have grounds for asylum.

People who search for a better life abroad, economic migrants, often end up in the asylum process.

There are other significant challenges. Over 90 percent of those seeking asylum in Sweden lack documents. This fact has brought to the fore the question of proof.

What can you request from an asylum seeker in terms of proof? Let me also briefly come back to my point of departure - global migration. International law separates asylum from migration. And I strongly believe that we should continue to do so. To seek asylum if you are persecuted is a human right. To work or study in another country is not.

But the fact that we are living in an age of extensive migration affects the asylum system, since there is no global normative framework for migrants.

This analysis was the starting point for the Global Commission on International Migration, which was established in 2003. It was an initiative taken by UN Secretary General, in close cooperation with Sweden and Switzerland. The Commission is working with the delicate question how to manage migration better globally.

One of its tasks is to discuss and propose a normative framework for other migrants than refugees. It will launch its report this autumn. I hope it will be courageous and constructive. Finding ways to manage migration better globally will have positive effects also on the asylum system.

2. Secondly, I would like to say something about the European cooperation.

The European Union has during the last five years gone through a major change, by seeking to harmonize its asylum policy. We have come relatively far in that process.

The reasons are obvious. With a common external border and free movement of persons within the Union there is no longer such a thing as a national migration policy.

The concept of a common asylum system is crucial in order to achieve solidarity between Member States. The harmonization is a tool to share our international undertakings. It is a way to improve both the protection and reception of asylum seekers in the Union as a whole.

It is important to have as similar procedures as possible, so that the process itself won't be a push or a pull factor within the Union. An asylum seeker should know that his or her application will be processed in a similar way, no matter which Member State he or she comes to.

We are now in the midst of implementing the first-phase legal instruments that have set minimum standards. We will build from the experiences of implementation towards a common legislation.

At the same time we have begun working with a new programme for the years ahead of us. It includes better practical cooperation, for example an increased exchange of information on asylum practice.

3. Finally, let me say something about our national agenda.

The topic for this afternoon - "legal systems within the asylum processes" - is very timely from a Swedish perspective.

We are now preparing a major reform in this very area.

We have currently an administrative appeal procedure for asylum cases. Next year, the first of January, we will have two appeal instances, instead of one. And more important, the whole appeals' procedure is moved from being an administrative authority into the regular court system.

The administrative court of appeal in Stockholm will set jurisprudence.

This reform has been prepared for several years. Sweden will together with the reform present a new Aliens Act that is more clear and concise.

At the same time we will propose a widening of the application of the term refugee. It will in the future cover also persons who risk persecution because of gender or sexual orientation.

We are also suggesting a widening of the definition of subsidiary protection.

The purpose of the reform is to make the asylum process more open. The possibility to present a case orally, also at the appeal's level, will increase significantly. This will, hopefully, increase legitimacy for the process. We hope to strengthen the public confidence for the decisions made.

With the reformed Aliens Act we want to strengthen the focus on protection.

A great challenge is to promote an expedient procedure. The rule of law also implies timely decisions. We don't want to see a procedure that drags on for years and years.

I would like to say a few words on return. The credibility of the system also depends on the return of those that are found not to be in need of protection. To enforce final decisions is crucial. It is, I believe, decisive for the legitimacy of the asylum system.

We all know that most refugees never reach the developed countries. They stay in the neighbourhood, hosted by some of the poorest countries in the world. Our asylum system can never be anything but a complement to the efforts made in the surrounding regions.

Supporting the governments to increase their protection capacity is necessary. So is direct assistance to the international community that is working in the field to protect refugees. The UN High Commissioner for Refugees is our most important partner in this work.

I hope this conference will contribute to a good dialogue between judges from different parts of the world. We have a lot to learn from each others' experiences.

Good luck in your discussions!

PRESIDENT'S REPORT
Allan Mackey

It is now some ten years since the initial planning for this Association took place, which led to the first conference in London at the Inner Temple. Some 60 judges from 27 countries attended that first conference. We have now reached our sixth international conference. Membership is now approximately 450 from 65 countries. While fortunately the latest figures, from the UNHCR, show a marked reduction in the number of people seeking asylum and at risk, the challenges for us, as refugee judges to uphold the rule of law in this field and maintain an independent judicial overview, have certainly not diminished.

It is timely to remind ourselves of the aims of our Association. My predecessor, and our life member Geoffrey Care, neatly summarised these in his report to the Wellington conference. He stated:

"The vision, which the Association has, is to achieve a consistent and coherent application of international norms in the role of asylum and refugee matters. It is committed to promoting a worldwide understanding of refugee law principles: to encourage countries, courts and tribunals to adopt the best practices-not just minimum standards on the local stage-in the determination process, in appeals from earlier decisions, and to do what we can to ensure that all claims for Refugee Status and analogous protection are governed by the rule of law."

With that vision in mind a report such as this should assess how we have performed to meet that vision, over the past few years. An international conference, like this one, then gives the chance to see how we might perform in the future.

We have faced large challenges in meeting those aims, over this time. These have been in how we should respond to the reactions, legislation and rules introduced by many governments, in their efforts to enhance border protection, to provide security from the real threats of global terrorism, and the perceived problems of increasing migratory movements of people worldwide. All too often legislation has been well intentioned, but ill thought out, or has been introduced as an over-reaction to sensationalist, poorly researched media reports. These reactions have blurred or politicises the two issues. And there the problem arises for us, as immersed in those two groups are, of course, those genuinely fleeing persecution.

The events of 9/11, Madrid, Bali, Beslan, the Middle East and elsewhere certainly required governments around the world to take steps to protect their citizens. Unfortunately the response used in many countries has been to try to appear tough and to introduce a creeping "domestication" into refugee and asylum law. In so doing the vital

differences between "privilege based" domestic immigration issues and "international human rights based" protection and asylum issues are often clouded, either intentionally or unintentionally. We see serious examples of this "domestication" in many countries, particularly those with a dualist approach to International law. Examples of this have been seen in:

- introducing national definitions of "persecution" that do not accord with international jurisprudence,
- defining what must constitute adverse credibility, or severely restricting the role of independent judges from assessing whether an administrative assessment of credibility is wrong in law,
- "white listing",
- expanding the Exclusion clause definitions,
- and not allowing so called "clearly or manifestly unfounded" claims to proceed.

As the rightful objective for every country's *immigration* policies should be to make those policies benefit their citizens it is correct that such policies should define and confer the "privilege" of entry. However, we do ourselves, and refugees a clear disservice if we get drawn into confusing, in our minds, or our jurisprudence, those immigration *privileges* with treaty based *rights* obligations.

The first ten years of our Association's activities have contributed to growing harmonisation and/or consistency of interpretation on most significant legal aspects of refugee jurisprudence (and, issues such as particular social group (PSG), internal relocation, and gender, spring to mind). Whilst the IARLJ can take some credit for that regrettably it appears others choose not to hear.

Recently I was passed some comparative global trend figures for 2003/4 by the UNHCR. These alarmed me. They show that any consistency we have achieved is certainly not applied in first instance decisions on status in many countries. I think we must therefore conclude some failure on our part, and that consistency in interpretation, we seem to agree and pride ourselves on, is not getting through, in many places, to decision makers below us.

These UNHCR figures set out recognition rates for claimants, from seven major refugee producing countries, in some 16-20 receiving countries, and UNHCR's own refugee status determination (RSD) results as well, where they do the assessments. The percentages are virtually a set of random numbers, or a lottery. For example: Afghanistan; rates vary from 90% in one receiving country to 1% in two other major jurisdictions (with UNHCR rate 65%), Iran; 67% and 48% in two major countries through to 4% and 11% at the other end (UNHCR rate 84 %), Iraq: 80% and 50% at one end and 1% and 0% at the other. Sudan, Turkey and

China show similar range fluctuations. The figures do show subsidiary protection, plus appeals, in some of the low approval rate countries, do add between 5% to 20% for some countries. However, clearly the huge variations are very concerning, and there may be serious cause for concern in the high recognition rates as well as the low ones. Also we should never forget these are all the applications of individuals and their families we are considering in this "lottery", not just statistics!

It will be a truly sad day if we end up with the more than 160 countries, who are parties to the Refugee Convention, having 160 or more different national interpretations of who is a refugee, and the UNHCR, and a few lonely IARLJ members, left crying out- "This is one convention; there should be a harmonised view!"

The reactions by so many governments to the horrific events of 9/11, and elsewhere, often appear to paint all asylum seekers as terrorists. The legislative responses have thus also caused great problems for us in many aspects of the traditional application of the Rule of Law. As stated recently by Erika Feller, in the UNHCR review of 2004:

"Equating asylum with safe haven for terrorists is not only legally wrong and unsupported by the facts, but it serves to vilify refugees in the public mind and promotes the singling out of persons in particular races or religions for discrimination and hated-based harassment."

I think, in retrospect, over the few years of our existence, we have stayed largely consistent with our vision. In our activities, training, conferences and publications we have taken the international *rights based* view, or perhaps regional view that is broadly compatible with that international approach. In this way we are not being lobbyists, or driving an agenda, but rightfully meeting our vision of promoting better consistency and upholding the Rule of Law.

It is appropriate therefore that we spend the whole first session at this conference debating these, and related issues. We will consider how we, as independent judges, can continue to uphold the Rule of law to the best of our ability, in the light of these growing and worrying tendencies towards more administrative or executive decision-making, less judicial overview and wide variances in first instance decision making.

Our activities

As will be seen, from the attached activities reports in the Annexes, the past three years have been busy times. I hope that the majority of you have felt the benefit of your membership and involvement with the Association from this wide range of activities. All of these activities are carried out with the aim of benefiting our membership, judges and others working in this field. I am sure I speak for all those members who make these "busy times" happen in asking all of you to bring forward more ideas, suggestions, and criticisms as to how we can continue to enhance

the benefits of membership, and beyond that meet the wider aims and vision of the association.

I wish to highlight a few areas in particular.

Regional Chapters

It will be recalled that the first regional chapter got underway in Australia and New Zealand in 2001. That chapter has made considerable progress and now has annual meetings and significant cooperation in training and exchange of jurisprudence. It is to be hoped they can expand beyond on what has already taken place, and involve judiciary in the wider Asia- Pacific area.

Over the last 18 months we have seen the establishment and flourishing of the Americas chapter. They recently placed themselves firmly on the map with their very successful conference in San Jose, Costa Rica. It has been a privilege to work with the Americas chapter in their development and we can all learn a considerable amount from the efficient and effective manner in which they conduct their affairs. They are well advanced in the preparation for the next major conference, possibly in Mexico. It is hoped that many of you, from other areas, will take the opportunity of attending that conference. It is particularly pleasing to see the involvement in Latin America and the Caribbean that has been achieved. The more established American jurisdictions are already giving significant assistance to these countries. Detailed reports from this, and the other chapters, will of course be provided to this conference.

The European chapter has achieved a considerable amount over the past two to three years. This has included:

- Professional development/training workshops in countries as diverse as Ukraine, Moldova, Georgia, Spain and virtually every one of the 10 new states in the European Union,
- Acting as consultants in a number of European meetings,
- Judging moot courts,
- Organising judicial exchanges,
- European conferences in Dublin, Trier and Edinburgh.
- The European conference in the beautiful city of Edinburgh in November last year was our most recent major activity. This was a highly successful meeting of some 70 judges and associates who really tried to come to grips with the new European qualifications and procedures directives. We were particularly honoured to have wonderful hospitality and participation from the senior Scottish judiciary.
- In conjunction with ILPA, in London, annual *ad hoc* seminars on topics of high current interest for both judges and practitioners. The last one of these was on the issue of "Expert

evidence". This then has led to the set up of a new working party, from whom we will hear more from at this conference.

The European chapter will from now, particularly in the light of the change of international presidency, operate more independently. I am delighted that Eamonn Cahill, from Dublin, has agreed to be the convener of the European chapter. The chapter is hopeful of having its next workshop/conference in November this year in Budapest.

As you will be aware we have been hopeful that one or more African chapters could also be established. Work is been done on this and there will be report(s) to this conference on this topic -Website and database

Two other, partly related, significant developments have been the development of our website at www.iarlj.nl and the international jurisprudence database, that will be officially launched immediately after this address.

About two years ago we decided to invest Euro 7000 in a major upgrade of our website. This has been money extremely well spent and we now have a very effective website that is indeed the communication core of our organisation. It is very ably supported by Liesbeth (our executive secretary) and Sebastiaan De Groot in Haarlem. We have budgeted for continuing maintenance and development of the website, because of the essential role it can perform in an international association such as ours.

We have all long recognised the language problems in trying to access jurisprudence from other jurisdictions where there is no common language. The exciting database that is about to be launched, after considerable work by our colleague from Frankfurt, Judge Paul Tiedemann, will, I am sure, add a significant dimension to our work international judges. It will be also linked to the association's web site.

Professional development

You will see that a considerable amount of our activity has been involved in professional development workshops. (An excellent example has been in Poland. We have now had three significant seminars and accordingly the level of understanding; debate and issues confronted are becoming more and more advanced). We have updated the IARLJ training manual after considerable work by Rick Stainsby. It has also been translated into Spanish and Arabic, and further translations are imminent. The European section is being updated again, by the Dutch academic, at this time. This is required because of the significant changes taking place in the European Union, which were the subject of our Edinburgh conference. It will be seen that professional development, and the use of our Manual, as a training tool, are core resources we can and do provide. Many of our members

are now well versed in running these workshops and I would encourage all of you to look for further opportunities, not only in your own countries, but also in countries where this area of law is a new or developing one to see how the IARLJ can assist. Contact can always be made with the secretariat or the local UNHCR representatives, with whom so often we co-operate in such workshops.

Exchange visits

In the past year we have carried out a considerable amount of research, (and crunched a lot of numbers!) into the operation of judicial exchange visits, particularly in Europe. The three judges who came to UK in November 2004 carried out a trial. They reported this was a highly successful project. The reciprocal visits in the trial, are planned over the coming months. We applied for a European commission grant to operate a fairly significant programme of judicial exchanges and were only unsuccessful because we did not have full-time project management working for us. The project itself however was seen as extremely worthwhile and desirable. We will continue to work on this and hopefully establish such a programme. We would strongly commend other chapters of the association to look at such exchange programmes. They appear excellent projects where everyone learns and useful ongoing links are set up. They need be only be for periods of 4-5 days visiting and receiving. It appears to give the opportunity for us as judges to look at, not only a comparative jurisdiction, but also to see how their own jurisdiction operates (or does not operate), when seen from the outside. As one of our association's objectives is to promote harmony in jurisprudence, and constantly improve our own court procedures, the executive considers this is an area we should continue to promote and support. The research material is available from the Secretariat.

Finance

All financial reports and accounts will be presented to the general meeting but I wish to report some significant developments. At the outset I am pleased to announce an excellent innovation, which has been wisely suggested by Sebastiaan de Groot. We will operate, for the future, a "members' finance/audit committee", nominated at each General Meeting. They will report to the General Meeting an independent overview of the accounts. I am sure this will greatly assist us all and ensure better transparency and understanding of how your money is received and spent, as well as helping to ensure prudential management of IARLJ assets. Gaetan de Moffarts(Be) and David Plunkett(NZ) have kindly offered to be the first members.

The finances of the association are reasonably healthy, particularly given the fact that, until recently, we were predominantly run on

member's subscriptions only. We have, over the past year or so, been fortunate to get some significant contributions towards our organisational costs from some Western European countries, beyond the generous long-term support we have had from the Netherlands Courts. The ice on this project was broken by the good services of our recently retired executive committee member, and great friend, Jean Massot, from France. OPRA, the funding authority of his court, agreed to provide us with EUR3000 per year. This "precedent" allowed me then to prevail upon the United Kingdom (DCA) with satisfactory results. The Republic of Ireland is now also about to assist in similar fashion. We are hopeful that these examples (with a little help from a number of you) will encourage several other courts or countries to make appropriate contributions to our organisational needs as well. If we were able to achieve like assistance from 4 or 5 more countries it may then be feasible for us to have a full-time project manager, which appears to be the key to obtaining funding for professional development and exchange programmes we could so readily operate.

In thanking the countries that have contributed so far I do not overlook the very significant contributions made by other courts or countries. Obviously Sweden, with the generous promotion of this conference comes to mind first, also Costa Rica, Ireland, Canada and New Zealand have recently contributed significantly. Other countries provide significant financial support to executive members and council members. This is a great saving to the Association. In this regard Belgium, Canada, Poland and Australia are thanked. There may be others, I am sure, please forgive me if I overlook them.

The Working Parties (WPs)

The inter-conference working party groups have very active over recent times, under the very able guidance of James Simeon. A number of excellent publications and reports have been completed and will be distributed at the conference. It is pleasing to report the establishment of two new WPs: Expert reports and Publications, both of which will be reporting to the plenary session.

The Council and Executive Committee

I wish to thank the Executive Committee members, Council members, Regional chapter chairpersons and committees for the tremendous support they have given to me over my term as President. They have all acted on your behalf with the highest standards of professionalism and their work has given great benefit to fellow judges, courts' administration and of course to the refugees, whose needs and status, we recognise.

The executive committee has been extremely busy over the past three years as the Activities reports attached as Appendices A and B show.

It has required not only a number of face-to-face meetings (usually in Europe) but also many conference calls and constant daily e-mails. Nothing has been too much trouble for my fellow executive members. They work very hard for you and undertake all the tasks with a smile (often an electronic one!) It really has made my job so much easier and rewarding. I thank them sincerely.

I must give very special thanks to my Vice President Katelijne Declerck. She has assisted me tremendously and has got through a tremendous workload on behalf of us all. As many of you know she is a woman of immense ability which she shows in all her many activities.

Also my thanks to Sebastiaan de Groot, he has been our secretary, since we started, and now also treasurer. His efforts have been very significant in the operational success of the Association. His support to me is greatly valued, as is the cheerful and constructive support given by so many of the staff and judiciary at the Haarlem court.

I cannot leave the Haarlem court without paying another huge debt of gratitude both personally and on behalf of you all to Liesbeth van de Meeberg our extremely capable executive assistant. Again nothing is ever too much trouble for her. I find most tasks are usually done before I think of asking for them, and at a level of competence way beyond that I expected.

We are truly fortunate to have such dedicated people working on our behalf.

Conclusions

When I took on the role as President the Association had passed through its formative years, under the capable guidance of Geoffrey Care and others of you. I thought therefore the best I could achieve would be to try to ensure the Association had management, operational and accountability systems or structures that assured confidence that, within the constraints we operate, we were able to achieve a limited number of goals well. I hope we have been able to move somewhere along the road. This Association is as much a group of individual, independent judges, wishing to enhance their own professionalism, and to promote the Rule of law in this highly exposed, often controversial, jurisdiction, as it is a group of colleagues who wish to meet informally and convivially to discuss mutual problems and issues. I hope we have achieved the right balance between those two.

I have learnt much and made many friends in the stewardship you have honoured me with. Those friendships will be my enduring reward and benefit that I will take from these few years. I pass the presidency over to my fellow Anzac, Tony North in a few days. I am confident that under his excellent guidance your Association will prosper, advance and take on new challenges.

My grateful thanks and best wishes.

APPENDIX A

ANNUAL REPORT - 2004

January 2004:	a joint ILPA/IARLJ workshop in London on the issue of the use and misuse of expert reports (particularly medical and psychiatric).
March 2004:	EC Asylum and Immigration Law: Reaching the Tampere milestones? A seminar organised by ERA, Trier, IARLJ was invited to chair a session.
May 2004:	LARC / Legal Assistance through Refugee Clinics (affiliated to the Helsinki Committee) In Slovenia the third annual moot court competitions for post grad students studying in the asylum area. Members from the association have been invited to act as judges over the past several years.
May 12-14, 2004:	professional development course, using for the first time the IARLJ manual - now translated into Spanish - with the new European chapter, in Spain at Chinchon. Meeting with judiciary and ombudsmen in Spain. Organised by Debbie UNHCR, Madrid.
June 2004:	After the launch on the Americas chapter of the association. An inaugural conference in San José, Costa Rica. 75 Participants from 19 countries.
June 21 and 22, 2004:	4th Berlin Symposium for the Protection of Refugees, EU Enlargement and a Common Protection Framework'
June 2004:	members of the executive have attended roundtable workshops with ECRE, particularly to debate EU Council Directives. Following from this, and in Association with the Aire Centre, on June 7/8 the deputy President Immigration Appeal Tribunal, UK represented the association as a trainer/presenter at a conference for Eastern European judges in the Ukraine, virtually on the border with the expanded EU.
June 2004:	IARLJ Seminar in Sydney, Australia, followed by an IARLJ Australasian Chapter meeting.
June/July 2004:	The IARLJ has lodged with the Eu Commission an application for a judges exchange project to

observe and understand the asylum and protection appellate system in other EU countries (IARLJ - PEPE).

August 7-10, 2004: Training in Japan. Completed by Ema Aitken (New Zealand)

August 31 - September 3, 2004: Conference on Future Union co-operation in the Field of Asylum, Migration and Frontiers, Amsterdam. IARLJ was invited to participate.

September 16-17 2004: IARLJ was invited as a speaker in the TAIEX seminar in co-operation with DG Justice and Home Affairs: introduction into the area of Asylum and Migration.

September 24-26 2004: a workshop event organised by the UNHCR office in Tbilisi, Georgia, targeting judges and lawyers. IARLJ was invited as a speaker

APPENDIX B

ACTIVITIES' REPORT 2002 AND 2003

1. Major institutional changes in the association:
   For regional purposes and activities, the Association has formed the following chapters:
   — European in 2002
   — Americas In 2003
   — Australia/New Zealand (Australasian) in 2001 with a further meeting in Auckland in 2003.

   The main reason for the creation of the Chapters is the wish of the IARLJ to be a forum of 'active judges' and to give practical support on key issues.
2. Cooperation with major international institutions:
   — UNHCR: IARLJ has a Memorandum of Understanding (MoU) with UNHCR that has been updated in 2003
     - the Global Consultations on the 1951 Convention. IARLJ has a consultative position with UNHCR. Some 20 judges participated in these consultations.
   — Council of Europe:
     - IARLJ has been given consultative status with the Council of Europe. We will be able to participate in various activities of the Council as consultants.
   — ECRE (The European Council on Refugees and Exiles)
     - In September 2003 IARLJ was invited to participate in two important workshops held by ECRE in London on the EU common asylum policies and procedures.
     - IARLJ also participated in the ECRE Biennial General Meeting Netherlands 26/28 March 2004 specifically in the matters concerning the 'Common Asylum System within Europe'
   — LARC / Legal Assistance through Refugee Clinics (affiliated to the Helsinki Committee)
     - In Slovenia 2003 the third annual moot court competitions for post grad students studying in the asylum area took place in March. 22 Teams from Central and Eastern European countries tried to convince a panel of 12 international recognised judges and experts. Members from the association have been invited to act as judges over the past several years. In 2004 judges Katelijne Declerck, Judith Gleeson, Jacek Chlebny and Willem van Bennekom enjoyed this stimulating activity.

— Odysseus Academic Network (European network of lawyers specialised in asylum and immigration law)
  - since 2002 several IARLJ judges participate in the yearly summers school programme on the European Immigration and Asylum policy.

3. Conferences / workshops:
   — October 2002: The IARLJ fifth world conference held in Wellington, New Zealand.
   — European Chapter conferences
     - Dublin in May 2002
     - May 2003 in Trier
4. IARLJ has been requested numerous times to provide resource persons for workshops / training sessions who are actually being involved in refugee determination procedures : some of these in the period concerned are:
   — IARLJ has been involved in a workshop sponsored by LARC in Slovakia in October 2003.
   — In October 2003, a UNHCR organised meeting of German speaking judges "Tagung" on asylum issues was held in Stuttgart, with participation of several of IARLJ members.
   — Training and workshops for experienced and new refugee law judges and other decision makers in 2003 Romania (March), Hungary (March), Slovenia (April), Slovakia (April), Czech Rep. (April), Cyprus (June)
   — Co-ordination and participation in a project "to assist the South African Refugee Appeal Board and UNHCR and the Minister of Home Affairs, South Africa", to clear a backlog of appeals.
   — Around the globe: Participation in many refugee and judicial conferences as speakers and commentators on asylum/protection and international human rights issues.
   — Participating partner in German speaking judges symposia on asylum and protection issues.
   — September 2003 Poland:
     - Warsaw: in cooperation with UNHCR advanced training to judges
     - Krakow: in cooperation with the LARC and the university of Krakow
5. Projects - as lead agency or main participator:
   — Principal partner in the Iustitia Project, funded by EU, UNHCR and the IARLJ, comprising conferences in Dublin in May 2002 and in May 2003 in Trier (in co-operation with the Europäische Richterakademie)

  - Several extensive training projects with judges in almost all accession countries.
- A 'Training Manual' for judges and a 'Training for Trainers Manual' have been developed.
  - Translations have been made into Spanish also used in Latin America.
  - Translation into Russian will be done in the near future through the Council of Europe
- The set-up of a website www.iarlj.nl with relevant case law and country information and other news items.
- The publication of conference books of the presentation of all major speakers.
- The development of working parties (8) on asylum law and human rights topics. The object of the working parties is to provide judges with updated legal doctrine and jurisprudence.

II

JUDICIAL OR ADMINISTRATIVE PROTECTION

Legal Systems within the Asylum Process

THE INTERPRETATION OF THE REFUGEE CONVENTION: IDIOSYNCRASY V UNIFORMITY

RT HON LORD JUSTICE DYSON*

Introduction

Interpretation lies at the heart of the law. In the field of commercial law, the interpretation of contracts occupies a central position. What did the parties mean by this word or that expression? Different legal systems have devised and refined different rules for answering these questions. How can there be significant differences of approach to a question of the meaning of words used in a context from which emotion is absent and in which politics has no part to play? Surely, the only question raised by an issue as to the meaning of words used in a contract is: what did the parties intend? It may be a matter of some surprise to those who have not been schooled in the common law tradition that in England at least, the true meaning of a contract must be determined without regard both to what the parties say during the course of their negotiations and what they say about what they have agreed after the contract has been concluded. Other systems have different rules for the interpretation of contracts. I doubt whether there are many, if any, mature systems of law whose rules governing the interpretation of contracts have not by now become reasonably secure and clearly established.

* Deputy Head of Civil Justice, England.

But however clear and secure the rules may be, there will always be difficulties in the interpretation of contracts. This is because it is an inescapable fact that human beings are not capable of unfailingly expressing themselves with precision and without ambiguity. Moreover, they do not foresee every contingency that may arise: they leave gaps in their agreements, and difficult questions arise as to how the contract should be interpreted when an event occurs for which the parties have not provided. Problems of this kind are standard fare in the world of private law. Sometimes the issues are very difficult to determine, and are ones which different tribunals can reasonably resolve in different ways. Ultimately, whatever the parties may think, the true interpretation of the contract will be that fixed by the tribunal to whom the disputed question has been referred. Problems of contractual interpretation are rarely touched by international law: they are usually matters which are archetypically within the province of domestic law and national courts.

But national courts are increasingly becoming concerned with questions of interpretation which do have an international dimension. In the UK, the landscape has been transformed during my professional life. Until comparatively recently, an English judge rarely had to interpret an international convention, let alone construe domestic legislation in a way which was compatible with an international treaty. But where an English court did interpret an international treaty, it adopted the same techniques of construction and interpretation as would an international tribunal: see, for example, *Fothergill v Monarch Airlines*[1]. This required the court to adopt different rules and a different approach from that which was, and still is, adopted (although to a lesser extent) in relation to the interpretation of domestic legislation.

Recent Developments

Two developments in particular have accelerated the internationalisation of important parts of law in the UK. The first is the ever-increasing part played by EC law. Directives and Regulations affect our national law, and are often given effect by primary and secondary domestic legislation. Our courts are obliged to interpret domestic legislation which purports to give effect to EC Directives and Regulations so far as possible in a way which does in fact give effect to them: *Marleasing SA v La Comercial Internacional de Alimentacion SA*[2]. This is a very powerful imperative indeed, which, if necessary, requires the court to engage in imaginative interpretation far beyond

1. [1981] AC 251
2. (Case C-106/89) [1990] ECR I-4135

anything that would be countenanced by a process of interpretation in a purely domestic context. Where it applies, EC law prevails over UK domestic law and, in effect, the ECJ is the final court of appeal in relation to questions of EC law that are referred to it.

The second important development has been the incorporation of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into UK domestic law by the Human Rights Act 1998. This does not give primacy to the ECHR. But section 3 of the 1998 Act provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Section 2(1) requires the national court to take into account any relevant Strasbourg case law. While such case law is not strictly binding, the UK courts have held that, in the absence of special circumstances, they should follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*[3]. The European Court of Human Rights (ECtHR) is the final court of appeal in relation to a question of the interpretation and application of the ECHR.

The willingness of so many states to cede ultimate authority in such important areas to international courts is one of the most remarkable developments in post World War II European history. Some of the cases which have been taken to Strasbourg have raised issues of considerable controversy, and some of the decisions have been the subject of shrill and intemperate criticism by the popular press in the UK. For example, the prohibition against ill-treatment provided by article 3 of the ECHR has significant implications in expulsion cases. Take the case of *Chahal v UK*[4] . The authorities sought to deport an Indian citizen, who was believed to be a Sikh separatist, on grounds of his threat to national security. The Strasbourg court upheld the complaint that his expulsion would violate his rights under article 3. The court held that, whenever substantial grounds are shown for believing that a person would face a real risk of being subjected to treatment contrary to article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged. The activities of the individual in question "however undesirable or dangerous cannot be a material consideration." The prohibition on expulsion in such circumstances is absolute. There is no room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a state's responsibility

3. [2003] UKHL 23, [2003] 2 AC 295
4. (1996) 23 EHRR 413

under article 3 is engaged. The significance of decisions such as these is obvious particularly at the present time, when in the UK at least, foreign nationals who are thought to be highly dangerous terrorists are arrested, cannot be tried for criminal offences and cannot be deported to their countries of origin.

In view of the willingness of the states who are parties to the ECHR to cede jurisdiction to an international court in cases of such political sensitivity, it is perhaps surprising that it took the member states of the EU so long to decide to achieve a common approach questions which impinge on the interpretation of the Convention relating to the Status of Refugees of 1951 and the Protocol of 1967 (the Refugee Convention). I shall come to the EC Council Directive 2004/83/EC of 29 April 2004 (the EC Refugee Qualifications Directive) later in this paper.

It hardly needs to be said that questions of immigration in general, and asylum in particular, have been and continue to be the subject of great controversy in many countries. The UK is no exception. The issue has generated much ill-informed and, at times, disingenuous discussion. There are strong and dangerous currents swirling around at the present time.

The EC Directive is an important development. It came into force on 20 October 2004. Article 38 requires the member states of the EU to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006". But it binds fewer than one sixth of the signatories to the Refugee Convention. It is, therefore, appropriate to ask the question whether it is necessary or desirable to seek to internationalise the interpretation and application of the Geneva Convention. In short: is there a problem?

Divergent Interpretations of the Refugee Convention

There are two principal ways in which the signatories to the Refugee Convention can diverge from each other in their interpretation of it. The first is by their own domestic legislation. The second is by the interpretative process itself.

Domestic Legislation

A good example of the domestic legislative route is to be found in the English decision of *R (Pepushi) v Crown Prosecution Service*[5]. The applicant, a national of the Federal Republic of Yugoslavia, arrived at Heathrow Airport on a false passport, having previously travelled through Italy and France. He was arrested at the airport, when

5. [2004] 1 WLR 638

attempting to board a flight to Canada. He said that he intended to claim asylum in Canada. He was prosecuted for using a false instrument. He argued that the prosecution was in breach of Article 31 of the Geneva Convention in that it wrongly penalised him on account of his illegal entry or presence in the UK. Article 31(1) provides that the contracting parties shall not impose penalties on refugees who "coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation..." The corresponding provision in UK domestic law was section 31 of the Immigration and Asylum Act 1999. This provided that, where in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the UK, there would be a defence to the offence with which the applicant was charged only if "he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country".

It was held by the court that, in enacting section 31 of the 1999 Act, Parliament had decided to interpret Article 31 more narrowly for the purposes of domestic implementation, although that domestic implementation could not affect the UK's international obligations under Article 31. The court said that it would if at all possible strive to give section 31 a meaning that was consistent with Article 31, but it was not possible to do so in the present case. It is a well-established rule of English law that there is a strong presumption in favour of interpreting statutes so as not to place the UK in breach of an international obligation. Another rule of the interpretation of domestic legislation which should have been considered by the court is that it is assumed that Parliament does not intend to take away fundamental human rights (of which Article 33 is an important example) except by clear words: see *R v Secretary of State for the Home Department, ex pte Adan*[6]. But if Parliament has plainly laid down the law, it is the duty of the court to apply it, whether that would involve the Crown in a breach of an international treaty or not.

Judicial Interpretation

I turn to consider the problem of divergent judicial interpretations of the language of the Refugee Convention itself. The rules governing the interpretation of international treaties are to be found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1980 which codify existing public international law. Article 31(1) provides 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

6. [2001] 2 AC 477

and in the light of its object and purpose. Article 31(2) defines what the context comprises. Article 31(3) states that there shall be taken into account together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any relevant subsequent practice in the application of the treaty and any relevant rules of international law applicable in the relations between the parties. Article 31(4) states that a special meaning is to be given to a term if it established that the parties so intended. It can be seen, therefore, that Article 31(1) contains the essential rule. But its alluring simplicity and obvious good sense are deceptive. Problems arise because some of the concepts which are the subject of the Refugee Convention are inherently difficult to express in clear ordinary and comprehensive language.

A good example of the problem is to be found in the meaning of "refugee" in Article 1A (2) in relation to persecution by non-state agents. In the case of *Adan*, the problem arose in the following way. Two applicants, one a citizen of Somalia and the other a citizen of Algeria, travelled to the UK via Germany and France respectively. They sought asylum as refugees who feared persecution by non-state agents in their countries of origin. In each case, the Secretary of State issued a certificate authorising the applicant's return to Germany or France as safe third countries where their claims to asylum would be determined in accordance with the Refugee Convention. Section 2(2)(c) of the Asylum and Immigration Appeals Act 1996 provided that such a certificate could only be issued if the Secretary of State was satisfied that the government of the third country would not send the person to another country or territory "otherwise than in accordance with the Convention". The applicants challenged the certificates on the grounds that, since Germany and France did not recognise persecution by non-state agents as qualifying for protection under the Refugee Convention, at least if the state itself was not complicit in the persecution, they were not countries to which they could lawfully be returned.

The Secretary of State accepted that under Article 33 (prohibition on refoulement) threats to a refugee's life or freedom may come from agencies other than the state. In other words, he adopted the "protection" theory rather than the "accountability" theory in relation to persecution by non-state agents. This has been held by the UK courts to be the correct theory: see *Adan v Secretary of State for the Home Department*[7]. The question remained, however, whether as a matter of law it was open to the Secretary of State to certify that in

7. [1999] 1 WLR 293

his opinion Germany and France would not send the applicants to another country otherwise than in accordance with the Refugee Convention. Could the Secretary of State say that he was satisfied that another state would not send the applicant to another country otherwise than in accordance with the Geneva Convention if the other state adopted an interpretation which the Secretary of State rejected, but which he accepted to be a reasonably possible or legitimate or permissible or perhaps even arguable interpretation? The House of Lords answered this question with a resounding "No".

They decided that it was necessary to inquire into the meaning of the Refugee Convention approached as an international instrument, and to determine the "autonomous" meaning of the relevant treaty provisions. It had to be given an independent meaning derivable from the text of the Convention itself as well as the sources mentioned in Articles 31 and 32 of the Vienna Convention and without taking colour from the distinctive features of the legal system of any individual contracting state. As a matter of principle, therefore, there could only be one true interpretation of a treaty. It was not right to say that a treaty can have a range of acceptable meanings. The House went on to consider what is the true autonomous meaning of "refugee" and saw no reason to depart from the interpretation previously given in favour of the "protection" theory. It is interesting to note that in amplification of the earlier decision, Lord Steyn relied on two further points. The first was that the UK view was shared by the majority of states and appeared to be gaining ground. The second was that the "protection" theory" enjoyed the support of the UNHCR Handbook (para 65). Lord Steyn pointed out that under Articles 35 and 36 of the Refugee Convention, and under Article II of the 1967 Protocol, the UNHCR plays a critical role in the application of the Convention. Contracting states are obliged to co-operate with UNHCR. It is, therefore, not surprising that the UNHCR Handbook, although not binding on states, has high persuasive authority and is much relied upon by domestic courts and tribunals.

There is reference in more than one of the speeches to Article 38. This provides that any dispute between parties to the Refugee Convention "relating to its interpretation or application" which cannot be settled by other means shall be referred to the International Court of Justice. No such reference has yet been made. Lord Hobhouse relied on Article 38 as showing that the "scheme" of the Refugee Convention was that any such differences should be so referred. Importantly, he went on to say that so long as such differences continue to exist, "the intention of the Convention to provide uniformity of approach to the refugee problem will be frustrated and the scheme of the international response will remain grossly distorted." It was

contrary to the intention of the Convention and productive of the most severe abuses that there should be such a premium on making a claim for asylum on the north side of the English Channel as opposed to on the south side. The evidence disclosed that only 5% of would-be refugees from Algeria were granted asylum if they made their application in France, whereas 80% of such applicants were successful if they applied in the UK.

There are other examples of provisions of the Refugee Convention whose interpretation is a matter of some difficulty. Take the question of internal protection or the internal flight alternative. The Convention does not deal expressly with the situation that arises where a person may technically be able to live in part of a country free of fear, but for one reason or another it is not reasonable to expect him to do so. How should the Convention be interpreted where such a contingency arises? Given the frequency with which this issue does arise, it is somewhat unfortunate that the Convention contains this lacuna. The English courts have grappled with the problem on a number of occasions. The leading authority is *R v Secretary of State for the Home Department, ex pte Robinson*[8]. Having noted the lacuna in the Convention and that there was no international court charged with its interpretation (Article 38 was not even mentioned), the Court of Appeal found the guidance given by the UNHCR Handbook particularly helpful as well as the statement in the 1996 joint position on the harmonised application of the definition of the term "refugee" in Article 1 of the Convention. Relying on this material and decisions of the Australian and Canadian courts, the Court of Appeal concluded that international protection was not necessary where the home state of the claimant could afford protection in a safe area of its own territory to which it would be reasonable for the claimant to relocate. The court set out relevant factors that can be taken into account in determining what is reasonable in this context. They considered the test suggested by Linden JA in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*[9] to be particularly helpful: "would it be unduly harsh to expect this person...to move to another less hostile part of the country?" Paragraph 91 of the Handbook provides that 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." No reference to "unduly harsh" here or indeed in the UNHCR annotations on Article 8 of the EC Refugee Qualifications Directive (internal protection). These state that member states may determine that an applicant is not in need of

8. [1998] QB 929
9. (1993) 109 DLR (4th) 682

international protection if in a part of the country of origin there is no well-founded fear of persecution "and the applicant can reasonably be expected to stay in that part of the country". The concept of "reasonableness" is easy enough to understand, but often difficult to apply. In *Robinson*, the court said rather tantalisingly that the use of the words "unduly harsh" fairly reflected that "what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country". It is not enough for a claimant to show that it would be very inconvenient for him to move to a different part of the country or that he would suffer a significant reduction in his quality of life. Something substantially more extreme than that is, I think, what the court had in mind. But there are limits to the extent to which it is practicable to sharpen the definition of reasonableness. I should add the test propounded in *ex pte Robinson* has since been somewhat modified by the Court of Appeal in *AE* and *FE* v. *Secretary of State for the Home Department* [2003] EWCA Civ 1032.

Another problem area has been the meaning of "persecuted" which is an integral part of the definition of "refugee" in Article 1A (2). I pause to mention the persecution/prosecution dichotomy. The Convention does not help, but the UNHCR Handbook does. It discusses the problem of the political offender at paragraphs 84-86. It states that if prosecution for a political offence pertains to a political act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee. Whether a political offender can also be considered a refugee will depend on various other factors. Prosecution for an offence may be a pretext for punishing the offender for his political opinions. There may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence: "such excessive or arbitrary punishment will amount to persecution". In *R (Sivakumar) v Secretary of State for the Home Department*[10] the House of Lords considered these paragraphs in the UNHCR Handbook, and concluded that, with the substitution of "may" for "will" in the sentence just quoted from paragraph 85, the guidance was valuable.

In *Sepet v Secretary of State for the Home Department*[11], the House of Lords had to consider whether refugee status should be accorded to Turkish Kurds who claimed asylum in the UK on the ground that, if returned to Turkey, they would be liable to perform compulsory military service on pain of imprisonment if they refused. They did not claim to have a conscientious objection to military service per se

10. [2003] UKHL 14, [2003] 1 WLR 840
11. [2003] UKHL 15, [2003] 1 WLR 856

but objected to the policies of the then Turkish Government towards the Kurdish people. Once again, the court had to grapple with the meaning of "persecution" for one or more of the five Convention reasons. In approaching this question, the court reminded itself that the Refugee Convention is a living instrument in the sense that, while its meaning does not change over time, its application will. The leading international instruments were examined to see whether they provided any support for the applicants' argument. These included the UNHCR Handbook, the General Comment No 22 of the United Nations Human Rights Committee, the 1996 Joint Position statement, the Charter of Fundamental Rights of the European Union (2000/C364/01) and the draft directive of the Council of the European Union (15068/02). This material did not show a clear international recognition of the right for which the applicants contended. The House of Lords then went on to consider whether the applicants' contention found compelling support in the decided cases from other jurisdictions, and found that, although there were indications of changed thinking among a minority of members of the European Commission, there was as yet no authority to support the applicants' case.

Sepet is an interesting example of the techniques deployed by a national court in seeking to find the true interpretation of the Refugee Convention. Obviously, the starting point is the Vienna Convention, but that is only the starting point. It examines relevant international instruments to see whether they provide a clear indication of the answer to the question at issue. Having regard to the central role of the UNHCR, the Handbook assumes particular importance here. It also considers what leading academic writers have to say. Finally, it has regard to decisions by courts of other jurisdictions. There is a growing corpus of case-law from a significant number of national courts on the interpretation of the Refugee Convention. In the UK, we have drawn heavily, in particular, on decisions of the courts of Australia and Canada.

Learning from Others

An interesting and difficult question is: by what criteria does a national court decide whether to adopt the view of academic writers or the decisions of other national courts? In our courts at least, a passage from a textbook or a judgment is often cited to reinforce a conclusion that has already been reached by independent detailed reasoning. Sometimes, however, the passage sets out reasoning which the judge considers to be so compelling that he or she simply adopts it. The willingness of judges to borrow from each other is now an accepted and, in my view, welcome fact of judicial life. There is much that we can learn from each other, and not merely in relation to the interpretation of international treaties. In recent years, the

development of the common law in England has benefited hugely from decisions of the courts of other common law jurisdictions.

But to return to the Refugee Convention, what Roger Haines said in a paper in 1995[12] should surely be of universal application. He was writing in relation to New Zealand, but I think that what he said is, or should be, of universal application. He said that it is a question of seeking out the best of overseas refugee jurisprudence. He gave as an example the meaning of the requirement that the fear of persecution be "well-founded" and the standard of proof that an applicant must satisfy. He referred to a number of formulations of the test adopted in different jurisdictions, including "a reasonable possibility" (Supreme Court of the US), "a reasonable degree of likelihood" (UK House of Lords) and "a real chance" (High Court of Australia). Having reviewed these alternatives, the New Zealand Court of Appeal preferred the "real chance" formulation, because it was a test more readily capable of comprehension and application by sometimes harassed decision-makers.

Mr Haines pointed out that if we are increasingly to borrow what we perceive to be the best refugee jurisprudence from other states, we must be aware of the domestic law setting and the considerations which may have influenced that state's jurisprudence. Thus there is much in the Canadian case law which is driven by the imperatives of the Canadian Charter of Rights and Freedoms, especially in relation to procedural fairness.

So far, I have spoken about the interpretation of the Convention. But it is at least as important to note that there is considerable scope for divergences in the *application* of the Convention. Different states may reach different decisions as to the safety of particular countries or territories. In practical terms, it makes no difference whether (by way of example) Germany is considered to be a "safe" country (a) because it applies the "accountability" theory in relation to persecution by non-state agents (a question of interpretation) or (b) because it considers that, on the basis of its assessment of the objective material relating to a particular country, an applicant does or does not have a well-founded fear of persecution in that country (a question of application).

Uniformity as a Goal

But it is time to return to the fundamental question: is it necessary or desirable to seek to achieve a uniformity of interpretation of the

12. International Judicial Co-operation in Asylum Laws. Suggestions for the future.

Refugee Convention? It is important to distinguish between this question and the question whether states which operate a "dualist" system can pass domestic legislation which is inconsistent with the true meaning of the Refugee Convention. I have earlier referred to the English decision of *Pepushi*. The last decade has seen a number of countries, including the USA, Australia and the UK, enact legislation which stipulates how certain provisions of the Refugee Convention are to be defined. It is to be assumed that, from the point of view of the governments, there is no conflict between these domesticating provisions and their obligations under the Refugee Convention: they simply represent their own parliament's view of how particular terms in the Convention are to be interpreted. But that view is not always correct. The problem arises not least from the fact that much of the text of the Refugee Convention is couched in rather broad terms, and the detail of what is to be inserted into its interstices is often crucial. It is in this detail that there is scope for the introduction of more or less stringent conditions whether by domestic legislation or judicial interpretation. Judges within a dualist system must apply their national legislation, and may not apply the Convention in so far as it is inconsistent with relevant national legislation. As I have said, judges will strive to interpret domestic legislation conformably with the true meaning of the Convention, but where that is not possible, the former will prevail. This is unfortunate, because there is no provision in the Convention for derogations and Article 42 prohibits reservations in respect of Articles 1, 3,4,16(1),33,and 36-46 inclusive. But the scope for robustly purposive interpretation of domestic legislation so as to ensure that it conforms to the Convention is considerable, and the decisions on the interpretation of domestic legislation enacted to give effect to the UK's obligations under the EC Treaty point the way.

A question of interpretation, however, is a pure question of law which, in the event of disagreement, must be determined by some arbiter. It seems to me that it is wrong in principle that parties to a treaty should be free to interpret it in different and idiosyncratic ways. It should be no more possible for states who sign a treaty to be free to interpret it as they choose as it is for parties to a contract to be free to interpret it as *they* choose. The analogy is, of course, not exact, but it is close enough for present purposes. The House of Lords was plainly right to say in *Adan* that the Convention has only one autonomous meaning. Article 38 shows conclusively that the parties intended that there should be no differences of interpretation. And that is not surprising because they intended that there should be a uniformity of approach to the refugee problem. Anything less would inevitably result in a distortion of the

international response to the problem, with some states being unfairly required to shoulder more of the burden of receiving asylum-seekers than others.

Solutions

So what should be done? Article 35 of the Refugee Convention identifies the duty of the UNHCR as being that of "supervising the *application* of the provisions of this Convention" (emphasis added). The existence of Article 38 indicates that the parties to the Convention considered that the UNHCR should not be the arbiters of its *interpretation,* and that interpretation was a judicial function. The Convention left it to each state to establish the procedures for the determination of refugee status "that it considers most appropriate, having regard to its particular constitutional and administrative structure": see paragraph 189 of the UNHCR Handbook. A significant number of states have sought the assistance of the UNHCR in their procedures. In some states, the UNHCR plays a partial role in the process. In others, governments have simply delegated to UNHCR members the task of determining who will be recognised as refugees by their countries. Even in countries where the UNHCR has no formal part in the determination of refugee status, it has a major de facto role to play. Although the Refugee Convention does not appear to accord to the UNHCR an interpretative role, in practice it has assumed such a role. As I have shown, the guidance given by the Handbook on pure questions of interpretation is frequently acknowledged and followed by the UK courts, Similarly with regard to other publications such as the ExCom series of resolutions, Global Consultation papers and positions papers dealing with specific subjects. And in relation to questions of application, UNHCR publications on current risk categories in specific countries are of inestimable value to those charged with the responsibility of applying the Convention in individual cases.

So should the UNHCR be formally recognised as the final arbiter on questions of the interpretation of the Refugee Convention? Its members clearly have huge expertise in this area and have greatly contributed to the jurisprudence that is emerging from the national courts. But it seems to me that this is a function that should not be entrusted to it. First, questions of interpretation are ones of law and should be decided by judges rather than officials who may not even be lawyers. Secondly, judges are trained and expert in deciding questions of law. Advocates may be excellent lawyers; so too are many academics. They can argue a question of law very effectively. But that is a different skill from that of actually making a decision. In arriving at a decision on a

question of law, the judge is often assisted by good advocacy and well-researched academic writings. But ultimately, he or she has to reach a decision taking account of all manner of competing considerations. Judges are used to the process of choosing between conflicting arguments and submissions. They are also experienced in writing judgments. It is particularly important that decisions as to the true meaning of the Refugee Convention should be well-reasoned and provide clear precedents. This is something to which judges are accustomed to aspiring, although some may be more successful at it than others. I would interpolate that, if the role of putative final arbiter were extended also to include decisions as to the application of the Convention in relation to particular claimants from particular countries of origin, then the case for a judge arbiter would be even stronger. This is because judges are by their training and experience particularly well equipped to sift and assess evidence and make findings of fact. Thirdly, judges are, or should be, impartial and independent. It is vitally important in the often highly-charged area of refugee law that the arbiter of the interpretation of the Refugee Convention should be, and should be seen to be, independent of executive power. Fourthly, it is clear from the still-born Article 38 that the signatories to the Refugee Convention did not intend that the UNHCR should be the arbiters of its interpretation; they intended that this should be a function that was to be entrusted to a court. To give this task to any body other than a court would frustrate the clearly expressed wish of the parties to the Convention themselves. Fifthly, the existence of international courts to determine disputed questions of interpretation of international instruments provides strong international recognition of the suitability and importance of having such questions decided by judges and not administrators or officials. The ECJ and ECtHR are good examples of this.

It is opportune at this point to mention, albeit briefly, the EU Refugee Qualifications Directive. It describes itself as laying down "minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" (Article 1). The Directive covers much of the same ground as the Refugee Convention, but fills in some of the interstices left by the Convention. It does not purport to interpret the Convention, and in a few respects it differs from it. As an aside, I would observe that Article 3 is somewhat problematic. It provides that member states may introduce or retain more favourable standards for determining who qualifies as a refugee and for determining the content of international protection "in so far as those standards are compatible with this

Directive". In its commentary on this article, the UNHCR states that more favourable national standards which reflect binding international obligations "should always be understood to be compatible with the Directive". If this is right, why was it thought necessary to add the words I have just quoted at all?

But the importance of the Directive is obvious. As recital (6) makes clear, its main objectives are to ensure that (a) member states apply common criteria for the identification of persons who are genuinely in need of international protection, and (b) a minimum level of benefits is available for these persons in all member states. The member states are required to bring into force domestic laws and make necessary administrative provisions to comply with the Directive by 10 October 2006. National courts will then be required to interpret these domestic laws compatibly with the Directive. Where necessary, references will be made to the ECJ in Luxembourg. In this way, the ECJ will become the final arbiter of the interpretation of the Directive. This court will approximate to a final court for the determining of questions of interpretation of the Refugee Convention. I say "approximate", because the Directive does not precisely mirror the Refugee Convention, and member states are in any event free to legislate more favourably. It remains to be seen to what extent the Directive will in practice have an important influence on the interpretation and clarification of the meaning of the Refugee Convention in states outside the EU. The position of the signatories to the Refugee Convention who are not parties to the Directive will, at least in a formal sense, be untouched by it.

Ideally, it seems to me that an international court should be created to determine at least all disputed questions of the interpretation of the Refugee Convention. Its decisions should be binding on all parties to the Convention. That would introduce welcome certainty. Whether its jurisdiction should extend to questions of the application of the Convention is another matter. In view of the fact that (a) there are so many parties, (b) the number of applicants and countries where there is a risk of persecution is so large and (c) the circumstances in those countries tend to change so swiftly that there would be a real danger that a court to which disputed questions of application could be referred would be overwhelmed by references to it.

I recognise that there is likely to be political opposition to the establishing of an international court even with the limited jurisdiction that I have described. One of the controversial questions would be whether states which operate a "dualist" system would continue to be permitted to "interpret" the Refugee Convention by domestic legislation. If they were to be denied the possibility of doing this,

there would be a grave danger that some states might seek to withdraw from the Refugee Convention altogether, or at least attempt to renegotiate its terms, with the concomitant and regrettable possibility of a reduction in the international protection afforded by the Convention.

In the meantime, there are encouraging signs that judges of national courts do wish to find common ground when seeking the true meaning of the Refugee Convention. The jurisprudence of national courts is now widely disseminated, and there is a good deal of cross-fertilisation of thinking between judges. The IARLJ has an important role to play in promoting this welcome development, and conferences such as this can only be a force for the good.

JUDICIAL OR ADMINISTRATIVE PROTECTION – LEGAL SYSTEMS WITHIN THE ASYLUM PROCESSES

ERIKA FELLER*

Distinguished Colleagues

Protection of people must be amongst the most important of the purposes and functions of the law. UNHCR is a strong believer in active judicial supervision, as a critical factor for the delivery of effective protection to refugees, who are some of the most vulnerable people in any society. This being said, there are fundamental issues to do with where and how legal systems fit within asylum processes. In the limited time available to me, I want to explore some of these issues and then offer a few observations on how this Association might make progress with them.

There are few, if any, parts of the world that do not either produce or receive refugees, often under very horrifying circumstances. Darfur is but one ongoing example. In a recent report we learnt of girls first being raped, either for fun or deliberately to fragment communities, and then subsequently detained by the justice system for the offence of fornication when they become pregnant. Payment to the police of a fine, which can be up to $80 – an enormous amount in Sudan – will buy freedom and also delay the punishment, which is to be whipped, until after the birth of the baby. UNHCR is particularly cognisant of the special vulnerability of women and children in displacement situations and in Darfur, amongst other initiatives, we have established a significant number of women's shelters in areas where high rates of sexual assault against women are reported. This is the "front line" of protection, and the fact that it has to be carried out, more often than not, in remote and dangerous locations where a climate of total impunity reigns, makes it a singularly difficult task.

Your Association is, of course, several steps removed from these field realities. Impunity, however, is not an unknown issue closer to home. Let me give it its context. Protection has to be realised today in a global climate of emerging "asylum fatigue". This is born of various concerns, some understandable and others much exaggerated. Countries profess to be much disturbed about the burdens of hosting refugees falling unequally; about the growth of international crime, people smuggling and terrorism, and its alleged link to unauthorised asylum arrivals; as well as about the difficulties in trying to distinguish

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between refugees and migrants. For the people who need protection, accessing it effectively is impeded by all these things, as well as by faltering support for asylum seekers among civil societies and political imperatives, including the survival of elected government ministers, that fuel a climate of impunity when it comes to respect for international refugee law and protection principles.

Systematic violations of human rights and blatant disregard of humanitarian law in conflict will continue to cause displacement and seriously jeopardise asylum seekers in asylum countries in some parts of the world. However, the growth in a number of countries of restrictive asylum systems, marked not least by contestable interpretations of the refugee definition, barriers to accessing asylum processes and substitution of discretionary forms of protection for protection based on universal principles, is a parallel development of growing concern. Interdiction or interception of persons, including refugees, trying to enter a country is established practice. Even while asylum in another country for shorter or longer periods is still the only viable protection possibility for many of the world's forcibly displaced, the asylum space is becoming ever narrower in response to security fears, backdoor migration and local xenophobia. Many of the measures being taken to respond to these concerns and effectively close the asylum door are formulated in quite restrictive legislation and a maze of subsidiary regulations. Collectively, and depending also on the vagaries of ministerial discretion, they can serve as a formidable barrier to a humanitarian protection response. In this sense, instead of the law being used as a humanitarian instrument to protect people in accordance with international obligations, it becomes a shield to deflect those very same obligations.

UNHCR does not contest that the problem of irregular migration is a serious one for states, that many migrants misuse asylum systems in developed countries, or even that the principles on which these systems are based may not respond fully to all of today's protection challenges. The law must be allowed to develop in a way that remains true to its object and purpose and that responds in a principled manner to new factual realities. This is the very important role of the judiciary, which we actively promote.

All of the foregoing is by way of context for what I now want to say. I have been asked to reflect in more detail on how best an asylum system might be constructed in today's not so positive environment, so as to ensure fairness and accountability in the decision making process, as one guarantee at least that protection will be accessible to those in need of it.

As many of you know, UNHCR has a responsibility, set out in Article 35 of the 1951 Convention relating to the Status of Refugees,

to supervise its implementation. Amongst other activities, this work involves promoting the setting up, and monitoring the operation of, refugee status determination procedures. Fair and efficient procedures for the determination of refugee status are in our understanding essential for a full and inclusive application of the Convention. UNHCR encourages countries to sign the Convention and to set up such procedures, in order to identify quickly and accurately, those who need international protection and those who do not. Some of you come from countries which have not yet acceded to the 1951 Convention or have not yet set up procedures – we hope you will support our efforts to encourage your governments to do so.

Most functioning refugee status determination procedures consist of an administrative body that makes the decision in the first instance. This decision is subject to review on the basis of fact and law by another administrative or judicial body. Judicial review on questions of law is sometimes available thereafter.

UNHCR's experience in many different asylum systems leads us to recommend that the review of an initial RSD decision be made by a specialized administrative tribunal in a judicial or quasi-judicial process. Decisions of such tribunals not only help to ensure fairness in the individual case but also provide formal guidance to the primary eligibility decision-making body. Provided such tribunals are adequately resourced and are permitted to function fairly and independently, then the role of the regular civil courts in RSD should be largely confined to judicial review and to standard-setting on issues of major legal significance.

To recap, the core elements, or hallmarks, of an effective system for the determination of refugee status, are in our experience:

(*a*) a single, specialized first instance body with qualified decision-makers, trained and supported with country of origin information;
(*b*) adequate resources to ensure efficiency, to identify those in need of protection quickly and to curb abuse;
(*c*) an appeal to an authority different from and independent of that making the initial decision;
(*d*) a single process to deal with both refugee status and complementary forms of protection.

Based on our review of asylum procedures world-wide over many decades, there is no doubt that the involvement of the judiciary in a national system is a very positive factor. To put it diplomatically, the sheer number of people trying to enter national asylum procedures is sometimes a temptation for governments to look for economies of due process. These can take a variety of forms. They have included,

over recent times, resort to legal devices to allow summary dismissal of claims deemed manifestly unfounded, using criteria which have only a marginal relationship to the notion of manifest unfoundedness. The creation of new legal concepts [such as internal flight alternative, irregular movement or safe third country] as barriers to accessing asylum, which are ill defined, and which in effect change the refugee definition, or graft onto it criteria not properly attuned to its protection base. Expeditious procedures have their place. So too does new thinking. However these should not be at the expense of key Convention notions, or basic principles of fairness and thorough enquiry. Here judges have an important, if not always popular, role to play. Active judicial supervision and an insistence on the rule of law certainly materially help to disentangle refugees from this net of migration controls.

Refugee issues are often emotive ones, raising concerns over such things as state security, sovereignty and social cohesiveness. The value of the judiciary in the asylum system is rooted in its independence – not only as an entity independent of the initial decision-maker, but as an institution which is independent *per se*. This is what sets judicial decision-making apart, and makes it so indispensable in a democracy. Judges decide cases according to the law as applied in the individual case and not subject to pressures of outside influences.

The value of the judiciary in asylum procedures is not only linked to its independence – but also to its role of setting precedent, interpreting the definition, deciding individual cases and establishing procedural standards. As these have been the focus of my remarks at previous Association conferences, I will deal with them only briefly today.

The judiciary has given important guidance on the meaning of the Convention refugee definition – what can constitute persecution, who can be agents of persecution, what is a well-founded fear, what is political opinion. These issues have been analyzed with great care by judicial bodies around the world, often after considering decisions from other jurisdictions. Courts have also pronounced themselves on the criteria for complementary protection.

In addition, leading judgments have addressed minimum procedural standards, such as the need, in most cases, for a face-to-face interview or hearing before the decision-maker. Courts have held that the decision on refugee status is a serious one requiring a high level of procedural fairness. There have also been important decisions on the burden of proof and evidentiary standards.

However, the developments have not always been positive. At both the administrative and judicial decision-making levels, there have been decisions, which in the view of UNHCR, go against the spirit

and indeed the letter of the 1951 Convention. Examples include unduly restrictive interpretations of the refugee definition including very limiting notions of what amounts to persecution, who are relevant agents of persecution and what constitutes effective state protection. This has led some to argue that refugee law, rooted as it is in international law, should not be too closely in the hands of national courts. The argument goes on that refugee law was not drafted by lawyers or for their interpretation, but rather by diplomats for governments to apply. In the hands of the legal profession it can, even inadvertently, become as much an instrument to restrict rights as one to guarantee they will be respected. Let me hasten to add that, while it is true that on occasion over-legalistic approaches do become a complicating factor in the current restrictive climate for refugee protection, overall careful legal scrutiny is certainly a plus and in most countries constitutionally guaranteed.

There are dilemmas for judges in using international law as an authoritative basis for decisions. They 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 through, in effect, judicial law making. The imprecision of the language of international law is indeed a drawback for those for whom law is a more exact science. The challenge is to interpret the principles in a manner that strengthens the protection framework, to take a purposive approach to using international law which places the focus less on the strict letter and more on the object of the text, the victim and the palliative purpose of protection.

Part of UNHCR's supervisory role is to intervene in problem cases, which we often do in both quasi-judicial settings or before courts, in the form of *amicus curiae* briefs, statements or letters. We do this to promote a more inclusive and appropriate interpretation of the Convention definition. UNHCR's role in this regard has normally been appreciated by Governments and Courts, although our positions have not always been adopted.

More generally, I would like to mention, particularly as there are present here a number of judges who are new to refugee law, that since its inception, UNHCR has provided governments with advice on refugee status determination. The seminal work in this regard is the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. It was prepared by UNHCR in 1979 at the request of Governments in order to provide guidance to their officials involved in refugee status determination. It was based on the practice of States and of 25 years of experience by UNHCR. I can say that there is no better overall description of the refugee definition in the literature.

We have recently supplemented the Handbook with a series of

six Guidelines on particular issues: Religion, Membership in a Particular Social Group, Internal Flight or Relocation Alternative, Gender-related Persecution, Cessation and Exclusion. These were all canvassed in the Global Consultations a couple of years ago. Each topic was examined in detail by government officials, members of the judiciary and of the legal profession, academics, UNHCR and non-governmental organizations. On some of the topics, like Membership in a Particular Social Group and IFA, there were wide divergences in national jurisprudence. Part of UNHCR's aim was to examine these and suggest a way forward.

The UNHCR Handbook has over time been recognized by Courts and Tribunals across the world as an authoritative text on the interpretation of the Convention Refugee definition. We are pleased to see that the Guidelines are beginning to be cited in judgements, for example in Australia, New Zealand, the U.K, and the U.S.A. It is our hope that with time, they will be as useful to decision-makers like you, as the Handbook has been. The Handbook and the Guidelines are in UNHCR's Refworld, which you can see in the hallway outside. The Handbook is also in a booklet format.

If I have concentrated on issues of interpretation, it is because these are where you are most likely to meet refugee questions. But not only!! As I have had occasion in the past to mention, refugees may well appear before you in other contexts, when such basic rights as housing, education, medical support, family unity, work and social security are for them not easily obtainable, or obstructed. They may accordingly appear in the criminal courts, traffic courts, family courts or labour courts, as well as in immigration detention hearings. In all these contacts with the host state legal system, understanding from the Bench for the special vulnerability of refugees and their cultural or linguistic disadvantages can add real meaning to refugee protection.

I would like to turn now to the work of this Association and expand on my words of welcome. UNHCR is happy to have supported the establishment of the IARLJ. Our partnership was formalised on the basis of the Memorandum of Understanding agreed with you some 6 years ago. As the MOU envisages, we are working together, amongst other things, to promote within the judiciary and with quasi-judicial decision-makers world-wide, a common understanding of refugee law and asylum principles, to encourage the use of fair practices and procedures to determine refugee status, and to promote capacity-building and networking.

It has been a very fruitful relationship. Since 1997, well over 500 national judges in different countries have been trained by the IARLJ, with innumerable national training sessions having been conducted for member and associate judges and non-judicial first instance

decision-makers. Most of the activities of the IARLJ have centred on Conferences and Workshops – and through them on setting up a network of judges interested in international refugee law. Judges from all over the world have held consultations and exchanged experiences through meetings of the Association in places as various as Canada, Costa Rica, India, New Zealand, South Africa, Switzerland, and now in Sweden. Regional Chapters have been established on several continents. A singular advantage of the IARLJ is that it offers a forum where judges can speak directly to judges, colleague to colleague, on the basis of shared interests, different experiences and common bonds. In this respect the IARLJ fills a particular niche. It has as a result attracted a great number of committed members who devote a significant amount of their scarce "spare time," energy and intellect to working with the Association.

To this point, then, the evaluation is a positive one in terms of how much UNHCR, and the international system for the protection of refugees, have benefited from this partnership with the IARLJ. Still, I believe there is more we can do. I would, therefore, like to spark some reflection on possible improvements for the future. Here I have three specific thoughts for your consideration.

First, I would like to suggest that the Association might consider a more strategic review of where, region by region, members might contribute their expertise to professionalising the judicial processes in place for refugee protection. I have the sense that the activities pursued by the Association would benefit from greater thinking ahead and structured planning to ensure broader region specific coverage and spur an even broader membership base. In other words, there might be a cascading approach, from the world or international conferences, to the regional ones, and subsequently on down to sub-regions or national meetings.

Secondly, it may be timely to take a more expansive view of how and where the Association can contribute to capacity-building. The Agenda for Protection, a practical programme of action designed to improve the climate for and the delivery of protection around the world, calls on States to make more effort to assume their proper responsibilities for refugee status determination. UNHCR is currently undertaking refugee status determination in some 80 countries, 60% of whom have signed the 1951 Convention. In 2004, UNHCR made decisions concerning some 50,000 persons. In effect, UNHCR is doing refugee status determination in many countries by default. We are currently planning an initiative to promote and resource the transfer of this RSD responsibility to Signatory States, in particular. Capacity-building has to be a part of this initiative. We have had bitter experiences in the past with precipitate assumption of responsibility

by states who were in actual fact unprepared - institutionally, resources-wise, or from the point of view of requisite skills - for the demands of a national procedure. We would like to explore with you how the Association might contribute to this initiative. Capacity-building goes beyond training in the basic concepts – it is about reinforcing knowledge, but also putting in place processes which respect the dictates of due process and are built on understandings that have protection at their core. Capacity building in this sense is longer-term; it is about attitudes, relationships and institution building; it is dependent on getting to know a country, its legal and administrative traditions [including, where relevant, the place of traditional justice systems], as well as the particular challenges faced by a developing country. In this latter context it is about innovative thinking, such as how to make roving or mobile courts effective dispensers of fair justice.

Recently, new capacity building opportunities have opened up as a result of certain regional initiatives. One to mention, in particular, is the Mexico Plan of Action for Enhancing International Refugee Protection in Latin America. It was adopted in November 2004 in connection with 20th anniversary celebrations of the 1984 Cartagena Declaration. The Plan envisages *inter alia* activities to build decision making capacity of judges in the region through doctrine development, training and institution building.

The issues are, of course, not only, or even principally, in the developing countries. There is quite a challenge here in Europe. UNHCR has offered its assistance to improve the quality of first instance decision making in some big partner countries. That this is needed is evidenced by the fact, not least, of the high turnover rate on appeals. Investment in the first stage of the process – in solid training of decision makers, informed interpretation and application of the refugee definition, in interview practices, in the use of interpreters, and in the country of origin information base, to name a few – is an investment in more timely protection, earlier solutions, and the overall credibility of the system in the public mind. It also reduces the costs to the taxpayer. This reasoning has encouraged us to launch a Quality Initiative Project which we hope to expand to a number of recipient countries. A resource here might well be the IARLJ.

The Agenda for Protection also calls on UNHCR to improve the consistency and quality of our own mandate status determination processes. We will continue to do refugee status determination in many countries for the foreseeable future and hence are making efforts to improve our processes. It is clear, however, that we will continue to have to grapple with unforeseen increases in caseloads, or sudden backlogs. In these circumstances, the injection of new resources into

operations for limited periods of time can make all the difference – that is, as long as the individuals concerned do not have too steep a learning curve. We could discuss with you how to improve our cooperation in this area as well.

My third point goes back to the beginnings of an arrangement we had with the Association during the Global Consultations era, several years ago. The idea that was piloted, but which never really matured, was that the IARLJ could play the role of "sounding board", off which to bounce evolving new understandings or interpretations gaining currency in the protection area. UNHCR is a repository of extensive knowledge and expertise here, and is obviously strong on the legal aspects of the Convention and its definition. The ingenuity of some governments is, however, boundless when it comes to new restrictive measures, new forms of persecution, or ideas like "off-shore" processing. It would be useful for UNHCR, from time and on a strictly confidential, non-attributable basis, to be able to draw on the legal expertise and reasoning skills of some of your members, to help us think our way through the issues also from a practitioner's perspective.

In summing up, let me reiterate that UNHCR is very grateful for the work of the Association. If I have offered some perspectives on possible roads ahead, it is in this spirit and because we very much believe that there is even more potential to tap for a mutually beneficial relationship between your members and our organisation. I hope that the agenda for this meeting will allow for some discussion of these ideas.

Refugees are high on the agendas of politicians, the press and the domestic public. This makes status determination and ensuring respect for the rights at stake a high profile, often stressful responsibility, potentially quite vulnerable to compromise. It certainly assists here to keep always to the fore why one does this work – and for whom. The words of the President of Latvia, at the opening of the Ministerial Meeting of States Parties to the 1951 Convention and 1967 Protocol [held in Geneva in December 2001] are, I believe a salutary note on which to end. She said:

"I entreat you, when you think about the problem of refugees to think of them not in the abstract. Do not think of them in the bureaucratic language of "decisions" and "determinations" and "priorities." I entreat you, think of human beings who are touched by your decisions. Think of the lives who wait on your help."

Thank you very much.

THE IMPACT OF THE MINIMUM STANDARDS DIRECTIVE 2004/83/EC ON NATIONAL CASE LAW

NICHOLAS BLAKE QC[1]

Introduction

1. Council Directive 2004/83/EC came into force at the end of October 2004 following its publication in the OJ L 304/12 on the 30th September 2004. By Art 38, Member States of the European Union (hereafter EU) "shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 10th October 2006".
2. It is the culmination of a process of a move towards EU harmonisation of asylum law and policy that had as one of its first visible measures the EU Joint Position[2] of 1996. Whereas the Joint Position was issued under the Third Pillar of the Maastricht Treaty on European Union 1992 (Title VI Article K Cooperation in the fields of Justice and Home Affairs) and was expressed not to be legally binding, the present Directive has as its legislative base Article 63 (1) © Part IV of the EC Treaty as amended in 1997.
3. It will be legally binding and under Art 68 the European Court of Justice (ECJ) has jurisdiction to give a ruling on the interpretation of the Directive (other than in respect of measures taken relating to maintenance of law and order and internal security) either on:
   (*a*) A reference from a court or tribunal from whose decisions there is no judicial remedy under national law or
   (*b*) On a request from the Council, the Commission or a Member State.
4. The Directive is the result of a compromise between Member States, and represents in part a dilution of earlier proposals by the Commission. It has been the subject of a critical comments and a commentary by UNHCR[3].
5. Notoriously the Directive reflects the EU Amsterdam Treaty in concluding that only third country nationals or stateless

1. The author is a barrister practicing in London and has been engaged in many cases before the courts of the UK and in Europe.
2. OJ L63/2 13.3.1996.
3. UNHCR The European Union, Asylum and the International Refugee Protection Programme, September 2004.

persons could be considered refugees under EU law[4]. A national of a Member state seeking refugee status in another Member state must be refused asylum therefore irrespective of the merits of the claim to a well founded fear. Such a measure merely whets the appetite for unilateral restriction of who can be a refugee, in conflict with the norms of the Refugee Convention 1951 and the 1967 Protocol (hereafter the Convention). It adds political legitimacy to the dubious concept of safe countries of origin to be determined by legislative dictat rather than a judicially determined appraisal that a claim is manifestly unfounded or fit for fast tracking.

6. On the other hand the Directive has resulted in consensus that victims of non-state agents of persecution can in certain circumstances be recognised as refugees[5]. It has also brought supplementary protection within the ambit of EU legislative obligation[6].
7. Although the harmonisation gained by the Directive has been achieved at the considerable cost of dilution, it must be recognised that political events within Europe at least, may mean that the Directive with all its faults is better than a complete absence of measures, leaving national authorities free to define their duties as they deem fit.
8. The UK is about to enter an election period where the official opposition is committed to imposition of quotas on asylum seekers, and has indicated that it will withdraw from the Refugee Convention , the Human Rights Act and renegotiate the ECHR in order to do so. Since the asylum and human rights provisions of the Draft EU Constitution are regarded by its opponents as one of the features to which objection is taken, it is timely that the Directive recognises the primacy of the 1951 Geneva Convention and the applicable provisions of the Charter on Fundamental Rights and Freedoms (see for example Preamble 2, 10, 24, Art 2(b) Art 5(b) 20(6)). If such a policy of withdrawal were to be implemented it would entail withdrawal not merely from the Council of Europe, but the European Union and the EEA. There is no mechanism of de-ratifying a Directive that has been opted into, and in any event the Directive reflects in this the text of the treaty.

4. Asylum (Protocol No. 29 1997) annexed by Treaty of Amsterdam to EC Treaty.
5. See Article 6
6. See Articles 2, and Chapter V of the Directive.

9. This paper does not intend to provide a commentary on the Directive as such, but seeks to explore the question of how "a minimum standards directive" can or should impact on a national case law developed in accordance with ordinary principles of construction of an international treaty (the UN Refugee Convention 1951).

Minimum standards

10. It is clear from Art 63 (1) ©[7] of the EC Treaty and the title, preamble, and Articles 1 and 3 that the EU Directive sets minimum and not maximum standards. It is expressly a floor and not a ceiling on a state's humanitarian duties with respect to those who are claiming refugee status or any other kind of international protection.
11. The Directive permits states to provide more generous treatment and thus does not require a state to amend its case law to the extent of curtailing its obligations where more generous provision has already been established[8]. In this the concept of minimum standards distinguishes the Directive from other provisions of EU law where the purpose of harmonisation is essentially to lay down a level playing field in the internal market for the free movement of goods, persons and capital.
12. The interaction of the minimum standards in the Directive and established national case law could thus raise some novel questions. By way of example Article 4(3) (d)[9] and Article 5(3)[10] could be read as reading that the concept of refugee *sur place* requires extra exclusion clauses to be read in to the Convention and the insertion of the supposed good faith doctrine before a claimant can be recognised as a refugee. In the UK this issue

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7. *"Minimum standards with respect to the qualification of nationals of third countries as refugees".*
8. Article 3
9. *"Whether the applicant's activities since leaving the country of origin were engaged for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country".*
10. *"Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin".*

has been carefully considered and such a doctrine rejected by our Court of Appeal in the case of ex p Danian [1999] INLR 533 CA, and a line of cases following it.

13. In UK law the ultimate issue is the existence of risk on return. As Simon Brown LJ has said :
"in all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason . . . the critical question: if returned, would the asylum-seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however, unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum"
14. A person whose acts are seen to be self serving or even merely imprudent in a host state, might expect his claim to be treated with scepticism but if the country of origin would nevertheless persecute him on account of perceived opinion or other relevant Convention reason, he cannot be denied status because "the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin". Such a formula could be applied to a gay person who comes out when it is safe to do so, a person who professes his religious faith, or political opinions free from the shadow of oppressive tyranny. A strong tradition of Commonwealth jurisprudence and recourse to the human rights principle suggests that exercising of a human right can never be the reason to be deprived of it[11].
15. The risk is that where national case law is uncertain as to meaning and scope, or is being revisited by a higher court or tribunal, there must be a temptation in the judicial body not to expose a Member state to the vulnerability of forum shopping by a adopting an interpretation more generous than that laid down by the Directive. New Member states without a developed national case law are particularly unlikely to buy in to a more generous interpretation, in the absence of compelling reason to do so. Such harmonisation downwards would lead to illicit redrafting by a section of member states of core concepts at the heart of the refugee definition.

11. See Refugee Appeal No. 74665/03 (New Zealand) [2005] INLR 68. But see the ... of the UK Court of Appeal in Z v Secretary of State for the Home Department [2004] EWCA Civ 1578.

The interpretation of the Convention

16. Without the assistance of the Directive, or a dominant international body charged with determining between differences of interpretation, national courts have over the years been laying down principled approaches to the question "who is a refugee?".
17. In its judgment in ex p Adan and Aitseguer 19th December 2000 [2001] 2 AC 477; [2001] 1 All ER 593 (or available on the House of Lords website[12]) the House of Lords had to consider the meaning of a domestic UK statute that prohibited removal of an asylum seeker "otherwise than in accordance with the Refugee Convention". This prompted an examination of how the Convention was to be interpreted.
18. Lord Steyn giving the principal speech held:
" ...the enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. ....Closer to the context of the Refugee Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions"

He went on to say:

"The rules governing the interpretation of treaties are articles 31 (General rule of interpretation) and article 32 (Supplementary means of interpretation) of the Vienna Convention on the law of Treaties (1980) (Cmnd. 7964), which codify already existing public international law: *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 282D. It is common ground that there are no relevant supplementary means of interpretation to be considered in regard to the Refugee Convention and I will therefore not set out article 32. But article 31 is important in the present context. It reads as follows:

'(1) 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.

12. http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldjudgmt/jd001219/adan-1.htm)

(2) The context of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty.
(3) There shall be taken into account, together with the context:
   (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[13];
   (*c*) any relevant rules of international law applicable in the relations between the parties.
(4) A special meaning shall be given to a term if it is established that the parties so intended'.

It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning."

19. I have quoted this passage in full as it seems to me to encapsulate the problem of a minimum standards view as to the meaning of the term "refugee" in a treaty.
20. Admittedly, on any view there is broad scope for differences of practice in the application of the terms, procedural,

13. In the case of R (Sivakumaran) v Secretary of State for the Home Department [1988] AC 958 it was argued that the handbook was admissible as evidence of state practice.

evidential and marginal questions. But on such a fundamental question as whether persecution can be the product of non state agents (the issue in the case) there can hardly be a range of acceptable views.

21. The UK Government argument in *Adan and Aitseguer* was that the Convention laid itself open to a range of interpretation and it was only if the state of intended return applied a construction that was outside a reasonable range of interpretation that removal was precluded. Needless to say, it relied on the EU Joint Position of 1996. This argument was rejected by the House of Lords because a treaty designed to protect individuals and confer on them a status cannot have a range of meanings. The rule of law means compliance with what the law actually means and not what the executive could reasonably believe it means.
22. Could the Government hope to rely on the Directive in 2006 with greater hope of harmonising downwards that it was able to achieve by the Joint Position? In principle, the same response ought to be given to any reliance by the state on the Directive in favour of the judicially established meaning of the Convention on a particular point.
23. I would suggest that this meaning is elicited from:
    (*i*) the reference to human rights in the Preamble to the Convention[14];
    (*ii*) the place of asylum within the 1948 UN Declaration on Human Rights and thus heralding a connection between persecution and the international bill of rights[15];
    (*iii*) the applicable provisions of the UN Handbook which is indeed evidence of state practice in the application of the Convention,;
    (*iv*) a survey of broadly comparable national jurisprudence, excluding those states whose asylum jurisprudence is based essentially on their constitutional traditions and domestic legislative framework.
24. Of course it is open to states in pursuit of their sovereign right to control frontiers to legislate as to what a refugee is and how claims will be examined. At different times the USA and Australia have done just that. Where national legislation

14. The Preamble to the Refugee Convention begins *"Considering that...the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination"*.
15. UDHR Art 14 (1) reads *"Everyone has the right to seek and enjoy in other countries asylum from persecution"*.

departs from Convention standards, however, the state loses any claim to be applying the Convention however as opposed to subordinating it to its national interests. In Europe, at least, it has been constantly re affirmed that the Convention is the effective appropriate international instrument to which states aspire to give effect. This is reflected in the clear language of the Directive. Indeed it could be argued that the reference to such phrases as "without prejudice to the Geneva Convention" in the Directive incorporates the Convention into EU law itself, or at the least requires an interpretation consistent with Convention.

What is the effect of the Directive on interpretation?

25. Let us now return to our good faith example (paras 12 to 15 above). What impact will the Directive have on the meaning independently established by the judiciary in the UK that Parliament has not purported to over-rule or amend?
26. The problem will become acute when the first appeals reach the ECJ. What is the precise function of that court? It is surely not to determine the meaning of the Geneva Convention generally. This is a function preserved to national courts or the ICJ in the event of an inter-state dispute. The ECJ's function is the definition of the Directive although the Directive expressly defers to the Convention. In particular its function is to examine whether the minimum standards set in the Directive have been properly applied.
27. It may not be easy to decide whether minimum standards have been acceptably met without addressing some regard to the Convention itself. Will the Court start from the proposition of agreeing with the House of Lords that the Convention has a single autonomous meaning? If so will it find that meaning in order to interpret the Directive? Or does it approach the task by accepting as legitimate the divergence in state practice as to meaning and profess an unwillingness or inability to adjudicate between meanings? Will it make a reference to the ICJ or encourage states parties to do so?
28. Let us suppose the highest court of state X in the EU declares that an asylum seeker, whose well founded fear of persecution is based on voluntary acts in the country of refuge, cannot be accepted as a refugee within the Directive? How will the ECJ proceed? There seems to me to be a number of possible options. It could :-
    (*i*) follow the UNHCR critique and declare that the good faith principle is not to be read into the Convention and

the sole question is whether the fear is well founded however it arose; or

(*ii*) construe the Directive narrowly and permit exclusion from status only where the claim is plainly manufactured and has no basis in the expression of the claimant's human rights; or

(*iii*) indicate that there is a broad range of acceptable interpretations of the Convention and the Directive permits the state to apply any one within the range including unreasonable conduct post flight;

(*iv*) conclude that the Directive Article 5 has properly grasped the essence of the Convention and that any unreasonable post flight acts must be discounted for refugee assessment purposes and therefore that the UK CA approach is wrong.

29. The first approach would run the risk of challenging the validity of the Directive itself, and the fourth challenges the concept of minimum standards in the meaning of a human rights treaty like the Refugee Convention. Either would raise difficult questions as to the legitimacy and competence of the ECJ to decide these issues.

30. The third option is not without difficulty either, as it suggests that there is no inherent meaning to the Refugee Convention apart from individual state practice in making a policy decision as to who to grant protection to. This is the proposition the UK courts and others have rejected as we have seen. The state concerned might attempt to argue that the Directive can be cited as an example of state practice to which regard can be had under the Vienna Convention on the Interpretation of Treaties Art 31 (3(a) and b) (quoted above in Adan). But this approach has three difficulties. It is not an agreement by the international community as a whole as to how the Convention should be applied. Secondly, the Vienna Convention allows practice as to the meaning of the treaty, to be taken into account and not practice indicating the absence of an agreed meaning. It is precisely the function of courts to decide the meaning of treaties where practice and other means of interpretation have left the matter uncertain. Thirdly, incremental shifts in meaning should be developed through the UNHCR and not in opposition to it. The development of state practice should be primarily reserved to the UN Handbook and the decision of the UN Executive Committee of the High Commissioner's programme undertaken in implementation by states of the duty of cooperation with the UNHCR.

31. This leaves the most likely approach to be one of interpreting

the EU's duty to conform to the Convention by reading the Directive compatibly with the Convention where it is possible to do so, and the Convention preamble and case law gives a clear indication of what is required. Ambiguous words that run the risk of subverting the protections afforded by the Geneva Convention may need to read generously to protect human rights norms. Derogations and restrictions from protection should be read narrowly, and again in conformity with established human rights jurisprudence. The object must surely be to enhance rather than diminish the universal standards of the Convention based on respect for developing human rights norms.

Maximum standards

32. There is, however, a real fear that the interpretation of minimum standards will by one means or another become the maximum standards, and the Directive will be seen to be dispositive of the question of refugee status, and set a minimum threshold for the asylum seeker to meet before EU protection can be granted rather than the minimum acceptable response of the state to the request for protection.
33. Indeed it is difficult to see how lists of safe countries or origin or even the language of Art 9 (1) of the Directive reflects the language of minimum standards.
"Acts of persecution within the meaning of Art 1A of the GC *must;*
(*a*) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights".
34. At least this approach links persecution to denial of human rights and reflects conclusions that a number of states have reached in their case law by conventional interpretative techniques. But why use "must" instead of "normally"? What is a severe violation and what are the basic rights protected? They surely go beyond the non-derogable rights of freedom from arbitrary killing, torture, inhuman or degrading treatment or retrospective punishment?
35. Where does politically motivated prosecution short of execution and torture come in, or prosecution for blatantly political offences? Is there not a risk that this language will impose rigidity instead of flexibility? It will lead to a conception of "persecution", removed from the traditional non-technical meaning of persecution as persistent harassment or oppression discriminatorily targeted at the victim for a Convention reason.

36. Human rights law must be increasingly capable of defining the right to freedom of expression or manifestation or religious, freedom from unfair trial or arbitrary detention, freedom to enjoy respect for private and family life without the intrusion of the state's penal powers or the state's failure to protect these rights from interference by others. But human rights bodies may not speak with one voice or advance at the same rate. Is a pure conception of the Convention doomed to consign gender or sexual orientation claims to dismissal because there is no universal consensus as to the range of rights engaged in this context?
37. It seems to me that there is here potential for a progressive role for regional human rights bodies or regional consensus on questions. There is no reason why the EU Directive should not stimulate principled contribution to Convention interpretation having regards to the Charter of Fundamental Rights and the extensive case law of the Strasbourg Court. A regional contribution can thus be made to universal standards to be applied regionally, rather than regional norms subjecting the universal norm to regional political concerns.
38. I want to draw attention to another UK case in the House of Lords called ex parte Sepet and Bulbur[16] where the requirement for universal consensus on human rights was seen to be a clog of potentially progressive regional developments.
39. Turkish Kurdish asylum seekers were claiming asylum because of political objection to conscription in the Turkish army that was used for repression of their own citizens. Although there were many recommendations of the Council of Europe, the HRC and the UNHCR that conscientious objection should be recognised in a member state and that therefore penal sanction for refusing to accept military service that violated manifestation of religious or political belief was persecution there was little human rights case law to this effect. One judge in the CA concluded that there was least a European consensus based on the case of *Thlimmenos v Greece*[17], but the House of Lords concluded that there had to be an universal consensus on the ambit of human rights before the Refugee Convention could be said to embrace them. It may be that consensus will not be long arriving and it will first emerge in ECHR interpretation of the concept of "manifestation" of religious

16. [2003] 3 All ER 304; [2003] 1 WLR 856
17. [2001] 31 EHRR 15

beliefs guaranteed under Article 9. If so the interpretation of the Directive must march in step.

Conclusion

40. It is well known that the drafters of the 1951 Convention did not spend their energies on an exhaustive definition of refugee status but were concerned with the status to be afforded recognised refugees in post war societies.
41. It is clear that by the time of the 1967 Protocol at least a living instrument untrammelled by time or regional factors was intended to be created. Such an instrument must respond to the challenges of the contemporary world if it is to retain its meaning and relevance.
42. Once the grant of asylum is seen as an aspect of human rights law (as it surely must be having regard to its recognition within the Universal Declaration) , then the human rights principles that underlie the concept of persecution leads to the updating, living instrument approach. A desiccated devotion to the historic text or the intentions of the drafters is a misconstruction of the treaty and a failure to apply proper norms of interpretation to this class of subject matter.
43. Interpretation of a legal obligation is a matter for judicial supervision according to the national system in question. The meaning of a human right cannot be left to politicians and the exigencies of executive expediency.
44. The Directive cannot be used or read as a means of circumventing the rule of law as applied by national judges and the effective application of the Refugee Convention in the domestic legal systems of the EC. It cannot be permitted to replace one treaty that has been the subject of proper interpretation by a new legislative order controlled by an assembly of politicians.
45. We should therefore follow the UNCHR in reading it as an aid to interpretation of something bigger, better, more life like and of universal appeal: the Convention itself.
46. From this perspective it seems to me that the Directive can, in the end, be welcomed as a legally binding minimum obligation of participating states to a set of values in interpreting the Convention based on human rights experience, common constitutional traditions and the broad humanitarian recommendations of the Council of Europe and the UNHCR. Regional aids to construction are not impermissible in principle if they seek to develop notions inherent in the Convention rather than subjugate them to inappropriate concepts. With

Article 3 of the ECHR, indeed, the EU has developed a protection against *refoulement* that goes beyond Article 33 of the Convention or even Art 3 of UNCAT. It is protection against *refoulement* that extends to those excluded on citizenship grounds from refugee status. It surely prevents interception on the high seas or other extraterritorial acts that expose a person to prohibited harm. To use the experience of the regional in pursuit of the determination of the universal seems to me both possible and necessary. It also locates the judicial function in any constitutional arrangement in relation to protection claims above the furore of quotidian politics, but not so entrenched in an ivory tower with claims to universal recognition to be incapable of responding in a principled way to contemporary needs.

JUDICIAL OR ADMINISTRATIVE PROTECTION OF ASYLUM-SEEKERS – CONTENT OR FORM?

RODGER HAINES QC[18]

INDEX

Introduction

[1] It is sometimes said that administrative and judicial systems are different. Whether that is true or not is most often debated at a rather abstract level and possibly coloured by subjective experiences. Common law lawyers in particular seem unusually vulnerable to presuming an innate superiority of the common law model which emphasises ***judicial*** protection, even while administrative adjudication continues to proliferate in most common law jurisdictions and while civil disputes move ever more into alternative, non-judicial forms of conflict resolution.

[2] This paper does not enter the debate as to the supposed divide between administrative rather than judicial protection. The position taken is that in the refugee context these are largely false opposites. The real question is whether the particular legal system delivers effective protection under the Refugee Convention. This transcends a more myopic view which falsely assumes that administrative protection is necessarily inferior to judicial protection. An administrative system may in some countries be as effective, if not more so, in delivering meaningful protection than a judicial system and vice-versa. In other countries only a mix of the two systems working together produces

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the desired result. As of 31 March 2005 there were 145 States parties to either the 1951 Convention or the 1967 Protocol or both of these instruments. The legal systems of these countries are so diverse that it would be artificial to construct a supposed polarity between administrative and judicial protection.

[3] A more pragmatic, and hopefully more useful approach, is proposed namely to pose the question "Does the domestic legal system ensure the good faith observance by the State party of its obligations under the Refugee Convention?"

[4] The core purpose of the Refugee Convention is to protect those at real risk of being persecuted for a Convention reason from being returned to their country of origin. The question to be addressed is how well that obligation is implemented at domestic level. It is the effective discharge of the protection obligation which is important, not the particular delivery system. All legal systems, whether based primarily on an administrative system or a judicial system, must be measured against this single overarching criterion.

[5] What this paper does is to identify and briefly discuss an admittedly limited set of factors which may impact on the level of protection delivered by a particular system.

[6] First it is important to note the nature of the fundamental duty of any State party which enters into treaty obligations. It is the duty of good faith observance of the Treaty.

The duty of good faith

[7] The obligations assumed by a State party under the Refugee Convention are mandatory and of immediate binding effect. Each of Articles 3 to 34 employs the mandatory "shall". They are duties of result. See particularly the all important Articles 16 and 33:

Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Article 16.—Droit d'ester en justice

1. Tout réfugié aura, sur le territoire des États contractants, libre et facile accès devant les tribunaux.
2. Dans l'État contractant où il a sa résidence habituelle, tout réfugié jouira du même traitement qu'un ressortissant en ce qui concerne l'accès aux tribunaux, y compris l'assistance judiciaire et l'exemption de la caution *judicatum solvi.*
3. Dans les États contractants autres que celui où il a sa résidence habituelle, et en ce qui concerne les questions visées au paragraphe 2, tout réfugié jouira du même traitement qu'un national du pays dans lequel il a sa résidence habituelle.

Article 33. - Prohibition of expulsion or return ("refoulement")

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

Article 33.—Défense d'expulsion et de refoulement

1. Aucun des États contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.
2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

[8] The Convention, however, is of course silent as to how these mandatory obligations of a State party are to be implemented at domestic level. Few legal systems are the same and the assumption is that each State party will observe the principle *pacta sunt servanda.* Domestic law cannot justify failure to perform a treaty. Principles of

customary international law codified in the Vienna Convention on the Law of Treaties, 1969 are clear[19]:

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

[9] Article 18 of the Vienna Convention on the Law of Treaties further obliges a State to refrain from acts which would defeat the object and purpose of a treaty by which it is bound.

[10] Similarly the Refugee Convention, while providing a comprehensive definition of the term "refugee", does not prescribe any particular form of procedure for determining refugee status. It is implicit in the good faith obligation and in the guarantee of the right of access to courts that the procedures will maximise the opportunity for a refugee claimant to establish that he or she is a refugee which in turn maximises State observance of the non-refoulement obligation. Fairness is an indispensable aspect of such procedures[20], as is the need for the procedures to be both prescribed by law and subject to the scrutiny of the courts of law on the territory of the State party.[21]

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19. *Libya v Chad* ICJ Reports (1994) 4 at [41]; *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 171 ALR 483 (FC:FC) at [14] & [90] - [91] per Drummond & Katz JJ; *Refugee Appeal No. 74665/03* [2005] NZAR 60 at [45] (NZRSAA).
20. See, for example, the recent analysis of the EU proposals by Sylvie Da Lomba in *The Right to Seek Refugee Status in the European Union* (Intersentia, 2004) Chapter V and the earlier discussion by Guy Goodwin-Gill, "The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam" and by Johannes van der Klaauw, "Towards a Common Asylum Procedure" in Elspeth Guild & Carol Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart, 2001) 141, 155, 165, 172.
21. Thomas Spijkerboer, "Higher Judicial Remedies for Asylum Seekers - An International Legal Perspective" in IARLJ, *Asylum Law: First International Judicial Conference* (1995) 217 at 219-224 commenting on the Article 13 ECHR obligation to provide an effective remedy and the Article 16 Refugee Convention obligation to provide free access to courts of law.

[11] Above all, however, are the points made by Professor James C Hathaway in the Canadian context[22]:

(*a*) There must be a recognition that refugee claimants are not opponents or threats, but rather persons seeking to invoke a right derived from international law.

(*b*) The refugee criteria must be applied dispassionately, recognising that refugee determination is among the most difficult forms of adjudication, involving as it does fact-finding in regard to foreign conditions, cross cultural and interpreted examination of witnesses, ever present evidentiary voids and a duty to prognosticate potential risks rather than simply declare the more plausible account of past events.[23]

(*c*) These evidentiary and contextual concerns make departure from traditional modes of adjudication imperative.

Rather than "technocratic justice", cases demand what Professor James C Hathaway has described as "expert, engaged, activist decision-makers who will pursue substantive fairness".[24]

[12] While the prescription may be clear, implementation of the Refugee Convention at the domestic level can be less than straightforward. Because the Convention prescribes no particular procedure for determining refugee status, it is not "self-executing" for those states which take the monist approach to treaty incorporation. In this respect the Refugee Convention is not capable of being applied at domestic law without new legislation.[25]

[13] States which subscribe to the dualist approach would require legislation in any event[26].

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22. James C Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993) 7.
23. Ibid 6. See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* para 47.
24. James C Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993) 7 cited in *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 (SC:Can) at [41] per Bastarache J .
25. For a brief description of the monist approach and examples (France, Germany, The Netherlands, Poland, Russia, Switzerland) and an explanation of the dualist approach (UK) and a discussion of the way treaties are dealt with under the Constitution of the USA, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, 2000) at 143-161.
26. See for example *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005) (HCA) at [17] & [35].

Domestic incorporation - manner and form

[14] ***How much*** of the Refugee Convention is incorporated domestically is just as important a question as ***how*** incorporation itself is achieved. There is a marked reluctance to incorporate the entire Convention. The failure by Australia, for example, to adopt this simple expedient has led to Byzantine complexities.[27] There is a decided preference to adopt only the definition in Article 1A(2) (or a modified version of it). Canada has not incorporated Article 1D.[28] The Dutch definition apparently does not include the cessation and exclusion clauses of Articles 1C, D, E and F.[29] There is also a tendency to paraphrase the Convention "well-founded fear ***of being persecuted***" into "well-founded fear ***of persecution***", as in the case of Canada, Australia and the USA.[30] This can lead to dangerous distortions as in the nexus or causation requirement.

[15] The Refugee Convention employs the passive voice "well-founded fear ***of being*** persecuted". These words emphasise that the refugee definition has as its focus the ***predicament*** of the refugee. The Convention defines refugee status not on the basis of a risk of "persecution" but rather a risk of "being persecuted". The language draws attention to the fact of exposure to the harm rather than to the act of inflicting harm. In the result:

(*d*) The focus is on the reasons for the predicament of the refugee claimant rather than on the mindset of the persecutor. The holding of the US Supreme Court in *Immigration and Naturalisation Service v Elias-Zacarias*[31] to the contrary that the mindset or intention of the persecutor ***is*** essential must be seen in the light of the fact that the Immigration and Nationality Act s 208(a) (codified at 8 USC para 1108(a)(42)) is

27. See for example *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005) (HCA) addressing *inter alia* "The phrase 'protection obligations under the Refugees Convention' in s 36 of the Migration Act 1958 (Cth).
28. This was the position under the Immigration Act 1985 and remains the position under the Immigration and Refugee Protection Act 2001.
29. Dirk Vanheule, "The Netherlands" in Jean-Yves Carlier, Dirk Vanheule et al (eds), *Who is a Refugee? A Comparative Case Law Study* (Kluwer, 1997) at 479, 481.
30. Immigration and Refugee Protection Act 2001, s 96 (Can). The Migration Act 1958 (Cth) ss 91R, 91S, 91T & 91U legislatively stipulate the meaning of "persecution", "membership of a particular social group", "non-political crime" and "particularly serious crime" for the purposes of Australian Federal Law; for the USA see the definition of "refugee" in the Immigration and Nationality Act para 101(a)(42)(A); 8 USCA para 1101(a)(42)(A).
31. *Immigration and Naturalisation Service v Elias-Zacarias* 502 US 478 (1992)

differently worded (*a well-founded fear of persecution on account of*) to Article 1A(2) (*well-founded fear of being persecuted for reasons of*).[32] Contrast the decision of the High Court of Australia in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[33] and that of the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No. 72635/01*[34].

(*e*) The better view, based on the text of the Refugee Convention itself and not on a modified or paraphrased version thereof, is that it is sufficient for the refugee claimant to establish that the Convention ground is a ***contributing cause to the risk of "being persecuted"***. It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established.[35]

[16] As Joan Fitzpatrick has pointed out, *Elias-Zacarias* illustrates the dangers of a domestic asylum system disconnected from an international framework.[36] The same observation could be made of the provision in the Australian Migration Act 1958 (Cth), s 91R(1)(a) which requires decision-makers to recognise ***only*** the *"essential and significant reasons for the persecution"*.

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32. See further Shayna S Cook, "Repairing the Legacy of *INS v Elias-Zacarias*" (2002) 23 Mich J Int'l L 223.
33. *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [33] (HCA).
34. *Refugee Appeal No. 72635/01* [2003] INLR 629 at [168] (NZRSAA).
35. *Michigan Guidelines on Nexus to a Convention Ground* (2002) 23 Mich. J. Int'l L. 210 and see *Refugee Appeal No. 72635/01* [2003] INLR 629 at [167] to [178] (NZRSAA). This approach has been adopted by the UNHCR in recently issued Guidelines, specifically the UNHCR, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 7 May 2002) at para 20. See also the discussion by Karen Musalo, "Claims for Protection Based on Religion or Belief" 16 IJRL (2004) 165, 205-212.
36. Joan Fitzpatrick, "The International Dimension of US Refugee Law" 15 Berkeley J Int'l Law (1997) 1, 21. There have been bitter divisions in the Supreme Court of the United States on the relevance of international human rights norms. See particularly *Lawrence v Texas* (2003) 156 L Ed 2d 508, particularly the dissenting decision of Justice Scalia at 539. Note the apparently contradictory position taken by Justice Scalia and Justice Sandra Day O'Connor in *Olympic Airways v Husain* 124 S Ct 1221 (2004) noted in "Supreme Court's Use of Court Decisions of Treaty Partners" (2004) 98 American Journal of International Law 579.

[17] The point of these examples drawn from the USA and Australia is that the reach of the protection afforded by the Refugee Convention can be impeded to a dangerous degree by the manner and form of domestic incorporation. Particularly where the domestic legislation not only departs from the text of the Convention, but also seeks to impose a particular "vision" of what the definition *ought to be*[37]. In the EU context this vision has been described as "tunnel vision".[38]

[18] In these circumstances there is little opportunity for the system to self-correct, unless there is a Constitution or other fundamental law which allows tribunals or courts to substitute the actual (and binding) terms of the Refugee Convention for the non-conforming language employed in the domestic legislation. As a general rule judicial protection would, in these circumstances, afford a higher level of protection to the sometimes hierarchically inferior administrative processes.

Domestic incorporation - interpretation of the Refugee Convention

[19] Whether perfectly or imperfectly incorporated into domestic law the Refugee Convention will potentially raise a number of difficult interpretation issues, particularly in relation to the Inclusion and Exclusion clauses. The degree to which a particular system facilitates a full and informed debate of these interpretation issues is a significant measure of the integrity of that system.

[20] Experience shows that it is unlikely (though not impossible) for a first or even second instance tribunal or court to chance on the "true" interpretation of the Refugee Convention the first time a particular issue arises. There are considerable advantages in the opportunity for further argumentation and consideration at higher administrative or judicial levels, provided the relevant body is independent and possessed of the expertise necessary to interpret and apply an international human rights instrument. The advantages of higher consideration are substantial. The process as a whole has greater legitimacy and the ruling (hopefully "correct") in the individual case will provide a precedent by which other refugee claims will be determined. There is opportunity for the development of a principled

37. See generally Alice Edwards, "Tampering with Refugee Protection: The Case of Australia" 15 IJRL (2003) 192, 202-204; Roz Germov & Francesco Motta, *Refugee Law in Australia* (Oxford, 2003) 189-192; Shayna S Cook, "Repairing the Legacy of *INS v Elias-Zacarias*" (2002) 23 Mich J Int'l L 223, 243.
38. Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, "Understanding Refugee Law in an Enlarged European Union" (2004) 15 EJIL 355, 371.

interpretation of the Refugee Convention in accordance with accepted principles of treaty interpretation. This too is a substantial component of the duty to be fair. But unfortunately error-free jurisprudence cannot be guaranteed. Mistakes will occur, as in the case of the "well-founded fear" standard which the common law world unjustifiably interprets as mandating both objective and subjective components. This is an unsupportable interpretation and not one which prevails in civil jurisdictions.[39] A degree of humility is required for false jurisprudence to be abandoned.

The question of natural justice and fairness - impartiality and independence

[21] There is a direct connection between the good faith discharge of the obligations (of result) under the Refugee Convention and procedural due process. Giving a refugee claimant a fair hearing is a necessary precondition to the accurate determination of whether the non-refoulement obligation of the State is engaged in relation to that specific individual. In this context procedural rights perform an ***instrumental*** role in the sense of helping to attain an accurate decision on the substance of the case.[40] Formal justice and the rule of law are enhanced in the sense that the principles of natural justice or fairness help to guarantee objectivity and impartiality.[41]

[22] In a paper of limited scope it is not possible to do more than mention the centrality of fair procedures to the good faith observance of the obligations under the Refugee Convention. There can be much debate as to the minimum content of those procedures, as is currently occurring within the European Union in the context of Article 6 of the ECHR generally[42] and in the asylum and human rights context specifically. See most recently the Qualifications Directive adopted by the Council of the European Union on 29 April 2004 (implementation

39. See most recently the *Michigan Guidelines on Well-Founded Fear* (disponible aussi en français *Les Recommandations de Michigan sur la crainte avec raison*) <http://www.refugeecaselaw.org/fear.asp>. It is intended that a background study to these *Guidelines* will be published shortly in the Mich. J. Int'l L.
40. PP Craig, *Administrative Law* 5th ed (Sweet & Maxwell, 2003) 408.
41. Ibid, 408.
42. Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia, 2004) 173; Paul Craig, "The Human Rights Act, Article 6 and Procedural Rights [2003] PL 753; Jurgen Schwarz, "Enlargement, the European Constitution and Administrative Law" (2004) 53 ICLQ 969 and *Wade & Forsyth, Administrative Law* 9th ed (Oxford, 2004) 445-449.

date 10 October 2006) and the Procedures Directive (draft).[43] It is necessary, however, to touch on the issue of impartial decision-making and independence.

[23] At the 5th IARLJ Conference held at Wellington, New Zealand in October 2002 Sir Stephen Sedley memorably articulated the overt and covert pressures on asylum judges which are capable of affecting the impartiality of their decision-making and which render their independence fragile.[44] As he rightly points out, the critical function of first-instance asylum judges in the majority of the world's developed jurisdictions is the function of fact-finding. Many, perhaps most, decisions have to be arrived at only after determining whether the refugee claimant is telling the truth and, if not, what the truth is.[45] He has judicially described this function as:

"... not a Conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."[46]

[24] Addressing the difficulties of credibility evaluation he referred in his paper to what he calls the "darker hinterland in which judges ... have to do their unaided best to decide whether an account is credible or not"[47]:

It is in such a situation, where there is frequently so little firm or objective help to be gained from materials before the judge and where so much depends on personal impression and visceral reaction, that

43. Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia, 2004) 173; Robert Thomas, "The Proposed Procedures Directive - its likely impact on national decision-making and its compatibility with European Union law and the European Convention on Human Rights" (paper delivered at the IARLJ Conference, Edinburgh, November 2004).
44. Sir Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence?", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (2002) 319.
45. Ibid 323.
46. *R v Immigration Appeal Tribunal; Ex parte Syeda Khatoom Shah* [1997] Imm AR 145, 153 approved on appeal in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL).
47. Sir Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence?", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (2002) 319, 324-325. See also Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" in IARLJ, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (October 1998) 134, 139-140.

the demands of independence and impartiality become acute. I suspect that a truly impartial outcome in a high proportion of asylum cases would be a draw. But that is the one luxury denied to judges. Setting the standard for a successful claim well below truth beyond reasonable doubt and even below a preponderance of probability, and limiting it to the establishment of a real risk, may help the asylum-seeker but does not ultimately help the asylum judge. A possible life-and-death decision extracted from shreds of evidence and subjective impressions still has to be made.

Not only for these substantive reasons but for procedural reasons too, asylum adjudication calls up a very particular version of impartiality. In ordinary civil and criminal contests, impartiality implies no more than not taking sides, at least until one has heard the evidence and the argument. In asylum law, except to the extent that the state takes on itself the role of the asylum-seeker's adversary, there are no such sides. In an exercise which is typically one of testing assertions, not of choosing between two stories, the form which impartiality most typically takes for the judge is abstention from pre-ordained or conditioned reactions to what one is being told. It means not so much knowing others as knowing oneself - perhaps the hardest form of knowledge for anyone to acquire.

[25] These insights highlight the necessity to afford the refugee claimant a fair hearing. The rule of law requires nothing less. It enforces minimum standards of fairness, both substantive and procedural.[48] It maximises the opportunity for the "voice" of the claimant to be heard above the decision-maker's own prejudices, conditioned reactions, doubts and the subconscious influence of public opinion and hostile comment. Above all it ensures that the decision-maker's mind is concentrated on the single composite issue posed by Articles 1A(2) and 33 of the Refugee Convention: Is ***this*** individual at real risk of being persecuted for a Convention reason if returned to the country of origin?

[26] This is not a prescription for over-sophistication and complexity in refugee determination. A balance must be struck between over-judicialisation at the primary level and over-pragmatism at the

48. In the common law context see *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 591 (HL) (Lord Steyn); Wade & Forsyth, *Administrative Law* 9th ed (Oxford, 2004) 20-25 and see the recent statement by Collins J in *R (on the Application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] Imm AR 142 at [12] that the court will act where the process is unfair, even where a particular individual cannot be shown to have suffered.

higher levels. Refugee protection includes a requirement that the principles of refugee law be articulated with clarity and simplicity to facilitate consistent application. A refugee determination process must also be "nimble on its feet", responding rapidly to new refugee situations and new understandings of the Convention which is, after all, a "living instrument".[49] This is especially important in the context of claims based on gender, age, disability and sexual orientation.

The question of appeal and judicial review

[27] Because so much of the practical implementation and application of the Refugee Convention is done by government or executive action or policy and because so much of the process and conditions for applying for refugee status can be controlled and influenced by the executive, there must be a means of effective challenge to a higher authority with power to review on both the merits and the law.[50]

[28] Given the interests involved, both of the individual and of the State, most systems allow for an appeal and/or judicial review in one form or another. The tendency, however, is to restrict rather than expand such appeal or judicial review rights. Where restriction occurs, the perception is that the system is over-generous to declined asylum-seekers or that the system is being abused. These are legitimate concerns, but can be managed in different ways. A standard of excellence at the primary decision-making level is a much under-appreciated means of increasing the overall speed of the decision-making process, reducing appeals or review, reducing costs and engendering confidence in the refugee determination system.

[29] The overarching requirement, however, at all levels of a refugee determination system is that irrespective of whether the system is characterised as "administrative" or "judicial", all decision-makers must be both independent and impartial.[51]

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49. *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304 (HL) at para [6] per Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) approving Sedley J in *R v Immigration Appeal Tribunal; Ex parte Shah* [1997] Imm AR 145, 152; *Refugee Appeal No. 74665/03* [2005] NZAR 60 at [70] & [71] (NZRSAA).
50. Colin Harvey, "Refugees, Asylum-Seekers, the Rule of Law and Human Rights" in David Dyzenhaus (ed), *The Unity of Public Law* (Hart, 2004) 201, 202-203, 205-206.
51. For a comment on this issue in the context of the Nordic countries, see Robin Lööf & Brian Gorlick, "Implementing international human rights law on behalf of asylum-seekers and refugees: The record of the Nordic countries" (UNHCR, New Issues in Refugee Research, Working Paper No. 110) (November 2004) at 8.

CONCLUDING OBSERVATIONS

[30] Neither judicial nor administrative systems have innate superiority in refugee determination. They are false opposites. The more relevant inquiry is how well a particular asylum process accurately and fairly identifies individuals who satisfy the definition of "refugee" in the Refugee Convention. The challenge is to identify the factors which have the potential to either impede or to facilitate the protection of asylum-seekers and refugees in the refugee determination process, irrespective of the legal "tradition" of the particular State party and irrespective of the particular domestic system employed for refugee determination. Content must prevail over form.

[31] This paper has suggested that often-overlooked factors have a greater influence on the outcome of refugee determination than generally recognised. These factors include the way in which and the degree to which the Convention itself is incorporated into domestic law, the degree to which the particular domestic system will allow and facilitate a purposeful and dynamic interpretation of the Convention in accordance with its language, context, object and purpose and the degree to which fairness is allowed to intrude into the determination process. Independence and impartiality are the essential foundation stones of any credible process, as is the existence of a right of appeal or review to an independent judicial or administrative body.

TOWARDS CONVERGENCE IN THE INTERPRETATION OF THE REFUGEES CONVENTION — A PROPOSAL FOR THE ESTABLISHMENT OF AN INTERNATIONAL REFUGEE COURT

JUSTICE A M NORTH† AND JOYCE CHIARA*

Introduction

For refugees, now as half a century ago, the 1951 [Refugees] Convention is the one truly universal, humanitarian treaty that offers some guarantee their rights as human beings will be safeguarded.[52]

The Refugees Convention[53] (the Convention) is the foundation of international refugee law. Its terms are universal, and the protection it offers is designed to be universal. Yet the interpretation of those terms varies from country to country. This inconsistency undermines the universality of the protection offered by the Convention.

In this paper, we propose a practical way of addressing this issue. An independent judicial body, called the International Refugee Court, comprised of a small number of eminent jurists and experts in refugee law would be formed under the authority of the United Nations High Commissioner for Refugees (UNHCR). The function of the Court would be to provide opinions on major questions relating to construction of the Convention. The opinions would be carefully reasoned. They would not be binding or enforceable but would gain their authority from their intellectual and practical quality as well as the court's institutional mandate.

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52. Marilyn Achrion, 'A "timeless" treaty under attack' (2001) 123 *Refugees Magazine* 4, 29, available on the website of the United Nations High Commissioner for Refugees (UNHCR), http://www.unhcr.ch.
53. All references to the Refugees Convention are to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

The aims of this proposal are similar to those that inspired the second track of the Global Consultations process recently convened by UNHCR,[54] in which experts discussed difficult issues regarding the interpretation of the Refugees Convention and from which UNHCR produced legal guidance in the form of Guidelines on International Protection.[55] In this proposal, UNHCR would continue its efforts by creating and supporting a permanent court.

In the first section of the paper we set out the purpose of the proposed Court, some foundational principles which apply, the way the Court would be created, the functions of the Court, its method of operation, the appointment numbers and terms of judges, the funding and support of the Court, disseminating information about the work of the Court, and the relationship with the UNHCR.

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54. The Global Consultations on International Protection was an initiative of UNHCR which aimed to "rise to modern challenges confronting refugee protection, to shore up support for the international framework of protection principles, and to explore the scope for enhancing protection through new approaches": Erika Feller, 'Preface', in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) ('*Global Consultations*'), xvii. It consisted of three 'tracks', the second of which consisted of expert roundtables held during 2001. The relevant material is collected in *Global Consultations*.
55. For a summary, see Volker Türk, 'Introductory note to UNHCR Guidelines on International Protection' (2003) 15 *International Journal of Refugee Law* 303. So far, UNHCR has issued the following Guidelines (available on its website): 'Gender-related persecution within the context of Article 1A(2) of the 1951 Convention/or its 1967 Protocol relating to the status of refugees', HCR/GIP/02/01, 7 May 2002; '"Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention/or its 1967 Protocol relating to the status of refugees', HCR/GIP/02/02, 7 May 2002; '"Internal flight or relocation alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees' (2003) 15 *International Journal of Refugee Law* 875, HCR/GIP/03/04, 23 July 2003; 'Cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the status of refugees (the "ceased circumstances" clauses)' (2003) 15 *International Journal of Refugee Law* 307, HCR/GIP/03/03, 10 February 2003; 'Application of the exclusion clauses: Article 1F of the 1951 Convention relating to the status of refugees' (2003) 15 *International Journal of Refugee Law* 492, HCR/GIP/03/05, 4 September 2003; and 'Religion-based refugee claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the status of refugees' (2004) 16 *International Journal of Refugee Law* 500, HCR/GIP/04/06, 28 April 2004.

In the second section of the paper, we examine in more detail why such a body is necessary, and illustrate that with some current examples of divergences in the interpretation of the Convention.

In the third section of the paper, we review the efforts of the UNHCR, the European Union, the Council of Europe and NGOs directed to harmonising the application of refugee law. We draw attention to the limited success of these efforts.

In the fourth section of the paper, we ask whether existing institutions, namely the International Court of Justice, some regional courts, and the UN treaty committees have the potential to advance a more harmonious construction of the Convention. We conclude that there is limited scope for success by use of these bodies.

In the fifth section of this paper, we explain why the issue of divergence is best addressed by an international judicial body. We rely upon the rationale underlying the doctrine of separation of powers, and examine the nature of the discipline of the law, and the advantage of a body taking an international standpoint.

In the sixth section of the paper, we examine some further institutions, and return to consider some already referred to, in order to determine whether there are features of these organisations which should be incorporated into the design of the Court, and whether there are features which should be avoided in the design of the Court.

1. The Proposal Explained

1.1 The purposes of the Court

The primary purpose of the Court would be to advance interpretation of the Convention in an internationally consistent manner. In the process of achieving this purpose, and as a secondary aim, the Court would promote reasoned discussion on the major controversies concerning the construction of the Convention.

1.2 Some foundational principles

As the authority of the Court will depend on the quality of its work, it is essential that the Court be independent and composed of judges of the highest skill, reputation, and integrity. These foundational principles of independence and quality will be the touchstones of the following discussion.

1.3 The role of UNHCR in the creation of the Court

Recognising the fundamental role of UNHCR in international refugee law, it is proposed that the Court be created pursuant to the existing supervisory mandate of UNHCR. Paragraph 8 of the UNHCR Statute provides that the High Commissioner "shall provide for the

protection of refugees falling under the competence of his Office by ... promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto" (emphasis added). Articles 35 and 36 of the Convention provide for the corresponding obligations of States to co-operate with UNHCR in this respect.[56] In this way, the proposal supplements the authority of the UNHCR, rather than usurping it. The special role of UNHCR will also be recognised in the operation of the Court, as explained at the end of this proposal.

The Court can be created informally by UNHCR or, as with the case of the Committee on Economic, Social and Cultural Rights, through a formal resolution by ECOSOC. As the Court is not adjudicative in nature and its purpose is clearly within the supervisory mandate of UNHCR, with whom the State parties have an explicit obligation to co-operate, a treaty is not required for its formation.

This method of creation avoids many of the difficulties of the traditional process of treaty negotiation. Even if all States could be persuaded to participate, the creation of the Court would be significantly delayed. Not all States will be persuaded to ratify, thereby fragmenting a universal regime. More importantly, there are likely to be compromises caused by bargaining between States. States will attempt to retain control of the body, either formally or informally, as the experience of the UN treaty committees and the International Criminal Court demonstrates. The present trends in the refugee policies of many States, and the experience of the process of developing a common asylum policy in the EU, suggest that the negotiation of any treaty may undermine, rather than strengthen, the protections of the Convention.

1.4 Functions of the Court

The primary objective of the Court is to promote consistency in the interpretation of the Refugees Convention. The role of the Court is to provide authoritative opinions on the meaning of the Convention. It will not be involved in determining applications made by individual asylum seekers.

In order to achieve the primary objective the Court would produce compelling opinions analysing, and providing practical legal guidance in relation to, current divergences in interpretation. Such opinions, directed as they are towards interpretation rather than adjudication, would consolidate and draw upon all sources of international and

56. See Volker Türk, 'UNHCR's supervisory responsibility', October 2002, UNHCR New Issues in Refugee Research, Working Paper No. 67, 19.

domestic law, and provide guidance both at the level of general principle and in relation to particular fact solutions.

1.5 Methods of Operation

1.5.1 Selection of Cases

The Court itself would select the questions on which it would deliver its opinions. It would, by consultation between the judges, isolate the major areas of debate over the construction of the Convention. The judges would be informed by input which the Court would invite from UNHCR, leading academic commentators, governments, the legal profession and NGOs.

Additionally, it may be useful to allow certain parties, such as UNHCR, to apply to the Court for its opinion. The Court would have discretion to accept or refuse such an application. The Court must avoid becoming a tool for political causes, or becoming over burdened by an excessive number of applications by individual asylum seekers who wish to agitate their personal circumstances.

1.5.2 The hearing process

The rules of the Court would give it flexibility in choosing the best procedure for determining each case. In some instances it may be appropriate to conduct oral hearings. But many issues could be determined from written submissions from invited parties and research papers prepared for the Court.

The Court would have power to invite submissions from any source it considered could usefully contribute, and would usually invite submissions from UNHCR, other NGOs, concerned governments, leading academic commentators, and refugee law practitioners. As judges are likely to be spread across the world, there may be a place for hearings by telephone or video conferencing.

1.5.3 Single or multiple opinions?

The civil law method which generally envisages the production of a single opinion by a judicial body has the value of certainty and of providing clear guidance for future cases. This system avoids the morass of separate opinions, which often arrive at the same conclusion with barely distinguishable paths of reasoning. Such decisions generate confusion in the administration of the law. The virtue, however, of the common law tradition which allows for dissenting opinions, is that it exposes contrary standpoints, and thereby promotes the development of the jurisprudence. Given that it is proposed the Court assist in the development of a proper interpretation of the Convention, and given that it is not to be a body which finally

determines individual applications, there is a place for dissenting opinions. However, the Court would be expected, perhaps through rules governing its procedure, to strive towards producing a single opinion whenever reasonably possible.

1.5.4 Reviewing Opinions

The Court would be able to review or re-open opinions where it appears necessary to do so.

1.5.5 The authority of the opinions of the Court

The opinions of the body would neither be binding nor enforceable. This may, at first, appear a great limitation. To lawyers familiar with domestic courts, the enforcement powers of courts appear fundamental to their authority. There are, however, insuperable difficulties in the way of such an approach. Specific consent by States parties would be required in order to make the opinions binding. Such consent is not likely to be forthcoming, and in some cases may be constitutionally impossible. The experience of the International Court of Justice, and the small number of States parties that have agreed to accept its compulsory jurisdiction,[57] indicate the magnitude of the task.

Nevertheless, the experience of the International Court of Justice, and other international bodies, illustrates the value of non-binding, non-enforceable judicial opinions. Even though, practically speaking, the judgments of the International Court of Justice are not enforceable, those judgments have significant normative value and political influence.[58] Indeed, the judgments of a vast majority of international judicial and quasi-judicial bodies are either not binding or unenforceable, the notable exception being the European regional courts. Even judgments of the US Supreme Court were defied in the early days.[59] What is important is not so much the powers of enforcement but rather a political and cultural acceptance of the legitimacy of the Court's decisions.

Although enforcement is not a practical possibility, some powers could be assigned to the body by UNHCR. For example, its interpretations could be binding in the many countries where UNHCR is responsible for determining refugee status.[60] It could be given the

57. See below n 280.
58. See below n 286.
59. See, for example, the cases described in Bernard Schwartz, *A History of the Supreme Court* (1993), 93-94 (the *Cherokee Nation* case); 127-128 (the *Merryman* case).
60. See generally Michael Alexander, 'Refugee status determination conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251.

power to declare certain interpretations contrary to the view of UNHCR, although the judicial body may also decide that it is more effective to persuade than to condemn.

1.6 Appointment, numbers, and terms of appointment of the judges

As the work of the Court would be confined to the correct interpretation of the Convention, and as the body would have the power to set its priorities and workload, it would not be necessary to have a large number of judges. Indeed, a smaller number of judges would be more practical, as they would require fewer resources, be capable of producing opinions more quickly, and be more likely to achieve the ideal of single judgments. However, there should be a sufficient number to represent different regions, cultures, legal systems, and genders. It is suggested that nine judges be appointed initially, given it is likely that the workload will be heavy in the early stages.

The workload will not require full-time judges. As the judges would be active in organising their workload and priorities, and as there would be no parties requiring the resolution of disputes, there would be a great deal of flexibility in the organisation of the judicial workload. There are considerable benefits in making the appointments part-time. First, higher calibre personnel will be available, as many academics and sitting judges will be capable of engaging in the task part-time, but be unwilling or unable to give up their full-time position. Second, such judges would be able to rely on the institutional support of their staff in their full-time position, thereby greatly decreasing the resources required by the body. Third, such appointments would not require full-time judicial salaries.

The experience of the UN treaty committees, however, has shown that part-time appointments can result in insufficient time and attention being devoted to the body, and also may create conflicts of interest. However, this may be suitably addressed at the appointment stage. Candidates unable to dedicate a certain amount of time to the task, or who have a potential conflict of interest, can be eliminated during the appointment process; and the terms of office may require that candidates who find themselves unable to fulfil their duties for whatever reason must resign.

It is expected that a commitment of five years would be suitable, although the selection committee would be wise to canvass suitable candidates as to their preferred length of term. As the appointment process is not politically determined, some flexibility in the length of terms and re-appointment could be permitted in the process without undue interference. The appointment commission would have the power to require a resignation in the event of incapacity, misconduct,

conflict of interest, and like specified circumstances.

In order to attract the highest calibre candidates, it will be necessary to remunerate them appropriately for their time. The conditions of office should be similar to those available to other international judges, albeit with appropriate recognition of the part-time nature of the duties.

The appointment process, and the terms and conditions of office, should conform with the recently published International Law Association's 'Burgh House Principles on the Independence and Impartiality of the International Judiciary'.[61] In particular, in contrast to other international judicial bodies, there should be no element of State interest or control in the appointments process. Rather, a version of a process that is increasingly becoming popular in many nations, the judicial appointments commission, could be used.

The appointment of judges should be an open and transparent process. In order to engage the wider community, the first stage of the process might be an open nomination process, in which individuals, NGOs, judges, legal practitioners and academics could formally propose names to an appointment commission.

Vacancies, and the criteria for appointment, should be widely published. While there should be due representation of different regions, cultures, legal systems, and genders, the primary criteria for selection should be expertise in international refugee law, whether that expertise be derived from academic, judicial or practical experience. Minimum legal qualifications would be required. However, a mixture of academic, judicial and practical experience would be ideal. It is expected that most of the candidates would comprise eminent academics, judges or retired judges with refugee law expertise, and former high level UNHCR officials.

The appointments commission would adopt a transparent procedure for selection which would include consulting a list of suitable advisers, such as judges already on the body, colleagues, and relevant domestic and international legal bodies.

The composition of appointments commission would be critical. It would include a representative of relevant specified organisations such as the International Association of Refugee Law Judges, the International Law Association, and the International Commission of Jurists, several widely recognised refugee law experts, a sitting judge expert in refugee law and a representative of nominated NGOs involved in refugee law.

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61. 25 November 2004, available on http://www.pict-pcti.org/.

1.7 Funding and support of the Court

In order to hasten the creation of the Court, it is envisaged that public financial support would be minimal. Private foundations, leading law firms, and commercial organisations with an interest in the project would be invited to fund the salaries of judges, a limited number of registry and support staff, as well as a space for its head quarters.

A novel approach to the funding of research support would be taken. Thus, the proposed body would offer to a recognised faculty or faculties a memorandum of understanding whereby specified academic staff would be made available to support the work of the Court. The support might also extend to the provision of information technology and translation facilities.

1.8 Engagement with interested parties

It is vital that the Court should not be isolated in its decision-making, and rather should be engaged in a relationship of dialogue with others interested in the same objectives. Acceptance of the opinions of the Court will primarily depend on refugee decision makers becoming aware of the existence, role, and quality of the Court. Many such decision makers are senior judges on national appellate courts. Many more decision makers are members of administrative tribunals responsible for initial refugee claim determinations. There is a place for a retired senior judge or like person to act as a rapporteur under the present UN model to visit decision makers and discuss with them the role of the Court. National political support for the Court would assist its development and the rapporteur would need to promote the Court at that level also. Further, there is a place for the appointment of a liaison officer with similar functions to the rapporteur, directed to other relevant organisations and institutions. Judges of the Court would also need to explain to their local legal profession and academics about the existence and role of the Court. The Court may, at appropriate times, wish to consider other means to further the general aim of engaging with interested parties.

1.9 The role of UNHCR in the operation of the Court

It is expected that UNHCR will play a significant role in the operation of the Court. The UNHCR would have a role in the appointments commission, it would be one of the nominated parties with a right to make applications for an opinion of the Court, and the Court would ordinarily be expected to invite the UNHCR to make submissions to it on cases pending before it. At the same time, the funding arrangements for the Court are designed to avoid adding to, and even perhaps easing, the financial burden on the UNHCR by

separating the function of providing interpretations of the Convention from the other work of the UNHCR. However, whilst recognising the central role of the UNHCR, it is critical for the legitimacy of the Court that it be, and be seen to be, independent in formulating its opinions.

2. Is there a need for The Court?

In this section of the paper, we argue that the rule of law requires that like cases are treated alike, and that this principle is not sufficiently applied in refugee law because of the state of divergence in the interpretation of the Convention. This section, therefore, establishes the need for the creation of the Court.

2.1 The principle that like cases be treated alike

A basic principle of justice — that like cases should be treated alike — is offended by the present disharmony in interpretation. In its practical application, that principle requires that a person should be able to obtain refugee status, outside of his or her home country, in any State that is party to the Convention. A stark illustration that this is not the case is *Adan v Secretary of State for Home Affairs*.[62] In that case, three asylum-seekers who claimed persecution by non-state actors transited through Germany and France before arriving in the United Kingdom. At that time, unlike the United Kingdom, Germany and France did not recognise persecution by non-state actors as a Convention basis for refugee status to be granted. As a result, it was held, the UK Secretary of State was unable to authorise the asylum-seekers' return to either Germany or France as 'safe third countries'.

The principle that like cases should be treated alike underlies the very notion of a system governed by the rule of law. It is antithetical to that notion that legally irrelevant differences in individual cases should result in different outcomes. The principle that like cases should be treated alike has its philosophical basis in the notion of the rule of law — namely, the opposition of the order of law to the arbitrary exercise of power. As the current Chief Justice of the High Court of Australia has said:

> As an idea about government, the essence of the rule of law is that all authority is subject to, and constrained by, law. The opposing idea is of a state of affairs in which the will of an individual, or a group ... is the governing force in a society. The contrasting concepts are legitimacy and arbitrariness.[63]

62. [1999] 3 WLR 1274; [1999] 4 All ER 774; affirmed [2001] 2 AC 417.
63. Murray Gleeson, 'Courts and the rule of law', in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 178, 179.

This concern with restraint on the exercise of arbitrary power has particular resonance in the context of refugee law.[64] It is difficult to think of any person more at the mercy of arbitrary power than a refugee who, by definition, is dependant on a home State, which is persecuting or failing to protect the refugee. Since the Convention does not oblige States to grant asylum, the refugee is also at the mercy of the international community of States when protection is sought. Clearly, the consequences of an arbitrary application of the law in this context are dire, and possibly fatal.

Because each nation uses different refugee determination procedures, the principle that like cases should be treated alike cannot be entirely realised. Differences caused by procedure, not all of which may be justified by reference to the individual circumstances and systems of States, are beyond the scope of this proposal. Political negotiation seems the only means to resolution because of the implications for resources and the domestic legal and institutional contexts of each State.

Although the ideal that like cases should be treated alike may not be perfectly realisable, we should strive to reach that ideal to the extent possible. Improving the consistency of interpretation of the Convention is, in contrast to the question of consistency of refugee determination procedures, a much more confined task.

Divergence of interpretation may not necessarily be undesirable. One country's more generous interpretation may influence the interpretation of other countries and thereby develop the law. Any attempt at convergence may result in the imposition of minimum standards. However, the design of the Court does not compel uniformity. The Court will only have persuasive authority. It is not contemplated that opinions must be unanimous. It is also envisaged that the Court will explore and build upon divergences and it would be open to the Court to re-open or review its opinions, and thereby take into account any subsequent developments. Most importantly, however, by basing the Court on the principle of an independent judiciary, focused on the improvement of refugee jurisprudence, rather than on political imperatives, it is expected that the danger of political compromises amongst members will be minimised.

64. See, in the African context, Bonaventure Rutinwa, 'Refugee protection through the rule of law in Africa: Problems and prospects' (1998) 12 *Commonwealth Judicial Journal* 10.

2.2 *The present state of divergence in the interpretation of the Convention*

> [T]he interpretation of the criteria for granting refugee status and asylum displays almost as many variations as there are countries.[65]

It is beyond the scope of this paper to undertake an exhaustive survey of current disharmonies in interpretation. However, this brief survey indicates an unacceptably high degree of divergence in interpretation, which demonstrates that like cases are not treated alike in refugee law.

Indeed, even the broad interpretative approach taken to the Convention generally is contested. Judges of the High Court of Australia, for example, have disagreed sharply as to whether the Convention should be interpreted with reference to its historical genesis, or as a 'living instrument' capable of adaptation to present needs.[66] Some commentators have argued that the Convention should not be interpreted with a minute focus on its text, but broadly, in light of its avowedly humanitarian character.[67]

The most notable controversies, however, concern the definition of refugee enshrined in Art 1A(2) of the Convention, which states that a 'refugee' is a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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.

A controversial element of this definition is the category of 'membership of a particular social group'. As has been noted by the High Court of Australia, "[c]ourts and jurists have taken widely

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65. Quoted in Eduardo Arboleda and Ian Hoy, 'The Convention refugee definition in the West: Disharmony of interpretation and application' (1993) 5 *International Journal of Refugee Law* 66, 76.
66. *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1, 46-57 (per Gummow J) and 70-71 (per Kirby J). See generally Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Feller et al, *Global Consultations*, above n 54, 87, 104-106.
67. Lauterpacht and Bethlehem, above n 66, 106-107.

differing views as to what constitutes 'membership of a particular social group' for the purposes of the Convention."[68]

In the Global Consultations paper devoted to this topic, two broad approaches were identified. The 'protected characteristics' approach looks to the inherent structure of the proposed group, and the second (the 'social perceptions' approach) looks to whether that group is recognised as a group by the community.[69] Australia follows the second approach,[70] although the first approach is followed (although differently formulated) in most common law jurisdictions, including the United Kingdom,[71] Canada,[72] New Zealand,[73] and the United States. Indeed, within the United States itself two different tests have been applied in different Circuits.[74] In contrast, European civil law

68. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 259. The literature on this is vast: see, eg, Penny Dimopoulos, 'Membership of a particular social group: An appropriate basis for eligibility for refugee status' (2002) 7 *Deakin Law Review* 367.
69. T Alexander Aleinikoff, 'Protected characteristics and social perceptions: An analysis of the meaning of "membership of a particular social group"', in Feller et al, *Global Consultations*, above n 54, 263.
70. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.
71. After considering the various common law tests, their Lordships failed to agree on a test in the leading case of *Islam v Secretary of State for the Home Department* [1999] 2 AC 629: see Aleinikoff, above n 69, 273-275.
72. *Canada (Attorney-General) v Ward* [1993] 2 SCR 689. A three-part definition was adopted by La Forest J, namely that it included (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.
73. *Re GJ*, New Zealand Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 1312/93, 1 NLR 387, 1995.
74. The line of authority in the Ninth Circuit differed from that adopted by the Board of Immigration Appeals (BIA) and other Circuits. The Ninth Circuit required a "cohesive, homogeneous group": *Sanchez-Trujillo v INS*, 801 F 2d 1571 (9th Cir, 1986), while the BIA and other Circuits required "a group of persons all of whom share a common, immutable characteristic": *Matter of Acosta* Interim Decision No. 2986, 1985, 19 I. & N. Decisions 211, BIA, 1 March 1985. In *Hermandez-Montiel v INS*, 225 F 3d 1984 (9th Cir, 2000), 1093 the Ninth Circuit seemed to combine the two standards, holding that a particular social group was held as "one united by a voluntary association, including the former association, or by an innate characteristic that is so fundamental to the identities and consciences of it members that members either cannot or should not be required to change it." See generally Aleinikoff, above n 69, 275-280.

jurisdictions such as France, Germany and the Netherlands have avoided analysis of this ground, preferring to rely on other elements of the definition.[75] The Guidelines issued by UNHCR attempts to combine both approaches.[76]

While the 'protected characteristics' and 'social perception' approaches often lead to similar results, the latter approach is broader. For example, it encompasses more readily asylum-seekers who object to the social mores of their society, such as women who object to female genital mutilation.[77] Illustrating the difference, the High Court of Australia gave the vivid example of witches, who would have been a 'particular social group' in the society of their day, "notwithstanding that the attributes that identified them as a group were often based on the fantasies of others".[78]

Even where the case law is consistent it is "lost in a mosaic when these definitions are applied to certain categories of persons",[79] as illustrated by a long series of conflicting decisions in the United States and Canada listed by the High Court of Australia in its leading case on the issue of people fleeing China's one child policy.[80] In Australia, these asylum-seekers are not 'members of a particular social group',[81]

75. See Aleinikoff, above n 69, 280-285. This also appears true of Austria and Spain, while Belgium prefers the 'protected characteristics' approach (100-101) and Denmark interprets the term very strictly: Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman and Carlos Peña Galiano (eds), *Who is a Refugee? A Comparative Case Law Study* (1997), 49 (Austria), 368 (Spain), 100-101 (Belgium), 330 (Denmark). In Heaven Crawley and Trine Lester, 'Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe', EPAU/2004/5, UNHCR Evaluation Report, May 2004, [379], it is said that only four of the surveyed countries had case law guidance on this definition (France, Lithuania, the Netherlands and the United Kingdom).
76. '"Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/02, 7 May 2002.
77. See Aleinikoff, above n 69, 298.
78. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 265.
79. See Carlier et al, above n 75, 713.
80. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 261-263.
81. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. Whether they could rely on the ground of political opinion has not been definitively settled: see *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559.

although children born in contravention of that policy are members.[82] In the United States, the courts have rejected such claims made either on the ground of 'political opinion' or on the ground of 'membership of a particular social group', but Congress has overturned that interpretation.[83] In Canada, the courts are divided on the issue.[84] Such claims have been accepted in the Netherlands,[85] but not in France.[86]

Two other examples of divergent interpretation are the application of the Convention to cases of civil war[87] and to non-state actors of persecution,[88] both issues thrown up by changing methods of persecution.

Changes in perception also affect the interpretation of the definition. For instance, more recent concern with gender-sensitive interpretations of the Convention has been the subject of much academic comment and was the subject of concerted efforts by UNHCR in the 1990s.[89]

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82. *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293.
83. Penelope Mathew, 'Conformity or persecution: China's one child policy and refugee status' (2000) 23(3) *University of New South Wales Law Journal* 103, 114. The definition was amended by *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 8 USCS § 1101(a)(42).
84. Compare *Cheung v Canada* [1993] 2 FC 314; (1993) 102 DLR (4th) 214 and *Chan v Canada* [1993] 3 FC 675, 692-693.
85. Aleinikoff, above n 69, 284, citing Afdeling Bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State), 7 Nov 1996, RV 1996, 6 GV 18d-21 (China).
86. Ibid, 281, citing *Zhang*, CRR, SR, Decision No. 2228044, 8 June 1993; *Wu*, CRR, SR, Decision No. 218361, 19 April 1994.
87. See, eg, *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 (a 4-3 decision), esp 63-66 per Kirby J (dissenting); cf *Adan v Secretary of State for the Home Department* [1999] AC 293. Compare Canada: *Salibian v Canada (Minister of Employment and Immigration)* [1990] 3 FC 250.
88. See, eg, Arboleda and Hoy, above n 65, 86-87; *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, esp 490-493 (on the position of the UK in contrast to other European countries); European Council on Refugees and Exiles, 'Non-state agents and the inability of the State to protect', London, September 2000, available at http://www.ecre.org/research/nsagentsde.pdf (on the position of Germany).
89. See, eg, Katja Luopajärvi, 'Gender-related persecution as basis for refugee status: Comparative perspectives', Åbo Akademi University, Finland, Institute of Human Rights Research Report, No. 19 (2003), available at http://www.abo.fi/instut/imr/publications_online.htm; Crawley and Lester, above n 75; Audrey Macklin, 'Cross-border shopping for ideas: A critical review of United States, Canadian, and

Jurisdictions have differed over whether women generally may constitute a 'particular social group';[90] whether domestic violence constitutes 'persecution';[91] and whether women fleeing fundamentalist regimes that discriminate against women fall within the Convention definition.[92] An analysis of the gender guidelines issued in a number of jurisdictions demonstrates divergence between these issues or, in a number of cases, ambiguity.[93]

Recently, in tune with the increasingly restrictive temper of many refugee-receiving countries, attention has shifted to other sections of the Convention, and in particular to the construction of the clause that provides for the cessation of refugee status (art 1C)[94] and, more contentiously, the clause that permits exclusion of refugees (art 1F).[95]

Australian approaches to gender-related asylum claims' (1998) 13 *Georgetown Immigration Law Journal* 25; Rodger Haines QC, 'Gender-related persecution', in Feller et al, *Global Consultations*, above n 3, 319.

90. See, eg, *Minister of Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; *Islam v Secretary of State for the Home Department* [1999] 2 AC 629; *Canada (Attorney-General) v Ward* [1993] 2 SCR 689; Carlier et al, above n 75, 282 (Germany); 516 (The Netherlands). Sweden's Gender Guidelines go against the general trend by not recognising women as a particular social group generally: Migrationsverket [Swedish Migration Board], Legal Practice Division, *Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection*, 28 March 2001, [95].
91. See, eg, *Minister of Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.
92. See, eg, Carlier et al, above n 75, 50 (Belgium); 284 (Germany); 334 (Denmark); France (412-413); 517 (The Netherlands); Refugee Appeal No. 71427/99 [2000] NZAR 545.
93. Macklin, above n 89.
94. See generally Joan Fitzpatrick and Rafael Bonoan, 'Cessation of refugee protection', in Feller et al, *Global Consultations*, above n 3, 491; David Milner, 'Exemption from cessation of refugee status in the second sentence of Article 1C(5)/(6) of the 1951 Refugee Convention' (2004) 16 *International Journal of Refugee Law* 91.
95. See generally Lawyers Committee for Human Rights, 'Safeguarding the rights of refugees under the exclusion clauses: Summary findings of the project and a Lawyers Committee for Human Rights perspective' (2000) 12 Supp *International Journal of Refugee Law* 317, 324-325; Peter J van Krieken (ed), *Refugee Law in Context: The Exclusion Clause* (1999); Geoff Gilbert, 'Current issues in the application of the exclusion clauses', in Feller et al, *Global Consultations*, above n 3, 425; Jeff Handmaker, 'Seeking justice, guaranteeing protection and ensuring due process: Addressing the tensions between exclusion from refugee protection and the principle of universal jurisdiction' (2003) 21 *Netherlands Quarterly of Human Rights* 677.

Article 1F provides that the Convention does not apply to any person 'with respect to whom there are serious reasons for considering that' he or she has committed specified offences. Three categories of offences are specified, and debates rage concerning which offences properly fall within the ambit of those categories.

The first category, specifying crimes against peace, war crimes, and crimes against humanity, involves evolving crimes for which there is "no one accepted definition".[96] The second category of 'serious non-political crimes' poses the problem of what is 'non-political',[97] and in particular the subjectivity of the characterisation of 'terrorism'.[98] The third category, comprising 'acts contrary to the purposes and principles of the United Nations', is widely interpreted by States, and as "there is as yet no internationally accepted understanding", this category is "vague and ... open to abuse by States".[99]

More generally, there is divergence in the procedure used by States in determining the application of the clause. There is, for example, divergence: between common law and European practice as to whether it is necessary to consider whether the asylum-seeker is a refugee before proceeding to consider the application of the clause;[100] whether the seriousness of the alleged crime has to be balanced against the seriousness of the feared persecution;[101] as to whether the level of evidence that constitutes 'serious reasons for

96. Gilbert, above n 95, 434.
97. See generally ibid 439-455.
98. See, eg, Walter Kälin and Jörg Künzli, 'Article 1F(b): Freedom fighters, terrorists, and the notion of serious non-political crimes' (2000) 12 Supp *International Journal of Refugee Law* 46.
99. Gilbert, above n 95, 457.
100. The UK says yes, although its practice is not uniform; France increasingly agrees; Belgium's practice is inconsistent; generally they do not in the US; and Canada has held there is normally no obligation: Michael Bliss, '"Serious reasons for considering": Minimum standards of procedural fairness in the application of the Article 1F exclusion clauses' (2000) 12 Supp *International Journal of Refugee Law* 92, 106-108. The Netherlands has recently put in place a special procedure for exclusion that precludes the inquiry into whether they are a refugee: Handmaker, above n 95, 685-686.
101. Generally they do in Europe, but not so in common law countries: see *T v Secretary of State for Home Department* [1996] AC 742 (UK); *INS v Aguirre-Aguirre*, 526 US 415 (1999) (US); *Applicant NADB of 2001 v Minister for Immigration and Multicultural Affairs* (2002) 126 FCR 453 (Australia); *Malouf v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 537 (Canada).

considering';[102] and whether decision-makers can infer 'serious reasons' merely from the asylum-seeker's membership of a particular organisation.[103]

There is further divergence in relation to the 'safe third country' question[104] and the 'internal flight or protection' alternative,[105] which arises outside the text of the Convention. One of the primary difficulties with the 'safe third country' concept, as the case of *Adan v Secretary of State for Home Affairs*[106] illustrates, is the difference between different countries' jurisprudence. Under the recent 'safe third country' agreement between the United States and Canada, for example, different treatment of gender-related claims could result in Canada breaching its obligations under the Convention, as defined by Canadian jurisprudence.[107]

A related difficulty is whether a signatory owes protection obligations to those asylum-seekers who can find "effective protection" in another country. This caused some judicial discord in Australia when recently a long-standing approach taken in the Federal Court was overruled by the High Court.[108]

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102. There is a conflict in Canada between "lower ... than the balance of probabilities": *Ramirez v Canada* [1992] 2 FC 306, 311-313; and "clear and convincing evidence": *Cardenas v Canada*, 23 Imm LR 92d, 244 (1994); in the UK the evidence must "point ... strongly to his guilt": *T v Secretary of State for Home Department* [1996] AC 742; and in the US 'probable cause' is enough: *Ofosu v McElroy*, 933 F Supp 237 (SDNY 1995). UNHCR itself has proposed a "more likely than not" test in its own practice: Lawyers Committee for Human Rights, above n 95, 329.
103. Contrast, eg, the US *Immigration and Naturalization Act*, § 219(a), 8 USC § 1189(a)(1), and *T v Secretary of State for Home Department* [1996] AC 742. In the Netherlands, in practice the determination body pre-determines whether the organisation, and by association the applicant, has a 'cruel purpose': Handmaker, above n 95, 687.
104. See, eg, Gretchen Bordelt, 'The safe third country practice in the European Union: A misguided approach to asylum law and violation of international human rights standards' (2002) 33 *Columbia Human Rights Law Review* 473.
105. James C Hathaway and Michelle Foster, 'Internal protection/relocation/flight alternative' in Feller et al, *Global Consultations*, above n 3, 357.
106. [1999] 3 WLR 1274; [1999] 4 All ER 774; affirmed [2001] 2 AC 417.
107. *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (5 December 2002), available at http://www.cic.gc.ca/english/policy/safe-third.html.
108. The doctrine was first developed in *Minister for Immigration v Multicultural Affairs Thiyagarajah* (1997) 80 FCR 543. This was strongly

The Global Consultations review of the 'internal flight or protection' alternative raises the following issues: whether the applicant must establish that he or she is at risk of country-wide persecution; the availability of domestic protection; and, especially, which factors (such as family and social networks,[109] language ability,[110] and a deterioration in economic status[111]) are relevant in considering whether it is 'reasonable' to expect an asylum-seeker to avail him or herself of that alternative. We consider that, where 'reasonableness' is concerned, the "inherent lack of analytical clarity produces wide inconsistency between jurisdictions".[112]

Differences between jurisdictions are not solely the product of legitimate differences in judicial interpretation. Undoubtedly, an increasingly hostile political climate informs judicial interpretation.[113] Further, legislatures have increasingly taken it upon themselves to 'interpret' the Convention in a manner which tends to be influenced by perceived national interests. The US State Department, for example, considered asylum-seekers from El Salvador as economic migrants, despite statements by UNHCR to the contrary.[114] Inconsistent interpretation permits "States to unilaterally manipulate the definition to suit their perceived national and foreign policy interests"[115] — interests that may be fundamental to immigration law, but which should be irrelevant to refugee law.

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questioned, although followed, in *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 144, and the appeal was allowed by the High Court in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6. The legislature has also intervened, amending the relevant Act to include its own 'safe third country' exception: see s 36 of the *Migration Act 1958* (Cth). See generally Roz Germov and Francesco Motta, *Refugee Law in Australia* (2003) 463-475.

109. See Hathaway and Foster, above n 105, 386.
110. Ibid 387.
111. Ibid 386-387; see also European Council of Refugees and Exiles, ELENA (European Legal Network on Asylum), 'Research paper on the application of the concept of internal protection alternative', London, November 1998, updated autumn 2000, available at http://www.ecre.org/research/ipa.pdf.
112. Hathaway and Foster, above n 105, 386.
113. Arboleda and Hoy, above n 65, 79.
114. Elizabeth Lentini, 'The definition of refugee in international law: Proposals for the future' (1985) 5 *Boston College Third World Law Journal* 183, 195.
115. Ibid.

Variations in national interpretations work injustice. It is impossible to gauge the extent of this injustice, although statistics showing variation in acceptance rates by different countries may raise a presumption that a substantial degree of injustice results.[116] For example, even after five years of intensive harmonisation efforts in Europe, "seeking asylum remains a dangerous lottery" — "a person can have a 90% chance of being accepted as a refugee in one EU country, while her chances are virtually nil next door."[117]

3. Efforts to promote consistency in interpretation, and their limited success

In this section we examine the efforts of the UNHCR, EU, regional bodies, and NGOs to promote consistency in the interpretation of the Convention, and draw attention to the limited success achieved by the mechanisms used. We assess the reasons for the limited success in order to inform the design of the Court.

3.1 UNHCR

The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Handbook)[118] published by UNHCR is often the first port of call for primary decision-makers. Its supplementary publications include the Guidelines on International Protection and a variety of position papers.[119] Occasionally, UNHCR also intervenes and presents amicus curiae briefs in significant cases.[120] Some of the Conclusions of its Executive Committee provide another

116. Arboleda and Hoy, above n 65, 80-81.
117. European Council on Refugees and Exiles, 'Europe must end asylum lottery — Refugee NGOs' (Press Release, 4 November 2004) PR6/11/2004/EXT/RW, available at http://www.ecre.org/press/asylumlot.pdf.
118. HCR/IP/4/Eng/REV.1, redited, Geneva, January 1992.
119. These can be accessed from the UNHCR website.
120. UNHCR has been involved in *R v Immigration Officer at Prague Airport; ex parte European Roma Rights Centre* [2004] UKHL 55; *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304, *El-Ali v Secretary of State for the Home Department* [2003] 1 WLR 95; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3; *Islam v Secretary of State for the Home Department* [1999] 2 AC 629; and *Haitian Centers Council v McNary* 969 F 2d 1326 (2nd Cir, 1992), vacated as moot, 113 S. Ct. 3028 (1993). UNHCR's documents for these can be found on its website.

source of interpretative guidance.[121] The institutional authority of UNHCR, the global nature of these publications, and their wide dissemination have led to their substantial impact on the development of the interpretation of the Convention.

Official statements of support for this work of UNHCR abound. The Council of the European Union has affirmed the Handbook's status as "a valuable aid to Member States in determining refugee status".[122] The House of Lords has said that the Handbook, "although not binding on States, has high persuasive authority, and is much relied on by domestic courts and tribunals,"[123] and was an "important source of law (though it does not have the force of law itself)".[124] In the United Kingdom, Guidelines issued by the UNHCR have been accorded "considerable weight",[125] and even a letter from a UNHCR representative has been accorded "persuasive effect".[126] Similarly, the US Supreme Court has said the Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform",[127] and the US Court of Appeals has accepted that it is "guided by [its] analysis".[128] In Canada, the Handbook has been considered "a highly relevant authority in considering refugee

121. See generally Jerzy Sztucki, 'The Conclusions on the international protection of refugees adopted by the Executive Committee of the UNHCR Programme' (1989) 3 *International Journal of Refugee Law* 285. The conclusions are usefully compiled by UNCHR in 'A thematic compilation of Executive Committee Conclusions', March 2001, available on the UNHCR website.
122. '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 definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees' [1996] OJ L 63, 2, available at http://www.unhcr.bg/euro_docs/en/_26_term_en.pdf.
123. *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 520.
124. *T v Immigration Officer* [1996] AC 742, 786. See also *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840, 843; [2003] 2 All ER 1097, 1101 and *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, 864; [2003] 3 All ER 304, 313.
125. *R v Uxbridge Magistrates Court; ex parte Adimi* [1999] Imm AR 560, 567; [1999] 4 All ER 520, 528.
126. *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000.
127. *INS v Cardoza-Fonseca*, 480 US 421 (1987), 439, fn 22.
128. *Zhang v Ashcroft*, 388 F 3d 713 (9th Cir, 2004).

admission practices".[129] In New Zealand, the Conclusions of the Executive Committee have likewise been said to be "of considerable persuasive authority".[130]

However, the Handbook has not been universally accepted as an authoritative exposition of the Convention. For example, Lord Bridge of Harwich once said of the Handbook:

> [I]t is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law.[131]

In 1989, the Chief Justice of the High Court of Australia observed that he had not found the Handbook "especially useful", and he considered it "more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention."[132] This dictum is still quoted by other judges.[133] Indeed, one judge recently suggested that "a certain conservatism should attend" usage of the Handbook, because of a "general lack of enthusiasm for using the Handbook" among judges.[134]

On appeal, however, that comment was disapproved. The appeal judges said the Handbook was "a useful constructional aid, depending on the circumstances; it is simply an element for courts to consider".[135] In Australia, therefore, the weight accorded to the Handbook varies from judge to judge. A cursory survey of the reported Australian cases suggests that, in the event of conflict, greater weight is accorded

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129. *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, 620, 628. See also *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 713-714.
130. *Re SA*, Refugee Appeal No. 1/92, Refugee Status Appeals Authority (NZ), 30 April 1992, available at http://www.refugee.org.nz/rsaa/text/docs/1-92.htm#The%20Relevance%20of.
131. *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 524.
132. *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392.
133. See, eg, *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 451, per Beaumont J; *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405, 413 per French J.
134. *Savvin v Minister for Immigration and Multicultural Affairs* (1999) 166 ALR 348, 358, per Dowsett J.
135. *Minister for Immigration v Savvin* (2000) 98 FCR 168, 192-193.

to decisions of other common law courts and learned commentators.[136] In none of these cases was the Handbook's interpretation preferred against these latter authorities.

Similarly, the US Supreme Court, in a case that rejected the interpretation endorsed by the Handbook, emphasised that, "[t]he U. N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts".[137]

It is difficult to say whether the recent Guidelines on International Protection carry more authority. So far, their influence on judicial interpretation has not been marked.[138] The US Court of Appeals for the Sixth Circuit, for example, noted that the Board of Immigration Appeals' definition of 'membership of a particular social group' might evolve along the path indicated by the Guidelines. However, it refrained from adopting the proposed definition.[139]

The Conclusions of the Executive Committee are in a slightly different position. In the UK they are regularly invoked,[140] but in

136. See, eg, *Applicant NADB of 2001 v Minister for Immigration and Multicultural Affairs* (2002) 126 FCR 453; *Minister for Immigration and Multicultural Affairs v WABQ* (2002) 121 FCR 251, 275-278. In particular, the texts by James Hathaway, *The Law of Refugee Status* (1991) and Guy S Goodwin-Gill, *The Refugee in International Law* (1983) are often cited: at the time of writing, there were 65 cases that referred to either or both texts in the authorised reports of the Federal Court of Australia.
137. *INS v Aguirre-Aguirre*, 526 US 415 (1999), 427.
138. In Australia, the Global Consultations were referred to in *Applicant NADB of 2001 v Minister for Immigration and Multicultural Affairs* (2002) 126 FCR 453, 461, and were cited in support in dissent in *Minister for Immigration and Multicultural v Applicant S* (2002) 124 FCR 256, 269. In the US, the guidelines have been cited twice to date, including in support by the Ninth Circuit Court of Appeals in *Zhang v Ashcroft*, 388 F 3d 713 (9th Cir, 2004), 720. In Canada, it was cited in support in *Rahaman v Canada (Minister of Citizenship and Immigration)* [2002] 3 FC 537, 561-563. In the UK, they have been cited in argument once: *L v Secretary of State for the Home Department* [2004] EWCA CIV 1441, [2004] All ER (D) 43 (Nov).
139. *Castellano-Chacon v INS*, 341 F 3d 533 (6th Cir, 2003), 548-549.
140. See, eg, *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; *A v Secretary of State for Home Department* [2004] UKHL 56, [2004] All ER (D) 271 (Dec); *R (on the application of Hoxha) v Secretary of State for Home Department* [2003] Imm AR 211. They were also cited in *Rahaman v Canada (Minister of Citizenship and Immigration)* 211 DLR (4th) 455, [45].

Australia they are rarely used.[141] The views of the Executive Committee, which is composed of representatives of parties to the Convention, might be considered good evidence of State practice. On the other hand, the intergovernmental character of the Committee also lends its Conclusions a political flavour; indeed, in a feverish political climate, the Committee may try and avoid settling sensitive disputes altogether.[142] Of the many Conclusions that are issued, only a few provide a guide to interpretation, their dissemination is often limited and their institutional legitimacy often unclear.[143]

The attitude of particular judges aside, the Handbook and its sister publications suffer from a more general limitation. The Handbook is a relatively brief guide which has not been updated for more than ten years. Its purview is not comprehensive, and does not always address the issue at hand, particularly where such an issue relates to contemporary circumstances not originally envisaged by the Convention or relates to recent jurisprudence.[144]

3.2 European Union common asylum policy

Very different problems arise from the ongoing process of harmonising asylum and immigration policies in the European Union. The development of a common asylum policy in the European Union, at the forefront of the EU agenda since 1999 and now in its final stage,[145] necessarily encompasses much more than harmonising the

141. In the Federal Court of Australia, since 1995 they have been cited only in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294, [52]; *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119, 128; and noted in *Thiyagarajah v Minister for Immigration and Multicultural Affairs* (1997) 80 FCR 543, 561; *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (unreported, Sackville J, 4 May 1995); and *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245, 295.
142. 'The 44th session of the UNHCR Executive Committee: A view from the side' (1994) 6 *International Journal of Refugee Law* 63.
143. See Sztucki, above n 121, 303-317.
144. See, eg, in Australia *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405, 413; and in Canada *Xie v Canada (Minister of Citizenship and Immigration)* [2004] 2 FCR 372 (Canada), [25] and *Pushpanathan v Canada (Minister of Employment and Immigration)* [1996] 2 FC 49, [22]; reversed on appeal, [1998] 1 SCR 982.
145. The Tampere programme, which began in 1999, concluded in 2004: see 'Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations' COM(2004) 0401 final, 2.6.2004, and its Annex I, 'List of the most important instruments adopted', SEC(2004) 680, 2.6.2004, available at http://europa.eu.int/comm/

interpretation of the Convention. It involves incorporating into EU law a refugee burden-sharing mechanism,[146] and includes directives on matters such as minimum standards for temporary protection in cases of mass influx,[147] reception standards,[148] and family reunification.[149]

Most importantly for present purposes, the EU has adopted a directive on minimum standards for the qualification of refugee status (the Qualification Directive).[150] This deals, inter alia, with contested issues such as the recognition that the need for international protection may arise as a result of the actions of an individual after leaving their country (art 5); with the inclusion of non-state actors of persecution (art 6); with the availability of internal protection (art 8); with the definition of persecution, including gender-specific and child-specific forms (art 9); with the approach taken to 'membership of a particular social group' (requiring *both* the 'social perception' approach *and* the 'protected characteristics' approach to be satisfied: art 10); and which elaborates the meaning of the cessation and exclusion (arts 11 and 12) clauses.

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justice_home/doc_centre/scoreboard_en.htm. The next phase, called the Hague Programme, has recently been approved: see the Presidency Conclusions, 4-5 November 2004, available at http://www.statewatch.org/news/2004/nov/hague-programme-final.pdf. For a recent summary, see Elspeth Guild, 'Seeking asylum: storm clouds between international commitment and EU legislative measures' (2004) 29(2) *European Law Review* 198.

146. *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities* [1997] OJ C 254 , 1 (the Dublin Convention); adopted as *Council Regulation (EC) No. 343/2003 of 18 February 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* [2003] OJ L50, 1.
147. *Council Directive 2001/55/EC of 20 July 2001, On Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof* [2001] OJ L 212, 12.
148. *Council Directive 2003/9/EC of 27 January 2003, Laying Down Minimum Standards for the Reception of Asylum Seekers* [2003] OJ L 031, 18.
149. *Council Directive 2003/86/EC of 22 September 2003, On the Right to Family Reunification* [2003] OJ L 251, 12.
150. *Council Directive 2004/83/EC of 29 April 2004, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L 304, 12.

Although these directives must be implemented by nation-states, by virtue of the doctrine of the supremacy of EC law the Qualification Directive has direct legal effect in member states.[151] This contrasts with the merely persuasive effect of UNHCR documents. It is, therefore, a much more direct and effective method of harmonisation. For example, the adoption of the Directive overturns Germany's long-standing narrow interpretation of persecution by non-state actors.[152]

The primary objection to the EU's method is that it is harmonisation by political negotiation, not judicial interpretation. Unlike UNHCR initiatives, the process is not driven by a desire to remedy the injustice of inconsistency. It is open to the charge that Fortress Europe is protecting its shores by reaching for the lowest common denominator, potentially in breach of the international obligations of its members.

Closer inspection does not dispel this perception, although in some respects standards have improved under the harmonisation process. The directive on minimum asylum procedures caused an unprecedented call by the European Council on Refugees and Exiles (ECRE) and nine other European NGOs for its withdrawal "on the basis that it would be in breach of the commitments of the EU as set out in the Charter of Fundamental Rights and would violate individual Member States' legal obligations under international refugee and human rights law".[153]

With respect to the Qualification Directive, the ECRE has observed "with regret that the protracted nature of negotiations has resulted in the lowering of some of the standards outlined in the original draft of the Directive proposed by the Commission, and the adoption of many provisions whose standards are in fact lower than the current practice of many Member States."[154] Also, the final form of the

151. See generally Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (2002), 288-291.

152. Art 6. See European Council on Refugees and Exiles, 'ECRE information note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted' (Press Release, October 2004), IN1/10/2004/ext/CN, 2, available at http://www.ecre.org/statements/qualpro.pdf ('ECRE Qualification Directive note').

153. See European Council on Refugees and Exiles, Amnesty International and Human Rights Watch, 'Refugee and human rights organisations across Europe express their deep concern at the expected agreement on asylum measures in breach of international law' (Press Release, 28 April 2004), available at http://www.ecre.org/press/asylum_procedures.shtml.

154. ECRE Qualification Directive note, above n 152.

Qualification Directive does not reflect the more liberal amendments proposed by Parliament.[155] A leading commentator ended a review of the process on this bitter note:

> [W]hen one comes to examine the developing EU *acquis* in the field one has the impression that the Member States are seeking to draw up a whole new *acquis* unencumbered by their international commitments. Indeed, the Member States have insisted on the inclusion in EU measures of provisions which either have already been criticised by the supra-national courts ... or by national courts ... They thereby give the impression that they wish to re-write the rules to get rid of inconvenient human rights issues. Some Member States appear to be seeking the right to crush protection seekers like soft drink cans which are no longer wanted.[156]

There are several other objections. First, this regional approach has the tendency to undermine the global character of the Convention.[157] Second, the approach can only be pursued by virtue of 'minimum' standards. This allows ample room for continuing differences and divergences, unless the 'minimum' standard becomes the European standard — hardly a desirable option. Third, on examination, the Directive leaves at least as many problems unresolved as it resolves. A glaring example is that it sets out no criteria for the 'reasonableness' of availing oneself of the 'internal protection' alternative.[158] While the European Court of Justice may give further guidance, it is not desirable for that court to develop jurisprudence on refugee law through the indirect and distorting lens of the Directive.

3.3 Some other regional mechanisms

Some of these comments also pertain to the efforts of the broader European political grouping, the Council of Europe. Unlike the EU, human rights is traditionally a focus of the Council of Europe, and the work of its Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) reflects this impulse.[159]

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155. Ibid.
156. Guild, above n 145, 218.
157. Oldrich Andrysek, 'Gaps in international protection and the potential for redress through individual complaints procedures' (1997) 9 *International Journal of Refugee Law* 392, 401.
158. ECRE Qualification Directive note, above n 152.
159. For a recent summary of the activities of the Council of Europe generally, María Ochoa-Llidó, 'Recent and future activities of the Council of Europe in the fields of migration, asylum and refugees' (2004) 5 *European Journal of Migration and Law* 497.

Although the work of CAHAR, composed of experts and national representatives, is quite broad, it has issued several recommendations and resolutions directly relevant to the interpretation of the Convention. It is currently examining the application of the exclusion clauses and recently issued a recommendation on the interpretation of 'membership of a particular social group' that broadly reflects the approach taken by UNHCR's Guidelines.[160] It has issued recommendations on the application of the safe third country concept, along with many situation-specific recommendations.[161]

These recommendations and resolutions are of persuasive effect only. There are but a few of them, and they do not involve detailed analysis. Nor is CAHAR a global or judicial body. Valuable as its work in this area is, CAHAR has only limited impact on the problem of inconsistency of interpretation, and it is not a substitute for ongoing authoritative interpretation of the Convention.

Regional approaches exist in Africa and Latin America,[162] and to a lesser extent in South Asia.[163] These processes are much less intense and of even less utility in tackling the divergence in interpretation as in most of those countries UNHCR is responsible for assessing refugee status.[164]

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160. 'Recommendation No. R (2004) 9 on the concept of "membership of a particular social group" (MPSG) in the context of the 1951 Convention relating to the status of refugees', adopted by the Committee of Ministers on 30 June 2004.
161. 'Recommendation No. 4 (97) 22 to member states containing guidelines on the application of the safe third country concept'. See also 'Recommendation No. (98) 13 on the right to an effective remedy by rejected asylum-seekers against decisions on expulsion in the context of article 3 of the European Convention on Human Rights', 'Recommendation No. R (ii) 23 to member states on family reunion for refugees and other persons in need of international protection' (2000) 12 *International Journal of Refugee Law* 281. For a full list, see http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens/Asylum,_refugees _and_stateless_persons.
162. See generally José H Fischel de Andrade, 'Regional policy approaches and harmonization: A Latin American perspective' (1998) 10 *International Journal of Refugee Law* 391; and the San José Declaration on Refugees and Displaced Persons, adopted by the International Colloquium in commemoration of the 'Tenth Anniversary of the Cartagena Declaration on Refugees', San José, 7 December 1994, available on the UNHCR website.
163. See generally Pia Oberoi, 'Regional initiatives on refugee protection in South Asia' (1999) 11 *International Journal of Refugee Law* 193.
164. Andrade, above n 162.

3.4 Other non-governmental organisations

Various NGOs, including refugee and human rights advocacy groups, academic experts, and legal associations, have attempted to address the problem of variable interpretations.

ECRE has published positions on the application of the exclusion clause[165] and the interpretation of Article 1;[166] the University of Michigan issued guidelines on the internal protection alternative;[167] the Lawyers Committee for Human Rights[168] funded a project on the application of the exclusion clauses;[169] and the International Association of Refugee Law Judges has conducted workshops on critical issues of interpretation.[170]

These efforts are useful but they lack institutional authority. Further, their contributions are not widely disseminated and are limited by their generality and abstraction.

3.5 Conclusion

This review of efforts at resolving divergent interpretations of the Convention suggests some conclusions relevant to the design of the Court, namely:

- The interpretation of the Convention should be global, not regional, in character.
- In order that such interpretation be accepted by national decision-makers, it should be arrived at by accepted judicial techniques and have an authority derived from the expertise and integrity of the institution.
- Such interpretations should address practical factual circumstances rather than general and abstract questions.
- There should be an ongoing interpretative body, to ensure continuity over time and relevance to the current needs of decision-makers.

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165. 'Position on Exclusion from Refugee Status', March 2004, PP1/03/2004/Ext/CA, available at http://www.ecre.org/policy/position_papers.shtml.
166. 'Position on the Interpretation of Article 1 of the Refugee Convention', September 2000, available at http://www.ecre.org/policy/position_papers.shtml.
167. J C Hathaway, 'The Michigan Guidelines on the internal protection alternative' (1999) 21(1) *Michigan Journal of International Law* 131.
168. Now called Human Rights First.
169. Lawyers Committee for Human Rights, above n 95.
170. See James C Hathaway, 'A forum for the transnational development of refugee law: the IARLJ's advanced refugee law workshop' (2003) 15 *International Journal of Refugee Law* 418.

— Such interpretations must be widely promoted and publicised to ensure that they come to the attention of decision-makers.

4. Can existing institutions be used to address the problem of divergent interpretations of the Convention

The interpretation of the Convention is already within the institutional competence of a number of bodies. However, as with the efforts to resolve the disharmonies in interpretation already discussed, the potential for these institutions to remedy the underlying problem is limited.

4.1 The International Court of Justice

Under its Statute, the International Court of Justice is competent to interpret the Convention either at the invocation of the States or by an organ of the UN, such as UNHCR.[171] The ICJ, of course, has significant judicial expertise in the interpretation of treaties, is global in character, and is generally respected (if not always obeyed) by States. Use of this jurisdiction of the ICJ would also obviate the expense and labour required to set up a new judicial body.

However, this jurisdiction of the ICJ has never been invoked, and the prospects of it being used are remote. Generally, States have no interest in pursuing resolution of the interpretation of human rights instruments in the ICJ, particularly as its proceedings are complex and expensive. This is particularly relevant in the case of refugees who, by definition, are without the protection of a home State. Additionally, as the experience of the EU indicates, there are political benefits in a legislative, rather than a judicial, resolution of such disputes.

Further, while UNHCR could invoke the jurisdiction of the ICJ and therefore avoid this difficulty, the ICJ is not a suitable forum for these kinds of disputes. The kinds of interpretative disputes raised by the Convention are not especially amenable to the adversarial procedure of the Court. The cost and delay of such proceedings, combined with the manifold interpretative issues raised by the Convention, would make such a process of 'harmonisation' inefficient, even if the docket of the Court were not already 'full'.[172]

4.2 Regional Courts

Similar comments apply to the potential for the European Court of Justice to interpret the Convention on the basis of the Qualification

171. Under Arts 36(2) and 65 of its Statute.

172. At the time of writing, there were 12 cases pending: see http://www.icj-cij.org/icjwww/idocket.htm.

Directive.[173] Additionally, the jurisprudence of the ECJ would be regional in character and would provide an indirect interpretation of the Convention through the lens of the Qualification Directive.

These same objections apply to the European Court of Human Rights. Although it has greater institutional competence in the field of human rights, it has limited jurisdiction over refugee issues. Art 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights)[174] prohibits torture or inhuman or degrading punishment. A party to the European Convention on Human Rights breaches Art 3 by expelling an asylum-seeker where substantial grounds have been shown for believing that the person concerned faces a real risk of torture or inhuman or degrading treatment or punishment in the country to which he or she is returned.[175] The ECHR is concerned not with the interpretation of the Convention, but with the interpretation of Art 3 of the European Convention on Human Rights. Further, due to its excessive caseload, the ECHR is likely to prove an even slower forum for resolution than the ECJ.

The Inter-American Court of Human Rights is in a different position, as it has broad advisory jurisdiction over human rights conventions ratified by the American states, potentially including the Convention.[176] It therefore does not present the difficulty of peripheral interpretation and, given its smaller caseload, the prospect of significant delay. However, the same comments in relation to the non-adversarial nature of interpretative disputes, the lack of self-interest in the prosecution of such disputes, and the regional character of the body apply. Further, as has been observed, the disharmonies of interpretation of the Convention are not pronounced in the American States, as UNHCR assesses most of the claims for asylum and because of the broader regional definition of refugee.

4.3 UN Treaty Committees

In the absence of a specific supervisory mechanism for the Convention, refugee advocates have begun to turn to other UN treaty

173. Under Art 69 (ex art 73p) of the EC Treaty, which gives restricted jurisdiction to the ECJ in respect of EU visa and immigration policy: *Treaty establishing the European Community* (Consolidated version 1997) [1997] OJ C 340.
174. Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
175. *Cruz Varas v Sweden* (1991) 14 EHRR 1. Such violations of Art 3 have been found: see, eg, *Chahal v United Kingdom* (1996) 23 EHRR 413; *Jabari v Turkey* (2000) 9 BHRC 1.
176. Statute of the Inter-American Court of Human Rights, art 64.

monitoring bodies, such as the Human Rights Committee and the Committee Against Torture (CAT), for redress.[177] Indeed, most cases before CAT now involve asylum-seekers.[178]

This highlights the current deficiency in the supervision of the Convention. Nevertheless, although a valuable practical option in the present institutional framework, the use of the UN Committee is no answer to the problem at hand. The principal duty of these Committees is to their own Conventions, and any incidental interpretation of the Convention is naturally distorted by the primary focus of the Committee. Indeed, CAT has already indicated its reluctance to deal with refugee issues dressed up as torture issues.[179]

5. The Benefit of an International Judicial Body

In this section of the paper, we argue that the need for harmony in interpretation of the Convention is best addressed by an international judicial body for the same reasons as underlie the doctrine of separation of powers, because of the special authority inherent in the discipline of law, and because of the particular expertise of the judiciary in interpretation.

5.1 Separation of powers

The principle of separation of powers has, to some extent, been translated at the international level[180] through the recent proliferation

177. See, eg, Joan M Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum-seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (2002); Andrysek, above n 157; Saul Takahasi II, 'Recourse to human rights treaty bodies for monitoring of the Refugee Convention' (2002) 20 *Netherlands Quarterly of Human Rights* 53; Amnesty International and the International Service for Human Rights, *The UN and Refugees' Human Rights, a Manual on How UN Human Rights Mechanisms Can Protect the Rights of Refugees*, Geneva 1997, IOR 30/02/97, available at http://web.amnesty.org/library/pdf/IOR300021997ENGLISH/$File/IOR3000297.pdf.
178. Of the 18 decisions made on the merits reported in the 2004 report of CAT to the UN General Assembly, 15 of those concerned asylum-seekers. The other three were cases brought by Tunisian nationals granted refugee status in Switzerland. See *Report of the Committee against Torture*, UN GAOR, 59th sess, annex VII, UN Doc A/59/44 (2004), ('CAT Annual Report 2004').
179. *X v Spain* (No. 23/1995), UN Doc CAT/C/15/D/23/1995 (20 Jan 1995), [4.4]: cited in Andrysek, above n 157, 410.
180. See, eg, Paul Mahoney, 'Separation of powers in the Council of Europe: The status of the European Court of Human Rights vis-à-vis the authorities of the Council of Europe' (2003) 24 *Human Rights Law Journal* 152.

of international judicial and quasi-judicial bodies.[181] Independent experts have increasingly been entrusted with the job of monitoring the implementation of treaties, and independent dispute settlement mechanisms have either been introduced or strengthened in respect of a large number of important treaties. While the significance, and practical effect, of these institutions is often exaggerated, the trend expresses the value of an independent dispute settler in a way analogous to that of the domestic dispute settler.

The doctrine of separation of powers expresses the value of fragmenting the functions of governance. Adjudication of disputes is accepted as fair if, among other things, the adjudicator is impartial and independent. The independence of the judiciary, although not necessarily in the short-term interests of a government, legitimates executive power in the long run.

But the separation of the judiciary does more than simply legitimate the system of governance. It allows disputes to be resolved that cannot be resolved politically, not only in cases of high political importance such as the election of a President, but also in the detail of interpreting nuances of legislation and regulating the private disputes of citizens.

Unlike other major human rights conventions, the Convention presently does not have a separation of executive and interpretative power. Yet such a separation suits the hybrid nature of UNHCR. For example, UNHCR is open to the charge that its operational needs undermine its authority as an interpreter of the Convention. A natural pressure exists upon UNHCR not to condemn a country that lets it operate within its territory or the handful of donor countries.[182] UNHCR can more effectively achieve both its supervisory and operational objectives by devolving some of its supervisory responsibility to an independent judicial body.[183]

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181. See generally of Cesare P Romano, 'The proliferation of international judicial bodies: The pieces of the puzzle' (1999) 31 *New York University Journal of International law and Politics* 709; Thomas Buergenthal, 'Proliferation of international courts and tribunals: Is it good or bad?' (2001) 14 *Leiden Journal of International Law* 267; Pierre-Marie Dupuy, 'The danger of fragmentation of unification of the international legal system and the International Court of Justice' (1998-1999) 31 *New York University Journal of International Law and Politics* 791; Jonathan I Charney, 'The impact on the international legal system of the growth of international courts and tribunals' (1998-1999) 31 *New York University Journal of International Law* 697.

182. According to UNHCR, ten donors provide 83% of its funding, with three donors covering 51% of its funding: *UNHCR Global Appeal 2005*, 23-24, available at http://www.unhcr.ch/cgi-bin/texis/vtx/template?page=publ&src=static/ga2005/ga2005toc.htm.

5.2 The discipline of the law

Another factor underpinning the legitimacy of an independent judicial body is the special authority of law.[184] There is no hard and fast line between law and politics, and the notion of law as a morally or politically neutral sphere has long been exploded. Yet the law is a discipline and the rules of law are different from the rules of politics. The law is concerned with reasoning from principles and rules, using accepted legal techniques and the loyalty of lawyers and judges is to the law itself. Judges are servants of the law and owe their allegiance to it, not to the political masters of the day. In particular, they have a function in ensuring the legality of government, and in restraining arbitrary exercises of power, a function and value which has special importance in the current age.[185]

5.3 The benefits of an international standpoint

Of course, to some extent the value of the judiciary is already present in the international refugee regime, as in many countries the judiciary already plays a leading role in the interpretation of the Convention. However, an international judicial body has distinctive benefits.

Most obviously, an international judicial body is more appropriate given the international nature of the Convention, and in light of the present state of disharmony that has resulted from divergent national interpretations. An international judicial body dedicated to refugee law would also benefit from the special expertise of its members and by its sole focus on refugee law.

Further, an international judicial body has greater capacity to resist the politicisation of refugee law by national governments and to point out where national laws breach international law.

The experience of recent years has demonstrated that even well-

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183. See generally Takahasi, above n 177, 61-63.
184. See Malcolm N Shaw, 'The International Court of Justice: A practical perspective' (1997) 46 *International and Comparative Law Quarterly* 831, 853.
185. See, eg, Lord Steyn, 'Guantanamo Bay: The legal black hole' (British Institute of International and Comparative Law, 27th FA Mann Lecture, 25 November 2003), available at http://www.statewatch.org/news/2003/nov/guantanamo.pdf. For case law examples, see *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56; *Zaoui v Attorney-General*, SC CIV 13/2004 (Supreme Court of New Zealand, 9 December 2004), available at http://www.justice.govt.nz/judgments/decisions/SC%20Civ%2013%202004%20Zaoui%20Bail.pdf; and *Rasul v Bush* and *Rumsfield v Padilla* (US Supreme Court, 28 June 2004).

established independent national judiciaries are not immune from the restrictive temper of their government's refugee policy.[186] And even if judges hold fast to their duties as guardians of the law, legislatures may undermine both the political system and the integrity of refugee law by developing accelerated procedures, restricting access to judicial review or appeals, by enacting particular interpretations of the Convention, and even by attacking judges.

In Australia, there have been recent examples of such things. In September 2001, the Australian government passed legislation[187] which significantly narrowed the scope of the definition of 'refugee',[188] and a privative clause purporting to oust much of the jurisdiction of the courts to review decisions of the Refugee Review Tribunal.[189] The then Minister for Immigration and Multicultural and Indigenous Affairs alleged that Federal Court judges were "deliberately undermining the Government's tough stance on asylum-seekers",[190] and commented that "I do remember a time when judges who wanted to be able to involve themselves in the political process saw it as being more appropriate to resign from the bench and stand for parliament."[191] The Minister subsequently expressed regret,[192] but damage was done to the principle of separation of powers.

There are examples of domestic legislation that breach international law in this area.[193] Narrow interpretations of the

186. Andrysek, above n 157, 399.
187. *Migration Amendment (Excision from Migration Zone) 2001* (Cth); *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) 2001* (Cth); *Migration Legislation Amendment (Judicial Review) 2001*(Cth); *Migration Legislation Amendment Act (No. 1) 2001*(Cth); *Migration Legislation Amendment Act (No. 5) 2001* (Cth); *Migration Legislation Amendment Act (No. 6) 2001* (Cth); *Border Protection (Validation and Enforcement Powers) 2001* (Cth).
188. S Karas, 'Dealing with immigration and refugee cases post September 11: the experience of the Australian Refugee Review Tribunal and the Migration Review Tribunal' (paper presented at Council of Canadian Tribunals Third International Conference (CCAT), Toronto, 20 June 2004).
189. *Migration Act 1958* (Cth), s 474.
190. 'Ruddock lashes out at judges', *The Canberra Times*, 30 May 2002, 1.
191. Darrin Farrant, 'Judges hit back at Ruddock', *The Age*, 4 June 2002, 1.
192. Benjamin Haslem, Barclay Crawford, and Sophie Morris, 'Ruddock regrets but party applauds', *The Australian*, 5 June 2002, 2.
193. See, eg, Jaya Ramui, 'Legislating away international law: The refugee provisions of the Illegal Immigration Reform and Immigrant Responsibility Act' (2001) 37 *Stanford Journal of International Law* 117 (the USA); Maryellen Fullerton, 'Failing the test: Germany leads Europe

Convention, whether legislatively or judicially inspired, are in tension with the humanitarian spirit of the Convention, and have the capacity to threaten the legitimacy of the norms of international refugee law.

Although an international judicial body is no certain solution to these problems, such a body will raise awareness of opposing views and make attacks on the Convention and those who administer it less likely to succeed.[194] The normative influence of a persuasive international judicial body can be drawn upon by courts in response to these ills, as recent jurisprudence from the House of Lords demonstrates.[195] The principled development of international refugee law promotes a certainty and predictability that can only enhance the legitimacy of national judicial decisions. The international composition of such a body also has the benefit of a broader perspective.

Finally, by looking at the Convention directly, rather than through the distorting lens of national legislation, an international body can see the Convention for what it is, namely, an international humanitarian instrument.

6. Lessons for the design of the Court from existing bodies

In section 4 of this paper, we examined some existing organisations to establish whether they would be suitable to undertake the task of adjudicating on divergent interpretations of the Convention. We now return to a further examination of those organisations, and some others, to isolate features that should be included or avoided in the design of the Court.

6.1 The UN treaty committees

Seven UN treaty committees,[196] consisting of between nine and eighteen expert members, meet several times a year to supervise and

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in dismantling refugee protection' (2001) 36 *Texas International Law Journal* 231; Joanna Harrington, 'Punting terrorists, assassins and other undesirables: Canada, the Human Rights Committee and requests for interim measures of protection' (2003) 48 *McGill Law Journal* 55.

194. C A Groenendijk, 'The competence of the EC Court of Justice with respect to inter-governmental treaties on immigration and asylum' (1992) 4 *International Journal of Refugee Law* 531, 533.

195. See, eg, *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

196. These are: the Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee against Torture (CAT), the Committee on the Rights of the Child (CRC), and the Committee on the Elimination of Discrimination against Women

monitor compliance with a particular human rights treaty. The committees' principal tasks include examining state reports, examining and issuing non-binding 'views' on individual and inter-state communications alleging violations of the treaty, and issuing General Comments. Some of the later committees also have wider powers to investigate through periodic visits of States parties.[197]

With one exception, these committees were created through a formal treaty process, either by the main treaty itself or a separate protocol,[198] although ratification of the complaint procedures is optional.[199] This explicit consent of States parties to the jurisdiction of the committees provides the process with considerable legitimacy, particularly as the treaties are global in character and ratified by 75% of UN member States.[200] However, in exchange for their consent, the States have significant control over the nomination of members, and retain the ability to ignore and defy the views of the committees without sanction.

(CEDAW), and the new Committee on the Protection of Migrant Workers (CPMW). Similar committees exist in the International Labour Organisation, which are broadly subject to similar critical comments: see Phillip R Seckman, 'Invigorating enforcement mechanisms of the International Labor Organization in pursuit of US labor objectives' (2004) 32 *Denver Journal of International Law and Policy* 675.

197. See generally Philip Alston and James Crawford (eds), *The Future of Human Rights Treaty Monitoring* (2000) and Anne F Bayefsky, *The UN Human Rights System: Universality at the Crossroads* (2001).

198. CERD was created by Part II of the Convention on the Elimination of All Forms of Racial Discrimination and was established in 1965. The HRC was created pursuant to Part IV of the International Covenant on Civil and Political Rights, in 1976. CEDAW was established in 1979 pursuant to art 22 of the Convention on the Elimination of all forms of Discrimination against Women. CAT was created in 1986 pursuant to the Convention against Torture 1984. In 1991 the CRC was created in accordance with art 43 of the Convention on the Rights of the Child. CPMW was established by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which held its first session in March 2004: Report of the Committee on the Rights of All Migrant Workers and Members of Their Families, UN GAOR, 59th sess, UN Doc A/59/48(SUPP) (2004). Only the CESCR was created absent a treaty, through ECOSOC resolution 1985/17.

199. Bayefsky, above n 197, 7. The statistics are: 33% for the CCPR, 66% for CAT, 79%, for CERD, and 92% for CEDAW.

200. Ibid. The statistics for non-participation of UN member states by treaty are: 1% for the CRC, 13% for CEDAW, 19% for CERD, 23% for CCPR, 25% for CESCR, 35% for CAT.

In recent years the UN treaty monitoring system has been the subject of trenchant internal and external criticism.[201] The perception of most commentators, and the UN itself, is that the UN treaty process needs major reform. This perception accords with the fact that there is a considerable record of non-compliance by States parties. On these measures, there are significant 'legitimacy gaps' in the UN treaty committee system.

A fundamental flaw of the system is that it is ultimately reliant on the good faith of States,[202] a flaw intimately related to the method by which these committees were created. This good faith appears to be misplaced. Apart from notable cases in which States have openly defied or questioned the views of the committees,[203] follow up procedures introduced by some Committees suggest that only one third of States exhibit a willingness to comply.[204] This picture does not seem to be improving. In the last annual report by the Human Rights Committee, the Committee stated that it was "deeply concerned about the increasing number of cases where States parties fail to implement the Committee's views, or even to inform the Committee within the requested time frame of 90 days as to the measures taken".[205]

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201. Alston and Crawford, above n 197; Bayefsky, above n 197. All the relevant UN and NGO reports are conveniently collected on http://www.bayefsky.com/tree.php/id/48610753; see especially the Report of the UN Secretary-General, *Strengthening the United Nations: An Agenda for Further Change*, UN Docs A/57/387 (2002), A/57/387/Corr.1 (2002), and A/58/351 (2003).
202. James Crawford, 'The UN human rights treaty system: A system in crisis?' in Alston and Crawford, above n 197, 1, 7-8.
203. See, eg, Devika Hovell, 'The sovereignty stratagem : Australia's response to UN human rights treaty bodies' (2003) 28 *Alternative Law Journal* 297.
204. The Human Rights Committee had received follow up information in respect of 90 views by its 57th session, but had not done so in respect of 68 views. In some cases, it was the applicant who informed the Committee that the State had complied. Of those received, two-thirds either stated that the applicant had failed to comply with statutory deadlines, or explicitly challenged the Committee's Views: Andrysek, above n 157, 404. Detailed updated information is available in two reports by the Special Rapporteur for Follow-up on Views, *Follow-up Progress Report*, UN Doc CCPR/C/71/R.13 (2001), and UN Doc CCPR/C/80/FU/1 (2004), and the *Report of the Human Rights Committee*, UN GAOR, 59th sess, UN Doc A/59/40 (2004). Of the 61 communications considered in the 2004 follow up report, at best 11 showed substantial compliance with the Committee's views to the satisfaction of the Rapporteur.
205. *Report of the Human Rights Committee*, UN GAOR, 59th sess, UN Doc A/59/40 (2004), [256].

Not only are States unwilling to comply with the views of the committees, but they are also failing to participate in the process. Lack of compliance with the States reporting requirements is notorious. As at 1 January 2000, an average of 71% of States parties had overdue reports.[206] At 1 January 2000, twenty-nine States parties had never had a report considered by any treaty body.[207] Indeed, it has been suggested that the high rate of ratification is made possible by the view that Committees can blithely be ignored.[208]

This low level of State participation is matched by a low level of participation by individuals in the individual communications process. Despite their wide jurisdiction, the relatively low number of complaints registered indicates either widespread ignorance of the complaints procedures or distrust in the efficacy of those procedures. As already noted, those complaints predominantly come from countries that are generally respectful of human rights, indicating a lack of efficacy in the countries where such a system is needed most.

A key reason nominated by commentators for these 'legitimacy gaps' in the UN treaty committee system is the pervasive influence of international politics. Although the members are elected in their individual capacity, they are nominated by States and in practice the process of election amounts to horse-trading between States.[209] In some cases, the influence of politics leads to the composition of some of these Committees being, to put it politely, somewhat incongruous.[210]

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206. Bayefsky, above n 197, 468.
207. Ibid 253.
208. Ibid 8.
209. Crawford, above n 202, 1, 9.
210. The current membership of the Committees is available at http://www.unhchr. ch/tbs/doc.nsf/Committeefrset?OpenFrameSet. The Committee against Torture, for example, includes representatives from Egypt, Cyprus, China, Ecuador, the Russian Federation and the United States. The use of torture is a significant problem in these countries: see, eg, Human Rights Watch, 'Egypt's Torture Epidemic', Background Briefing Paper, 25 February 2004, available at www.hrw.org/english/docs/2004/02/25/egypt7658_txt.pdf; the European Committee for the Prevention of Torture and Inhuman and Degrading Punishment, *Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 22 to 30 May 2000*, CPT/Inf (2003) 1, 15 January 2003, available at http://www.cpt.coe.int/documents/cyp/2003-01-inf-eng.htm#_Toc27206401; Amnesty International, 'Torture — A growing scourge in China — Time for action', ASA 17/004/2001, 12 February 2001, available at http://web.amnesty.org/library/index/engasa170042001; Amnesty International, *Report 2004*, 'Ecuador',

The influence of governments on members is actual as well as apparent. The internal UN study found that, on average, half of the members are employed in some capacity by their governments.[211] Members meet socially with government representatives prior to the adoption of concluding observations; report to and use the facilities of the UN missions of their state; and country rapporteurs often have close links with the state party being examined.[212]

Perhaps not surprisingly, in view of this, the quality of the members is variable. Despite the requirement that the members are experts, their qualifications are not carefully scrutinised prior to election.[213] The part-time and honorary status of membership has led to members frequently missing significant amounts of meeting time.[214] Although eminent legal experts have served and do serve on the committees, committees are dominated by retired ambassadors and former public servants, many of whom are seen as an extension of their government.[215]

Given the record of non-compliance, non-participation and the politicisation of the process, it seems fair to say that the UN treaty system is not sufficiently supported by contracting parties, and has not gained widespread support by its client base as a whole. As a system of shaming governments, it has had some success and some well-publicised rebuffs. Its lack of enforcement mechanisms and, until recently, its lack of follow up procedures, have only added to the perception of weakness.

Even more damning is the efficiency of the system. In measuring the quality of their contribution, any assessment must recognise the normative value of their views and their status as important resources for non-governmental organisations and for opponents to government

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available at http://web.amnesty.org/report2004/ecu-summary-eng; Nick Paton Walsh, 'Torture now routine for Putin's police', *The Observer*, 19 October 2003, available at http://observer.guardian.co.uk/international/story/0,6903,1066223,00.html; Human Rights Watch, 'Recent Human Rights Watch Work on the Torture and Abuse of U.S. Detainees', http://www.hrw.org/doc/?t=usai_torture.

211. Bayefsky, above n 197, 103. There is a range of 35-60% between the committees, with HRC and CAT having 15% fewer members employed by government.
212. Ibid 104.
213. Many of the nominees' curricula vitae contained very little information, and indeed individuals have been elected in the absence of any curricula vitae at all: ibid 103-104.
214. Ibid 102-104.
215. Andrew Clapham, 'UN human rights reporting procedures: An NGO perspective', in Alston and Crawford, above n 197, 175, 188-190.

policy. Further, the committees have produced some important jurisprudence on the meaning of the treaties and provided redress to a significant number of individuals.[216] However, a review of reports from the HRC and CAT criticised the quality of discussions as being characterised by a lack of cohesion and preparation, and evincing a lack of awareness of important issues and the recommendations of other international human rights bodies.[217] The internal UN study cited ignorance of treaty provisions and processes as a key problem.[218]

Perhaps the most criticised feature of the system, however, is the entrenched delay in considering state reports and communications. A startling conclusion of the internal study was that the chronic backlog of state reports would take the committees between 5.3 and 9.5 years to clear.[219] This was so notwithstanding that the examination of state reports took up the majority of the time in meetings. The record in the case of individual communications is also disheartening. By 2000, the average time difference between the initial submission and a decision on inadmissibility by HRC was 30 months; and the average time between initial submission and a final view was nearly 50 months.[220] For the CAT, it was 22.1 months and 19.8 months respectively.[221]

Critical to this problem is a mismatch between the resources of the committees and their importance.[222] The rapid increase in ratification was not matched by an increase in resources,[223] and while the session time devoted to the Committees has increased, it is still inadequate. In discharging their obligations, the Committees meet from 25 to 60

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216. Andrysek, above n 157, 396; Crawford, above n 202, 3.
217. Roland Bank, 'International efforts to combat torture and inhuman treatment: Have new mechanisms improved protection?' (1997) 8 *European Journal of International Law* 613; Roland Bank, 'Country-oriented procedures under the Convention against Torture: Towards a new dynamism' in Alston and Crawford, above n 197, 145.
218. Bayefsky, above n 197, 6-7.
219. Ibid 200; as at 1 December 2000, on the assumption that one state report would be accepted as satisfying compliance in respect of all overdue reports by that State.
220. Ibid 513-514.
221. Ibid 521-522.
222. See generally Elizabeth Evatt, 'Ensuring effective supervisory procedures: The need for resources' in Alston and Crawford, above n 197, 461, and Markus Schmidt, 'Servicing and financing human rights supervisory bodies' in Alston and Crawford, above n 197, 481.
223. See Schmidt, above n 222, 481.

days a year, including pre-sessional meetings,[224] and deal with between 4 to 41 communications,[225] with views being laboriously adopted by consensus.

More disturbing is that the five bodies (excepting CEDAW) are serviced by a total of 30 professionals, half of whom have no permanent position and frequently rotate or leave. This staff must deal with queries, reports and communications from 193 states; service five committees of 74 members; attend and service meetings held for 48 weeks in a 52-week period, handle 97 state reports, assist with the production of 4-6 general comments, deal with 1-4 inquiries under CAT Article 20, handle approximately 200 living cases, and receive 3,000 pieces of correspondence relating to communications.[226] This is compounded by chronic under-funding.[227]

The priorities and procedures of the committees are partly to blame. Committees spend a great deal of time examining state reports through discussions with a state representative. As noted above, state reports are often inadequate and submitted late, if at all. They are dependent on the good faith of the submitting party. Treaty bodies are not well co-ordinated and at times duplicate each other's work.[228]

Much of the bulky workload of the committees is delegated to preparatory committees. The procedure of adopting views by consensus is laborious and time-consuming. Until recently, committees failed to follow up their concluding observations and views. The committees have not created national vehicles for implementation. Nor do they encourage individual complaints — not surprisingly, given their backlog.[229] Little publicity is given to these views outside of the human rights community.[230]

In light of these criticisms, it is difficult to disagree with the view that until the treaty system is reformed wholesale, there would be little point in setting up another treaty body for the Refugees Convention.[231] The function of authoritative interpretation is peripheral to the many other tasks of a UN body, and thus the need for consistent interpretation will not be the focus of any such body.

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224. 35 days (CERD), 60 days (CCPR), 40 days (CESCR), 40 days (CEDAW), 25 days (CAT), and 60 days (CRC): see Bayefsky, above n 197, 449-454.
225. Ibid 502.
226. Ibid 130.
227. See Crawford, above n 202, 7-8.
228. Bayefsky, above n 197, 6-7.
229. Ibid 6-7.
230. Philip Alston, 'Beyond "them" and "us": Putting treaty body reform into perspective', in Alston and Crawford, above n 197, 501, 505-509.
231. Takahasi, above n 177, 73.

Even if UN treaty committees were reformed, such a body is likely to be fatally compromised by the committees' reliance on the ratification, participation and compliance of States, and their reliance on the overstretched budget and resources of the UN. The restrictive temper of many States is likely to influence, or at least to be perceived as influencing, the work of such a body. Of course, the restrictive temper of many States also makes it highly likely that such a body will either not be created, or not attract the global support necessary to prevent a fragmentation of the universal regime of refugee protection.

Nevertheless, the model of the UN treaty committees provides us with some instructive lessons. The role of States should be minimised in the proposed judicial body. Dependence on the resources of the UN should also be limited. Importantly, the hybrid character of the committees, and the mixture of judicial and other functions, seem unsuitable to the confined and purely legal task in the present case.

On the other hand, the UN treaty committees are an example of the power of the idea of an independent interpreter mandated to expound a particular Convention. The idea (if not the practice) that expert members should be convened by the UN in a global body is attractive, bringing together elements of intellectual and institutional authority in a universal mechanism.

6.2 The regional court system

The most notably successful international judicial bodies have been the European models: the European Court of Human Rights and the European Court of Justice. The European models have in turn inspired the Inter-American Court of Human Rights and, more recently, the proposed African Court of Human Rights and a parallel African Union Court.[232]

6.2.1 The European Court of Human Rights

The European Court of Human Rights, a body of the Council of Europe, is the largest international human rights court in the world. It rules on claims of violations of the European Convention on Human Rights brought by individual applicants against the 45 contracting parties. The jurisdiction and competence of the Court was restructured

232. See generally Nsongurua J Udombana, 'An African human rights court and an African Union court: A needful duality or a needless duplication?' (2002-2003) 28 *Brooklyn Journal of International Law* 811; and also Romano, above n181, 720-723. As the African courts have not yet been established, they are not discussed further.

in 1998 by Protocol No 11, which abolished the European Commission of Human Rights, made the right of individual application mandatory, and reduced the role of the Committee of Ministers to that of supervising enforcement of its judgments.[233] The Court, thus, looks much like a domestic court.

The creation of this Court was also by a formal treaty process. However, the partner institutions of the Council of Europe have proved active in reforming the Court from time to time, so that the Court has evolved from its original function as a part-time court with the discretion to rule on individual applications referred to it by its former partner. The original design of the Court, therefore, bore the hallmarks of the reticence of States parties to submit to an international court, but was enabled to adapt and build upon its success by supportive partner institutions.

In stark contrast to the record of the UN treaty committee system, measures of the legitimacy of the Court reveal a record of great success. Its extensive body of jurisprudence is widely cited by judges and academics, even in States not party to the Convention. It is generally perceived as the leading human rights institution by the legal community. Although its many judgments holding governments to account naturally run into hostility from governments, a recent review of non-compliance with its judgments found that few judgments were defied for political reasons.[234] The extremely high workload of the Court also indicates a perception of success among litigants.

Part of this success stems from its undoubted institutional competence. It has broad jurisdiction over 45 States parties, all of whom have implemented the Convention into their domestic system and many of whom are long-standing members of the Council. Its judgments are binding, and the Committee of Ministers is entrusted with supervision of enforcement.[235]

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233. See Andrew Drzemczewski, 'The European Human Rights Convention: A new Court of Human Rights in Strasbourg as of November 1, 1998' (1998) 55 *Washington & Lee Law Review* 697.
234. Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 'Report on the execution of judgments of the European Court of Human Rights', Doc 8808, adopted on 28 September 2000, reprinted in (2000) 21 *Human Rights Law Journal* 275; European Commission for Democracy through Law (Venice Commission), 'Opinion 209: Implementation of the judgments of the European Court of Human Rights)', reprinted in (2003) 24 *Human Rights Law Journal* 249.
235. This was strengthened by Protocol No. 14, which empowers the Committee of Ministers to ask the Court to interpret its ruling and to institute infringement proceedings.

Some criticism has been made, however, of the independence of the judges,[236] although these criticisms have been met with responses by the partner institutions. Under Protocol No 11, for example, procedures were instituted for standard curricula vitae, and informal examination of the candidates.[237] Under the recently adopted Protocol No 14, the judges are elected by the Parliamentary Assembly of the Council of Europe for a nine-year non-renewable term, an amendment intended to reinforce the independence and impartiality of the judges.[238] The provision for the appointment of ad hoc judges was also amended for the same reasons.[239] Nevertheless, the literature evinces no significant concern with the quality of the judges.

Most importantly, the Court is supported by, and promotes, a well-versed human rights culture that accepts the authority of its decisions, and the importance of human rights. Its high-profile cases receive significant media attention and have worked dramatic changes on domestic laws, as the recent ruling on the requirement for legal aid in the long-running British 'McLibel' case demonstrates.[240]

Indeed, the very success of the Court has led to its chief problem: its increasing workload,[241] a problem aggravated by the accession of new States in 1990. The reform of the Court sought to address this problem, but it has not succeeded in stemming the tide. Applications have increased around 130% since the reform of the Court in 1998, and by about 1400% since 1988.[242] During 2003, some 39,000 new applications were lodged and at the end of that year, approximately

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236. Interights, London, 'Judicial independence: Law and practice of appointments to the European Court of Human Rights' (2003) 24 *Human Rights Law Journal* 262.
237. See Drzemczewski, above n 233, Appendix IV and V, 723-724.
238. *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, opened for signature 13 May 2004, CETS No. 194, available at http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=194&CM=7&DF =22/02/05&CL=ENG.
239. Ibid.
240. *Steel and Morris v United Kingdom*, 15 February 2005, 68416/01; Mark Oliver and agencies, 'McLibel two win legal case', *The Guardian*, 15 February 2005.
241. See, eg, Paul Mahoney, 'New challenges for the European Court of Human Rights resulting from the expanding case load and membership' (2002) *Penn State International Law Review* 101.
242. Jean-Paul Costa, 'The European Court of Human Rights and its recent case law' (2003) 38 *Texas International Law Journal* 455, 467.

65,000 applications were pending before it.[243] Whereas the Commission and the Court had given a total of 38,389 decisions and judgments in the 44 years up to 1998, the single Court has given 61,633 in 5 years.[244] The backlog only continues to increase.[245] As a result, there have been extensive discussions of reform that led to the recent adoption of Protocol No 14 in an attempt to create better procedures to filter unmeritorious applications and deal with repetitive cases.[246]

This backlog illustrates the primary reason such a court is not an appropriate body for our purposes. The function of the Court is adjudicative, and it is because of this that it demands such great resources. Such an adjudicative function is only peripherally concerned with interpretation, and will serve only to distract the proposed body from the objective of promoting consistent interpretations. Moreover, such a function poses the real danger of overwhelming any proposed judicial body with an influx of applications.

However, many of the features of this Court have been adapted for the proposed body. The purely judicial role of the members of the Court, which must contribute to the greater legitimacy of its personnel, has been adopted. The experience of the Court emphasises the need for institutional support, and the receptivity of its addressees.

6.2.2 The European Court of Justice

The other European court, the Court of Justice of the European Communities, is the judicial organ of the European Union and a foundational pillar of the European Community. Although it has responsibility for a large amount of European legislation, the Court consists of only 25 members, recently increased in response to the accession of new members of the EU.[247] As with the ECHR, the form and structure of the Court has been evolutionary, with a Court of First Instance being created in 1989 to hear certain types of disputes.

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243. Steering Committee for Human Rights, Committee of Ministers, *Explanatory report to the [draft] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, 114th sess, CM(2004) 65 Addendum 2 final, [5] (Committee report on Protocol No. 14).
244. Ibid.
245. While the Court is increasing the number of cases terminated, this is matched by an increase in applications. In 2004, applications rose 16%, although the number of cases terminated rose by 17.5%: European Court of Human Rights, 'President calls for speedy ratification of new Protocol', Press Release, 27 January 2005, available at http://portal.coe.ge/enews/EEpylEVZllWQxBJWsQ.php.
246. Committee report on Protocol No. 14, above n 243.
247. European Court of Justice, *Annual Report 2004*, 5.

The Court has been instrumental in fostering the European Union. Indeed, in its early, 'heroic' years, the Court was in the vanguard of integration, notably by its assertion of the supremacy of EC law and the direct effect of EC legislation.[248] Nevertheless, there are question marks over the Court's legitimacy. There has been trenchant criticism of the alleged judicial activism of the Court, and its relationship with national courts, particularly those of France, Germany and Italy, has been rocky.[249] There have been notable examples of defiance of its judgments,[250] especially in the early days of integration.

Of particular concern is that its members are chosen privately by the governments of member states by way of diplomatic meetings.[251] This level of governmental control is perhaps understandable given the major political stakes involved in the project of union, and also reflects the process of political negotiation and compromise involved in the creation and development of the European Union. There does not appear, however, to be any significant concern about the quality of the judges appointed. Moreover, given the political stakes, the record of compliance and participation is very good.

The real problems arise, as with the ECHR, at the level of efficiency. Whilst the judgments of the Court have been criticised for their delphic quality,[252] it is once again the continuing backlog of judgments that have not been implemented that has prompted concern and reform.[253] The 2003 annual report reveals a steady rate of new cases, and a significant number of pending cases.[254] Apart from the appointment of more judges, reforms have included the ability to rule on a case without the assistance of Advocates-General where no new point of law is raised, and the reduction of the size of the Grand Chamber.[255]

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248. See generally Douglas-Scott, above n 151, chs 7 to 8.
249. Ibid 288-291, 199, 210-224, 262-277.
250. For example, the 'Sheepmeat affair', Case 232/78 *Commission v France* [1979] ECR 2729.
251. Douglas-Scott, above n 151, 201.
252. Ibid 228.
253. According to the Commission of the European Communities, 20th *Annual Report on Monitoring the Application of Community Law (2002)*, COM(2003) 669 final, Annex V, 129 judgments of the Court of Justice up until the end of 2002 remained to be implemented. See also Maria A Theodossiou, 'An analysis of the recent response of the Community to non-compliance with Court of Justice judgments: Article 228(2) EC' (2002) 27 *European Law Review* 25; Douglas-Scott, above n 151, 419-422.
254. In 2003, 494 cases were completed; 561 new cases were submitted; and 974 cases were pending: European Court of Justice, *Annual Report 2004*, 215.
255. Ibid.

Many of the comments in relation to the ECHR apply in relation to this Court. However, a few additional matters have influenced the present proposal. First, the experience of the ECHR underlines the need to ensure co-operative dialogue with other human rights bodies and the addressees of the body. Second, the more transparent election process of the ECHR is preferred to that of the ECJ. Third, the difficulty with implementing the delphic judgments of the ECJ underpin the suggestion that opinions of the body should be ambulatory and practical, and capable of implementation. Fourth, the success of the preliminary ruling procedure, by which national courts refer questions of interpretation to the ECJ, suggests its utility for the proposed body. In 1961, there was one preliminary reference; from 1993 onward, the figure has regularly topped 200.[256]

6.2.3 Inter-American Court of Human Rights

In some respects, more might be learnt from the Inter-American Court of Human Rights, one of two human rights organs of the Organisation of American States. It was modelled on the European Court of Human Rights, and has wide advisory and contentious jurisdiction over a range of human rights instruments including the American Convention on Human Rights. A significantly smaller court, with only seven judges, meeting on a sessional basis, the Court is a partner of the more active Inter-American Commission of Human Rights. Both were created by resolutions of the OAS Council.

On any measure of legitimacy, this Court has been less successful than its European counterpart. While there have been important decisions, the number of these are dramatically fewer than the European counterpart: since its establishment in 1979, it has given decisions in 55 cases.[257] It is much less visible than the European counterpart, reflected in part by the relative dearth of academic commentary on the Court. Indeed, it was said in 1990 that "the general public, including American international lawyers and human rights experts, remain[ed] unaware of the Court's existence".[258]

The record on compliance and participation points in the same direction. Although the Court's jurisdiction is mandatory in a majority of the OAS States, it has no jurisdiction in Canada or the United States, as well as some smaller countries. During the 1980s

256. Ibid 229.

257. See the list of judgments at http://www.corteidh.or.cr/seriec_ing/index.html, as at 13 January 2005.

258. Amy S Dwyer, 'The Inter-American Court of Human Rights: Towards establishing an effective regional contentious jurisdiction' (1990) 13 *Boston College of International and Comparative Law Review* 127, 141.

when many of the worst abuses occurred, the Court was largely confined to an advisory role,[259] as it had less potential to harm the interests of States.[260] States remain reluctant to submit to its contentious jurisdiction.[261] Its rulings have led to Peru seeking to withdraw from the Convention[262] and Trinidad and Tobago denouncing it. The oppressive milieu in many of those States in the 1980s also led to reluctance by individuals to use those procedures, as those involved were sometimes threatened or even murdered.[263]

There is no doubt that this poor record stems almost entirely from the lack of support of relevant institutions and a hostile political climate. As the region has become more democratic, its effectiveness has revived. Nevertheless, the level of support by States does not come close to matching compliance in its European equivalent. While generally the State is prepared to pay pecuniary reparations, it is a rare case in which it is prepared to investigate, try and punish the perpetrators.[264]

More specifically, in the 1980s it was not supported by the Inter-American Commission of Human Rights, which barely referred any cases to it and focused instead on country reports.[265] The Commission itself received much resistance initially in its inquiries regarding individual cases.[266] In later years, the Commission has begun to refer

259. See generally ibid; Dinah Shelton, 'Improving human rights protections: Recommendations for enhancing the effectiveness of the Inter-American Commission and Inter-American Court of Human Rights' (1988) 3 *American University of International Law and Policy* 323.
260. Dywer, above n 258, 156-157; Jo M Pasqualucci, 'Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights law' (2002) 38 *Stanford Journal of International Law* 241.
261. See generally Dwyer, above n 258.
262. On 9 July 1999, President Fujimori presented its declaration of withdrawal to the OAS Secretary-General, in response to its judgment in *Castillo Petruzzi*. However on 9 February 2001, the new Peruvian government presented the Court with a note re-affirming its acceptance of the contentious jurisdiction, without interruption, since its original declaration was deposited. See Christina M Cerna, 'The Inter-American system for the protection of human rights' (2003) 16 *Florida Journal of International Law* 195, 204, 206-208.
263. Dwyer, above n 258, 148.
264. Cerna, above n 262, 203-204.
265. Ibid 198-199.
266. Of the first 24 cases considered, it received full responses for only two: Shelton, above n 259, 328.

cases more regularly to the Court. In 2003, the Commission submitted fifteen new contentious cases to it.[267]

As with all the institutions so far considered, the independence of the judges remains a thorny issue. An absolute majority of States parties elects the candidates by secret ballot. As with the ICJ, a State party to a case may appoint an ad hoc judge of its choice.[268] The quality of output is doubtless also impacted upon by the part-time status of the Court. Nevertheless, the judges have been well qualified.

The relatively light caseload does, however, mean that the Court is more efficient than its European counterpart. Remarkably, it manages to function effectively with seven judges and only four sessions a year, on a budget of US$1 million, although significant delay remains a problem, due to a lack of resources, the inefficiency of the filtering system, and the ambiguous role of the Commission.[269] The Court itself has recently introduced procedural reforms to enhance its legitimacy, mainly by allowing greater individual access to the Court, providing for provisional measures, and emphasising the monitoring of compliance with its rulings.[270] The Court is also active in maintaining links with a variety of institutions, non-governmental organisations and other elements of the community.[271]

The tale of the Court reinforces many of the lessons already drawn. Only three matters need be mentioned here. First, the Court's experience emphasises the critical importance of effective institutional support and a receptive political climate. Second, it also highlights the potential of an advisory jurisdiction, wisely used. Third, the activity of the Court in promoting its goals through extra-judicial means has been an inspiration in the development of the proposal.

6.3 The International Court of Justice

The International Court of Justice, composed of 15 judges, is the principal judicial organ of the UN, with contentious and advisory jurisdiction primarily to decide inter-State disputes. Its Statute, an

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267. *Annual Report of the Inter-American Court of Human Rights 2003*, 44-49.
268. Jorge Luis Delgado, 'The Inter-American Court of Human Rights' (1999) 5 *ILSA Journal of International and Comparative Law* 543-545.
269. Michael R Cosgrove, 'Protecting the protectors: Preventing the decline of the Inter-American system for the protection of human rights' (2000) 32 *Case Western Reserve Journal of International Law* 39, 53-57.
270. See also Cerna, above n 262, 204.
271. See *Annual Report of the Inter-American Court of Human Rights 2003*, 54-73.

international treaty adopted together with the UN Charter, was based on the Statute of its predecessor the Permanent Court of International Justice, and therefore reflects the vision and compromises of the victors of the World Wars.

Its premier status as the judicial organ of the UN endows the Court with substantial legitimacy. Its judgments are widely cited as authoritative,[272] and the Court has a significant jurisprudence. Nevertheless, reform proposals have generally concentrated on expanding the Court's jurisdiction, by increasing the number of parties subject to its compulsory jurisdiction;[273] greater use of its advisory jurisdiction,[274] the introduction of a preliminary ruling procedure,[275] or by procedural reforms.[276]

As this might suggest, the Court, like the Inter-American Court of Human Rights, has been widely criticised for its inactivity and ineffectiveness prior to the ending of the Cold War,[277] although it has

272. Shaw, above n 184, 843-844.
273. For a contrary view, see Shigeru Oda, 'The compulsory jurisdiction of the International Court of Justice: A myth?' (2000) 49 *International and Comparative Law Quarterly* 251.
274. See, eg, Louis B Sohn, 'Important developments in the functioning of the principal organs of the United Nations that can be made without Charter revision' (1997) 91 *American Journal of International Law* 652, 658-660; Jacques Chirac, 'Speech by the President of the French Republic, Mr Jacques Chirac, to the International Court of Justice', 29 February 2000, available at http://www.icj-cij.org/icjwww/ipresscom/IPress2000/ipresscom2000-07att_chirac_speech_20000229.htm. See also Dupuy, above n 181, 799-801.
275. See, eg, Judge Stephen M Schwebel, 'Address to the plenary session of the General Assembly of the United Nations', 26 October 1999, available at http://www.icj-cij.org/icjwww/ ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm; Francis G Jacobs, 'Judicial dialogue and the cross-fertilization of legal systems: The European Court of Justice' (2003) 38 *Texas International Law Journal* 547, 550; Sohn, above n 274, 660-661. Cf Rosalyn Higgins, 'The ICJ, the ECJ, and the integrity of international law' (2003) 52 *International and Comparative Law Quarterly* 1; Jenny S Martinez, 'Towards an international judicial system' (2003-2004) 56 *Stanford Law Review* 429, 480.
276. See Sean D Murphy, 'Amplifying the World Court's jurisdiction through counter-claims and third-party intervention' (2000-2001) 33 *George Washington International Law Review* 5.
277. See generally J Patrick Kelly, 'The changing process of international law and the role of the World Court' (1989) 11 *Michigan Journal of International Law* 129.

since revived and, indeed, is now facing a mounting problem with its workload.[278]

The key battle for the Court has always been that of attaining legitimacy in the eyes of the States. Even today, States respond to adverse decisions by attacking the legitimacy of the Court.[279] A significant number of States do not adhere to its compulsory jurisdiction,[280] detracting from its competence and its legitimacy. States can and do refuse to appear before the Court.[281] On occasion its rulings are defied[282] or even openly attacked.[283] As one commentator has observed, "[a]n international culture that gives automatic and full authority to the ICJ's utterances does not exist."[284]

While the Court of necessity offends parties before it, it does

278. See generally Susan W Tiefenbrun, 'The role of the World Court in settling international disputes: A recent assessment' (1997) 20 *Loyola of Los Angeles International and Comparative Law Journal* 1, 2-4.
279. See, eg, the Israeli reaction to the recent judgment on the Israeli security barrier: 'Israeli statement on ICJ advisory opinion on Israel's security fence', 9 July 2004, available from the Israeli Ministry of Foreign Affairs website, http://www.mfa.gov.il/.
280. Currently, only 65 of the 191 UN members have adhered to the ICJ's compulsory jurisdiction, and the UK remains the only permanent member of the Security Council that subscribes to Article 36(2) of the Court's statute: *Report of the International Court of Justice, 1 August 2003-31 July 2004*, UN GAOR, 59th sess, UN Doc A/59/4 (2004) ('ICJ Annual Report 2004'), [57].
281. Stephen M Schwebel, 'The docket of the World Court' (1998-1999) 37 *Columbia Journal of Transnational Law* 1, 7. However, a recent study suggests that this problem is no longer real: Colter Paulson, 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434, 460.
282. Eg, the famous case of *Breard v Greene*, 523 US 371 (1998), when the US executed Mr Breard in spite of the provisional measures taken by the ICJ: see 'Agora: *Breard*' (1998) 92 *American Journal of International Law* 666.
283. See, eg, the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14: see generally Keith Highet, '"You can run but you can't hide" — Reflections on the US position in the *Nicaragua* case' (1987) 27 *Virginia Journal of International Law* 551. Or, more recently, the US and Israeli responses to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (unreported, International Court of Justice, 9 July 2004).
284. Charney, above n 181, 703.

retain the support of the General Assembly[285] and the wider community. International pressure generated by wide publicity in high-profile cases illustrates this support. Such support is crucial as the Court has no enforcement powers. Yet its judgments are, recent studies have shown, generally effective,[286] and have, at the least, significant normative value.[287] The increasing number of cases submitted to the Court also suggests that States increasingly view the Court positively.

Another oft-criticised element of the Court is the highly political process of election.[288] The judges are elected both by the General Assembly and by the Security Council. From the openly political 'pre-nomination' process, to the nomination process and election, governmental influence is "omnipresent".[289] In addition, nations can appoint an ad hoc judge of their nationality on cases in which they are involved, and States may consult with the Court in constituting Chambers, both practices that undermine the legitimacy of the Court.[290] Judges, however, are usually well-qualified.[291]

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285. See, eg, the following General Assembly Resolutions: Res 44/43, UN GA OR, 49th sess, A/RES/44/43 (1990); UN GA OR, 55th sess, A/RES/55/33X (2001); and UN GA OR, 10th emergency special sess, UN Doc A/ES-10/L.18/Rev. 1 (2004).
286. Paulson, above n 281, 434; Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (2004).
287. Andrew Coleman, 'The International Court of Justice and highly political matters' (2003) 4 *Melbourne Journal of International Law* 29.
288. Although this does not appear to have in fact impeded independence: see Shaw, above n 184, 843, 846.
289. Niels Blokker and Sam Muller, 'The 1996 elections to the International Court of Justice: New tendencies in the post-Cold War era?' (1998) 47 *International and Comparative Law Quarterly* 211, 213.
290. Shaw, above n 184, 834-835; Tiefenbrun, above n 278, 23-24. For a contrary view as to its operation in practice, see Stephen M Schwebel, 'National judges and judges ad hoc of the International Court of Justice' (1999) 48 *International and Comparative Law Quarterly* 889. It seems, however, that the practice of using chambers is now in disuse: Gregory Maggio, 'Process, practice and procedure of the International Court of Justice' (1998) 92 *American Society of International Law Proceedings* 278, 289.
291. See generally Chittharanjan F Amerasinghe, 'Judges of the International Court of Justice — Elections and qualifications' (2001) 14 *Leiden Journal of International Law* 335. Contrast the earlier comments by Gabriel M Wilner and Thomas J Schoenbaum, however, that questioned the quality and independence of the judges: 'Forum: American acceptance of the jurisdiction of the International Court of Justice: Experiences and prospects' (1989) 19 *Georgia Journal of International and Comparative Law* 489, 497-500.

Whilst in the past reformers have focused on the legitimacy of the Court, the recent increase in workload has turned attention to problems of efficiency. According to its latest report, the Court has 20 cases pending, whereas its rate of turnover is at best one or two judgments a year.[292] Indeed, from its establishment until 2000, the Court had only disposed of 47 cases in total.[293]

The focus of recent reforms has been on balancing the quality of the judgments with more efficient procedures. To that end, there has been a push towards reforming its laborious procedure of deliberation, and towards improving its case management and imposing tighter controls on the parties.[294] These reforms, however, will not improve the Court's meagre budget. The Court is extraordinarily under-resourced compared to a domestic court, and compared even to the ad hoc criminal tribunals.[295] As late as 1996, there was only one photocopier

292. ICJ Annual Report 2004, above n 280, 17.

293. Oda, above n 273, 257.

294. See generally D W Bowett et al, The International Court of Justice: Process, Practice and Procedure (1997); Report of the Secretary-General, *Consequences that the Increase in the Volume of Cases before the International Court of Justice Has on the Operation of the Court*, UN GAOR, 53rd sess, UN Doc A/53/326 (1998); Gavan Griffith QC, 'Modernising the general business of the International Court of Justice: A critical evaluation' (1996) 17 *Australian Yearbook of International Law* 75; Shaw, above n 184, 855-864; Shabtai Rosenne, 'Controlling interlocutory aspects of proceedings in the International Court of Justice' (2000) 94 *American Journal of International Law* 307; 'International law in ferment and the World Court: A discussion on the role and record of the International Court of Justice' (2000) 94 *American Society of International Law Proceedings* 172, 176-180; Maggio, above n 290. See also International Court of Justice, 'The International Court of Justice takes measures for increasing its productivity' (Press Release 2004/30, 30 July 2004), available at http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-30_20040730.htm.

295. In 2004, the ICJ had in total 98 staff and the ICTY had a staff of 1,180; for 2004-2005, the ICJ had a budget of $31.5 million and the ICTY an initial budget of nearly $300 million (with another $27 million requested): ICJ Annual Report 2004, above n 280, 11, 54; Report of the Secretary-General, *First Performance Report of the International Criminal Tribunal for the former Yugoslavia for the Biennium 2004-2005*, UN GAOR, 59th sess, UN Doc A/59/547 (2004), 3; *Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN GAOR, 59th sess, UN Doc A/59/215 – S/2004/627 (2004) ('ICTY Annual Report 2004'), 87. The 2005 budget for the International Criminal Court is approximately 66 million euros:

for all of the judges.[296] The last budget approved the conversion of five law clerk posts to permanent positions, but rejected the addition of a second IT officer.[297]

As with the other Courts, the adjudicative function of the ICJ makes it an unsuitable model. Its laborious procedures and its slow rate of decision-making compound the usual difficulties. Two other features are unsuited to the present proposal: the constraint on resources, and the method of State appointment.

Nevertheless, the proposed body would benefit from the global institutional mandate that underpins the ICJ. The experience of the ICJ shows that a small number of expert judges can be an effective tool even in the absence of enforcement powers, a testament partly to the power of the idea of the judiciary.

6.4 The International Criminal Court

Although international criminal tribunals and courts perform a function quite different from that of the proposed judicial body, the wealth of literature on the performance of these recent tribunals and courts reinforces the general themes on the need for legitimacy and effectiveness.

Most strikingly, the International Criminal Court demonstrates the challenges posed by a lengthy and complex implementation process.[298] On the one hand, the Rome Statute of the International Criminal Court[299] is a source of great legitimacy, evincing as it does the consent of a large number of States to a pioneering court, a consent strengthened by its speedy ratification.

Assembly of States Parties, *Programme budget for 2005, Contingency Fund, Working Capital Fund for 2005, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for the year 2005*, Resolution ICC-ASP/3/Res.4.

296. Griffith, above n 294, 81.
297. ICJ Annual Report 2004, above n 280, 11, 52-54. Law clerks were first introduced in the 2002-2003 budget: *Report of the International Court of Justice, 1 August 2000-31 July 2001*, UN GAOR, 56th sess, UN Doc A/56/4 (2001), 17.
298. Although the history of the idea is even longer, the ICC itself can be said to have originated in 1989, when the UN General Assembly charged the International Law Commission again to explore the feasibility of the project. See generally Cassandra Jen, 'A Successful Permanent International Criminal Court ... "Isn't it Pretty to Think So?"' (2004) *Houston Journal of International Law* 411, 414-429.
299. Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

On the other hand, the descriptions of the Convention that adopted the Rome Statute, with its 2000 unprepared and largely unqualified delegates rushing through midnight sessions, demonstrate the problems with such a process.[300] The compromises forced by the process may have undermined the legitimacy of the operation of the Court, with critical battles being fought in the negotiations over questions of legitimacy, such as the election of judges,[301] and the discretionary powers of its prosecutor.[302] In other respects, the parties to the Statute learnt from the failings of other international judicial bodies, such as the requirement that states must submit a statement of qualifications when nominating candidates.[303]

Critics of the Court rightly point out that its legitimacy will be undermined by a lack of political support. The need, and efficacy, of such a court has not convinced everyone; some think it merely an example of judicial romanticism.[304] Further, the fact that the Court will not have jurisdiction over both the only superpower, and States with the worst human rights records, undermines its objective.[305] Some point also to the radically different nature of the Court, and the reluctance of States to submit its citizens to individual, rather than

300. See M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the establishment of an international criminal court' (1999) 32 *Cornell International Law Journal* 443.

301. See Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999), ch 5; Sylvia de Bertodano, 'Judicial independence in the International Criminal Court' (2002) 15 *Leiden Journal of International Law* 409, 421-422.

302. See, eg, Lee, above n 301, ch 6; Allison Marston Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion of the International Criminal Court' (2003) 97 *American International Journal of Law* 510, 513-516; Robert T Alter, 'International criminal law: A bittersweet year for supporters and critics of the International Criminal Court' (2003) 37 *International Law* 541, 544-545.

303. See Thordis Ingadottir, 'The International Criminal Court, Nomination and election of judges: A discussion paper', ICC Discussion paper #4, available at http://www.pict-pcti.org/publications/ICC_paprs/election.pdf; Daryl A Mundis, 'The Assembly of States Parties and the institutional framework of the International Criminal Court' (2003) 97 *American Journal of International Law* 132, 142-143. Generally the elections so far have been well received: see Alter, above n 302, 547.

304. Steven R Ratner, 'The International Criminal Court and the limits of global judicialization' (2003) 38 *Texas International Law Journal* 445.

305. Ibid 449.

State, responsibility.[306] These concerns are also compounded by the wide-ranging attack on the ICC by the US.[307]

As the International Criminal Court has only been recently established, it is premature to speculate on its effectiveness. One sign that bodes well is that the Court is comparatively well-funded, with an annual budget in the vicinity of 31 million euros, and more than 200 staff,[308] although some have already expressed doubts about the efficacy of an international criminal court, with reference to the lengthy delays and difficulties experienced by the ad hoc criminal tribunals.[309]

6.5 International Criminal Tribunals

The difficulties experienced by the most famous of the ad hoc criminal tribunals, those for the former Yugoslavia (ICTY) and Rwanda (ICTR), are legion. In many ways, those tribunals represent examples of what not to do.

Sobering lessons can be drawn from Pierre Hazan's recent history of the ICTY.[310] The history begins with the "bloody" birth of the ICTY, a birth prompted by political opportunism and tainted with the "original sin" of their creation by resolutions of the Security Council, designed to salve the conscience of Western nations and disguise their reluctance to act.[311] In both cases, the tribunals were born in the wake

306. Ibid 445.

307. This includes a Security Council resolution that for one year from its establishment, the ICC will not begin or proceed with investigations or prosecutions against current or former officials and personnel from a State contributing to a UN peacekeeping mission but not a party to the Rome Statute: SC Res 1422, UN SCOR, 4572nd Sess, UN Doc S/RES/1422 (2002); bilateral agreements purporting to invoke Article 98(2) of the Rome Statute: see Cosmos Eubany, 'Justice for some? US efforts under Article 98 to escape the jurisdiction of the International Criminal Court' (2003) 27 *Hastings International and Comparative Law Review* 103; the *American Servicemembers' Protection Act of 2002* which essentially proscribes American co-operation with the ICC: 22 USC §7421-7432; and attempts to revise status of forces agreements. See generally Alter, above n 302, 547-550; Jen, above n 298; Diane F Orentlicher, 'Judging global justice: Assessing the International Criminal Court' (2003) 21 *Wisconsin International Law Journal* 495, 495-496.

308. Mundis, above n 303, 144.

309. Ratner, above n 253, 449.

310. *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the former Yugoslavia* (2004).

311. The ICTY was established by SC Res 827, UN SCOR, 48th sess., 3217th mtg., 1-2 (1993); 32 ILM 1159. The ICTR was established by its Statute annexed to and adopted by SC Res 955, UN SCOR 49th sess., 3453rd mtg, UN Doc S/RES/955 (1994); 33 ILM 1598.

of the failure of the international community to prevent genocide, and in the case of the ICTY, while war in the former Yugoslavia was still raging.

The keynote of Hazan's history is the baleful influence of the ebbs and tides of international politics. Accusations of "selective, politicized justice" still persist.[312] Two recent examples suffice: broadsheet editorials denouncing the Milosevic trial as a travesty in which the ICTY has "demonstrated its bias in favour of the economic and military interests of the planet's most powerful nations";[313] and a Belgian expert on the Rwandan genocide who recently ended co-operation with the ICTR, over its failure to prosecute any of the Tutsis.[314] There is no doubt that the tribunals work in a highly political climate, reliant as they are upon the UN, the co-operation of governments in extradition and enforcement, and the financial contributions of States, and mired as they are in still-simmering ethnic and political conflicts.

Examples abound of the influence this has on the tribunals. Hazan details how the ICTY was almost stillborn by a Security Council that refused to provide it with resources, delayed in appointing a prosecutor, and vetted the appointment of judges.[315] He describes the battle between the activist judges and the politically savvy first prosecutor to secure indictments for the major war criminals.[316] He also chronicles the promises of massive financial aid that finally secured the arrest of Slobodan Milosevic,[317] for which the responsible Prime Minister was later assassinated.[318]

The financial pressure exerted by the UN Security Council continues today: it has recently insisted upon the completion of the tribunals' work by 2010, despite the protests of the tribunals.[319] The Security Council also forced out the prosecutor for the ICTR,

312. Jen, above n 298, 424.
313. Neil Clark, 'The Milosevic trial is a travesty', *The Guardian*, 12 February 2004, available at http://www.guardian.co.uk/comment/story/0,3604,1146238,00.html.
314. Rory Carroll, 'Genocide tribunal "ignoring Tutsi crimes"', *The Guardian*, 13 January 2005, available at http://www.guardian.co.uk/rwanda/story/0,14451,1389194,00.html.
315. Hazan, above n 310, ch 3.
316. Ibid ch 4.
317. Ibid 156.
318. Katarina Subasic, 'Case closed' (2003) 50(7) *World Press Review*, available at http://www.worldpress.org/Europe/1133.cfm.
319. SC Res 1534, UN SCOR, 4935th mtg, UN Doc S/RES/1354 (2004); Jim Wurst, 'UN Council urged to postpone deadline on war crimes trials', *UN Wire*, 30 June 2004, available at http://www.unwire.org/UNWire/20040630/449_25389.asp

allegedly under pressure from the Rwandan President.[320] The tribunals also suffer large funding gaps due to overdue payments by States.[321] More critically, the tribunals have been obstructed from a lack of co-operation by governments in investigations and arrests[322] and the extradition of suspects[323] and continue to rely on political and financial pressure from US and European countries to procure reluctant co-operation.[324] The perceptions of illegitimacy thus fuelled are played upon routinely by Milosevic in his trial.[325]

Similar problems dog the ICTR. The government of Rwanda voted against the establishment of the ICTR,[326] and recently denounced a controversial acquittal.[327] Rwandan government officials have voiced concerns over the high rate of resignations of Tribunal officials, citing

320. Steven Edwards, 'Del Ponte says UN caved to Rwandan pressure', *National Post*, 17 September 2003, available at http://www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0918ponte.htm.
321. See *Ninth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January And 31 December 1994*, UN GAOR, 59th sess, UN Doc A/59/183–S/2004/601 (2004) ('ICTR Annual Report 2004'); ICTY Annual Report 2004, above n 295.
322. Louise Arbour and Aryeh Neier, 'History and future of the International Criminal Tribunals for the former Yugoslavia and Rwanda' (1997-1998) 15 *American University International Law Review* 1495, 1501-1502.
323. Susan W Tiefenbrun, 'The paradox of international adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court' (1999-2000) 25 *NCJ International Law and Commercial Regulation* 551, 557, 566-569, 582; Jen, above n 298, 426.
324. See, eg, 'EU keeps pressure on Croatia before entry talks', 21 February 2005, Reuters, available at http://www.alertnet.org/thenews/newsdesk/L21710159.htm; 'Serbia and Montenegro assistance', 23 January 2005, Voice of America, available from http://www1.voanews.com/Editorials/.
325. For an excellent account see Hazan, above n 310, 159-170.
326. Tiefenbrun, 'The paradox of international adjudication' above n 323, 557, 566-569.
327. 'Thousands demonstrate against UN tribunal', Hirondelle News Agency, 29 February 2004, available at http://www.hirondelle.org/hirondelle.nsf/0/48946dbe58a37270c125680100703134?OpenDocument.

external pressure.[328] Even the impartiality of the judges in the ICTR has been challenged on appeal.[329]

Nor have the tribunals gained the support of the communities they are meant to serve. A recent opinion poll found that 32% of Serbs think the ICTY's major goal is "to place all the blame for war suffering on Serbs".[330] Recent acquittals by the ICTR prompted thousands of Rwandans to demonstrate against the Tribunal.[331]

However, despite these travails, Hazan concludes that something of importance has been achieved:

> It has given a decisive push to international criminal law. It has incorporated rape among the crimes against humanity. It has judged war criminals of all stripes in the former Yugoslavia. It has returned dignity to victims by publicly recognizing their suffering. It has indicted, for the first time, a sitting head of state. ... it weakens the perception of collective responsibility and opens the door for hope in these once war-torn societies.[332]

Moreover, these early forays into international criminal justice laid the foundation for the International Criminal Court,[333] as well as subsequent ad hoc criminal tribunals. The recent calls for a tribunal, or the exercise of the jurisdiction of the International Criminal Court, in the case of the atrocities in Darfur are testament, partly, to the achievements of these tribunals.[334]

This is despite the chronic inefficiencies experienced by the tribunals. One measure of this inefficiency is the significant delay experienced by those accused. A recent review, which found that defendants spent an average of one year and five months in pre-trial detention and an average of 17 months in the trial process, pinpointed various causes: the large number of charges, the complexity of those

328. 'Rwanda alarmed by resignation of top Tribunal officials', Hirondelle News Agency, 18 May 2004, available from http://www.hirondelle.org/arusha.nsf/English?OpenFrameSet.
329. The fourth ground of the appeal in *Prosecutor v Furundzija*, Case No. IT-95-17/1A, Judgment of the Appeals Chamber (July 21, 2000), [164]-[215].
330. Ana Uzelac, 'Hague prosecutors rest their case', 27 December 2004, available at http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/1227rest.htm.
331. 'Thousands demonstrate against UN tribunal', above n 327.
332. Hazan, above n 310, 199.
333. Arbour and Neier, above n 322, 1496-1497.
334. See generally Human Rights Watch, 'US proposal for a Darfur tribunal: Not an effective option to ensure justice', available at http://hrw.org/english/docs/2005/02/15/sudan10179.htm.

charges, the mix of civil and common law procedures, the need for translation, the reticence of some judges, lax rules in the appellate process, and high expectations.[335]

This is compounded by the constant problem of resources. In the case of the ICTY, it began without any means of investigating crimes; it had no courtroom, rules of evidence or procedure, jails, or witness protection strategies; and it had little funding.[336] An observer noted: "They were starting literally from nothing but a UN Security Council resolution".[337]

Its experience, however, underscores the enormous resources required for an effective criminal tribunal. The staff at the ICTY grew to 1,180 in 2004 and its budget now surpasses $300 million.[338] Nevertheless, the Tribunal was forced to freeze recruitment in response to UN concerns over the spiralling costs of international justice, and the failure of States to pay their contributions.[339] As the cost of the tribunals escalates, tighter case management and procedural reform has moved up on the agenda.[340]

Given the vast sums spent on the ICTY, only 55 people have so far received judgment at the trial stage, with 33 having received their final sentence.[341] The ICTR, for its part, has convicted 20 people and acquitted three since its inception.[342] The massive number of suspects, in the case of the ICTR, has led to the Rwandan government setting up local courts to try the remainder of those implicated in the genocide.

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335. Carla Sapsford and Ana Uzelac, 'Lengthy Hague trials under scrutiny', Institute for War and Peace Reporting, 7 January 2005, available at http://www.iwpr.net/index.pl?archive/tri/tri_388_1_eng.txt.
336. See the (first) *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, UN GAOR, 49th sess, UN Doc A/49/342-S/1994/1007 (1994), 28-51.
337. Benjamin Ferencz, chief prosecutor in the Nuremberg trial, reported in Uzelac, above n 330.
338. ICTY Annual Report 2004, above n 295.
339. Ibid.
340. See generally Daryl A Mundis, 'The election of *ad litem* judges and other recent developments at the International Criminal Tribunals' (2001) 14 *Leiden Journal of International Law* 851; and the ICTY Annual Report 2004, above n 295, and ICTR Annual Report 2004, above n 321.
341. See 'Key figures of ICTY cases' as at 15 February 2005, http://www.un.org/icty/glance/index.htm.
342. 'Rwanda: Tribunal ready to start 17 new genocide trials, prosecutor says', IRIN News, 20 January 2005, available at http://www.irinnews.org/report.asp?ReportID=45158&SelectRegion=Great_Lakes &SelectCountry=RWANDA.

The international criminal judicial bodies provide, perhaps, the starkest examples of the difficulties of designing a judicial institution. Obviously, these models are inherently unsuitable, directed as they are to the prosecution and punishment of criminals. It is this investigatory and procedural aspect that is responsible for much of the delay and the demand on resources. As with the other bodies already discussed, the important matters of resources and procedures, and institutional and political support, cannot be ignored.

These examples also warn against the politicisation of the method of creation. The International Criminal Court demonstrates vividly the difficulties in the treaty negotiation process, while the creation of the ad hoc criminal tribunals by way of UN Security Council resolution tied those tribunals irrevocably to the fickle political needs, and purse strings, of the Security Council, as well as impaired their credibility. Most importantly, from our perspective, the pervasive politicisation of these bodies is something this proposed body must avoid.

What the proposed body should emulate, however, is the selection of active and committed judges. Hazan's chronicle of the ICTY tells the story of the resistance of the judges of the ICTY to the many obstacles put in their way, and of the way their persistence finally paid off. The careful selection of the first judges on the proposed body, therefore, will be vital.

6.6 Lessons to be learnt

The design of the present proposal draws from the lessons of this review. First, the objectives of the proposed body isolate the features of judicial bodies that have contributed to the proliferation of such bodies in the international sphere. These include an interpretative function; a supervisory function; and a legitimating function, by virtue of the special authority of the law and the special responsibilities of judges. It also draws from the adverse experiences of these bodies. For example, the objective of minimising the resources required, and of promoting dialogue within and outside the judicial community about refugee law, are lessons drawn from the repeated experiences of under-resourcing in international bodies, and from the political isolation of some of these bodies.

The oft-repeated theme of labour-intensive and repetitive international adjudication has also informed the design of the proposal. As already noted, adjudication will not be an aspect of the proposed body. The body will also not be involved in reviewing state reports and individual complaints in the manner of UN treaty committees, for the reasons already noted.

The specific details of the way in which the proposed body will

function are also drawn from the review. The need for exploratory and discursive opinions, with practical and specific guidance, is evident from the criticisms of the ICJ and the ECJ, as well as the difficulties the European courts have faced in implementing their judgments due to their declaratory nature. The practice of allowing dissent, although encouraging unanimity, is accepted by many of these bodies. Giving the judicial members extensive power to regulate its own procedures seems desirable given the number of procedural reforms instituted by international bodies. The suggestion that the body target the issues of greatest practical and global significance is derived from the frustrating experience of the passivity, repetition and time-consuming nature of international adjudication. An evolutionary approach to the body is consonant with the evolution of the ECHR. The achievements of the IACHR, the ICJ and, to a lesser degree, the UN treaty committees give encouragement to the use of a non-binding, non-enforceable power of persuasion.

The small size of the proposed body reflects the difficulty larger courts, such as the ICJ, have had in reaching decisions. The composition of the body, by jurists, judges and academics representative of a range of civilisations, legal systems, cultures and genders, is similar to that of most international judicial bodies. The part-time nature of the roles was suggested by the IACHR, although the pitfalls of this were illustrated by the UN treaty committees. The significant problems each body has had in ensuring a legitimate and politically neutral appointment process were taken into account when developing a different process, although that process is based on a judicial appointments process that is currently a trend in domestic legal systems.

Most obviously, the various forms of creating such a body and their attendant advantages and disadvantages were considered. In particular, the political difficulties in negotiating a treaty have been avoided, although the flexibility of a more informal creation was also a key benefit.

In envisaging a co-operative special relationship with UNHCR, regard was had to the desirability of a close institutional relationship in order to support the judicial body. The initial lack of co-operation with the Inter-American Commission of Rights, and the push-pull relationship of the ICJ and the ad hoc criminal tribunals and the UN Security Council, stood in stark contrast to the support of the Council of Europe for the ECHR. However, such a relationship should not compromise the judicial independence of the body. The consequences of too close an affiliation are readily apparent in the experience of the UN treaty committees.

The critical question of resources also led to an alternative model

of funding. Most of the bodies reviewed had significant issues with adequate resources and with the political strings that came attached. The independence of those resources, and the need to look outside the UN budget, were key considerations in the development of the proposal.

A last significant influence of the review was in its underlying theme of the need for wider engagement with interested parties. Certainly, the UN treaty committees have been criticised for not engaging NGOs often enough, and of being ignorant of relevant activities by other institutions. The ECJ has also been criticised for not being co-operative enough with national institutions which initially took umbrage. The ad hoc criminal tribunals, and the ICJ, have often been criticised for being isolated in their decision-making.

7. Conclusion

As was noted in the Global Consultations process, "the viability of a universal commitment to protection [in refugee law] is challenged by divergence in State practice."[343] This paper set out a modest, and practical, proposal to address one aspect of divergence — the interpretation of the Refugee Convention.

The present inconsistency in the Convention's interpretation is both undesirable and unjustifiable. The universal regime of international law envisaged by the Convention is, in practice, fragmented by diverging national interpretations. An international judicial authority, as has become evident in relation to many other international instruments, is an essential element of a regime based on international law.

This is not a problem that, as the present proposal indicates, demands significant resources or political will. It is a problem that is eminently capable of resolution by the international legal community. Indeed, it is a problem that can even be addressed at minimal cost, and not at the expense of the pressing material needs of refugees.

For many commentators, the prospect of an international refugee court has been a pipe dream. Looked at closely, however, what is needed is not yet another court to determine refugee status, but an authoritative interpreter of the Convention.

That fundamental insight informs the proposal. A small number of internationally renowned experts in refugee law, endowed with the authority of UNHCR and with their own formidable intellectual, analytical and rhetorical gifts, would be an invaluable asset in the task of promoting convergence in the interpretation of the Refugees

343. Hathaway and Foster, above n 105, 358.

Convention. Funded by civil society and the legal community in particular, untainted by the political influence of States, and untroubled by the procedural and administrative difficulties of deciding real cases, such a body would avoid many of the difficulties experienced by other international courts and tribunals. Instead, it could focus clearly on the task at hand — interpreting the Refugee Convention by the fearless and authoritative application of legal knowledge and rules.

REFUGEE AND ASYLUM PROTECTION IN THE AMERICAS: EMERGING TRENDS AND EVOLVING BEST PRACTICES

LORI SCIALABBA*

INTRODUCTION

I am pleased to have the opportunity to provide you with an overview of the United States' current asylum and refugee adjudication process. To begin with, I will briefly describe the administrative and judicial bodies that play an integral part in the United States asylum process. Next I will provide a brief overview of the current process by which an asylum seeker obtains such relief in the United States.[344]

I. ADMINISTRATIVE AND JUDICIAL BODIES

The Constitution and immigration laws of the United States assign a role in the determination of questions of law and fact in immigration matters to a wide array of administrative and judicial bodies. Some of these are more central to the process than others, but even those who rarely participate in a direct manner, such as the United States Supreme Court, may wield substantial authority. To understand the role of the principal participants in the asylum process it is important not only to discuss their functions and responsibilities, but also the role of other authorities that influence their work. These include United States Immigration Courts, the Board of Immigration Appeals, the Department of Homeland Security, and the United States Federal Courts.

A. United States Immigration Courts

Immigration Courts in the United States are a component of the U.S. Department of Justice, a Cabinet-level executive agency headed by the Attorney General of the United States. The courts are part of an agency known as the "Executive Office for Immigration Review" (EOIR). At this time, there are 224 Immigration Judges, appointed to indefinite terms of office by the Attorney General (currently Alberto

* Chairman of the Board of Immigration Appeals Executive Office for Immigration Review.

344. Additionally, I will identify what I believe works best in the asylum process as well as mention where I believe improvements could be made.

R. Gonzales). These are career not political appointments, and Immigration Judges often serve for many years, even decades, on the bench. The Office of the Chief Immigration Judge (OCIJ), headed by the Chief Immigration Judge (currently Michael J. Creppy) supervises the Immigration Judges for purposes of training and administration. However, Immigration Judges are independent in their decision-making and OCIJ has no authority to dictate how cases are to be decided.

B. Board of Immigration Appeals

The Board of Immigration Appeals (Board) is another component of the EOIR. The Board, headed by a Chairman (currently Lori Scialabba) is comprised of 11 Members and 125 staff attorneys. The Board hears appeals from decisions rendered by Immigration Judges on issues of asylum, withholding of removal (non-refoulement), inadmissibility, removal, relief from removal, adjustment to immigrant status, and other matters. Members of the Board are essentially appellate immigration judges. They are appointed by the Attorney General in much the same status as Immigration Judges, and often serve a substantial tenure. Like the Immigration Judges, the decisions of individual Board Members are independent. Decisions by the Board are the final and binding administrative determination in any individual case. The Board has been given nationwide administrative jurisdiction to review appeals in asylum and refugee matters. In addition, certain cases designated by the Board as formal precedents ("Interim Decisions") are published and serve as controlling legal authority for the Board, the Immigration Judges, and the Department of Homeland Security (DHS). On rare occasions, a precedent decision of the Board may be vacated, withdrawn, or reversed by the Attorney General acting in his capacity as the Executive Branch officer with principal authority over administration of the Immigration and Nationality Act (INA). [345]

Prior to September 2002, the Board handled a majority of appeals in panels consisting of three Board Members. The Attorney General revised procedures for adjudications before the Board through the Board Reform Regulation which now provides that the majority of appeals may be decided by a single Board Member as opposed to three Board Members. Additionally, a case management system was adopted to screen all cases and manage the Board's caseload, and time frames now govern the Board's adjudication (cases ready for

345. One example of the Attorney General reversing a Board decision is *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

adjudication must be completed in 90-days, single Board Member, and 180-days, three Board Member review).

C. The Department of Homeland Security

A Cabinet-level executive agency headed by the Secretary of Homeland Security (currently Michael Chertoff), DHS was established through the National Strategy for Homeland Security and by the Homeland Security Act of 2002, Public Law 107-296. Since March 1, 2003, the Secretary of DHS began administrating and enforcing the immigration laws of the United States when the former Immigration and Naturalization Service (INS) was transferred from the Department of Justice (DOJ) to DHS. Through the U.S. Citizenship and Immigration Services (CIS), DHS provides immigration-related services and benefits such as citizenship, employment authorization, asylum or refugee processing.

The Asylum Division, a component of CIS, has been delegated the authority to adjudicate applications for asylum presented by aliens who have not been placed in removal proceedings before an Immigration Judge. The staff of the Asylum Division includes several hundred full-time Asylum Officers whose primary responsibility is the adjudication of asylum applications and who receive specialized and continued training for this task. Asylum Officers either grant asylum or refer applicants who are not lawfully present in the United States for a hearing before an Immigration Judge. At this subsequent hearing, the asylum application may be renewed and adjudicated on a de novo basis. For aliens lawfully present in the United States, Asylum Officers either grant or deny the application.

DHS also is responsible for adjudicating the admission of refugee immigrants from outside United States borders. The Secretary of Homeland Security has also delegated this authority to CIS, which works in close cooperation with the Department of State in carrying out this function. The number of such refugee admissions varies from year-to-year and is not subject to a statutory limit or cap (as are many other categories of legal immigration into the United States). The Secretary of State annually proposes a level of admissions, with specific allocations for different regions of the world, to Congress. For the 2005 fiscal year (October 1, 2004 - September 30, 2005), the refugee admission from outside the United States borders was set at a total of 70,000. Personnel from the State Department and DHS interview refugee applications at various locations throughout the world, and their decisions are not subject to review by Immigration Judges, the Board of Immigration Appeals, or the Federal Courts.

D. Federal Courts

Federal Courts under Article III of the United States Constitution consist of judges appointed by the President and confirmed by the Senate for life tenure. There are 94 United States District Courts, 12 United States Courts of Appeals, and the Supreme Court. The Federal Courts, for the most part, have no original jurisdiction in immigration matters. (Exceptions would include challenges to the constitutionality or validity of a statute or regulation, and certain matters of naturalization.) The jurisdiction of the Federal Courts is largely a derivative of the administrative jurisdiction of the Department of Justice, and the right to appeal such administrative decisions is regulated by statute. In most cases, an alien must pursue all of his or her claims in the administrative forum before seeking "judicial review" of such decisions. Most such appeals are taken from decisions of the Board of Immigration Appeals. Based upon statistical information provided by the Office of Immigration Litigation, a component of the Department of Justice, which represents the Government in Federal Court, the courts uphold 93.6% of the administrative decisions appealed to the Federal Courts.

II. STATUTES AND REGULATIONS

The Congress of the United States is said to hold "plenary power" over matters pertaining to immigration and naturalization. This includes asylum and refugee law. The Federal Courts have sometimes disagreed with administrative interpretations of Congressional statutes in the field of immigration, but have rarely declared the statutes themselves unconstitutional or otherwise invalid. The chief source of statutory law is the Immigration and Nationality Act of 1952 (INA), which has been frequently amended, most significantly in 1965, 1980, 1986, 1990, and 1996. The Refugee Act of 1980 itself amended the INA of 1952 and is the source of most U.S. law pertaining to asylum and refugee matters.

Statutory enactments of Congress are binding on the Federal Courts, the Immigration Courts, and the DHS.[346] In addition,

346. Generally, international treaty provisions do not attain the force of law in the United States until legislation is enacted or regulations are promulgated. For example, until regulations became effective on March 22, 1999, Immigration Judges and the Board did not have jurisdiction to consider claims for protection pursuant to the Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10. A/RES/39/708 (1984) (enacted into force June 26, 1987); for the United States Apr. 18, 1988) ("Convention Against Torture").

regulations promulgated by the Attorney General and the Secretary of Homeland Security are binding on their respective agencies. Regulations promulgated by the Attorney General and the Secretary of Homeland Security are followed by the Federal Courts unless those courts find them to be unconstitutional or invalid interpretations of statutes passed by Congress. Under the constitutional principle of separation of powers, Congress may not play a direct role in the adjudication of individual immigration or asylum cases. Congress may, if it so chooses, grant special legislative dispensations to particular aliens seeking to remain in the United States, but it does so in an exceedingly small number of cases, and only after all administrative remedies have been exhausted.

III. OBTAINING ASYLUM IN THE UNITED STATES

In general, seeking asylum within the United States is accomplished two ways: affirmatively or defensively. Before discussing either process in any detail, let me start by saying that the distinction between the two processes is whether the asylum seeker is in removal proceedings.

A. "Affirmative" Asylum Process

This process involves asylum seekers who are physically present in the United States, regardless of their immigration status. These individuals complete and submit an application for asylum directly to the Asylum Division of CIS/DHS.[347] Since these individuals are not in removal proceedings and file their asylum applications voluntarily with DHS, they are considered to be "affirmative" asylum applicants.

Under the "affirmative" asylum process, an Asylum Officer at a local asylum office interviews the applicant within 43 days of the receipt of the application. The interview is conducted in a non-adversarial manner where the applicant is provided an opportunity to present evidence and witnesses. The interview is not open to the public. The applicants may have counsel or a representative present, and are required to provide an interpreter if they are unable to speak English. The majority of asylum applications are adjudicated within 60 days from the filing of the application.

Before an application is granted, security checks must be completed. Once all the appropriate checks have been completed and

347. An asylum-seeker is ineligible to apply for asylum under section 208(a)(2) of the INA if he or she failed to file an application for asylum within one year of their last arrival in the United States or April 1, 1997, which ever is later.

the application is granted, the applicant is automatically granted employment authorization. Moreover, once asylum is granted, it is for an indefinite period of time and means that the individual granted asylum cannot be returned to any country. One year after a grant of asylum, the asylee may apply for permanent residence in the United States. Based upon statistical information issued by DHS, there were 44,927 refugees and asylees granted lawful permanent resident status in fiscal year 2003 (October 1, 2002- September 30, 2003).

If the Asylum Officer determines that the application should not be approved, the individual is placed in removal proceedings if they are not legally in the United States where they may again request asylum "defensively" in a *de novo* hearing before an Immigration Judge. [Note: Work authorization may be available].

B. "Defensive" Asylum Process

Individuals who are placed in removal proceedings appear before Immigration Judges. Applications for asylum filed during removal proceedings are considered to be "defensive" because the request is made to avoid removal from the United States. The "defensive" asylum process is adversarial in nature, and thus, the applicant may have counsel or a representative present during the hearing. The proceedings are also interpreted and recorded at government expense. Moreover, the Government (DHS) is prosecuting the case and seeking the removal of the applicant, and in many cases will oppose the application for asylum. An Immigration Judge considers the evidence presented by the applicant as well as the concerns raised by DHS regarding the validity of the claim for relief. The Immigration Judge may either grant or deny asylum.

As previously mentioned, there are a total of 52 Immigration Courts throughout the United States. Based upon statistical information issued by EOIR, the Immigration Courts for the 2003 fiscal year (October 1, 2002 - September 30, 2003) received 65,153 asylum applications and had 68,093 completions. There were 13,365 asylum grants; 22,410 denials; 18,790 applications were either withdrawn or abandoned; and 13,527 were disposed for "other" reasons. For additional statistical information regarding asylum cases before the Immigration Courts, I refer you to EOIR's website at www.usdoj.gov/eoir/

Either party, the alien or DHS, may appeal from the decision of the Immigration Judge to the Board of Immigration Appeals (Board). At this time, I am unable to provide statistical information regarding asylum grants at the Board because we do not track adjudications based upon applications. This is something that the Board will be able to do in the future.

If the Board affirms a grant of asylum or reverses an Immigration

Judge's negative decision and grants asylum on its own and security checks have been completed, the case is ended and the applicant is eligible to remain in the United States. If the Board's decision is adverse to the asylum seeker, he or she may appeal to the appropriate Federal Court.[348]

IV. ACCELERATED PROCEDURES FOR DETERMINATION OF ASYLUM CLAIMS: EXPEDITED REMOVAL

Prior to 1996, there were no procedures for accelerated determinations of asylum claims in the United States. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress enacted a provision that allows for expedited removal.

The fundamental premise of the provision is that an alien who arrives in the United States without valid entry documents, or with documents procured by fraud or misrepresentation, may be ordered removed through an "expedited removal" order issued by an immigration officer (employed by DHS) at the port of entry. In such cases, the alien has no right to remain in the United States, no right to appear before an Immigration Judge to contest the decision of the immigration officer, and no right to judicial review. The arriving individual may be removed promptly from the United States. The person is denied entry in the case of an attempted land border entry, or returned to the point of last departure in the case of an airport entry. However, an individual who expresses a fear of persecution or torture or indicates an intent to apply for asylum is referred for an interview with an Asylum Officer.

The Asylum Officer is required to interview the alien to determine whether the alien has a credible fear of persecution or torture. Regulations implemented by the Attorney General in 1997 provide that the arriving applicant has the right to consult with other persons prior to the interview (but without expense to the United States Government), has the right to request review by an Immigration Judge of the Asylum Officer's credible fear determination, and is provided written notice of the decision by the Asylum Officer. The arriving applicant is also detained pending this interview, but may be paroled from detention only under narrow circumstances such as a medical emergency. The "credible fear" standard was designed to have a low threshold in order to screen all persons who might qualify for asylum into the hearing

348. A Board decision that is adverse to DHS may not be appealed to Federal Courts. Instead, DHS may request that the Attorney General certify the decision for review. Such requests by DHS are rare.

process. If an alien is found to have a "credible fear" of persecution, the alien is entitled to remain in the United States and apply for asylum before an Immigration Judge with all the procedural rights of other asylum seekers, including administrative review by the Board and judicial review by one of the United States Circuit Courts of Appeals. If the alien is not found to have a credible fear, the applicant may seek review of the Asylum Officer's determination by an Immigration Judge. Such review is to be completed within 7 days after the date the Supervisory Asylum Officer approves the negative credible fear determination. If the Immigration Judge reverses the decision of the Asylum Officer, the alien is found to have a "credible fear" and is referred for further processing of the asylum claim. If the Immigration Judge affirms the decision of the Asylum Officer, the alien is subject to expedited removal from the United States.

IV. WHAT WORKS BEST AND WHAT NEEDS IMPROVEMENT

Before I conclude my presentation, I would like to identify an aspect of the asylum process in the United States, which I believe is very beneficial to the asylum seeker. Specifically, in proceedings before the Immigration Judge, the Government provides an interpreter; the asylum seeker is provided the opportunity to fully explain the basis of their claim; and asylum seekers have basic due process rights throughout the proceedings. Moreover, in most cases the asylum seeker immediately receives an oral decision from the Immigration Judge at the conclusion of proceedings, and is able to pursue further administrative judicial review with the Board of Immigration Appeals where there are adjudication deadlines in place that ensure prompt review of case appeals. Finally, the asylum seeker is able to seek further judicial review in the federal courts.

The one thing I perceive to be an issue in the process, is that our procedures before the Immigration Judge and Board of Immigration Appeals do not generally provide relief on humanitarian grounds alone. Human rights law influences the asylum process; however, those asylum seekers whose claims are based upon humanitarian grounds must seek independent forms of relief through DHS. For example, Deferred Action, Temporary Protected Status and Deferred Enforcement Departure. Humanitarian relief is not considered in conjunction with the asylum or refugee claim. The one important exception is withholding under the Convention Against Torture (CAT), which may be considered by an Immigration Judge and reviewed on appeal by the Board of Immigration Appeals and Federal Courts.

V. CONCLUSION

The administrative and judicial bodies that are given the responsibility of implementing the immigration laws of the United States of America strive to implement an asylum process in which individuals fleeing oppression, persecution and torture are provided an opportunity to find a safe haven consistent with international and humanitarian principles. The United States continues to seek a balance between the need for a fair system that provides protection to genuine refugees against the need to prevent abuse of the asylum process.

Hopefully, by sharing with you the asylum process in the United States, I have furthered one of the IARLJ's goals - to exchange expertise and practices among all countries. We all benefit through such exchanges.

Thank you for the opportunity and privilege to speak here today. If you have any questions, I would be pleased to answer them.

ATTACHMENTS

ATTACHMENT 1
Refugees
Applications Filed in fiscal year 2003

Filed	42,705
Approved	25,329
Denied	16,550
Closed	32,124

Refugee-Status
Top 10 based upon geographic area and country of chargeability.

Geographic area and country of chargeability	*Applications filed*	*Applications Approved*
Ukraine	7,654	4,612
Cuba	4,963	1,599
Somalia	3,739	1,331
Ethiopia	2,937	1,311
Russia	2,895	1,894
Moldova	2,606	1,575
Sierra Leone	2,237	1,430
Vietnam	2,032	1,772
Bosnia-Herzegovina	1,819	1,145
Iran	1,784	1,755

Source: Statistical information obtained from *2003 Yearbook of Immigration Statistics;* Office of Immigration Statistics, Department of Homeland Security.

ATTACHMENT 2
Asylee
Applications Filed with USCIS in fiscal year 2003

Filed	46,272	(newly filed and cases reopened)
Granted	11,434	
Denied	1,539	
Adjudicated	39,456	
Referred to Immigration Judge	26,483	

Applications filed
Top 10 based on region and country of nationality

Region and country of nationality	*Applications filed*	*Applications Granted*
China	4,750	2,024
Colombia	4,547	1,652
Canada	3,846	26
Haiti	3,276	891
Indonesia	2,808	147
Guatemala	2,077	118
Cameroon	1,601	770
India	1,168	247
Armenia	924	371
Venezuela	896	166

Source: Statistical information obtained from *2003 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Department of Homeland Security.

ATTACHMENT 3
Immigration Court Asylum Applications – fiscal year 2003

Received	65,153
Granted	13,365
Denials	22,410
Abandoned	4,308
Withdrawn	14,482
Other	13,527

Asylum Applications Filed and Approved by Top 10 Nationalities

Nationality	*Applications Filed*	*Applications Granted*
China	9,320	3595
Colombia	6,802	1,590
Haiti	4,424	566
Indonesia	3,695	366
Guatemala	2,367	162
El Salvador	2,210	30
Albania	1,901	717
India	1,685	595
Armenia	1,102	412
Pakistan	1,070	227

Source: Statistical information obtained from *FY 2003 Statistical Year Book*, Office of Planning and Analysis, Executive Office for Immigration Review.

Note: The adjudication numbers in FY 2003 include applications that were filed in previous fiscal years.

THE BALANCE BETWEEN ADMINISTRATIVE AND JUDICIAL APPROACHES IN THE FRENCH CONTEXT

VERA ZEDERMAN*

In France, the requirements for obtaining refugee status are laid down in the Law of 25 July 1952 on the right to Asylum, which created a public administrative establishment, under the trusteeship of the Foreign Ministry, the French Office for the Protection of Refugees and Stateless Persons (OFPRA). The refugee status can also be granted in appeal by a court, the Refugee Appeals Board (Commission des recours des réfugiés), created by the same Law and qualified as a judicial body by the Council of State. This is now explicitly set out in article L 731-3 of the Admission and Residency of Aliens and Asylum code.

The independence of the Refugee Appeals Board from the OFPRA is an essential guarantee for the right to asylum (decision 2003-485 DC of the Constitutional Council of 4 December 2003).

The Refugee Appeals Board is placed under the supervision of the Council of State. The Board is subject to having its decisions set aside for errors of law or procedure by the Supreme administrative Court and in some cases, the Council of State can grant the refugee status itself.

In its decisions, the administrative establishment must comply with the Refugee Appeals Board's caselaw, even if it assesses its own Asylum's policy.

To unify and accelerate the procedure of asylum which was considered as too slow, the Parliament adopted a new law on the 10 December 2003 in anticipation of the new directives (qualification and procedure), and the Government laid down a new decree, on the 14 August 2004.

During the drafting of the law, the authors of this fundamental reform expressed a will to "rationalize" the proceedings and also created a new balance between the administrative and the judicial phases.

On average, 14% of the decisions of the OFPRA are overturned by the Refugee Appeals Board.

But it's quite difficult to explain in which way the differences between the administrative and the judicial phases explain the differences between their respective decisions[349]. For example, the

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349. The admission rate may be different according to the nationality.

organization of the OFPRA (each department is geographically specialized) and the organization of the Refugee appeals Board (140 sections made up of an administrative judge and two assessors representing the administration and the UNHCR) may partially reply to this question.

The aim of this presentation is to give some main trends.

The common scope of the competence

Every asylum application is subject to a "one-stop" procedure, both in OFPRA and in Refugee Appeals Board, meaning that, whatever the grounds of the claim, the OFPRA and the Refugee Appeals Board have to decide, first on the right of the applicant to be entitled to the Convention status, and secondly, if Convention status is not granted, on the right of the applicant to subsidiary protection.

Subsidiary protection is not discretionary (as the former territorial asylum was[350]), but subject to the requirements of the qualification directive: serious harm is defined as:

- death penalty or execution or
- torture or inhuman or degrading treatment or punishment... or
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situation of internal or international conflict.

If OFPRA denies the Convention status and grants subsidiary protection, the claimant can also appeal to Refugee Appeals Board and ask again for refugee status and subsidiary protection. Review is not on legal aspects, but also on the credibility of the statements. The Refugee Appeals Board rules on whether or not the person has the right to be granted refugee status or subsidiary protection.

Moreover, the protection officers of the OFPRA and the reporters of the Refugee Appeals Board who are responsible for the inquiry of asylum requests, are public agents, who belong to the same administrative body, use the same means of inquiry and according to the same requirements.

The differences

Competences

- The OFPRA is also empowered to recognize status to Stateless persons, under the Convention relating to the status of the Stateless persons, adopted in New York on 28 September

350. This status was granted by the Home Office under judicial review by ordinary administrative courts.

1954[351]. If the OFPRA denies its status, the claimant can appeal, but it will not be before the Refugee Appeals Board but before an ordinary administrative court.

— Moreover, the OFPRA is responsible for the protection of the refugees.

— In addition to its function as a jurisdiction, the Appeals Board examines petitions by individuals with refugee status who are the subject to one of the measures provided by Articles 31, 32 and 33 of the 1951 Refugee Convention and gives its opinions on whether to maintain or revoke such measures (*i.e.* escorting the refugees back to the border, deportation, house arrest, etc.). Only in such a case, the Appeals Board acts as an advisory administrative body.

Rules of Procedure

— The Refugee Appeals Board has to inform the applicant of the possibility to be summoned to a public session in order to present his or her verbal observations and to summon to an hearing the applicant who requested it (Council of State, Section, 26 July 1978, *Auguste*). The asylum seeker can be represented by a lawyer. He doesn't have this right before the administrative establishment.

— During its deliberations, the Appeals Board takes its decision to grant refugee status on all the information he has in its possession at the time of the ruling, including information which the OFPRA did not have when it ruled on the application (Council of State, Section, 8 January 1982, *Aldana Barrena*).

Res judicata of the decisions

The decision by which the Appeals Board recognises refugee status is a final judgement (Council of State, Assembly, 1st April 1988, *Bereciartua Echarri*). Until the reform, a judgment which has been taken on the basis of fraud, couldn't be overturned (Council of State, Section, 12 May 1997, *Ovet*).

The "readjustment" organized by the new legislation

— As a deadline to appeal exists, the new decree has provided for a procedure to register the claim with the OFPRA: the asylum seeker has twenty one days from the date he received the temporary residence authorisation to apply, otherwise the application is considered as inadmissible.

351. The term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

- In this case, the asylum seeker has not the right to file an appeal against this decision before the Refugee Appeals Board[352].
- From now on, at the stage of the administrative phase, the application has to be written in French, as every appeal before a court has to be (Article 1st of the new Decree).
- Except for manifestly unfounded cases, OFPRA is now compelled to hear asylum seekers.
- In the same way, the Refugee Appeals Board is no more compelled to summon the asylum seeker to a public session if its appeal is obviously unfounded or devoid of serious ground.
- What's more, before the Refugee Appeals Board, the claimants will not be allowed to produce new evidence or written statements three days before the hearing, in order to restore a real adversarial process between the parties.
- The new decree gives the possibility to the General Director of the Office of referring appeals to the Refugee Appeals Board if the judgment has been taken on the basis of fraud (Article 16-3 of the Decree).

The readjustment in practice

- When an appeal has been filed against its decision, the OFPRA is invited by the Refugee Appeals Board to provide written observations, but the OFPRA doesn't have an obligation to do so. It also has a right to provide oral observations during the hearing. From now on, the OFPRA exercises this right more often.
- The OFPRA exercises more often too its right to file an appeal against a decision of the Refugee appeals Board before the Council of State.

To conclude, the rationalization invoked by the French Government is not only between administrative and judicial phases but also inside the administrative phase. The Home office is responsible for admitting asylum seekers on the French territory and has enhanced its position in the asylum's proceedings. On the other side, this rationalization is not achieved. For example, some provisions of the qualification directive and the draft procedure directive have not been included in the new texts.

It's a bit early to draw conclusions on the effect of the new rules of procedure, which remain a means to accelerate the procedure, but they have certainly created a new balance between its administrative and judicial phases.

352. But has the right to appeal before the ordinary administrative court.

III

THE QUESTION OF PROOF
Evidence, Credibility and Public Perception

ASYLUM DETERMINATION AND EVIDENTIARY UNCERTAINTY: PERCEPTIONS AND PRESCRIPTIONS

BRIAN GORLICK*

The subject of this paper is based on the presumption that the nature of refugee status determination and the use of evidentiary standards, both by national authorities and the UNHCR, is inconsistent and irregular. This paper aims to present a reasonable prescription of remedies to make the application of the 1951 Refugee Convention[353] definition more consistent and predictable. This is no simple task, but it is something which is needed to help secure the continued value and application of international refugee law standards, particularly

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353. Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (hereafter '1951 Convention'). There are presently 145 state parties to the 1951 Convention and/or its 1967 Protocol.

as regards who is, and who is not, a refugee.

This paper will focus on the 1951 Convention definition, not out of a failure to recognise that many states grant subsidiary, complementary and humanitarian status which, in many cases, provides *de facto* protection to refugees, but out of deference to the only universal refugee definition we presently have. Furthermore, the grant of other protection and humanitarian status by states is extremely fluid and varied and based on divergent legal standards. The granting of subsidiary/complimentary protection status as it relates to Convention status in national decision-making is worthy of separate study, but it is beyond the scope of this essay.[354] This paper will also attempt to offer policy prescriptions and advice for future study, training, as well as the use of country of origin information, legal standards and guidelines, with a view to enhancing the ability of decision-makers (and thereby states) to apply the 1951 Convention refugee definition more uniformly.

The big picture

At the start of 2004 the number of persons 'of concern' to UNHCR was just over 17 million, a reduction from more than 20 million the year before. This figure of 17 million is the lowest figure in a decade. Of this number is some 9.7 million refugees, 1 million asylum-seekers, 1.1 million returned refugees, 4.4 million internally displaced persons, and 1 million stateless and others. Of the total number of refugees some 7.5 million refugees have been living in camps or settlements for more than a decade, which has been referred to as the "warehoused" refugee population. This latter figure testifies to a general failure in finding durable solutions for the majority of the

354. Well known in the European context is the adoption of the Council of the European Union (EU) Directive 2004/83EC (29 April 2004) on *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted* (hereafter 'Qualification Directive') which sets out a common legal instrument for EU Member States on the application of the 1951 Refugee Convention definition as well as the grant of subsidiary protection status. UNHCR has welcomed the aim of the EU to create a common European asylum system based on a full and inclusive aplication of the 1951 Refugee Convention. UNHCR has however called in EU Member States to take into consideration common understandings on the application of the 1951 Convention achieved in international fora, especially UNHCR's Executive Committee, as well as the development of state practice and best standards and practices developed in the EU and in other regions.

world's refugees.[355] One should add that the disproportionate share of the global refugee burden is borne by developing countries and contributes to, in some instances, overwhelming development challenges.

James Hathaway draws a telling comparison of refugee burden sharing in Northern and Southern states. Several years ago he noted that that: "Of the twenty-six states hosting at least one refugee per 100 citizens, twenty-one were among the world's poorest (i.e. they had a per capita income of less than US $1000 per year) ... Northern states each year spend at least $12 billion to process the refugee claims of about 15% of the world's refugee population, yet contribute only $1-2 billion to meet the needs of 85% of the world's refugees who are present in comparatively poor states."[356] These proportional figures are likely not much different today.

Despite diplomatic assurances to uphold protection principles for asylum-seekers and refugees[357], measures aimed at reducing the number of asylum-seekers reaching the West, challenges to the continuing validity of international refugee law and the authority of UNHCR, as well as fickle commitment to a growing number of protracted refugee problems are current realities. Although we are experiencing a global decrease in the number of refugees, there are a growing number of voices suggesting that the international system of refugee law is dysfunctional. Added to the heightened fear of global terrorism and the perception in some countries that foreigners are somehow responsible for large numbers of crimes and social unrest, this feeds into a prejudice which affects the generosity of the state and the public to receive asylum-seekers and refugees.

Public opinion polls in a number of Western countries have shown that the public view the arrival of significant numbers of asylum-

355. "Half a million refugees from Burma, for example, have lived in camps in neighbouring countries for 20 years with no right to work or travel. The same is true of about 140,000 Somalis, who have lived since 1991 in closed camps in North Kenya. The camps are often established quickly to deal with refugee emergencies and never get dismantled ....", Editorial 'End of Refugee Warehousing', *International Herald Tribune*, 29 September 2004.

356. Keynote address of Professor James Hathaway at New Delhi Workshop on International Refugee Law, *Indian Journal of International Law*, Vol 39, No 1, January-March 1999: 11.

357. See the *Declaration of States Parties to the 1951 Convention or its 1967 Protocol Relating to the Status of Refugees* adopted in December 2001 after the first ever meeting of states parties to the international refugee instruments, available on-line at: www.unhcr.ch

seekers as a danger.[358] Although one may question the validity of such polls, the fact remains that asylum and refugee issues rarely receive positive coverage in the media. Rapidly changing asylum policies and practices including greatly variant Convention recognition rates often confuse the public and reinforce the view that the vast majority of asylum-seekers are undeserving of legal protection and by consequence society's attention, sympathy and assistance.

Defining the problem

It is a fact that states which otherwise share similar values, political outlooks and common foreign policies and support for UN institutions including UNHCR, regularly display differential refugee recognition rates under the 1951 Convention. These differences are not just between states in the North, but between regions; for example,

358. A recent survey conducted in Switzerland found that Swiss citizens are more fearful about an influx of foreigners than terrorism or war. Two-thirds of the 714 people questions felt that the flood of asylum-seekers was a big danger, while only 51% were worried about terrorist attacks. 'Swiss more fearful of foreign immigrants than terror attack: survey', reported by *Agence France Press*, 1 December 2004. Danish Prime Minister Anders Fogh Rasmussen, when asked to name the areas where he had successfully altered attitudes during his tenure, said: "I would think that 80-85% of the population backs the government's policy on foreigners". The same article notes that Prime Minister Rasmussen's government swept to power three years ago on a promise to curb immigration and asylum-seekers. During this period Denmark's share of asylum applications in the Scandinavian countries fell from 31% in 2000 to 9% in 2003. Correspondingly Sweden's rose from 41% to 60% and Norway's from 28% to 31%. It is suggested that the reason for this drastic reduction in Denmark is linked to the government's adoption of a more restrictive asylum law and policy beginning in 2002. See *The Economist*, 'Send back your huddled masses', 16 December 2004.

359. Figures made available by the European Commission in 2002 noted the following Convention refugee recognition rates: Australia (out of 9,358 decisions, 13.2% recognised); Austria (out of 30,000 decision, 20% recognised); Belgium (7,700 decisions, 17% recognised); Canada (32,446 decisions, 46.2% recognised); Denmark (12,230 decisions, 10.4% recognised); Finland (3,334 decisions, 0.41% recognised); Germany (91,000 decisions, 6.6% recognised); Ireland (21,000 decisions, 9.5% recognised); Netherlands (70,000 decisions, 1.18%); Norway (18,000 decisions, 1.85% recognised); Spain (6,600 decisions, 2.5%); Sweden (39,740 decisions; 1.21% recognised); Switzerland (42,150 decisions, 7.10% recognised); UK (83,000 decisions, 9.8% recognised); United States (83, 900 decisions, 23% recognised). (on file with the author)

North America and Europe[359], and states North and South. Even if one were to control for countries of origin of asylum-seekers and first and appeal instance decisions, as well as numbers of decisions, there are remarkable differences between the Convention refugee recognition rates of asylum-seekers coming from particular countries. These differences are found when one compares recognition rates between asylum countries, and with UNHCR's determinations under its mandate.[360]

For example, in the case of asylum-seekers from Iraq, 2003 figures show that an Iraqi asylum-seeker would have a negligible chance of being recognised as a Convention refugee in Western Europe, but would have a 50-80% chance in North America. Similarly, Iranian asylum-seekers would have between 1-25% chance of being recognised in Europe, and approx. 50-70% chance in North America. Asylum-seekers from Sudan, Afghanistan, China and Eritrea tell a similar story. UNHCR's mandate recognition rates for certain nationalities of asylum-seekers, for example Afghans in India, Sudanese in Kenya and Iranians in Turkey, is clearly on the liberal side of the spectrum with positive decisions between 65-90%. Of course these figures change over time, but one can map out particular trends whereby asylum countries over a period of years have more, or less, generous grants of refugee recognition status.

Why the differences?

When one considers that refugee recognition in individual determination procedures is a first step towards ensuring broader access to human rights protection under the 1951 Convention, the importance of 'getting it right' should not be underestimated. Notwithstanding the key importance of granting Convention refugee recognition in deserving cases, comparative figures indicate that trends in some states are restrictive. Differences of interpretation of international legal standards as well as national developments in refugee jurisprudence may be one explanation. Despite the view that many states have established independent, expert authorities staffed by well-trained officials to determine refugee status, in some instances political signals and policies set by the executive branch of government could influence decision-making. A rather obvious observation is that no western industrialised states have a stated policy of maximising the number of asylum-seekers and refugees who may enter their territory. On the contrary, an increasing number of states have adopted

360. Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950.

measures to strengthen immigration control which may negatively impact on *bona fide* asylum-seekers.[361]

Could political influence be the explanation why during the mid-1980s some 80%-plus of El Salvadoran asylum-seekers were granted Convention refugee status in Canada, while at the same time in the United States, El Salvadoran asylum-seekers were granted Convention status in 10-14% of the cases? Could it really be, as some have suggested, that the 'genuine' asylum-seekers made their way to Canada while the 'bogus' ones remained in the US? Or could the explanation be that asylum-seekers of a particular nationality are less likely to receive favourable adjudication of their claims in the midst of a clearly partisan or polemical political climate in the asylum country?

Now consider the situation of Iraqi asylum-seekers. Currently in Western Europe some 1% of Iraqi asylum-seekers are granted Convention refugee status, while in the United States the Asylum Division of the US Department of Homeland Security recognised 50% of Iraqi applicants as refugees and the US Immigration courts has recognised 35% as refugees during the period of March 2003 and July 2004.[362] Given the differences of opinion amongst several European states and the US administration concerning the war in Iraq, one would think the figures should be different, if not opposite. Then again, such figures may attest to the considerable independence of the American asylum determination authorities.

Perhaps there is no standard answer for why there are divergent recognition rates amongst like-minded states. Any number of factors could come into play including the particularities of the refugee status determination process, the investment and practice of some authorities in collecting, analysing and disseminating country of origin information[363], how different legal traditions operate in practice, as well as how national authorities may choose and train their decision-makers and other professional staff. Evidentiary questions and

361. See footnote 19 *infra*.
362. Figures on file with the author.
363. See for example *The Structure and Functioning of Country of Origin Information Systems: Comparative Overview of Six Countries*, Report prepared by the International Centre for Migration Policy Development, August 2004, available on-line at: www.apci.org.uk. The countries surveyed in the study are the UK, Canada, Germany, the Netherlands and Switzerland. The study shows differences in the number and in some respects expertise of staff working on country of origin issues, as well as the focus, role and frequency the respective country information units play in preparing reports and providing inputs to the determination process.

perceived differences in how evidence is assessed in common and civil law traditions may also play a role in explaining why some countries do things differently, and as a consequence derive different results.[364]

Some scholars have identified that differences in global recognition rates are attributable to various factors including: the number of applications received in the country of asylum; neighbouring countries recognition rates; long-term political ideology; openness to outsiders; diplomatic relationships; economic conditions; administrative capacity; the consequences arising from an incorrect ruling on an asylum claim; and of most importance, the asylum country's ten year track record in granting refugee status.[365] Issues which have yet to be thoroughly studied on a comparative basis are how procedural and jurisprudential differences in national refugee status determination processes affect refugee recognition rates. It would also be useful to study how the expertise of decision-makers, reliance on credibility assessments and available resources interact and come into play in reaching decisions on asylum cases.

In another recent study, responses provided by first-instance Swedish Migration Board officials may be typical of the difficulties, and thus reason for inconsistencies, decision-makers face in reaching decisions in asylum cases. When the officials were asked *what is the number one problem making decisions in asylum cases?*, they identified the following:

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364. "... the terms 'burden of proof' and 'standard of proof' are used in the law of evidence in common law countries. In those common law countries which have adopted sophisticated systems for adjudicating refugee claims, legal arguments may revolve around whether the applicant has met the requisite evidentiary standard or degree of proof for demonstrating that he or she is a refugee. While the question of the *burden of proof* is also a relevant consideration in countries with legal systems based on civil law, the application of the *standard of proof* generally does not arise in the same manner as in common law jurisdictions ... UNHCR favours the more generous test of 'standard of proof' as developed in common law countries as the correct approach ....", Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status', *International Journal of Refugee Law*, Vol 15, No 3, 2003, at pp. 361 & 369.

365. Mary-Anne Kate, 'On what basis do destination-countries provide refugee and humanitarian protection to asylum-seekers?', unpublished dissertation submitted for an M.Sc. in European and Comparative Public Policy, University of Edinburgh, 2004 (on file with the author).

1. Issues of credibility (39%) "To decide whether someone tells the truth or not".
2. Lack of knowledge about home country (14%), "It's difficult to get adequate information about the situation in the asylum-seeker's home country".
3. Other (13%), "Political decisions from the government make judicially correct decisions impossible".
4. Difficulty in checking accuracy in given information (9%)
5. Empathy for the asylum-seeker (9%), "Decisions must not be made on the basis of one's feelings for the asylum-seeker".
6. Lack of time (6%)
7. Don't know or no answer (8%)[366]

Whatever the reasons for significant divergences of refugee recognition rates, as a legal problem, it is cause for concern.

In the words of Lord Steyn of the UK House of Lords, "in principle ... there can be only one true interpretation of a treaty."[367] Said another way, if we believe that international law is valuable and important, then it is equally important to apply international standards with a high degree of consistency and predictability. As noted by one author, "if asylum-seekers cannot expect equitable treatment, then 'asylum

366. Pär Anders Granhag, Leif A Strömwall and Maria Hartwig, 'Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception', *Journal of Ethnic and Migration Studies*, Vol 31, No 1, January 2005, at p 40.

367. In the House of Lords decision of *Regina v Secretary of State for Home Department, Ex Parte Adan, Regina v Secretary of State for the Home Department, Ex Parte Aitseguer*, Judgments of 19 December 2002, available at: www.parliament.the-stationary-office.co.uk/pa/ld200001/ljudmt/jd001219/adan-1.htm, Lord Steyn concluded that: "It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 (of the 1969 Vienna Treaty Convention) and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: Article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning" (at para 68).

shopping' is a reasonable and logical response for any persons wishing to secure protection."[368] Moreover, the fact that persons who may be deserving of Convention refugee recognition may not be obtaining it not only raises legal questions, but may feed into an already negative perception of asylum-seekers and refugees.

In describing the situation in the EU, Frances Nicholson has observed that:

> The proportion of asylum-seekers from certain countries of origin recognised in different states sometimes varies significantly, while interpretations of various aspects of the refugee definition also differ. These range from differing interpretations of obligations towards those fearing persecution by non-state agents or gender-related persecution to different approaches as regards the internal flight or relocation alternative or persons fleeing generalised violence. A variety of complementary or subsidiary statuses, generally offering less security and fewer rights than are available to refugees, were also being increasingly used by [EU] member states. Additionally, such diverging policies and practices have been among factors which mean that refugees do not necessarily enjoy comparable security of status or standards of treatment throughout the EU and may seek to move onwards if their status is not secure. These differences have also undermined the effectiveness and viability of efforts to share burdens and responsibilities for hosting refugees and asylum-seekers among EU member states.[369]

Although the developments of harmonised laws and policies in the asylum and migration field among EU states have been watched with anticipation by UNHCR, refugee advocates and no doubt refugees themselves, "the tendency has generally been in the direction of [adopting] lower standards, with restrictive concepts and practices ...being "exported" from one member state to another and even beyond ...."[370] The hope that a gradually enlarged common European market and geographic space would create oneness and harmony among a diverse group of nations remains a political objective of monumental proportions.

However, for the asylum-seeker who may try to enter Europe to seek refuge the barriers are getting more varied, more far-reaching and legally entrenched.[371] Whether and how such EU law and policy

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368. Kate, *op cit*, p 24.
369. Frances Nicholson, 'Challenges to Forging a Common European Asylum System in Line with International Obligations', forthcoming in S. Peers and N. Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary*, 2005.
370. *Ibid.*
371. Many states which have subscribed to the international protection regime by voluntarily becoming party to the international refugee

developments and practices will impact on individual determination of refugee status is yet another topic worth examining.

How to ensure that asylum determination is predictable and fair

Canadian lawyer David Matas has identified the following requisite elements for a functioning refugee determination system:

(1) Access to a refugee determination system
(2) A definition of protection broad enough to cover serious risk
(3) An independent qualified decision-maker
(4) Right to counsel
(5) Controlling unscrupulous immigration consultants

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instruments have and/or continue to undertake far-reaching changes through legislative and inter-state arrangements which may restrict access to asylum and the provision of legal rights to refugees. These restrictions include limiting access to refugee status determination procedures and employing an increasingly restrictive interpretation of the refugee definition. In order to avoid the related difficulties, expense and responsibility for protecting refugees on their own territory some states have introduced, in some cases temporarily, off-shore procedures for processing and granting temporary protection to asylum-seekers, a practice which parallels the extraterritorial arrangements being proposed by some EU states today. Practices which may have the effect of deterring asylum-seekers include: the use of administrative detention; the misuse of readmission agreements; the application of so-called 'safe third country' principles; the use of first country of asylum; the imposition of carrier sanctions; visa restrictions and inspection of travellers in airports before embarkation and immediately upon arrival; bolstering border patrols including air and sea port regulations; the absence of domestic refugee law or functioning determination procedures; restricting access to determination procedures including the right to appeal with suspensive effect; limitations on access to legal aid, legal counsel and UNHCR personnel; and interdiction on the high seas.

In the context of the former Yugoslavia and Northern Iraq the establishment of so-called 'safe zones' offered a poor alternative to facilitating access across borders to persons in need of international protection, but despite the dangers of such practices it is not unlikely they will be promoted again. Particularly in the post 9/11 world, there are increasing efforts by states to control illegal migration, and would-be refugees may find that they are subject to these control measures. It should be recalled that the system of international refugee protection enshrined in the 1951 Refugee Convention could not have foreseen these wide-ranging developments to avoid state responsibility for asylum-seekers and refugees, nor were the international refugee instruments designed to address migration issues.

(6) Disclosure of evidence
(7) The right to an oral hearing
(8) Use of the benefit of the doubt
(9) Full reasons for decisions
(10) Right to an appeal
(11) A possibility of reopening and second claims, and
(12) Humane treatment of claimants[372]

Each of these elements is reasonable enough, and one would agree that they form the minimum standards to ensure a fair administrative process to determine refugee status. However when one looks closely at the practices in a number of states, we find that some of these provisions are not ensured in national proceedings. Or, limitations are placed on particular aspects which frustrate the fairness of the determination process.

For example, the rules and practices governing *disclosure of evidence* differs greatly between countries. In some states all relevant documentation including, for example, embassy reports or other documents which may be 'classified', if relied upon in the asylum procedure, must be disclosed to the claimant and his or her counsel. Such an approach is legally sound and fair, especially if the evidence is being relied upon to question the credibility of the applicant.

In other states, open disclosure is not the norm. Indeed, although documentation such as embassy or diplomatic mission reports may be extensively relied upon to decide upon claims from particular countries of origin, these reports are not routinely or adequately shared or not shared at all. In such circumstances the asylum-seeker is unable to know and thus refute the evidence which may be relied upon to reach a negative decision. Non-disclosure or limited disclosure can also extend to requests from UNHCR officials, and by doing so the ability of the Office to consult with state authorities and offer its views in individual cases or related policy decisions is undermined.[373]

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372. David Matas, 'Stars and Mud: The Participation of Refugee Workers in Refugee Policy Formation", forthcoming in *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Honour of Joan Fitzpatrick and Arthur Helton*, Anne Bayefsky (ed), Brill Academic Publishers, 2005.

373. Under Article 35 of the 1951 Refugee Convention, the contracting states undertake to cooperate with the Office of the UNHCR in the exercise of its functions and shall in particular facilitate its supervisory duty. UNHCR's supervisory responsibility in respect of the 1951 Convention and its 1967 Protocol and other refugee protection instruments is also contained in Article 8(a) of the 1950 Statute of the Office of the UNHCR. At a minimum, UNHCR is granted an advisory-consultative role in

Right to an oral hearing and right of appeal are other elements which, legally speaking, one would favour as being an integral part of a fair administrative process for determining refugee status. Although many states provide for at least a review of an asylum claim in second instance or on appeal, it is increasingly the norm that asylum appeals have no suspensive effect.[374] This approach, which is contrary to the very nature of refugee status determination, is disturbingly present in the Council of the European Union (EU) Procedures Directive. The same Directive has put forward a number of possibilities to limit the

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national asylum and refugee status determination procedures UNHCR can be notified of asylum applications and informed of the course of determination procedures. UNHCR may have access to files and decisions that may be taken up by the authorities. UNHCR is entitled to intervene and submit its observations on any case at any stage of the procedure. UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts of law in the form of *amicus curiae* briefs, statements or letters. See Volker Türk, 'UNHCR's Supervisory Responsibility', Working Paper No 67, Evaluation and Policy Unit, UNHCR Geneva (2002), available on-line at: www.unhcr.ch; and Walter Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond', in *Refugee Protection in International Law*, Erika Feller, Volker Türk, Frances Nicholson (eds), Cambridge University Press, 2003.

The above-noted EC Qualification Directive inter *alia states* that UNHCR may provide valuable guidance for EU member states when determining refugee status according to Article 1 of the 1951 Refugee Convention. The EC Directive *on Minimum standards on procedures in member states for granting and withdrawing refugee status* (Asile 64 of 9 November 2004) (hereafter 'Procedures Directive'), at Article 21(b) provides that UNHCR shall "have access to information on individual applications for asylum, on the course and on decisions taken, provided the applicant for asylum agrees; Article 21(c) further provides authority for UNHCR to "present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure".

374. See Article 38(3) of the EU Procedures Directive. UNHCR has *inter alia* stated in official comments on the Directive that: "Many refugees in Europe are recognised only during the appeal process. Given the potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard. This requirement is essential to ensure respect for the principle of *non-refoulement*. If an applicant is not permitted to await the outcome of an appeal against a negative decision in first instance in the territory of the member state, the remedy against a decision is ineffective ....", UNHCR Provisional Comments on the Procedures Directive, at p 53.

possibility for personal interviews in first instance proceedings.[375] One could describe other examples where the basic formula and elements for fair asylum determination proceedings are being challenged at the international or national level.

The list presented by Matas provides basic and useful benchmarks which, if implemented, go a long way to ensuring that asylum procedures meet international legal standards and are consistent with administrative law principles of fairness and natural justice. Complimentary to these elements, the difficult job of asylum decision-making could be assisted *through development of common evidentiary guidelines*. Something which goes beyond a normative description of considerations as highlighted in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, its related updates and other sources.

What is required are detailed, analytical guidelines which could be used in both common and civil law jurisdictions, grounded on both international principles and leading national jurisprudence. For example, the study and guidelines on questions of evidence in asylum determinations prepared by the Canadian Immigration and Refugee Board are useful and would be particularly relevant in common law systems.[376] However, the idea would be to develop guidelines which specifically focus on evidentiary standards for inclusion, cessation, exclusion and cancellation of refugee status, and related issues of disclosure and sources of evidence. Over the years UNHCR has undertaken a series of studies and developed guidelines which

375. See Article 10(2)(b) and (c) and (3) of the Procedures Directive. UNHCR has expressed serious concern about the extended possibilities for limiting personal interviews in asylum determinations, as personal testimony often proves decisive in the decision. The Office has further noted that "such exceptions significantly undermine the fairness of procedures and the accuracy of decisions. In line with UNHCR Executive Committee Conclusions No 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983, all claimants should in principle be granted personal interviews, unless the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control. All reasonable measures should be undertaken to conduct an interview. Where an earlier meeting has taken place for the purpose of filing an application according to Article 10(2)(b), applicants should in particular be permitted to refute gaps or contradictions." (p 16)

376. See for example the Canadian Immigration and Refugee Board publications: *Weighing Evidence*, Legal Services, 31 December 2003, and *Assessment of Credibility in Claims for Refugee* Protection, 31 January 2004, available on-line at: www.irb.gc.ca

address some relevant issues.[377] What is missing is a more fully developed analysis of evidentiary standards and guidelines which decision-makers across jurisdictions can rely upon: guidelines which are adequately detailed and comparative, yet clear and straightforward and which would have universal application and appeal.

Country of origin information (COI) is a key source of evidence commonly used in asylum determinations. As concerns the use of COI, and in view of the particular nature of some asylum-seekers, it is a well-established principle that the decision-maker must share the duty to ascertain and evaluate all the relevant facts. Reference to relevant COI and human rights information by the decision maker assists in assessing the objective situation in an applicant's country of origin. UNHCR as well as a number of states and non-governmental organisations have made significant advances in producing, compiling and disseminating country of origin and related human rights information. The UNHCR REFWORLD database is a valuable tool and some useful national and comparative asylum caselaw databases are also available.[378]

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377. See, for example, UNHCR 'Guidelines on International Protection': Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2002, and Background Note on the Application of the Exclusion Clauses; and Cessation of Refugee Status under Articles 1C(5) and (6) of the 1951 Refugee Convention; HCR/GIP/03/03 of 10 February 2003. See UNHCR study on 'Cancellation of Refugee Status' by Sybille Kapferer, Legal and Protection Policy Research Series, March 2003; UNHCR 'Note on Burden and Standard of Proof in Refugee Claims' of 16 December 1998 and 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', UNHCR European Series, September 1995. Also see Part 7 (Exclusion) and Part 8 (Cessation) in Feller, Türk and Nicholson (eds), *op cit*. These documents and publications are available on-line at: www.unhcr.ch
378. The UNHCR REFWORLD CD-ROM and database contains COI including national legislation, case law, human rights reports and replies to queries on specific practices of states. The CD-ROM version of REFWORLD contains the full text of documents, but information is also available on the web: www.unhcr.ch/refworld. Other valuable sources include the European Country of Origin Network (www.ecoi.net); Canadian Immigration and Refugee Board Country Reports and Research Queries, the UK Home Office Country Reports; Danish Directorate of Immigration Country Reports; the UN Office of the High Commissioner for Human Rights is also a rich source of UN-based human rights country reports, etc (www.ohchr.org). Also see Refugee Survey Quarterly, Vol 16, (1997), 'Special Issue on Refugee-

Some national authorities invest significant resources in producing country of origin background papers which are publicly available. What we need to consider in terms of an evidentiary approach to COI is what decision makers consider an authoritative source. For example, are the views of UNHCR sufficiently authoritative? One would like to think so, but when you consider that UNHCR's protection guidelines for specific caseloads are regularly ignored begs a number of questions. Do states sometimes know better than UNHCR? If this is so, we must be able to discuss these differences of opinion constructively and openly with key stakeholders including decision-makers and judges.

Another important area where the International Association of Refugee Law Judges (IARLJ), UNHCR, academic institutions, the NGO community and national authorities should continue to cooperate in is *training of decision makers and judges.* The IARLJ training materials for refugee law judges are well-prepared and useful.[379] UNHCR has also developed a range of materials which can be used for specific training purposes. Given the importance, complexity, growth and international character of asylum decision making, consideration should be given to establishing an international training college for refugee law judges. Servicing an expert, up-to-date database where not only judgments, but guidelines, training materials and practice guidance in multiple languages is disseminated and shared would be of further use. Training of decision makers and judges should go beyond a detailed study of the law and could benefit from an inter-disciplinary approach and exposure to psychology, anthropology, human geography and the use and limits of 'expert' and forensic evidence.

Finally, it is a reasonable suggestion that there is *a need to improve monitoring of the implementation of the 1951 Convention and 1967 Protocol.* As part of the Global Consultations process, Walter Kälin produced a study for UNHCR on existing and possible future mechanisms to supervise implementation of international refugee law standards.[380] A number of Kälin's recommendations are clearly ambitious, such as

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Related Sites on the World Wide Web'. Needless to say, the availability of country of origin and human rights information available on the World Wide Web continues to grow at a remarkable pace.

379. Pre-Conference Workshop for New Refugee Law Judges Training Materials, 18-20 April 2005 (on file with the author). The IARLJ training materials were developed by the Immigration and Refugee Board of Canada, The Centre for Refugee Studies, York University, Canada and the UNHCR. Contact information for the IARLJ is available at: www.iarlj.nl

380. Walter Kälin, *op cit*, at pp 613-666.

establishing a Sub-Committee on Review and Monitoring and a judicial body "entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR".[381] Such far-reaching proposals require considerable political will and support by states and other actors, something which is presently lacking. These proposals to enhance supervision of the international refugee instruments are worth keeping in mind for the future.

Conclusion

It is commonly expressed that "each asylum claim is unique". While this may be true, international refugee protection standards developed over the last half century are also unique, and their implementation have underpinned a vast body of jurisprudence and praxis which can guide both states and UNHCR in their refugee status determination functions.

However desirable it may seem, we may never reach a satisfactory level of harmonised practice, particularly as concerns determination of refugee status. But increased uniformity of asylum practice and decision making should remain a goal. More recently, European states have adopted binding Directives which reaffirm existing international refugee law standards and set forth common minimum standards in the asylum field. How these minimum standards will be transposed into national practice is an ongoing process being closely watched by UNHCR and other actors. How asylum practices develop in Europe more generally will also be scrutinised by other countries and regions. It must be acknowledged that asylum practice in Europe sets an important example which goes well beyond the European space.

Other parts of the world, including developing states hosting significant refugee populations, must be encouraged and supported to ensure that international refugee law standards are upheld. In real 'refugee protection' terms, the needs of developing countries may be something quite different than the requirements of western industrialised states. Promotion of universal legal standards and procedural guarantees should nevertheless continue to form the backbone of our common interventions and programmes, as well as material and other support to states struggling to cope with displaced populations.

Forced displacement of refugees is a phenomenon closely linked to global justice (or lack thereof), and the continuation of inter-state and particularly today, intra-state war and conflict. The potential for

381. *Ibid*, at pp 657-658.

conflict in the world today continues to be great.[382] A study by Castles, Crawley and Loughna found that it is "the existence of conflict in a country – including the repression and discrimination of minorities, ethnic conflicts and war – that is the primary underlying cause of forced migration to the EU." Although the authors were careful to point out that by reaching this conclusion "is not to say that all of those who seek asylum in the EU who originate from these countries are in need of protection" as refugees, their concern was with establishing whether there are "general causal connections between the principle nationalities constituting asylum flows to the EU and the conflict situations in the countries of origin". The authors concluded that "this would certainly appear to be the case."[383]

The above conclusion is the sort of background 'evidence' which forms the basis on which many asylum claims are presented. It's a common and increasingly frequent story. The considerable challenge is how to ensure that those who are deserving of international protection as refugees are recognised. The absolute truth may never been known, but assessing the truth fairly and in accordance with international standards, practices and principles - which is the obligation of all decision makers – are steps in the right direction.

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382. Troeller has observed that "since the end of the Cold War, over 50 states have undergone major transformations, approximately 100 armed conflicts have been fought, over 4 million persons have died as a result of armed conflict or political violence, and the UNHCR has seen the number of persons under its care rise from 15 million in 1990 to over 27 million in 1995. The magnitude of the latter figure is better appreciated when one considers that in 1970 UNHCR was responsible for 2 million refugees". Civilians have always suffered in conflicts, yet there is a difference between "the nature of warfare at the beginning of the twentieth century and contemporary conflicts". Whereby at the turn of the century approximately 5% of casualties in armed conflicts were civilians, 90% of casualties in modern conflicts are civilians. In conclusion, "those fortunate enough to survive are refugees". Gary Troeller, 'Refugees and human displacement in contemporary international relations: Reconciling state and individual sovereignty', in *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, Edward Newman and Joanne van Selm, eds, United Nations University Press, Tokyo, New York, Paris, 2003, at p 55.
383. Stephen Castles, Heaven Crawley and Sean Loughna, *States of Conflict: Causes and patterns of forced displacement to the EU and policy responses*, The Institute for Public Policy Research, London, 2003, p 28. The countries examined in the study were the top 10 countries of origin of asylum-seekers coming to EU countries during the period 1990-2000. These countries are: Yugoslavia, Romania, Turkey, Iraq, Afghanistan, Bosnia and Herzegovina, Sri Lanka, Iran, Somalia and the DRC (Zaire).

And if we can make further improvements globally in the areas of sharing information and experiences with all parties, training decision makers and other asylum professionals and ensuring basic procedural guarantees in the asylum process, this should better our chances of 'getting it right'.

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IV

HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW

The Three Pillars

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Almost half a century after the Hague 1907 Convention on war, more than half a century after the 1951 Geneva Convention on the status of refugees, the four 1949 Geneva Conventions and the European Human Rights Convention and almost thirty years after the two 1977 additional protocols to the Geneva Conventions, the scope and contents of refugee law cannot be properly assessed and evaluated without a constant reference to two other legal corpuses: International humanitarian law and international human rights law.Moreover, while duly keeping in mind the specificity of each of these three pillars, the time may have come to initiate a reflexion on the fruits of their combination and on the perspective such an evolution offers.

This report will be divided into into two parts:

Part I, "The three pillars. Genealogy and chronology" ,contains a brief chronological outline of the main instruments (1), followed by remarks on their evolution (2) and on the supervision of their implementation (3).

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Part II, "Towards a new problematic of refugee law ? A reflexion on contemporary developments"" , contains some tentative thoughts on a number of significant contemporary developments: the evolution of the law relating to aliens and refugees (1); the role of NGO' (2); The apparition of new forms of conflicts and their consequences for refugee law (3); the creation of international criminal courts and its significance (4).

I
THE THREE PILLARS: GENEALOGY AND CHRONOLOGY

A chronological outline of the main instruments (1) will be followed by some remarks on their evolution (2) and by observations on the supervision of their implementation.

1. Chronological outline of the main international instruments.

(IHL: International humanitarian law.- R.L: Refugee law. - IHRL: International human rights law).

— 1907 - IHL - Hague Convention on the laws and customs of war.
— 1922 - RL - Arrangement with regard to the issue of certificates of identity to Russian refugees.
— 1922 - RL - Arrangement relating to the issue of identity certificates to Russian and Armenian refugees and amending the previous arrangements.
— 1925- IHL – Protocol on the prohibition of the use, in war time,of asphyxiating, toxic or similar gas and of bacteriological means.
— 1928 - RL - Arrangement relating to the legal status of Russian and Armenian refugees.
— 1928 – RL - Arrangement concerning the extension to other categories of refugees of certain measures taken in favour of Russian and Armenian refugees.
— 1929 – IHL - Convention for the improvement of the condition of the wounded and the sick of armies in the field.
— 1929 – IHL - Convention relating to the treatment of war prisoners
— 1933 - RL - Convention relating. to the international status of refugees.
— 1936 - RL - Provisional arrangement concerning the status of refugees coming from Germany.
— 1938 - RL - Convention concerning the status of refugees coming from Germany.

— 1939 - RL - Additional Protocol to the 1936 provisional arrangement and 1938 convention concerning the status of refugees coming from Germany.
— 1945 - IHRL - London Agreement for the prosecution and punishment of the major war criminals of the European Axis.
— 1948 - IHRL - Convention on the prevention and punishment of the crime of genocide.
— 1948 - IHRL - Universal Declaration of Human Rights.
— 1949 - IHL - First Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field.
— 1949 - IHL - Second Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea.
— 1949 - IHL - Third Geneva Convention relative to the treatment of prisoners of war.
— 1949 - IHL - Fourth Geneva Convention relative to the protection of civilian persons in time of war.
— 1950 - IHRL - European Convention for the protection of human rights and fundamental freedoms.
— 1950 - RL - Statute of the Office of the UN High Commissioner for refugees.
— 1951 - RL - Convention relating to the status of refugees.
— 1954 - IHRL - Convention relating to the status of stateless persons.
— 1965 - IHRL - International Convention on the elimination of all forms of racial discrimination.
— 1966 - IHRL - International Covenant on civil and political rights.
— 1969 - IHRL - American Convention on human rights.
— 1969 - RL - Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa..
— 1977 - IHL - Additional Protocol I to the Geneva Conventions.
— 1977 - IHL - Additional Protocol II to the Geneva Conventions.
— 1979 - IHRL - Convention on the eliminatioin of all forms of discrimination against women.
— 1984 - IHRL - Convention against torture and other cruel, inhuman or degrading treatment or punishment.
— 1987 - IHRL - European Convention for the prevention of torture and inhuman or degrading treatment or punishment.
— 1989 - IHRL - Convention on the rights of the child.
— 1990 - RL - Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the member States of the European Community.

— 1990 - RL - Schengen Convention applying the agreement of 14 June 1985 on the gradual abolition of checks at their common borders.
— 1993 - IHRL - Statute of the International Criminal Tribunal for the former Yugoslavia.
— 1994 – IHRL – Statute of the International Tribunal for Rwanda.
— 1998 - IHRL - Rome Statute of the International Criminal Court.
— 2001 - RL - EU Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member States in receiving such persons and bearing the consequences thereof
— 2003 - RL - EU Directive on minimum norms for reception conditions.
— 2003 - RL - Regulation on the determination of the State responsible for examioning applications for asylum lodged in one of the member States of the European Union.
— 2004 - RL - EU Directive on subsidiary protection.
— 2004 - RL - EU Directive on minimum standards for the qualification ansd status of third country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

2. The evolution of the scope and contents of refugee law, international humanitarian law and international human rights law.

(A) Refugee law

A two- fold evolution is visible: the first one led from a series of instruments relating to distinct categories of refugees according to their country of origin, characteristic of the 1920's and of the 1930's to the adoption of a single general convention covering all relevant aspects of the status of refugees, the 1951 Geneva one.Hence the silence of other human rights intsruments on refugees, the 1951 Convention being considered as a lex specialis. The second evolution relates to the apparition of a regional refugee law: this is now the case inside the EU, following the "communautarization" of asylum and immigration since the Amsterdam Treaty. Although the Geneva Convention is ritually mentioned by EU instruments, what is taking place amounts in fact to a deliberate and substantial revision of the 1951 Convention in a restrictive direction.

(B) International human rights law

The evolution has been a four-fold one, i. e.:

— The combination of universal (the UN convention on genocide,

the two Covenants, the conventions on discrimination, on the rights of the child, against torture) and of regional (Europe, America, Africa) instruments.
— Conventions relating to the rights of specific categories of persons (e.g. children, women).
— Conventions the aim of which is the prohibition of certain acts (e.g. the conventions against torture or against discrimination).
— The recent creation of international criminal courts: the International Criminal Tribunal for the former Yugoslavia; the International Criminal Courts for Rwanda and the International Criminal Court.

(C) International humanitarian law.(1)

Its scope has been extended in three directions:

— as to the categories of persons protected: starting with the military it now includes civilian populations.
— as to the situations covered, from war to armed conflicts, international or not (2)
— As to the rights mentioned, as shown, in particular, by Art. 3 common to the 1949 Geneva Conventions I, II and IV.
— In its Opinion on the legality of the threat to use or the use of nuclear weapons (1996) the ICJ affirmed that the predominating principle of humanitarian law is what has been called the " de Martens clause" (see the 1899 Hague Convention II on the laws and customs of war, reiterated in Art.1-2 of the 1977 Additional Protocol I.The Court concluded that the principles and rules of humanitarian law apply to nuclear weapons(§ 87).

3. The supervision of the implementation of international instruments.

Different conceptions have led to different practices.

(A) International human rights law.

The rule has been, generally speaking, to set up treaty bodies the task of which is a triple one: to receive, discuss and evaluate the periodic reports of the State parties on their implementation of the convention.To decide on individual applications when such a right has been recognized by State parties.To finally elaborate general commentaries on the convention.

In addition, such general bodies as the UN Commission on human rights and the sub- Commission have created fact-finding bodies, special rapporteurs or working groups, to study a particular

theme or the situation in a given country.This is not the place for a detailed assessment of all these mechanisms.Most evaluations are critical (3).

Two exceptions must be mentioned. Both are European ones .The first one is the European Convention on Human Rights. As early as 1950 it contained two major legal innovations: the right of individual petition, allowing an individual to bring an action against a State before an international forum; a Court to adjudicate on them. The second one is the 1987 European Convention for the prevention of torture and inhuman or degrading treatment or punishment.Each Party is under an obligation to allow the Committee set up under the Convention to visit freely any place within its jurisdiction where persons are deprived of their liberty by a public authority (Art. 1). Free and unlimited access is provided for by the Convention. Reports are published, together with the State's comments, with the latter's consent.They have been, over the years, an important source of information, used in domestic as well as international courts and other fora.

(B) International humanitarian law

The Conventions mentioned supra do not set up any permanent supervising body. Under Art. 90 of the 1977 Additional Protocol I an international fact - finding committee may be created when a number of conditions are met. One of them is the acceptation of its jurisdiction by 20 State parties. The only body which can make inquiries in this area is the International Red Cross Committee, a private Swiss organisation. The ICRC has played an important role in the codification of international humanitarian law in 1949 and in 1977.(4). Its role in the protection of persons covered by these instruments is explicitly mentioned in the 1949 Geneva Conventions (Art. 9 of Conventions I, II and III; Art. 10 of Convention IV) and in the 1977 Additional Protocol I (Art. 5) .In its 1986 decision on the Nicaragua vs USA case (Military and paramilitary activities in Nicaragua and against it) the ICJ referred to the practice of the ICRC in order to define humanitarian assistance.

(C) Refugee law

The State Parties to the 1951 Geneva Convention had no intention to set up a permanent supervising body other than the UNHCR itself (5).

Its missions are described in the 1950 Statute of the UNHCR

Under Art. 35-1 of the Convention:"The Contracting States undertake to co-operate with the Office of the UNHCR, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising

the application of the provisions of this Convention." As W. Kälin rightly remarked (6) there is a link between Art. 35-1 on the sixth paragraph of the preamble to the Convention:" Noting that the UNHCR is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner". Going back to the Statute of the UNHCR we read that he "shall provide for the protection of refugees falling under the competence of his Office by a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto....d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States" (Art. 8).

II
TOWARDS A NEW PROBLEMATIC OF REFUGEE LAW? A REFLEXION ON CONTEMPORARY DEVELOPMENTS

Four significant contemporary developments will be commented on

(1) The evolution of the law relating to aliens and refugees: the case law of the European Court of Human Rights as an illustration;
(2) The role of NGOs;
(3) The apparition of new forms of conflicts and their consequences for refugee law
(4) The creation of international criminal courts .From Nuremberg to The Hague to domestic courts.Towards a reunification of the three pillars?

(1) The evolution of the law relating to aliens and refugees: the case law of the European Court of human rights as an illustration

The law relating to aliens and refugees has been influenced by a number of legal and non –legal developments.

(A) Legal developments are of two-fold nature: international and domestic ones. At the international level the most important development has been the multiplication of human rights conventions (see supra I). As a result international law plays an important and growing role before domestic courts in the area of fundamental rights, including those of aliens, asylum- seekers and refugees, irrespective of the "dualist" or "monist" nature of the legal system.

At the domestic level, in addition to the influence of international

law, the two main developments have been the rise of constitutional law and of the case law of constitutional courts on the one hand, the expanding scope of judicial review of administrative action on the other one.

(B) Non - legal developments: The legal status and condition of aliens has become everywhere a matter of public and political debate, as shown by the frequent changes of legislation.NGOs have partipated to such debates; they also provide legal help and advice to aliens and asylum- seekers before domestic and international fora.

As a result the law applying to aliens has undergone profound and irreversible changes. The time at which it was composed almost exclusively of domestic instruments , allowing a wide discretion to the Administration, while judicial review of decisions was a rare and limited exercise, is gone forever.It contains now a number of rights and guarantees, both procedural and substantive.Among the latter one can mention the right to family reunion, the taking into account of the alien's individual situation (familial, social, medical). The case law plays an important role in shaping it .Courts have developed new tools and instruments of review .The increasing volume of the legal literature relating to the subject is both a cause and a consequence of the tendencies described supra.

The case law of the European Court of human rights relating to aliens and asylym seekers is an apt illustrration of these developments (7). The ECHR plays an important role to-day in Europe in the shaping and application of the law relating to aliens and asylum-seekers.This would have come as a surprise to the drafters and authors of the Convention. In 1949-1950, that is in the immediate post-war Europe, no-one thought of the rights of aliens. The main issue was then that of the " Displaced persons" (DPs) – one of the many understatements of the century -.The UNHCR was created in 1950 to replace the expiring IRO and the 1951 Geneva Convention was created to take care of refugees, that is, at the time, of European ones, as shown by the wording of Art..1- B. The 1967 New York Protocol changed the scope of the Convention in time and space.The "travaux préparatoires" of the Convention confirm this absence of preoccupation.Only clauses of th Convention, before the adoption of the Protocols relating to aliens restricted their rights, as shown by Art.5-1-f) on their detention during deportation or extradition proceedings or following a refusal of entry and Art. 16 on restrictions of their political activities. Later on the provisions contained in Art. 4 of the 4th Protocol (1963) prohibiting the collective expulsion of aliens and in Art. 1 of the 7th Protocol on procedural safeguards relating to their expulsion are extremely timid. 50 years later, we are in a position to assess the impact of the Convention and of the case law of the Strasbourg Court on the legal situation of aliens and asylum – seekers.

In cases before the Court the two provisions of the Convention most frequently invoked are Articles 3 and 8: the very importance of the rights guranteed by these Articles is one reason.The fact that, under the case law of the Court, Art. 6 does not apply to proceedings relating to the entry, stay, deportation or extradition of aliens, since decisions taken in such proceedings do not relate to disputes over civil rights and obligations and do not entail the determination of a criminal charge against the applicant is another one (8). I shall therefore comment the case law relating to these two Articles before turning to the issue of stay of execution of the challenged decision.

Article 3

Under Art. 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment". A few words on the contents of this Article, before turning to its application to decisions relating to aliens.

(a) Contents.

Its importance is a three-fold one: First, it relates to torture and other prohibited treatment or punishment. Such a prohibition has later on becopme a universaal one, as shown by the 1984 and 1987 conventions on torture. Second, such a prohibition is an absolute one, excluding any restriction or derogation under Art.15.Three, it applies, ratione personae, to all persons within the jurisdiction of a contracting State, irrespective of their behaviour or status.The differences with the non-refoulement clause contained in Art.33 of the 1951 Geneva Convention are obvious:the letter applies only to refugges, contains the restriction mentioned in Art.33-2 and , besides, mention only " life or freedom", and not torture.

(b) Application to aliens.

Art. 3 has been invoked mainly against decisioons to expel or extradite aliens.What was at issue was the risk, for the alien, to be exposed, in the country of destination, to torture or to treatment contrary to Art. 3.4 legal issues arise: the extra-territorial application of the Convention;the nature of the risk for the applicant; definitions and the origin of the risk.

The extra-territorial application of the Convention

Both the Commission (9) and the Court (10) held that a decision to expel or to extradite an alien may give rise to a question under Art. 3 if he may be subjected to treatment prohibited by Art. 3. The decisive step was taken in the Soering case in 1989.There is no need to describe the facts of the case, now well-known.The Court considered that the long period prior to execution forced prisoners to endure many years

of death-row conditions with " the anguish and mounting tension of living in the ever-present shadow of death".It held that these, combined with the personal circumstances of the applicant, constituted a real risk of treatment contrary to Art.3. It emphasized that the only responsibility engaged was that of the UK, which planned to extradite S. and not that of a third State T .The two-fold significance of this case lies in the affirmation of the extra-territorial scope of the ECHR and in the possibility of a conflict of treaty obligations if a treaty obliges a State to surrender a person.

The Kalantari case may also be mentioned here (11).K.had fled Iran and applied for refugee status in Germany.He alleged that one of his sisters had been executed and that another one had disappeared.He himself had participated in anti-governmental activities and the police had searched his apartment.His asylum application was rejected and an expulsion order towards Iran was taken against him.He brought an action in Strasbourg, alleging that his expulsion to Iran would expose him to the risk of treatments contrary to Art.3.During the proceedings before the Court, the German Government gave the assurance that he would not be expelled. The case was struck out. (12)

The nature of the risk for the applicant

There must be serious and strong reasons to believe that the applicant, if sent back to the receiving State, will run a real risk to be subjected to treatments contrary to Art.3 .This applies particularly to asylum-seekers whose application has been rejected and who are sent back to their country of origin. A good example is the Jabari case, where the Court took into consideration refugee law and the action of the HCR. Mrs J.,an Iranian, applied for refugee status in Turkey.Her application was denied.The European Court for human rights held that the Turkish authorities did not examine seriously her application:under Turkish law she had five days to submit it .There had been no proper examination of her claim relating to the risks for her if she were sent back to Iran.The Court held that the automatic and mechanical implementation of such a brief time limit to introduce an application for asylum was incompatible with the protection of the fundamental values contained in Art. 3.After the refusal of her application, the local HCR office examined her case and grantezd her refugee status.The HCR followed its guidelines and directives on gender-based persecution: she was prosecuted for adultery in Iran, the penalties being death by lapidation, flagellation or being flogged.The HCR held that Mrs.J had a well-founded fear of persecution based on her membership of a particular social group: women transgressing social mores.What is of particular interest here

is that the Court gave much attention to the HCR's decision and on its grounds.It also mentioned Amnesty's International 's submission on the penalties used in Iran against women convicted of adultery (13).

Definition.

Unlike the 1984 UN Convention against torture(14) ,the ECHR does not contain a definition of torture.The Court takes into account the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and the sex, age and state of health of the person.

The origin of the risk.

Three distinct legal issues arise. The first one is that of non-State authors.They may, the Court held, be taken into account.The applicant must show that the risk is a real one and that the public authorities cannot protect him (15).The second one is as follows: the risk of treatment contrary to Art 3 may have other causes than action of public authorities or private bodies.In a case decided in 1997 the Court held the UK to be in breach of Art 3 by expelling the applicant, who was suffereing from AIDS and only had a short time to live, to his State of origin (St Kitts), where he would not have access to appropriate medical treatment and would die in complete destitution (16).The third issue relates to the case of asylum-seekers whose application is rejected or held inadmissible and who are sent back to another country, through bilateral readmission agreements, or the Dublin Convention (now replaced by a Regulation) or because this country is held to be a " safe third country".The fact is that the case law of European countries on persecution by non-State actors is not the same everywhere. Some countries, like Germany, do not take at all into account such persecution. Others do, on certain conditions. The diverging interpretations were mentioined by the UNHCR in its submission before the European Court of human rights in the T.I. v. UK case (17).In such a case, the HCR held, "indirect removal could violate the non- refoulement principle.In its decision on substance (18) the Court affirmed an important principle: the British Government intended to remove T.I to Germany, where a deportation order to Sri-Lanka awaited him, on the basisi of the Dublin Convention. Rejecting the argument of the UK the Court added:

"Where States establish international organizations or, mutatis mutzandis, international agreements to pursue cooperation in certain fierlds of activities, there may be implications for the protection of fundamental rights.It would be incompatible with the purpose and object

of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the filed of activity covered bu such attribution"

The Court went on to examine whether the UK had complied with their obligation to protect the applicant from the risk of torture and ill-treatments prohibited by Art. 3.

Article 8

This article, one of the most important ones of the ECHR, guarantees rights and liberties which, under other international or domestic instruments, were not then are not always protected as they should be.In cases relating to aliens, it is used by applicants challenging a refusal of entry, or of a residence permit, or a deportatioin order. The Court's case law may be summed up as follows.

(*a*) Under a well- established principle opf international law; States are empowered to decide the conditions of entry and of residence of aliens and to order their expulsion on public order grounds.

(*b*) The Convention does not guarantee the right to establish one's family life in a given country (19).

(*c*) However they must , whenever they take decisions relating to aliens, respect their international obligations.If they infringe a right guaranteed by the Convention, the right to respect for one's private and family life here, these limitations must be based on a pressing social need and be proportionated to the legitimate end pursued (20.)

(*d*) Whenever the violation of Art. 8 is invoked, four questions must be answered: the first one relates to the existence of a family life.Under the Court's case law the primary group is constituted by parents and children, irrespective of marriage and of the status of children and even of actual cohabitation (21).Ther second question concerns the existence of an interference with it.The third question is: is the decision based on one of the grounds enumerated in Art. 8-2? The last and most difficult question is: is the decision proportionated to the aim pursued? The problem, as for other rights, is how to a achieve a fair balance between the individual right protected and those of society at large.The Court takes into consideration such elements as the behaviour of the alien, including the existence of sentences and their level, the existence of links with his country of origin and the contents and context of his family life in the country of residence.

Stay of execution: the Mamatkulov and Askarov v Turkey case (2005).

The facts were as follows: Both were Uzbek nationals, members of an opposition party M. arrived in Turkey in 1999 and was arrested under an international arrest warrant.The Uzbebk autorities requested his extradition on suspicion of homicide , attemped attatck against the Prime Minister and explosion of a bomb. A. arrived in 1998. The facts were the same.By mid-March, 1999, three weeks after M.'s arrival, the Turkish cvourts rejected both appeal against their extradition. They then brought an action before the European Court of Human Rights.On March 18, 1999 the president of the relevant chamber indicated to the Turkish Government, on the basis of Art. 39 of the rules of procedure of the Court, that it was desirable, in the interest of the parties and of the smooth progress of the proceedings before the Court, not to extradite the applicants to Uzbekistan prior to the meeting of the competent Chamber, on March 23.On that day, the Chamber extended the interim measure until further notice.The next day, the Turkish Government ordered the extradition, which took place on March 27th.On month later, it informed the Court that it had received assurances about the two applicants from the Uzbek authorities:they would not be subjected to torture or sentenced to death.On June 28,1999, they were sentenced to 20 and 11 years of imprisonment.

Before the Court they alleged the violation of several Articles of the Convention: 3 (no violation was found); 6-1 (This Article does not apply to extradition proceedings), and finally 34, on the right of individual application: by extraditing them despite the stay indicated by the Court under Rule 39 of the Rules of the Court, Turkey, they held, had failed to comply with its obligations nunder Art. 34 of the Convention. The contents of these two articles are the following one:

Art 34:" The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of the Court provides: " 1" The Chamber or, where apppropriate, 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 interests of ther parties or of the proper conduct of the proceedings before it."

In its previous judgment of 2003 (the case had been sent up to the Grand Chamber) the Court held:

"... any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any other act or omission that will undermine the authority and effectiveness of the final judgment.Consequently, by failing to comply with the interim measures indicated by the Court under Rume 39 of its Rules, Turkey is in breach of its obligations under Art. 34 of the Convention".

The issue was an important one.On the face of Art. 39 interim measures are not binding for the Government .How did the Court, both in 2003 and 2005, arrive at the opposite conclusion, thus departing from its previous case law (22). It took into consideration four elements:

(*a*) The importance of the right of individual application in the system of the Convention.It creates objective obligations for each State.Its safeguards must be effective and practical.

(*b*) The Court looked at the practice of interim measures under the Convention system. Art. 39 does not state the grounds on which it may be applied.The Court applies it in restricted circumstances, i.e. When there is an imminent risk of irreparable damage in relation with the right to life (Art.2), the prohibition of torture and of inhuman or degrading treatment (Art. 3) or, exceptionnally, the right to respect for one's private and family life (Art. 8).The majority of the cases in which interim measure have been indicated concern deportation or extradition proceedings. Hence the special interest of the judgment for aliens's law. Cases of States failing to comply with such measures are very rare.In the Soering case, the UK Government complied, in spite of its obligations towards the USA under the extradition Treaty.

(*c*) The Court next examined closely the views and practice of other international bodies having either individual petition procedures or procedures for the judicial settlement of inter-State disputes.One thing was clear: international courts and institutions have stressed the importance and purpose of interim measures.They have pointed out that compliance with them is necessary to ensure the effcetiveness of their decisions on the merits and have held that lack of compliance is a breach of the State's obligations. This is the practice of the UN Human Rights Committee, of the UN Committe overseeing the implementation of the Convention agaionst torture, of the ICJ (see the La Grand case, Germany v the USA). In one word the interpretation of the scope of interim measures cannot be dissociated from

the proceedings to which they relate or the decision on the merits they seek to protect (23).

(*d*) The Court then answered the question: Did the applicants' extradition hinder the effective exercise of their right of application? The answer was: yes.Their extradition reduced the level of protection of the Court for the rights asserted under Art. 2 and 3. .Moreover the applicants lost contact with their lawyers and were denied an opportunity to have further inquiries made in order to evidence their allegations under Art. 3.The Court was prevented by the applicants' extradition from conducting a proper examination of their complaints and ultimately from protecting them, if need be, against potential violations of the Convention. Turkey was found to be in breach of Art. 34 (24)

(2) The role of non- governmental organizations

In the three domains studied here—refugee law, international humanitarian law and international human rights law – their role has become more and more important and visible. Here are a few illustrations:

(*a*) They have had a direct influence on the drafting of certain international conventions, as shown by the role of the ICRC – admittedly a sui generis body -in the codification of international humanitarian law (22 bis), of the international coalition in the drafting of the Rome Statute of the ICC or of a Swiss NGO in the drafting of the 1987 European Convention against torture.

(*b*) They role in the monitoring of the implementation of conventions by States is vital.Their reports are a key source of information for Governments, public opinion at large and national and international courts and other bodies.

(*c*) Their supervision of the nomination and election of judges of such courts as the European Court of Human Rights and the ICC has proven to be very useful (23).

(*d*) Their submissions before international or domestic courts in the form of amicus briefs have been extremely helpful.

(*e*) On the ground they have been instrumental in providing humanitarian assistance in such key areas as medicine, food and shelter, especially for refugees.

(*f*) As a consequence their international status has been recognized and affirmed by a number of instruments: The UN Charter (Art. 71), varied resolutions of the UN General Assembly on their role in providing humanitarian assistance, the 1986 Council of Europe convention on the recognition of the moral personality of international NGO's.

(3) The apparition of new forms of conflict and their consequences for refugee law

In its classic form refugee law was built on a simple model: a tyrannic or oppressive State persecuted certain persons who fled and needed international and national protection in order to live in peace elsewhere and be able to travel. Such is still the case in many countries throughout the world.Since the end of the XXth century the world scene has been marked by the apparition of new types of situations, which have created new problems in relation to the protection of refugees and with the implementation and interpretation of the 1951 Geneva Convention. Here are a few illustrations.

(*a*) Persecution by non-State agents, while the State is either powerless or an accomplice.
(*b*) Civil wars accompanied by mass killings and exodus of populations (Rwanda, Sudan).
(*c*) Total collapse of the State, giving way to general anarchy or the coexistence of a number of local de facto authorities.
(*d*) Combination of civil war and international armed conflict: Yugoslavia in the 90's.
(*e*) Imposition of a kind of UN "protectorate", as in Kosovo. Who is in charge of what in such a new situation is a pertinent question.The organizational chart in Kosovo is the following one: the Special Representative of the UN has four bodies under his authority: the HCR is responsible for " humanitarian affairs"; the UN is in charge of "temporary civil administration"; OSCE cares for " Institution building" ; the European Union is responsible for " reconstruction"(25).
(*f*) Local protection provided to certain populations by special measures (e.g. the Kurds in Northern Iraq.

These new and complex situations have generated a number of debates on such issues as internal flight, the protection, or absence of, provided by public authorities, domestic or international. Here are some recent examples drawn from the case law of the French Commission des recours des réfugiés:

The first case relates to Somalia: the applicant, a woman, had been persecuted by members of Hawiyé militia after the fall of President Syad Barr in 1991 because she belonged to the Reer Hamar clan whose members, designated as foreigners, had been victims of systematic violence. After the death of her busband,in 1998, she had again been victim of violebnces and fled.In such circumstances the CRR held that the applicant had a well-founded fear of being persecuted, in view of her belonging to the minority mentioned supra, if she returned to

Mogadiscio, her region of origin, where rival hawiyé factions share de facto power. She could not, the decision held, avail herself, in Mogadishu or elsewhere, of the protection of a public authority.Refugee status was granted (26).

The two other cases relate to Kosovo and to the absence of protection afforded by the UNMIK. One case related to the situation in North Mitrovica, where the control by KFOR and UNMIK was not complete, so that Albanian refugees, who had returned, could not avail themselves of the protection of international authorities.The two applicants were a couple. Their house had been partially destroyed and looted by elements of the UCK, which the husband refused to join.He was then threatened with death and had to be evacuated by KFOR. He could not return. He could go to Mitrovica South or to the region of Pristina, but would be exposed there to reprisals by the UCK and without protection. Refugee status was granted.(27).

The second case gives an idea of the complexity and savagery of certain situations.The applicant, a Serbian national, was from Kosovo and belonged to the Albanian community.She lived in Kosovo with her companion .Members of her family in Kosovo collaborated with Serbian authorities by transmitting them information on the UCK. Former members of the latter and Albanian compatriots looking for members of her family used reprisals against her. She was threatened and had to leave for Pristina.There again she was threatened by the same people who accused her of collaborating with the Serbs.She complained to the police and to KFOR, but could not obtain any protection from them and fled the country. Refugee status was granted.(28).

(4) The creation of international criminal courts. From Nuremberg to The Hague to domestic courts: Towards the reunification of the three pillars?

The creation of international criminal courts is one of the major legal innovations of the XXth century. The way the ideas and the institutions developed over half a century contains many lessons ,and maybe a guide for the perplexed or the sceptics.

(*a*) The first step was the 1945 Statute of the Nuremberg IMT and its 1946 judgment (29):
The idea that individuals had certain obligations under international law, the use of criminal law to prosecute and punish the authors of certain crimes, the definition of crimes of war and and the creation of the concept of crimes against humanity have been its major and lasting achievements.

(*b*) The conventions adopted in the course of the next 40 years have laid the legal foundation of the jurisdiction of the new

international criminal courts. Whether they belong to international humanitarian law (the 1949 Geneva Conventions and the 1977 Protocols), refugee law (the 1951 Convention) or international human rights law (from the 1948 Genocide Convention to the Covenants, the Convention against torture and that on the rights of the child) is irrelevant here.

(*c*) The creation, in 1993 and 1994 of the International Criminal Tribunals for the former Yugosloavia and for Rwanda were a major step.Their jurisdiction, as enunciated in their statute (ICTFY, Art. 2 to 5), ICC (Art. 6 to 8) builds on the conventions mentioned in B) supra.

(*d*) The importance of the creation of the ICC is a three-fold one: it is the first permanent international criminal court. Its Statute (30) contains a more detailed and precise definition of the three categories of crimes which fall under its jurisdiction. The idea of complementarity with domestic courts is stated.

(*e*) That complementarity with domestic courts should coexist with the juridiction of an international court is a rather new concept. After 1946 the trials of German criminals before domestic courts took place after the IMT gave judgment.The fact that international grave crimes may, in certain circumstances, belong to the jurisdiction of States should increase their responsibility and diminish the temptation of passivity. The Pinochet decision of the House of Lords and the way the criminal procedure codes or laws of a number of countries have been changed after they ratified the Rome Convention are apt illustrations of this new and fundamental trend.

(*f*) The creation , here and there (East Timor, Sierra- Leone, Cambodia), of internationalised criminal courts, associating domestic members and foreign ones shows that the choice is not always between a full international court and a national one.

Whatever misgivings one may have on the way these new courts have been functioning till now, their very existence must definitely be included in our reflexion on the three pillars. The specificity of each of them remains, as to their scope and instruments of supervision.But a new dimension has been added to the international – and national legal order.And refugee law, that is all those in charge of implementing it, i. e of translating into actual practice the central notion of protection must take this global development into account.

NOTES

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8. Maaouia v France, October 5, 2000; IJRL, vol. 13, n° 13, (2002), 381; RUDH. 2000. 284.
9. See X v Germany, Application n° 1465/62; Amekrane v UK,Application n° 5961/72; Altun v Germany, Application n° 10308/83; Kirkwood v UK, Application n° 10479/83.
10. Soering v UK, June 26, 1989, EuGRZ.1989. 314; HRLL.1990.335; RUDH. 1989. 99; Cruz Varas v Sweden, March 20, 1991; EuGRZ.1991.203; HRLJ.1991.142; RUDH.1991.209.Vilvarajah and al v UK, October 30,

1991; HRLJ.1991.432; RUDH.1991.537; Chahal v UK, November 15, 1996; RUDH.1997.365.

11. Kalantari v Germany, October 11, 2001.
12. For a similar epilogue, relating to the extradition to China of a Chinese-Sierra-Leone national accused of murder, see Yang Chun Jun v Hungary, January 11, 2001 (Admissibility) and March 8, 2001 (case struck out), HRLJ, 2001,277 and 282.
13. Jabari v Turkey, July 11, 2000(see infra); see ailso Vivarajah et al v UK, mentioned supra n. 10.
14. Art. 1-1.
15. HLR v France, April 29, 1997; RUDH.1997.60.
16. D v UK, May 2, 1997.
17. Decision on admissibility in IJRL,vol.12,n° 2, 2000,p.244, at 258 (Decision on the merits, March 7, 2000).
18. March 7, 2000.
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20. Nasri v France,July 13,1995,§ 41; Boughanemi v France,April 24,1996,§ 41;C.v Belgium,July 8, 1996,§ 32.
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24. Mamatkulov and Askarov v Turkey, February 4, 2005. For an earlier study see Interim Measures Indicated by International Courts, R. Bernhardt, Ed, Springer, 1994.
25. See chart in A.Sigg, International human rights law, international humanitarian law, refugee law: Geneva from early origins to the 21st century, Swiss Federal Department of Foreign Affairs, Berne, 2003.
26. CRR, September 22, 2004, Mlle Hussen, ép.Adoyre; see also, same date,Mlle O.
27. CRR,April 4, 2003, M et Mme Morina.
28. Id, September 23, 2004,Mme Qerimi.
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HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW – THREE PILLARS

EMANUELA-CHIARA GILLARD*

I am honoured, daunted and delighted to be here today. Honoured and daunted as this is a very eminent audience and panel.

Delighted because the invitation to speak shows the International Association of Refugee Law Judge's interest in international humanitarian law and awareness of its relevance to issues of refugee law.

International humanitarian law, refugee law and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact.

I am delighted, finally, by this recognition of the role of the International Committee of the Red Cross ("ICRC").

I. THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND INTERNATIONAL HUMANITARIAN LAW

How does the ICRC carry out the mandate given to it by states to assist and protect persons affected by armed conflict?

- Pre-emptively, by disseminating international humanitarian law to armed forces in time of peace.
- In the heat of conflict by:
  - obtaining access to persons in need;
  - making interventions to parties to the conflict (states and organised armed groups) with a view to putting an end to violations;
  - dealing with the consequences of such violations, by the provision of emergency assistance: including water, shelter, food and medical care;
  - re-establishing family links;
  - visiting persons detained in relation to the conflict.

A. What is international humanitarian law?

In addition to this very operational side of its work, the ICRC is

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also the promoter and guardian of international humanitarian law, the body of rules applicable in armed conflict which

- protect those not or no longer taking active part in hostilities
- regulate permissible means and methods of warfare.

The principal sources of international humanitarian law today are

- the four Geneva Conventions of 1949;
- the two Additional Protocols thereto of 1977;
- a number of treaties prohibiting or restricting the use of specific weapons, eg the 1980 Convention on Certain Conventional Weapons and its protocols;
- the 1954 Convention on the Protection of Cultural Property in the Event of War;
- instruments establishing international mechanisms for the enforcement of international humanitarian law such as the 1998 Statute of the International Criminal Court;
- an important body of customary law.

B. When does international humanitarian law apply?

As I stated earlier, international humanitarian law applies in times of armed conflict. This begs the deceptively simple question of "what constitutes an armed conflict"?

While in 1974 the General Assembly adopted a definition of aggression, nowhere - neither in international humanitarian law instruments nor in any other body of international law – do we find a definition of armed conflict.

If we look to international humanitarian law treaties for guidance, while we do not find a definition, we do have provisions indicating when relevant conventions are applicable. International humanitarian law recognises two types of conflict: international armed conflicts and non-international armed conflicts. Different criteria determine the existence of these types of conflict, which are regulated by different rules.

1. International conflicts

These are conflicts opposing two or more states. The word "international" is used to describe the parties fighting each other (ie inter-*states*) and not in a geographic sense.

It is clear from provisions common to the four Geneva Conventions of 1949, the *Commentary* thereto as well as recent decisions of the International Criminal Tribunal for the former Yugoslavia ("ICTY") such a conflict exists whenever there is

> any difference arising between two States ... leading to the intervention of armed forces ... even if one of the Parties denies the existence of a state of

> war. It makes no difference how long the conflict lasts, or how much slaughter takes place.[384]

The ICTY Appeals Chamber in the *Tadic* decision seems to have taken a similarly expansive approach, holding that an international armed conflict exists and, consequently that international humanitarian law applies, "whenever there is resort to armed force between states".[385]

Any use of force by states is thus regulated by international humanitarian law – even if they do not label it as war.

2. *Non-international armed conflicts*

The position is not so simple with regard to non-international armed conflicts. These are conflicts opposing a state and an organised armed group or two or more such groups. Again, "non-international" is not used as a geographic term. Although these tend to be internal conflicts, they can easily have a cross-border dimension.

Time prevents me from going into the details of the two slightly different legal regimes that regulate such conflicts, one based on Article 3 common to the 1949 Geneva Conventions and one based on the 1977 Additional Protocol II thereto. Instead, I will focus on the key constituent elements of non-international conflicts.

Additional Protocol II applies to:

> conflicts ... between [a state's] armed forces and dissident armed forces or other organised armed 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.[386]

"Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are expressly excluded from the scope of the Protocol.[387]

In the *Tadic* case the Appeals Chamber of the ICTY held that international humanitarian law was applicable in situations of non-international armed conflict in cases of "protracted violence between governmental authorities and organised armed groups or between such groups within a State".[388]

Although there is no precise formula or checklist for determining

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384. J. PICTET (ed.), *Commentary to the IV Geneva Convention*, (1958) 20.
385. *Tadic*, IT-94, ICTY Appeals Chamber, 2 October 1995, § 70.
386. Article 1(1) Additional Protocol II. Common Article 3 of the Geneva Conventions applies simply to "armed conflict not of an international character".
387. Article 1(2) Additional Protocol II.
388. *Tadic, supra.*

the existence of a non-international armed conflict the following elements are relevant:

- parties: a state fighting an organised armed group or two or more such groups fighting among themselves;
- control of territory by the organised armed group is required for Additional Protocol II to apply. This is not necessary under common Article 3 of the Geneva Conventions. In any event it is a significant indicator of the level of organisation of an armed group;
- a certain level of violence and intensity of fighting;
- resort to military means;
- protracted violence.

It is by no means straightforward factually to determine if a situation is "unrest" or isolated or sporadic acts of violence or a conflict. Moreover, the determination and acceptance of the existence of a non-international conflict is an extremely sensitive political issue.

C. Who determines the existence of a conflict?

Finally, who makes the determination of existence of an armed conflict? Different entities for different purposes and with different consequences.

For example, the Security Council is authorized by the UN Charter to make a determination of the existence of a threat to the peace, breach of the peace or act of aggression. Such a finding brings into play the Chapter VII enforcement mechanisms of the Charter. The resolution making such a finding is binding on all UN Member States.

A Security Council determination of the existence of a threat to the peace, breach of the peace or act of aggression is not the same as a finding of the existence of an armed conflict. However, it may be an indirect evidence of the existence of such a situation, for example if the resolution calls upon the parties to the conflict to respect the Geneva Conventions – whose application, of course, presupposes the existence of an armed conflict.

Secondly, international and/or national courts may be required to make a determination of the existence of a conflict. This can occur *ex post facto* when they try individuals for alleged violations of international humanitarian law – for war crimes to be committed it is necessary to have a war. The international criminal tribunals for the former Yugoslavia and for Rwanda have therefore developed important jurisprudence on the notion of armed conflict that provide useful guidelines when analysing other situations. Of course, it is not only in relation to criminal matters that courts may have to determine whether a particular situation amounts to an armed conflict. The

question may also arise in civil claims, for example to determine whether a war exemption clause in an insurance contract is applicable.

Thirdly, the parties to the conflict themselves also make a determination of the situation in which they find themselves. This might be required constitutionally. For example parliamentary authorisation may be required for going to war. Or it may take the form of a more discrete determination, for example, by the provision of "armed conflict" as opposed to "law enforcement" rules of engagement to the armed forces.

Finally, the ICRC also and constantly makes a determination of whether a particular situation amounts to an armed conflict. This "qualification" of a situation, as we call it, is necessary both to determine whether international humanitarian law is applicable and for the ICRC to commence its traditional activities.

This is not a public finding. It is an essential part of an on-going confidential dialogue with the parties concerned and, of course, it is not binding. The ICRC qualifies every situation of violence in the world. Once it determines that a situation amounts to an armed conflict it sends a memorandum to the parties concerned setting out their obligations under international humanitarian law and it offers its services.

For obvious reasons this is an extremely sensitive issue, particularly in non-international armed conflict, where there is a tendency by states to deny the application of international humanitarian law, often claim the violence is terrorism and not armed conflict, or as has recently been the case in Colombia, that it is narco-trafficking and not armed conflict.

II. THE INTERPLAY BETWEEN THE "THREE PILLARS"

A. Interface between international humanitarian law and human rights law

While international humanitarian law only applies in times of armed conflict, human rights law applies at *all* times; in times of peace and in times of armed conflict. The concurrent application of these two bodies of law has been expressly recognised by various international tribunals, including the International Court of Justice, the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights and, of course, numerous national courts.

This being said, some human rights treaties permit states to derogate from certain rights in times of public emergency. Certain key rights may never be suspended, including the right to life and the prohibition of torture or cruel, inhuman or degrading treatment or punishment. Moreover, unless and until they have issued derogations in accordance

with the relevant procedures states are bound by the entirety of their conventional obligations even in times of armed conflict.

The scope of application of the two bodies of law is slightly different. international humanitarian law binds all actors in armed conflicts: states, organised armed grounds and individuals. Human rights law, on the other hand, lays down rules that regulate states in their relations with *individuals*. While there is a growing body of opinion according to which organised armed groups – particularly if they exercise government-like functions – must also respect human rights the issue remains unsettled. Although individuals do not have specific obligations under human rights law, the most serious violations of human rights, such as genocide, crimes against humanity and torture, are criminalised by international law and are often crimes under national criminal law.

The essence of some of the rules of international humanitarian law and human rights law is similar. For example, both bodies of law aim to protect human life. prohibit torture or cruel treatment, prescribe basic rights for persons facing criminal proceedings and prohibit discrimination. However, care must be taken to ensure the proper articulation of the relationship between the two sets of rules.

As stated by the International Court of Justice in its advisory opinion on *Nuclear Weapons*, in situations of armed conflict, international humanitarian law is *lex specialis*. What does this mean? The precise interplay depends on the rules in question.

There may be certain matters for which international humanitarian law lays down a "self-contained" set of rules. In these cases the provisions of international humanitarian law apply to the exclusion of human rights. A case in point are the rules relating to prisoners of war found in the Third Geneva Convention which, with regard to most matters, is a self-contained system. For example, this means that prisoners of war can be deprived of their liberty until the end of hostilities and a right to challenge the deprivation of liberty cannot be inferred from human rights law.[389]

On the other hand, international humanitarian law can be vague or silent on particular questions, in which case it is proper to turn to human rights law for guidance to interpret the rules in question. This is most notable in relation to fair trial provisions, where international humanitarian law only contains general provisions, like a reference to entitlement to "judicial guarantees recognised as indispensable by civilised peoples". The precise contents of such guarantees can be

389. Article 5 of Third Geneva Convention does give captured combatants a right to have their entitlement to prisoner of war status determined by a competent tribunal.

inferred from human rights law. Human rights law is also an important source of rules and protection in non-international armed conflicts, where the international humanitarian law treaty rules are few.

Finally, there may be issues addressed by *both* bodies of law. As international humanitarian law is *lex specialis*, the human rights norm must be interpreted through the prism of international humanitarian law. What do I mean by this? The right to life can serve as an example. What constitutes an "unlawful killing" in situations of armed conflict must be assessed on the basis of the relevant rules of international humanitarian law, including the fact that combatants or other persons taking a direct part in hostilities may be attacked - even with lethal force; and that killing of civilians in certain circumstances may not be prohibited. They may be permissible "collateral damage". The lawfulness of such deaths must be assessed pursuant to international humanitarian law's principle of proportionality which requires a balancing of the incidental loss of civilian life or injury to civilians with the concrete and direct military advantage expected from a particular attack.

In recent years we have been seeing the emergence of extremely interesting and important case law from human rights and national courts as they grapple with this complex relationship. The analysis is not rendered any easier by the question of the extent of extra-territorial application of human rights.

B. Interface between international humanitarian law and refugee law

The relationship between international humanitarian law and refugee law is also a two-way cross fertilisation.

1. International humanitarian law in refugee law and protection

Armed conflict and international humanitarian law are of relevance to refugee law and refugee protection in a number of ways.

First, to determine who is a refugee. Many asylum seekers are persons fleeing armed conflict and often violations of international humanitarian law. Does this make them refugees? Not every person fleeing an armed conflict automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution. While there may be situations, notably in conflicts with an ethnic dimension, where persons are fleeing because of a fear of persecution based on their "race, religion, nationality or membership of a particular social group", this is not always the case.

Recognising that the majority of persons forced to leave their state of nationality today are fleeing the indiscriminate effect of hostilities and the accompanying disorder, including the destruction of

homes, foodstocks and means of subsistence – all violations of international humanitarian law – but with no specific element of persecution, subsequent regional refugee instruments, such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict.

Moreover, states that are not party to these regional instruments have developed a variety of legislative and administrative measures, such as the notion of "temporary protection" for example, to extend protection to persons fleeing armed conflict.

A second point of interface between international humanitarian law and refugee law is in relation to issues of exclusion. Violations of certain provisions of international humanitarian law are war crimes and their commission may exclude a particular individual from entitlement to protection as a refugee.

2. *Protection of refugees under international humanitarian law*

International humanitarian law offers refugees who find themselves in a state experiencing armed conflict a two–tiered protection. First, provided that they are not taking a direct part in hostilities, as civilians refugees are entitled to protection from the effects of hostilities. Secondly, in addition to this general protection, international humanitarian law grants refugees additional rights and protections in view of their situation as aliens in the territory of a party to a conflict and their consequent specific vulnerabilities.

(a) General protection

If respected, international humanitarian law operates so as to *prevent* displacement of civilians and to ensure their protection during displacement, should they nevertheless have moved.

(i) The express prohibition of displacement

Parties to a conflict are expressly prohibited from displacing civilians. This is a manifestation of the principle that the civilian population must be spared as much as possible from the effects of hostilities.

During occupation, the Fourth Geneva Convention prohibits individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying power or, as is more often the case in practice, into third states.

There is a limited exception to this rule, which permits an occupying power to "evacuate" the inhabitants of a particular area if this is necessary for the security of the civilian population or for imperative military reasons. Even in such cases the evacuations should not involve the

displacement of civilians *outside* the occupied territory unless this is impossible for material reasons. Moreover, displaced persons must be transferred back to their homes as soon as the hostilities in the area in question have ceased.

The prohibition on displacing the civilian population for reasons related to the conflict unless the security of the civilians or imperative military reasons so demand also applies in non-international armed conflicts.

(ii) Protection from the effects of hostilities in order to *prevent* displacement

In addition to these express prohibitions, the rules of international humanitarian law which shield civilians from the effects of hostilities also play on important role in the *prevention* of displacement, as it is often violations of these rules which are at the root of displacements in situations of armed conflict.

Of particular relevance are:

— the prohibition to attack civilians and civilian property and of indiscriminate attacks;
— the duty to take precautions in attack to spare the civilian population;
— the prohibition of starvation of the civilian population as a method of warfare and of the destruction of objects indispensable to its survival; and
— and the prohibition on reprisals against the civilian population and its property.

Also of relevance are the prohibition on collective punishments which, in practice have often taken form of destruction of homes, leading to displacement; and the rules requiring parties to a conflict, as well as all other states, to allow the unhindered passage of relief supplies and assistance necessary for the survival of the civilian population.

(iii) Protection during displacement

Although prohibited by international humanitarian law, displacement of civilians frequently occurs in practice. Once displaced or evacuated civilians are entitled to various protections and rights. Thus we find rules regulating the manner in which evacuations must be effected: transfers must be carried out are in satisfactory conditions of hygiene, health, safety and nutrition; during displacement persons must be provided with appropriate accommodation and members of the same family must not be separated.

Although these provisions relate to conditions to be ensured on situations of evacuation – i.e. "lawful" displacements for the safety of

the persons involved security or for imperative military necessity - these conditions should be applicable *a fortiori* in situations of unlawful displacement.

In addition to these special provisions relating specifically to persons who have been displaced, such persons are civilians and, as such, entitled, even during displacement, to the whole range of protection appertaining to civilians.

(b) Specific protection of refugees

In addition to this general protection, international humanitarian law affords refugees further specific protection. In international armed conflicts refugees are covered by the rules applicable to aliens in the territory of a party to a conflict generally as well as by the safeguards relating specifically to refugees.

(i) Protection as aliens in the territory of a party to a conflict

Refugees benefit from the protections afforded by the Fourth Geneva Convention to aliens in the territory of a party to a conflict, including:

- the entitlement to leave the territory in which they find themselves unless their departure would be contrary to the national interests of the state of asylum;
- the continued entitlement to basic protections and rights to which aliens had been entitled before the outbreak of hostilities;
- guarantees with regards to mean of existence, if the measures of control applied to the aliens by the party to the conflict means that they are unable to support themselves.

While recognising that the party to the conflict in whose control the aliens find themselves may, if its security makes this absolutely necessary, intern the aliens or place them in assigned residence, the Convention provides that these are the strictest measures of control to which aliens may be subjected.

Finally, the Fourth Convention also lays down limitations on the power of a belligerent to transfer aliens. Of particular relevance is the rule providing that a protected person may in no circumstances be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs; a very early expression of the principle of *non refoulement*.

(ii) Additional protections for refugees

In addition to the aforementioned rules for the benefit of all aliens in the territory of a party to a conflict, the Fourth Geneva Convention

contains two further provisions expressly for the benefit of refugees. The first provides that refugees should not be treated as enemy aliens – and thus susceptible to the measures of control - solely on the basis of their nationality. This recognises the fact that refugees no longer have a link of allegiance with that state and are thus not automatically a potential threat to their host state.

The second specific provision deals with the precarious position in which refugees may find themselves if the state which they have fled occupies their state of asylum. In such circumstances, the refugees may only be arrested, prosecuted, convicted or deported from the occupied territory by the occupying power for offences committed *after* the outbreak of hostilities, or for offences unrelated to the conflict committed before the outbreak of hostilities which, according to the law of the now occupied state of asylum, would have justified extradition in time of peace. The objective of this provision is to ensure that refugees are not punished for acts - such as political offences - which may have been the cause of their departure from their state of nationality, or for the mere fact of having sought asylum.

All of this being said, who is a refugee for the purposes of international humanitarian law? Although the Fourth Geneva Convention expressly refers to refugees, it does not define this term. Instead, it focuses on their *de facto* lack of protection from any government.

The matter was developed in Additional Protocol I. This provides that persons who, before the beginning of hostilities, were considered refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or of residence are to be considered "protected persons" within the meaning of the Fourth Convention in all circumstances and without any adverse distinction.

D. ICRC's interaction with UNHCR and human rights agencies

So far I have focused on the law. I would now like to say a few words about the ICRC's interaction with UNHCR and international human rights bodies.

As I said at the outset, the ICRC is an operational agency. Extremely so! Currently it has a presence in 80 situations of armed conflict with more than 12,000 employees. Many of its activities in the field provide protection and assistance to refugees and internally displaced persons. It is natural for us to have a close interaction with UNHCR which is often working in the same context.

This interaction can be on legal matters. For example, in recent years we have worked together to determine the legal framework regulating the separation and internment of combatants who cross borders with

refugees in situations of mass influx and the development of guidelines for its implementation. We also regularly train one another's staff in international humanitarian and refugee law.

Obviously, there is also close interaction in operational terms to ensure a coherent and comprehensive response on the ground. Such interaction can be quite formal and at "high level" such as, for example, the Memorandum of Understanding concluded in March 2003 to allocate responsibilities and tasks for possible population flows from Iraq.

Interaction also takes place on a day to day basis in the field. Just to give one example, in Iraq today, where UNHCR currently does not have an expatriate presence, we are liaising to try to find practical ways of dealing with third country nationals in hands of multinational forces who cannot be released in Iraq and who have indicated their fear of being repatriated.

The ICRC's interaction with human rights agencies on the other hand is not so close. This could be due to the fact that the Office of the High Commissioner for Human Rights has a very limited field presence. Moreover, as human rights bodies are often by their very nature outspoken in their establishment and condemnation of violations, a close relationship would be hard to reconcile with ICRC's confidential *modus operandi*. This naturally gives rise to a relationship more at arm's length.

The Office of the High Commissioner, monitoring bodies and the Commission on Human Rights, where the ICRC has observer status, are increasingly addressing international humanitarian law in both country and thematic work and, where appropriate, the ICRC provides informal expert advice on international humanitarian law. To give but one example, earlier this week the Commission on Human Rights adopted the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law. The ICRC participated in the expert meetings leading to the adoption of this instrument and provided legal input on the international humanitarian law dimension.

III. CHALLENGES

To end I would like mention some current challenges to international humanitarian law, refugee law and human rights law.

A. Terrorism and the response to it

Terrorism negates the most basic principles of humanity which underlie the three bodies of law. At the same time, the efforts to

prevent further acts of terrorism and to bring suspects to justice have put existing legal frameworks of protection under strain.

I do not propose to go into the details of this question now. It was the subject of an expert workshop hosted by the Institute of International Humanitarian Law in San Remo in 2002. Suffice it to say that numerous international bodies have reaffirmed the need for states to respect international law while fighting terrorism.

B. Non-refoulement

I would like to spend my final moments to present a practical challenge that the ICRC has faced in recent years: how to ensure respect of principle of *non-refoulement*.

Non-refoulement is the keystone of refugee law and also forms part of international humanitarian law and human rights law, notably as part of the prohibition of torture: no one must be transferred to a place where s/he risks torture or other forms of ill-treatment. While the precise contours of the principle may differ slightly in the different bodies of law, the essence of the principle is uncontroversial.

The ICRC has to address problems related to *non-refoulement* in a variety of situations. I will only focus on those arising when we visits persons deprived of their liberty, including just before a release and repatriation and they express to us their concern at returning home. We communicate this concern to the detaining authorities and remind them of their obligations under the principle of *non-refoulement*.

A first challenge sometimes arises when we "unpack" these obligations. What are they in practice? At a minimum they include a requirement to

- suspend any repatriation or transfer;
- carry out a review of the well-foundedness of the fear expressed by the detainee by a competent tribunal;
- grant the individual access to refugee status determination procedures.

What problems are we sometimes faced with?

- issues of extra-territoriality. Although they are not relevant to *non-refoulement* as a principle of international humanitarian law, as what matters is the existence of a conflict, the international humanitarian law prohibition only expressly applies to aliens in the power of party to an international conflict and not in occupation or non-international conflict, in which cases we are implicitly invoking the prohibition as a principle of refugee law and human rights and issues of extra-territoriality may be more pertinent;

- the state concerned could disagree with our analysis of what the principle of *non-refoulement* means in practice;
- a competent tribunal might not exist;
- access to refugee status determination procedures may be denied;
- UNHCR may not be present to assist, or even if it is, the persons concerned may fall into the exclusion clauses.

On this last point, when talking of *non-refoulement* it is often said that for persons who are not granted protection as refugees, *non-refoulement* as a rule of human rights acts as a safety net. However, as a matter of practical reality all too often there is no-one to hold this safety net ...

- human rights agencies are not "operational" ie in the field and in places of detention, so can only rarely act swiftly and preventively in particular cases;
- the ICRC cannot provide them with information on individual cases that we are encountering during our confidential work;
- the ICRC's authority to invoke the principle as matter of human rights law may be challenged by states on the ground that the ICRC should only address questions of international humanitarian law.

The final element of complexity is the increasing resort by states to diplomatic assurances to side step their obligations under the principle of *non-refoulement*. The extent, if at all, these are compatible with *non-refoulement* is far from clear.

Moreover, the ICRC faces the risk of becoming part of the diplomatic assurances "deal" and thus giving it an element of legitimacy, when the sending state – without the ICRC's consent – requires the receiving state sonsent to the ICRC's monitoring the detention of any returned persons.

Why do I tell you all of this? Because of the pivotal role of national courts in upholding the principle of *non-refoulement*. We look to you to authoritatively

- set the limits and scope of the principle;
- identify its constitutive elements;
- determine the interplay between international humanitarian law, refugee law and human rights law, as well as any issues of criminal responsibility;
- determine the role and limits of diplomatic assurances.

HUMAN RIGHTS, HUMANITARIAN LAW AND REFUGEE LAW

PROF. GÖRAN MELANDER*

1. Introduction

Human rights, humanitarian law and refugee law are mostly seen as three different disciplines of public international law, as if there is no or only little connection between them. However, the borderlines between the three branches are artificial. The events in former Yugoslavia, in Rwanda and in Chechnya in the 1990s clearly demonstrate the difficulty to distinguish between human rights and humanitarian law. To the public at large only human rights violations took place, while particular knowledge is a prerequisite to decide, which atrocities meant a violation of human rights and which a violation of humanitarian law.

There are several examples of the close connection between the three branches. The Statute of the newly established ICC deals with breaches of both human rights law and of humanitarian law. The crime genocide is sometimes considered as a violation of human rights, sometimes as a violation of humanitarian law. The 1989 Convention on the Rights of the Child is not only a human rights instrument. There are important provisions, which belong to humanitarian law as well. When the age limit for soldiers (combatants) was raised, this was achieved by an Optional Protocol to the Convention on the Rights of the Child, not by amending the corresponding provision in Additional Protocol I to the 1949 Geneva Conventions. Torture is prohibited according to the UDHR, art. 3, ICCPR art. 8 and also the 1949 Geneva Conventions and the Additional Protocols. There are a number of rules in Additional Protocol I to the Geneva Conventions, which clearly are influenced, if not copied, after human rights provisions, in particular art. 75 on "Fundamental Guarantees". The refugee problem has its root causes in violations of human rights and the Universal Declaration of Human Rights could to a certain extent be used as a yardstick to decide, when criteria for refugee status are fulfilled under the 1951 Refugee Convention/1967 Refugee Protocol. Other refugees have left their country of origin because of fear of violations of humanitarian law. Numerous other examples can be given to illustrate the close relation between the three "branches" of international law.

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However, in most situations human rights, humanitarian law and refugee law are still seen as three separate regimes. Such a conclusion must be drawn from the way the branches are developed, promoted and discussed on the intergovernmental and governmental level, by NGOs and academics. Sometimes it is tempting to talk about three mafias: the first dealing with human rights law, the second with humanitarian law and the third with refugee law. It is true that the word "mafia" mostly is connected with criminality, but it is in no way my intention to accuse any of the three mafias with such activities. However, the word "mafia" may also be used to describe a closed group of persons, who are protecting each others interests, who seldom communicate and who are unwilling to cooperate in order to solve common problems.

In this paper I hope to clarify the close relation between human rights, humanitarian law and refugee law, and the necessity to have a clear knowledge about them.

2. Human Rights

Human rights can be defined as fundamental and inherent rights essential to all human beings. Should a more precise definition be desirable, it may be easier to explain what is meant by the three so-called "generations" of human rights. These are:

— civil and political rights;
— economic, social and cultural rights;
— solidarity rights.

Civil and political rights can be exemplified with the right to life, prohibition of torture and slavery, right to freedom, right to privacy, freedom of opinion and expression, etc. These rights have certain elements in common, namely:

— the State's freedom of action is limited as the State is obliged to respect such rights;
— they are clearly individual rights;
— all States have the possibility to respect these rights, irrespective of the political system and level of development;
— they are judiciable, which means that a court or a tribunal is able to assess, if a violation has occurred.

The following rights are examples of economic, social and cultural rights: the right to work, the right to education, the right to social welfare, the right to food, the right to housing, etc. They have partly other elements in common, namely:

— the State must try to achieve the full realisation of these rights;
— they are clearly individual rights;
— the possibility to respect these rights is due to the level of development and the economic wealth of the country;
— the rights are *not* judiciable.

This is at least the traditional view. Frequently it is argued, however, that the borderline between the two generations is artificial. To respect civil and political rights can be costly, in particular administration of justice and the rule of law. Also in developed countries a minister of finance might be anxious to reduce the allocation to a ministry of justice, which leads to a lower standard of administration of justice.

Besides sometimes economic and social rights are judiciable. The rights to work is closely related to international labour standards, which may be examined under the ILO system. The social welfare system is in many countries regulated in domestic legislation, which can be applied by courts. Under all circumstances the principle of non-discrimination is judiciable.

Examples of solidarity rights are the right to peace, the right to environment and the right to development. It is the latter right which in particular has been given attention, and is the only solidarity right, which has been expressed in an international instrument, namely the UN Declaration on the Right to Development.

Solidarity rights are of another character in so far that they are collective rights. It is no longer the individual human being, who is the beneficiary, but the people at large. Any person will, of course, benefit from the right to development as a member of the collective, but primarily it is not directed to the individual. Logically the right to development is of equal importance in developed States as in developing States. Some States have been negative towards the right to development as a human right and have argued that there is no need of a collective right to development. The same result will be achieved by respecting economic, social and cultural rights, which can be seen as the individual correspondence with the collective right to development.

3. Humanitarian Law

Humanitarian law is the law of warfare and is applicable in armed conflicts. Since the 1850s an impressive number of treaties has been adopted. Only rarely is humanitarian law of relevance under all circumstances. Accordingly, armed conflicts must be classified as:

— an international armed conflict, i.e. an armed conflict between sovereign States, whereupon humanitarian law will be applicable to its full extent; or

— a non-international armed conflict, i.e. a civil war, whereupon only the famous common art. 3 to the 1949 Geneva Conventions and Additional Protocol II will be applicable; or
— internal disturbances, when only such rules of humanitarian law will be of relevance, that are applicable under all circumstances.

A consequence of the classification procedure is that parties to a conflict try to "minimize" the conflict at stake. When common sense leads to the conclusion that an international armed conflict is ongoing, the parties involved may deny such an evaluation. The Vietnam War was not seen as an international armed conflict. It was classified as a non-international armed conflict between the Government in Hanoi and the Government in Saigon.

States often deny that they are involved in a non-international armed conflict. The Turkish army launches severe attacks directed against the Kurdish guerilla, which is seen as part international terrorism. Other examples can be given.

On the other hand, some rules of humanitarian law are based on international customary law, which sometimes makes the issue of classification less important: rules may be applicable under all circumstances.

Within humanitarian law there are two sub-branches: Geneva law and Hague law. Geneva law deals with protection, namely protection of wounded and sick combatants, prisoners of war and to a limited extent persons belonging to the civilian population. Relevant treaties are the 1949 Geneva Conventions (the Red Cross Conventions) and parts of the two Additional Protocols.

The second branch of humanitarian law, Hague law, deals with means and methods of warfare. Certain weapons are prohibited like dum-dum bullets, gas, bacteriological weapons, anti-personne landmines, etc. With respect to methods of warfare, the Additional Protocols prescribes some additional rules, which form parts of international customary law. Most important is the prohibition to attack the civilian population as such. By virtue of Additional Protocol I indiscriminate attacks are outlawed, i.e. attacks which are of a nature to strike military objectives and civilians or civilian objects without distinction.

4. Refugee Law

An important aspect of refugee law is to decide who is a refugee. A definition is enshrined in the 1951 Refugee Convention/1967 Refugee Protocol. According to the Convention, a refugee is a person who is outside his/her country of origin and who has a well-founded

fear of persecution, owing to race, nationality, membership of a particular social group, religion or political opinion. It is an individual concept, and that is why most States, which are parties to the Convention/Protocol have established a particular refugee determination procedure. It this context there are reasons to think, that a common misunderstanding is that refugee recognition has a constitutive effect. It has a declaratory effect, whereby all doubts relating to his/her status will be clarified.

The most controversial criterion of the definition is the meaning of the word persecution. To day most States and scholars are in agreement that persecution is related to violations of human rights. However, only certain human rights are of relevance, namely certain civil and political rights, like the right to life, the prohibition of torture, the right to freedom and perhaps a few other rights, and provided the violation is of a serious nature. Economic, social and cultural rights are of no relevance, unless a person is faced with serious discrimination of such rights.

However, out of the 20 millions refugees in the world to day, only a minor part fulfils criteria for Convention refugee status. Most of them are not accepted as Convention refugees, as they cannot invoke a well-founded fear of persecution. The main reason for them to have escaped is an on-going civil war or other situations of internal disturbances. Their villages may be attacked, they may become victims of indiscriminate attacks, etc. They are forced to escape in order to survive.

In many cases they arrive in the course of a mass exodus, trying to get protection and assistance in neighbouring States. It is, of course, impossible to send them back to their country of origin, as long as there is an ongoing conflict in that country, which means that the principle of *non-refoulement* also applies to these refugees. They are not Convention refugees but mostly referred to as *displaced persons.*

5. The Relation between the Three Branches of Law

Historically the main difference between traditional human rights law and humanitarian law lies in the fact that human rights were applicable in time of peace, while humanitarian law was applicable in time of war. This distinction is no longer relevant: important parts of human rights law are always applicable, and as stated above, important parts of humanitarian law is applicable under all circumstances without it being necessary to classify the armed conflict at stake.

It is obvious that human rights and Geneva Law both deal with individual rights or individual protection. There are, however, similarities also in substance. For instance, According to the 1949 Geneva Convention on Prisoners of War the protected persons must

be treated humanely, he/she must be given an decent shelter, food, medical care, torture if prohibited, etc. The same rules can be found in several human rights instruments, for instance, in the Standard Minimum Rules for the Treatment of Prisoners, in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. It lies close at hand to look upon the Prisoner of War Convention as a human rights instrument, although it is only applicable under certain circumstances. And the Geneva Convention relating to wounded and sick combatants are treaties on medical ethics, a subject which otherwise is seen as part of human rights. The Civilian Convention comprises mostly rules, which have a correspondence in human rights law. It is a close relation between civil and political rights and Geneva Law.

Hague law on the other hand does not provide individual protection. When it is prohibited to attack the civilian population, and when indiscriminate attacks are outlawed and when weapons that causes unnecessary suffering cannot be used, it is the civilian population and the combatants at large, who are the beneficiary. Hague Law encompasses collective rights, corresponding with individual civil and political rights, in particular the right to life and the prohibition of torture.

The relation between violations of human rights and refugee, who qualify for Convention refugee status, is obvious. And it seems also to be a clear relation between violations of humanitarian law and displaced persons.

The connection between the three branches of international law can be illustrated as follows:

Individual Rights	*Collective Rights*
Civil and Political Rights Geneva Law	Hague Law
Economic, social and cultural Right	Right to development
Violations: Convention refugees	Violations: Displaced persons

The important difference lies in the distinction between individual rights and collective rights. This difference is also of importance in the field of refugee law.

There is no universal treaty protecting displaced persons. There is, however, a regional treaty, namely the 1969 OAU Convention Governing the Specific Aspects of the African Refugee Problems. That Convention gives two definitions of the term refugee: the first corresponds with the 1951 Refugee Convention/1967 Refugee Protocol. The second protects those who have escaped because of war, internal

disorder, etc. The Cartagena Declaration, applicable in Latin American States makes reference to the OAU Convention with respect to defining refugees.

To an increasing degree States are distinguishing between Convention refugees and displaced persons. The tendency is that States make that distinction by numbers. Convention refugees are supposed to arrive individually in more or less a regular pace, and a refugee determination can take place. In a mass influx situation, States automatically label the refugees as displaced persons and argue that a determination procedure is not possible. The applicants are too many! However, it is totally unacceptable that refugees arriving in a mass influx situation always must be seen as displaced persons. Nor it is impossible to determine refugee status in such a situation. Sometimes massive violations of human rights take place in a State. Had a definition of the term refugee existed in the 1930s, all Jews from Germany would have qualified for refugee status. The only fact an asylum seeker would have to prove would have been their Jewish origin, as every Jew was persecuted. During the war in Bosnia all persons of Muslim origin feared becoming victims of the ethnic cleansing and and should therefore have been entitled to Convention refugee status. Numbers have nothing to do with the distinction between Convention refugees and displaced persons. Presently, there is a tendency to blame the refugees, when a determination board cannot find time to fulfil their task, because of too many applications.

There is another reason why States should make use of a determination procedure during mass influx situations. Among displaced persons it is most likely that there are persons who fulfil the criteria for Convention refugee status as well. If that is the case, they are entitled to the status prescribed for in the Refugee Convention. It is only when the displaced persons will be repatriated, that those who qualify for Convention refugee status are identified. They still have a well-founded fear of persecution, and it is for that reason they refuse to return to their country or origin.

Another difference between Convention refugees and displaced persons concerns the solution of a refugee problem. With respect to Convention refugees three classical solutions exist:

— voluntary repatriation;
— integration in the country of asylum and nationalisation; and
— resettlement in a third State, followed by integration and naturalisation.

It is interesting to note that the voluntary repatriation solution is applicable also when a person has ceased to be a refugee, i.e. also

when fundamental changes of circumstances have occurred in the country of origin.

With respect to displaced persons other solutions are needed:

— voluntary repatriation or safe return; or
— temporary asylum or temporary protection.

It is true that at least the Office of the UNHCR would like to apply the voluntary repatriation solution also with respect to displaced persons. States are not always equally willing to do so, in particular in situations, when peace has been restored to the country of origin and the return is safe. There are instances when the international community has used pragmatic methods to convince displaced persons to go back.

Temporary asylum or temporary protection (both terms are used) is a logical solution. To the displaced persons themselves this is most likely an ideal solution, waiting in a neighbouring State for the situation in the country of origin to be settled. However, there is one important problem: what is meant by "temporary"? One of the oldest, still existing refugee problems, that of the Palestine refugees, originated in the war in 1948. Some of the victims are still receiving "temporary protection" in neighbouring countries. Millions of the Afghan displaced persons, who arrived in Iran and Pakistan in the beginning of the 1980s are seen as displaced persons. A time limit for granting temporary asylum or protection must be established. Such a course has already been taken by a few States, which have established a time limit of two years.

A peculiarity in the field of refugee law is the rigidity in interpreting the criterion "persecution". As mentioned it is in most cases limited to the right to life, the prohibition of torture, the right to freedom, and occasionally the prohibition of discrimination. In refugee law, there exists a hierarchy among various human rights. Human rights lawyers have a different view, and it is well established that all human rights are of equal importance. They are universal, indivisible and interdependent and interrelated.

It is impossible to establish a hierarchy of human rights, because human beings value human rights differently. A detained person may stress the right to freedom and prohibition of torture. A farmer, who has difficulties to feed his family, may consider the right to food being the most important right. Journalists will most likely unanimously stress the freedom of the press and the freedom of opinion. All human beings have different values, which make it impossible to give priority to any specific rights, a fact, which clearly is an indication of human rights being individual rights.

However, it seems as if refugee judges have established a hierarchy of human rights by only accepting a limited number of rights constituting persecution. This is somewhat surprising, as the criterion "well-founded fear of persecution" also entails a subjective element. This criterion, however, is frequently neglected. It is symptomatic that this criterion is hardly mentioned in the UNHCR Handbook and Criteria for Determining Refugee Status. However, the subjective criterion clearly indicates, that human beings may evaluate human rights persecution differently. It is nothing that precludes that the term persecution is interpreted in such a liberal way as to include any violation of individual human rights.

NB This article is based on one that appeared in the Volume 15 edition of the Harvard Human Rights Journal (Spring 2002). The link can be found at: http://www.law.harvard.edu/students/orgs/hrj/iss15/anker.shtml

REFUGEE LAW, GENDER, AND THE HUMAN RIGHTS PARADIGM

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> Underlying the [Refugee] Convention is the international community's commitment to the assurance of basic human rights without discrimination .... Persecution, for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" ....[39013]
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> —Canada v. Ward, Supreme Court of Canada, 1993

Introduction: The International Human Rights and International Refugee Regimes.

International refugee law is coming of age.[14] As the Supreme Court of Canada signaled almost a decade ago in *Ward*, refugee law increasingly refers to, and more explicitly acknowledges its foundation in, an international human rights paradigm. The refugee regime is generating a serious body of law that elaborates basic human rights norms and has important implications in—and beyond—the refugee context. Despite this growing synchronicity, and despite longstanding and close connections, international human rights law continues to distance itself from refugee law.

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13. Canada v. Ward, [1993] 2 S.C.R.. 689, 733 (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 108 [1991]). Further discussion of this case and an earlier elaboration of the arguments in this article appears in Volume 15 of the Harvard Human Rights Journal.

14. International refugee law is based on the international refugee convention. Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1976, 19 U.N.T.S. 6223, 606 U.N.T.S. 267 [together hereinafter Convention or Refugee Convention. For general description of the Convention, the Protocol and their predecessor international instruments, see HATHAWAY, *supra* note 2, at 1-13. States parties to the Convention incorporate the Convention into domestic law (although incorporation is not uniform). Some states also have unique municipal law protections. In addition, there are regional refugee regimes. *See generally*, GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 20-25 (2d ed. 1996). For treatment of refugee law as part of the corpus of human rights law, see Weisbrodt.

Refugee law is often treated like a "poor cousin," as many human rights activists remain wary of engagement with refugee advocacy, especially individual claims to refugee status. The tension is due, in part, to unfamiliarity (among human rights academics and practitioners) with the ways in which refugee law has been evolving as international human rights law.

The function of the international human rights regime—in particular the Commission on Human Rights and the specialized human rights bodies—is to judge whether states are fulfilling their duties under internationally agreed upon human rights norms[15] and, through monitoring and publicizing, to deter future abuse: in short, to change the behavior of states. The norms derive from the international bill of rights—the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—and the more specialized instruments related to race, gender, children, among others.[16] The regime's institutions are international monitoring bodies and it has no significant enforcement mechanisms.

Refugee law grants protection to a subset of persons[17] who have fled human rights abuses. Under the international Refugee

15. The general applicability of these human rights norms is also supported by natural law and universalist theories. *See, e.g.*, Katherine Brennan, Note, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. J. 367, 373 (1991) (excerpted in FRANK NEWMAN AND DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS at 677-78 (1996) (discussing difference between positivist and natural law theories).
16. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. TREATY DOC. NO. 95-2, 95TH CONG., 2D SESS. (1977), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 [hereinafter ICESCR]. *See see* HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT Part A, B, C (2000) (discussing various instruments and institutions of the international human rights regime).
17. Most importantly for purposes of this discussion, refugee status is limited by the requirements of international border crossing, and discriminatory impact, i.e. "for reasons of " one of the five grounds. In other words, proof of a prospective human rights abuse and failed state protection—"persecution" *see infra* notes xxx and accompanying text)—is not sufficient to establish eligibility as a refugee. The person

Convention, a refugee is a person unable or unwilling to avail herself of the protection of her country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[18] Refugee law provides surrogate national protection to individuals when their states have failed to fulfill fundamental obligations, and when that failure has a specified discriminatory impact. As several jurisdictions are recognizing, the nature of those obligations, embraced within the refugee definition's concept of persecution, is determined by international human rights standards. But refugee law is not aimed at holding states responsible for human rights abuses; it does not seek to deter human rights abuse. Its function is remedial. To paint with a broad brush, the international community created two regimes to address human rights abuses: one to monitor and deter abuse, the other to provide protection—sanctuary, rights,[19] an alternative to state protection—to at least some of those compelled and able to flee from those abuses by crossing international borders.[20]

Human rights lawyers and scholars have viewed refugee law as too embedded in domestic immigration law and institutions. The great innovation of the international human rights movement of the past half-century was to bring human rights "out of the confines of domestic

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also must have left her country of citizenship or last habitual residence and she must establish that the violation she fears has a discriminatory impact based on one of the five grounds. Furthermore, there are other restricting elements; for example, a putative refugee must prove a "well-founded fear" that he will be subjected to the relevant human rights violation. This article focuses only on the meaning of the Convention's criterion of persecution.

18. Convention relating to the Status of Refugees *supra* note 2, art.1(a).
19. The Convention's various articles define a range of rights—protection from return, basic civil and political rights such as rights of association, to education, access to the courts—that a state party must grant a refugee (i.e., a person who meets the definitional requirements of article 1 of the Convention) over which it has *de facto* authority. Some of these rights attach by virtue of a person's fulfilling the criteria of article 1 and being under the authority of the state; others only attach if a refugee is formally recognized and granted status by the state party; some rights require other, or lesser levels of attachment. *See generally*, JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (1999); *see also* 2 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 195–397 (1972) (comprehensively describing and analyzing the rights of refugees, including under the Convention.).
20. James C. Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection* 8 J REFUGEE STUDIES 289 (1995).

legal systems" and into the realm of international law and institutions.[21] Under the Refugee Convention, the responsibility to provide international protection—a surrogate to the ruptured, national protection—is placed on states that are parties to the Convention. Thus, in apparent contrast to the international human rights regime, refugee law is implemented by states, to the extent possible, within domestic legal systems. In many other respects, the refugee regime seems different from the international human rights regime. For example, there is no regularized monitoring of states' compliance with their obligation to provide surrogate protection, although the United Nations High Commissioner for Refugees (UNHCR) serves an important supervisory function. There are no international bodies, formally part of the refugee regime, designated to hear inter-state complaints or individual communications.[22]

Yet refugee law *is* international law, grounded in an international treaty; its institutions are both national and international. Over the past decade especially, refugee law has been claiming its international human rights roots and evolving across national borders. As refugee law matures, judicial bodies, in some cases the highest courts of the states, are reviewing more refugee cases. There is also growing sophistication within some administrative systems.[23] The work of

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21. Louis B. Sohn, The Human Rights Movement 4 (1995) (Harvard Law School Human Rights Program); *see also*, STEINER & ALSTON, *supra* note xxx, vi.

22. *See, e.g.*, STEINER & ALSTON, *supra* note xxx, at 592-641, 705-773 (describing state reporting and optional individual communication procedures under the ICCPR (*supra* note XXX). *Cf* Walter Kalin, UNHCR's Supervisory Role under Article 35, 1-11 [Refugee Convention], paper submitted for expert roundtables under the "second track" of the Global Consultations on International Refugee Protection (on web or with author or to be published) (noting the extensive and positive impact of UNHCR's role in the protection of asylum seekers, contrasting with other human rights treaties. "Unlike the [Refugee Convention and 1967 Protocol, these treaties do not have an operational agency with a world-wide presence and 'protection officers' in a large number of countries working to ensure that these instruments are implemented." *Id.* at 11.

23. This is true in the United States where, especially during the decade of the 1990s, immigration courts and the immigration appellate body, the Board of Immigration Appeals, issued a larger number of reasoned decisions providing better guidance for decision makers. *See, e.g, In re* S-P-, 21 I. & N. Dec. 486 (BIA 1996) (relying extensively on human rights reports of Congress and State Department in finding related to motive of agent of harm, and providing list of criteria for identifying a relevant motive); *In re* H-, 21 I. & N. Dec. 337 (BIA 1996) (explaining meaning of past-

scholars and the UNHCR—which issues non-binding legal interpretations—have taken on particular saliency.[24] NGOs have played a significant role in the articulation of legal principles. For example, in some cases, governments have relied on NGO analyses, citing them in major judicial opinions.[25] Furthermore, several states' administrative bodies and courts are in dialog with one another. By borrowing, adapting, and building on each other's jurisprudence and instruments such as national guidelines, they are beginning to create a complex and rich body of "transnationalized" international law.[26]

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persecution standard, and specifying burdens of proof in such cases); *see also* Carolyn P. Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to 'Investigate Its Enemies'*, 23 SAN DIEGO L. R. 327 (1986) (discussing some problems in earlier Board jurisprudence). The New Zealand Refugee Status Appeals Authority has a long-standing distinguished reputation. *See* MARK SYMES, CASELAW ON THE REFUGEE CONVENTION ii (Refugee Law Center, London 2000) [hereinafter REFUGEE CASELAW].

24. For one prominent example of the influence of the UNHCR on the development of refugee law, specifically with reference to the protection of women refugees, see Nancy Kelly, *Gender-related Persecution*, 26 CORNELL INT'L L.J. 626, 633 (1993); HJlPne Lambert, *Seeking Asylum on Gender Grounds*, INT'L J. DISCRIMINATION & L 153, 162-65 (1995). Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 28-30 (1998). *See also*, K@lin, *supra* note 10 , at 2-10 (discussing exceptional role of UNHCR and in particular the authoritative character of its pronouncements and its 1979 *Handbook on Procedures and Criteria for Determining Refugee Status*) [hereinafter UNHCR HANDBOOK]. For general discussion of current challenges facing UNHCR and the refugee regime, see JOAN FITZPATRICK, *Taking Stock: The Refugee Convention at 50*, U.S. Committee for Refugees, WORLD REFUGEE SURVEY 2001, 22.
25. *See, e.g., Ex parte* Shah [1999] 2 All E.R. 545, 565 (Hoffman, L.) [1999] (citing gender guidelines of the Refugee Women's Group for definition of persecution); Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995) [hereinafter U.S. Gender Guidelines], *reproduced in* REFUGEE LAW CENTER, INC. GENDER ASYLUM LAW IN DIFFERENT COUNTRIES 67 (describing guidelines as "natural...outgrowth" of UNHCR, Canadian and draft guidelines of Women Refugees Project, Harvard Law School Immigration and Refugee Clinical Program and Cambridge and Somerville Legal Services).
26. One of the best examples of such transnationalization is the interpretation of the "particular social group" ground to include sex and gender. *See* Deborah Anker, *Refugee Status and Violence Against Women in the 'Domestic' Sphere'*, 15 GEO. IMMGR. L J. 391 [2000].

The human rights paradigm has been critical to these developments. It is not only that key criteria of the refugee definition are being interpreted in light of human rights principles; in a significant number of instances, international human rights law provides the unifying theory binding different bodies of national jurisprudence. For example, following the decision in *Ward*, some commentators and jurisdictions have embraced the Canadian Supreme Court's concept of persecution as serious human rights abuses, injuries reflecting systemic conduct, "demonstrative of a failure of state protection."[27] The House of Lords in *Shah and Islam* solidified this human rights approach by presenting a formal legal construct and analysis of persecution as constituted by two distinct elements: serious harm and a failure of state protection.[28]

This newer, internationalizing direction in refugee law has so far been limited to a conversation taking place among only a few states parties to the Convention. Cross-fertilization and grounding of interpretation in a human rights paradigm—including in those few countries—is uneven, and examples of inconsistencies and incomplete implementations of the Convention abound.[29] Moreover, the great majority of state parties to the Convention are not engaged in individual, legalized assessments of claims.[30] In these cases as well as

27. Canada v. Ward, [1993] 2 S.C.R.. 689, 733. The New Zealand authorities, for example, have held that, "Core norms of international human rights law may be relied on to define forms of serious harm within the scope of persecution." Refugee Appeal No. 71427/99, [2000] N.Z.A.R 545. 562-4. The New Zealand authorities recently included with the International Bill of Rights, other instruments such as the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of Discrimination against Women [hereinafter CEDAW or Women's Convention], as sources of those norms. *Id.* at 564. Nicholas Sitaropolos comments " Case law in the UK, France and Germany ... has established a close relationship between human rights violations and persecution," emphasizing a requirement of serious human rights violation. NICHOLAS SITAROPOLOS, JUDICIAL INTERPRETATION OF REFUGEE STATUS 245-46 (1999).
28. This analysis is important for refugee claims where the direct agent of harm is a non-state actor. *See generally* Anker, *supra* note 14.
29. *See, e.g.*, Kalin , *supra* note 10, 12-15 (highlighting problems of incomplete implementation of the Convention by, and inconsistencies in interpretation among, states parties).
30. This is largely due to the numbers of refugees involved and/or the lack of infrastructures for refugee determinations. *See* HATHAWAY, *supra* note XXX, at 12 (noting the impracticality of individual determinations in cases of large scale refugee movements); GOODWIN-GILL, *supra* note XXX, at 34

others, however, UNHCR does play an active role in refugee status determinations.[31] Generally, the UNHCR tries to synthesize and advance the best practices of states, and mediates among different states and protection systems, (although no doubt more formalized monitoring mechanisms, suggested by scholars and expert groups, are needed). Non-binding norms articulated by the UNHCR influence the standards for protection in both legalized and non-legalized settings.[32] Moreover, a growing number of states—South Africa, and countries in East and Central Europe, for example—are specifically incorporating the Convention into domestic law and developing domestic infrastructures for refugee status determinations.[33] They will rely on and develop other states parties' interpretations of the refugee definition, especially to the extent that they reference a common international framework. They also may further enrich refugee law, embedding its interpretations of international human rights norms in a greater diversity of cultural and national traditions.

In many respects, refugee law crosses the thresholds of justiciability and enforceability, problems that have long plagued human rights law. It provides an enforceable remedy—available under specified circumstances—for an individual facing human rights abuses. Determinations of refugee status entail contextualized, practical applications of human rights norms. Increasingly, refugee law is confronting issues on the forefront of the human rights agenda, especially questions of gender and women's rights. The discussion below provides three examples: rape and sexual violence, female genital surgery (FGS),[34] and family violence. In some cases, refugee law applies a human rights paradigm when evaluating these instances of violence against women

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(commenting that "[o]nly comparatively few States have instituted procedures for assessing refugee claims); UNHCR, THE STATE OF THE WORLD'S REFUGEES, 310 , Annex 3 (showing, in table of regional distribution of refugees, largest numbers arriving in countries in Asia and Africa).

31. *See* GOODWIN-GILL *supra* note XXX, at 33-34 (commenting that many states parties allow UNHCR to participate in status determinations and that certification of status by UNHCR pursuant to its own governing statute is often required, especially in states that have no domestic status determination processes).
32. *See supra* note 12.
33. South Africa, Hungary.
34. *See* Hope Lewis, *Between Irua and 'Female Genital Mutilation': Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 2-4 YEAR[(describing controversy over terminology, with many referring to the practice as "female genital mutilation"). *See also infra* notes XXX and accompanying text.

as serious harm within the scope of persecution. Refugee law has built on the work of the international human rights movement, and has had—or has the potential to have—a substantial impact on human rights law. As these examples illustrate, there are conflicts between human rights and refugee lawyers/ activists, but proven opportunities for partnership also exist.

The Human Rights Paradigm and Gender-Based Persecution

The development of "gender asylum law"[35] has required a human rights framework. Gender asylum law has also been a catalytic force in itself, a major vehicle for the articulation and acceptance of the human rights paradigm. For example, the 1993 landmark decision in *Ward* (which, while not a gender case, elaborated the human rights paradigm) was issued at the same time as the landmark Canadian *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution.*[36] Additionally, the UNHCR, practitioners, scholars, and

35. Gender refers to socially contingent divisions of roles between men and women, socially constructed notions of femininity and masculinity and resulting power disparities which implicate women's identities and status within societies. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW 3-4 (2000). Although this article focuses on women, gender also has implications for men's identities, especially in claims for refugee status and protection by gay men (and lesbians). *See, e.g.*, HEAVEN CRAWLEY, REFUGEES AND GENDER 161-63 (2001); *see generally* Kristen Walker, *The Importance of Being Out: Sexuality and Refugee Status*, 18 SYDNEY L. REV. 568 (1996). Crawley (among others) argues that the term "sex" (as opposed to gender) should be avoided, since the former suggests biological determinacy.CRAWLEY, *supra* at 6-7. Hilary Charlesworth and Christine Chinkin opine, however, that the sex may be used as well as gender, as sex is also a contestable category, resting on socially defined dichotomies between body and mind, nature and culture. CHARLESWORTH & CHINKIN *supra* at 3-4.

36. Canadian Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution (Mar. 9, 1993) [hereinafter Canadian Gender Guidelines], *reproduced in* GENDER DECISIONS, *supra* note XX, at 87. Canada issued a subsequent update. *See* Canadian Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (Nov. 25, 1996) [hereinafter Canadian Gender Guidelines: 1996 Update], *reproduced in* GENDER DECISIONS, *supra* note XX, at 106. Other national guidelines include the U.S. Gender Guidelines, *supra* noteXXX and those of Australia.); Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers (July 1996) [hereinafter Australian

activists consciously have constructed gender asylum law on the edifice of international women's human rights law and the work of the international women's human rights movement. For reasons as much strategic as principled, they have argued that, in order to respond to women's experiences needs to evolve and transform in interpretation, rather than be amended. The bars to women's eligibility for refugee status lie not in the legal categories per se (i.e., the non-inclusion of gender or sex as one of the five grounds) but in the incomplete and gendered interpretation of refugee law, the failure of decision-makers to "acknowledge and respond to the gendering of politics and of women's relationship to the state."[37] Simply adding gender or sex to the enumerated grounds of persecution would not solve this problem, nor would it address cases such as those discussed below where the harm feared (an element of "persecution") was unique to or disproportionately affected women.

Thus, refugee law has a primarily integrative perspective on women's rights. By interpreting forms of violence against women within mainstream human rights norms and definitions of persecution, refugee law avoids some of the problems of marginalizing women's rights in international law.[38] This

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Gender Guidelines] *reproduced in* GENDER DECISIONS, *supra* note XX, at 7; and Nathalia Berkowitz & Catriona Jarvis, Asylum Gender Guidelines, Immigration Appellate Authority [2000] [hereinafter UK Appellate Gender Guidelines]. http://www.iaa.gov.uk/GenInfo/Gender.pdf.. *See generally* CRAWLEY, *supra* note XXX, at 12-16; Kelly, *supra* note XXX at 633-34; THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS (Ashgate, 2000)) 1-3 (all describing background to guidelines).

37. CRAWLEY, *supra* note XXX, at 2. *See also*, Jacqueline Greatbatch, *The Gender Difference*, 1 INT'L J.REFUGEE L. 518, 526 (1989) (reconsidering feminist critiques of refugee law and suggesting a human rights approach which, *inter alia*, addresses the refugee's relationship to her state); Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, 6, No.3 REFUGE 3 (February, 1957); Kelly, *supra* note XXX at 642 (suggesting an interpretive framework which, *inter alia*, examines "the political nature of seemingly private acts"). *See generally*, SPIJKERBOER, *supra* note XXX. There are equally if not more important problems in asylum procedures and evidentiary rules – as well as with access to those procedures- which have a major impact on women refugees' ability to pursue refugee claims. *See, e.g.*, Kelly, *supra* note XXX, at 629-30; CRAWLEY, *supra* note XX, at 199-223.

38. *See* CHARLESWORTH & CHISKIN, *supra* note XXX, at 218-22 (discussing marginalization problem as well as particular weaknesses in enforcement and implementation under the Women's Convention, *supra* note XXX).

"mainstreaming" approach, (reinforced during 2001 UNHCR global consultations on the fiftieth anniversary of the Refugee Convention), is embraced by both the UNHCR and national guidelines, which have served as the foundations for much of gender asylum law and have had surprising normative effect.[39]

Rape/Sexual Violence

Rape was one of the first issues affected by the articulation of the human rights paradigm within refugee law and the increased willingness to consider gender-specific abuses within the scope of persecution. Although there was relatively early Canadian precedent for treating rape as "persecution of the most vile sort,"[40] rape was privatized in many cases, especially before 1993; it was regarded as a manifestation of unrestrained—and unrestrainable—male sexual appetite ("exaggerated machismo . . . rampaging lust-hate" in the words of one U.S. jurist in a 1987 case).[41] In short, the public/private distinction, which has so deeply affected international law, is reproduced in refugee law.[42] Even cases that fit the traditional paradigms of refugee law were being dismissed—largely because the physical harm involved was sexual and directed at a woman. For example, when a Salvadoran woman whose family was active in a cooperative movement was raped by death squads while they shouted

39. The most notable example of this integrative approach is Rodger Haines, *Gender-Related Persecution*, paper submitted for expert roundtables under the "second track" of the Global Consultations on International Refugee Protection (on web or with author or to be published). *See also* US Guidelines, *supra* note XXX, Canadian Gender Guidelines, *supra* note XXX; Australian Gender Guidelines, *supra* note XXX; UK Appellate Gender Guidelines, *supra* note XXX. *See also* Erika Feller, paper in IARLJ Conference proceedings 200017, 18-19.
40. Maria Veronica Rodriguez Salinas Araya, Immigration Appeal Board Decision 76-1127, 6 Jan. 1977, at 8, *quoted in* HATHAWAY, *supra* noteXXX, at 112 n.109.
41. Lazo-Majano v. INS, 813 F.2d 1432, 1438 (9th Cir. 1987) (Poole, J. dissenting); *see* discussion of case in Jane Connors, *Legal Aspects of Women as a Particular Social Group* , INTER'L J. REFUGEE L. 114, 121 (Special Issue, 1997).
42. *See generally,* CHARLESWORTH & CHINKIN, *supra* note XXX. The alternate feminist critique – that the public/private distinction can be overemphasized - also has been made in the refugee context. *See, e.g.* Greatbatch, *supra* note XXX, at 520 ("It roots women's oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the interconnnections of the public and private spheres.").

political slogans and hacked her male relatives to death, she was deemed the victim of private violence.[43] Similarly, a U.S. immigration judge denied asylum to a Haitian woman who was gang-raped because of her support for the deposed President.[44]

Since these cases were decided, there has been enormous change in the assessment of claims involving rape and other forms of sexual violence. In her 2001 treatise on refugee law and gender, Heaven Crawley suggests that now "[r]efugee law doctrine is unanimous . . . in its opinion that sexual violence, including rape, constitutes an act of serious harm."[45] As a severe physical assault, rape should be treated as one of the least controversial forms of serious harm, and it is now so described in national gender guidelines,[46] as well as in the case law of several jurisdictions.[47]

Feminist critics of international law have noted that, at least until the last few years (and largely in the context of international criminal law), rape and sexual violence have not been analyzed as core human rights violations, although they have been recognized as violations of international law and even as human rights abuses.[48] There is a markedly different trend in some of the refugee law jurisprudence. The New Zealand, Canadian, and Australian authorities have found that rape and sexual violence violate the rights to security of person, and the prohibition against cruel, inhuman and degrading treatment under the UDHR.[49] Recent refugee law commentators similarly analyze rape not on the margins of traditional human rights law, but at its core, relating to the prohibition against cruel, inhuman and degrading treatment

43. Campos-Guardado v. INS, 809 F.2d. 285 (5th Cir. 1987).
44. *In re* D-V-, 12 I. & N. Dec. 77, 79 (1993) (describing immigration judge decision in Board opinion overruling it).
45. CRAWLEY, *supra* note XXX, at 44.
46. *See, e.g.*, Australian Gender Guidelines, *supra* note XXX ; UK Appellate Gender Guidelines, *supra* note XXX; U.S. Gender Guidelines, *supra* note XX, at ; Canadian Gender Guidelines, *supra* note XX, at .
47. *See*, DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 255-57 (1999); CRAWLEY, *supra* note XXX, at 42-45, 131-33 (providing examples of some of this case law); NZ 5 in GENDER DECISIONS; NM v. Swiss Federal Office for Refugees (www.refugeecaselaw.org).
48. *See* CHARLESWORTH AND CHISKIN, *supra* note XXX, at 218-19, 234-35.
49. *See, e.g.*, U9206668, Immigration and Refugee Board of Canada (1993), *reproduced* in GENDER DECISIONS, *supra* note XXX, at 187; Re SDS, Refugee Appeal No. 2373/95 (Refugee Status Appeals Authority of New Zealand); *reproduced* in GENDER DECISIONS, *supra* note XXX, at 634; RRT N93/00656 (Aug. 3, 1994) (Ministry of Immigration and Cultural Affairs, Australia) *cited in* CRAWLEY, *supra* note XXX, 132.

and torture, the right to life and security of person.[50] All three of these core rights are specifically iterated in the Australian Gender Guidelines.[51] Furthermore, the U.S. Board of Immigration Appeals held in Matter of Kuna that a husband's continual brutal assaults on his wife, including years of rape and sexual violence, constituted torture within the terms of the Convention against Torture.[52] The Canadian authorities have found that "matrimonial violence"—a woman imprisoned in her home, raped and beaten by her husband over a ten-year period—can be the most extreme form of torture because there is no respite.[53]

The work of women activists and jurists in publicizing the issues of rape and sexual violence in the context of the conflicts in Yugoslavia and Rwanda has been a major factor in changing opinions and awareness among refugee lawyers. Refugee and human rights lawyers have also worked collaboratively to set important precedents on rape. Indeed, the first decision of a human rights body recognizing rape as torture (and outside of the detention or war context) arose out of the experience of Haitian refugee women fleeing to the United States after the 1991 *coup d'état*, which overthrew the first democratically elected President of Haiti, Jean Bertrand Aristide. The illegal de facto regime committed a multitude of human rights abuses against the civilian population aimed at the destruction of democratic movements and civil society, and the creation of a climate of terror. The primary instruments of the repression inflicted on women were rape and other types of violence committed by members of the army, police forces, civilian auxiliaries and paramilitary groups. Women were raped because they played an important role in the formation of democratic institutions, because of their status and role in helping civil society, because of involvement in activities to improve local communities, because of the political activities of male relatives, and because they were left behind.[54] As the Special Rapporteur on Violence against Women has commented generally, "to rape a woman is to humiliate

50. *See, e.g.*, CRAWLEY, *supra* note XXX, at 44.
51. Australian Gender Guidelines, *supra* note XXX, at 16-17, *reproduced* in GENDER DECISIONS, *supra* note XXX, at 22-23.
52. *In re* Kuna, A76491421 (unpublished decision)(BIA Apr. 25, 2000) (on file with author); *see infra* notes XXX and accompanying text.
53. C.R.D.D. No. 130, Nos. T93-07246, T93-07247, *Re* C. (V.T.), 1,7 (Immigration and Refugee Board of Canada 1993), *reproduced* in GENDER DECISIONS, *supra* note XXX, at 214.
54. OEA/Ser.L/V/II.88, Doc. 10 rev. 9 (1995) (under Inter-American Convention)[hereinafter OAS Haiti Report].

her community."[55] Women were often raped by several men on the same occasion, usually in their homes, in front of their children and other family members. In many cases, the woman was forced to witness the rape or murder of her daughter or other family member before being raped herself.[56]

The flight of Haitian refugees to the United States during the 1970s and 1980s helped precipitate the contemporary refugee rights movement in the United States. When Haitian women fled the violence during the time of the illegal coup, there was a network in place to hear, bear witness and give voice to their stories. These stories became the basis for asylum claims, resulting in three simultaneous developments. First, scholars and advocates obtained the first administrative precedent in the U.S. granting asylum to a woman and recognizing rape as serious harm that could constitute persecution.[57] Second, the United States issued its national gender asylum guidelines, which state that "[s]evere sexual abuse does not differ analytically from . . . other forms of physical violence that are commonly held to amount to persecution."[58] The U.S. guidelines were an important development internationally, building on the precedent set by Canada.

Third, these same Haitian women brought their stories in the form of asylum "affidavits" before the Inter-American Commission of the OAS which, in its *Report on the Situation of Human Rights in Haiti*, made findings of various violations during the illegal regime, including sexual violence against women employed as a political weapon. The Inter-American Commission's report also contained a specific legal determination that "rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the [Inter-American Convention], but also a form of torture in the sense of Article 5(2) of that instrument."[59] This was the first determination

55. Radhika.Coomarasamy, *Of Kali born: women, violence and the law in Sri Lanka* 49,50, *in* FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD (M. Schuler (ed.) (New York, UNIFEM, 1992). *See also Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences,* Ms. Radhika Coomarasamy, in accordance with the Commission on Human Rights Resolution 1994/45, 22 November 1994, UN Doc. E/CH.4/1995/42.
56. OAS Haiti Report, *supra* note XX, at X.
57. *In re* D-V-, 12 I. & N. Dec. 77, 79 (1993).
58. U.S. Guidelines, *supra* note X at 9, *reproduced in* REFUGEE LAW CENTER, GENDER ASYLUM DECISIONS, *supra* note XXX, at 75.
59. OAS Haiti Report, supra note XX, at X, X (also finding that widespread, open and routine use of rape as a weapon of terror also constitutes a crime against humanity under customary international law).

by a human rights body that rape, certainly outside the detention context, constitutes torture, *and that it violated specific human rights-based prohibitions against torture.*[60] It was not until 1998 that an international body, the International Criminal Tribunal for Rwanda, considered rape outside the context of detention and war as torture under international law.[61] The significance of the earlier Inter-American Commission's *Report on Haiti* has been lost in many human rights and women's international law treatises.[62]

As the example of rape and sexual violence suggests, refugee law can contribute to the elaboration of human rights norms, deepen understandings, and produce substantive changes—if it is embraced as part of human rights law. There has been some symbiosis, for example between the international women's human rights movement

60. *See* LOUIS HENKIN ET AL, INTERNATIONAL HUMAN RIGHTS 372-84 (2000) (discussing treatment of rape by human rights bodies and significance of OAS Commission's Haiti Report). *See also* Fernando Mejía Egochiago and Raquel Martin de Mejía v. Peru, Case 10.970, Inter_Am. Comm'n H.R. 157, OEA/Ser. L/V/II.91, doc. 7 rev. (1996) (further elaborating on rape as torture). *Cf* Aydin v. Turkey, 1997-VI Cur. Ct. H.R. 1866, E.H.R.R. 251 (finding that rape committed in state detention constituted torture, under specific torture prohibitions in European Human Rights Convention)
61. *See* Prosecutor v. Akayesu, Trial Chamber, International Criminal Tribunal for Rwanda [ICTR], 1998, Case No. ICTR-96-4-T, www.ictr.org/ENGLISH/Judgements/AKAYESU/akay001.htm, Akayesu (finding, in context of massive violence and repression against ethnic group in Rwanda that rape and sexual brutality constituted torture as a crime against humanity). Earlier (and later) decisions of the International Criminal Tribunal for Yugoslavia [ICTY] did find that sexual assaults of women constituted torture within the meaning of crimes against humanity, but largely in the context of forced detention in camps, and formally limited to situations of armed conflict. *See* Trial Chamber I, Review of Indictment pursuant to Rule 61, Nikolic case, IT-95-2-R61. *See also* Prosecutor v. Zelnil Delaliæ et al., Case No. IT-96-21-T, Judgment, (Nov. 16, 1998); Prosecutor v. Anto Furunddija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998). *Cf.* Prosecutor v. Dusko Tadic ICTY Trial Chamber, 1995, Case No. IT-94-1-T (interlocutory decision of Yugoslavian tribunal including as crimes against humanity acts in context of widespread or systematic attacks on civilian population). *See generally,* CHARLESWORTH & CHINKIN, *supra* note XXX, at 313-37 (discussing advances as well as problems in emerging international criminal law with respect to recognition of rape as torture and limitations of the armed conflict context for women's rights).
62. *But see* HENKIN, *supra* note XXX, at 373-74 (discussing significance of the Haiti Rape Report in recognition of rape as torture).

and gender asylum activists, but the commonalties between the two areas of law have been largely lost on the human rights community. In some cases, such as those involving female genital surgery (FGS), refugee law addresses issues that are divisive and unresolved within the international human rights movement. Refugee law can also sharpen the focus of the human rights question by grounding the debate in the circumstances of a real person seeking refugee law's particular, palliative solution.

Female Genital Surgeries (also termed Female Genital Mutilation)

Female Genital Surgery (FGS) has been extensively discussed in the human rights literature and elsewhere.[63] It is a traditional practice that involves removing parts of the female genital organs and, in some cases, stitching the two sides of the vulva together, usually without anesthesia or sterilized instruments.[64] "The range of physical effects resulting from FGS varies with the form of surgery but the physical complications of the most severe forms—clitorectomy and infibulation—can be disabling and life threatening."[65] There is a complex set of justifications for the continued practice of FGS. "The stated objective is usually the maintenance of some virtue such as chastity, piety and cleanliness rooted in centuries-old social, moral, and religious traditions. It is generally the case that these virtues are thought important to maintain the girl or woman's status as a suitable potential spouse, maintain the social status of her family and thus maintain harmony in the community at large."[66] FGS is most often practiced by older women on girl children or sometimes on young women at the time of marriage or first pregnancy. Although FGS is a ritual practiced across cultures and religions, it is particularly well documented in the Horn of Africa and in Muslim countries.[67]

FGS has been identified as a human rights issue in various

63. For a sampling, see STEINER & ALSTON, *supra* note XXX, at 409-25.
64. *See A Traditional Practice that Threatens Health- Female* Cicumcision, 4-World Health Organization Chronicle 31 (1986), *excerpted* in STEINER & ALSTON, *supra* note XXX at 409-411.
65. Lewis, *supra* note XXX, at X.
66. Bernadette Passade Cisse,, *International Law Sources Applicable to Female Genital* Mutilation 35 COLUM. J. TRANSNAT'L L. 429, XXX(1997).
67. N Toubia—A Peters and A Wolper, Womens Rights, Human Rights: International Feminist Perspectives (Routledge, London); N Toubia, Female Genital Mutilation: A call for global Action XX (Rainbo, New York); Minority Rights Law Group 1992. *See also* CRAWLEY, *supra* note XXX, at 176.

international fora,[68] but the feminist analysis of FGS as a human rights violation is complicated because FGS exists at the "intersection of complex cultural, gender and racial questions in human rights jurisprudence."[69] Concern about the practice, even opposition to it, is broad-based, with African women in the forefront. Yet the practice has also been defended as a ritual that binds together communities, especially communities of women.[70] Many activists and scholars—most prominently Africans and African Americans—have been critical of the focus on FGS to the exclusion of other issues that are more important to African women. The sensationalized accounts of the practice, the racist and incomplete portrayals of African women, and Western feminist involvement, raises questions about who should set the agenda for change and what should be the methods used to eradicate the practice.[71] Claims of cultural relativism have taken on renewed force in the 1990s, and FGS has been at the center of many of these debates, as have women's human rights more generally. "[T]he cultural-relativist challenge . . . presents a particularly acute challenge in respect of women's human rights since many denials of those rights are justified in terms of social and/or religious custom, sometimes enacted into law."[72]

There is a growing body of law recognizing FGS as the basis for a refugee claim. Unlike the international human rights fora, which have identified FGS as a human rights abuse but not necessarily a violation of core rights,[73] several refugee decisions have linked FGS to mainstream human rights violations or serious harm within the meaning of persecution. The Immigration and Refugee Board of Canada has found that the return of a woman to Somalia to face involuntary infibulation violated, inter alia, numerous provisions of the UDHR and the ICCPR, including the right to life and the prohibition against cruel, inhuman or degrading treatment.[74] The UK authorities recognize FGS as a form of torture and some Australian case law

68. *See* Lewis, *supra* note XXX, at 7.
69. *Id.* at XXX.
70. For an example of a qualified defense, see Mervine, Letter to the Editor, New York times, Nov. 24, 1993, A24 *excerpted in* STEINER & ALSTON, *supra* note XXX, at 421-22.
71. *See, e.g.*, Yael Tamir, *Hands off Clitoridectomy*, 31 BOSTON REVIEW 21 (Summer 1996).
72. HENKIN, *supra* note XXX, at 391.
73. CHARLESWORTH & CHINKIN, supra note XXX, at 225-29.
74. *See* M95-13161 (1997) (Canadian Immigration and Refugee Board), *reproduced in* Gender Decisions, *supra* note XXX, at 419, 425-26.

describes it as inhuman treatment.[75] In a 1996 U.S. decision, Matter of Kasinga, the U.S. Board of Immigration Appeals found that FGS constituted serious harm "consistent with our past definitions" of persecution, and rejected the immigration authorities argument that in cases of cultural practices a heightened "shock the conscience" test should be applied.[76] Recent commentators and some prominent refugee decision-makers have taken a strong anti-relativist position, while also opposing a view of human rights "that precludes flexibility in [its] conceptualization, interpretation and application within and between cultures."[77] Bernadette Passade Cisse suggests that reasoned analysis based on human rights principles can and should substitute for sensationalizing reports and culturally-biased judgments.[78]

Refugee law offers a different perspective on conflicts between individual and group rights, individual autonomy and cultural enfranchisement (the essence of the cultural relativist conundrum), raised in cases such as FGS. Whatever cultural consensus exists, refugee law is concerned with an individual who wishes to dissociate herself from that consensus. One who invokes refugee protection asserts that whatever her culture feels, her feelings are in line with international standards. For example, in the U.S. *Kasinga* case, a nineteen-year-old woman claimed that she faced an immediate threat of being forced to undergo FGS (infibulation), shortly before being married, against her wishes, to a forty-five-year-old man.[79] Thus, commentators have argued that a claim against return to face forced FGS goes to the philosophical core of human rights, the protection of individual autonomy and corporal non-interference.[80] "When an individual challenges societal norms by opposing FGM [female genital mutilation] and his/her basic rights, as articulated in international instruments, are not or cannot be controlled by the de jure public authorities, international human rights principles are implicated."[81]

Since refugee law does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular

75. *See* UK Appellate Gender Guidelines, *supra* note XXX, at 13, n. 31; RRT Reference V97/06156 3 November 1997 (Australia).
76. *In re* Kasinga, 21 I. & N. Dec. 357, XXX (BIA 1996) *see also id.* at XX (Rosenberg concurring).
77. CRAWLEY *supra* note xxx, at 184; Haines, *supra* note XXX, at XX; Refugee Appeal No. 71427/99, [2000] N.Z.A.R 545, 565 (para. 52) (New Zealand Refugee Status Appeals Authority).
78. Cisse, *supra* note XX, at 451.
79. *In re* Kasinga, *supra* note X, at XXX.
80. CRAWLEY, *supra* note XXX, at 184.
81. Cisse, *supra* note XXX, at XXX.

practices, it avoids controversies that have been divisive in debates concerning FGS and cultural relativism in general. These debates within the human rights community have been, at times, almost immobilizing, reflecting an unresolved theoretical standoff. In avoiding such paralysis, refugee law manages to address an important part of the human rights question: whether an international human right is implicated. Indeed, because of the cultural relativist conundrum, the continued failure to take women's rights seriously and the complexity of the state responsibility question, gender asylum law is one of the few areas where the question of FGS as a human rights violation is confronted. As Lewis notes, there is value to such direct confrontation of controversial human rights questions: "The engagement in active conflict on these issues at least removes FGS from the realm of a theoretical debate over whether westerners should ignore an exotic cultural practice and forces us to confront the question of how human rights law and policy could impact the lives of women on a day to day basis."[82] Lewis suggests that African-American women should be concerned if refugee law ignores issues like FGS that affect African women. They should also be actively engaged in determining the content of gender asylum guidelines and policies "in fulfillment of international human rights obligations."[83]

Refugee law, applying a human rights paradigm and building on the work of the international human rights community, has identified key forms of violence against women—rape/sexual violence and FGS—as core violations. Making the relationship between refugee law and human rights law explicit creates opportunities for advances within both fields. In the case of FGS, the human rights issues may be more clearly identified in refugee law than under the international human rights regime, whose purposes are broader and directed at fundamental change. In other cases, however, refugee law and human rights law may need to struggle together to interpret critical issues common to both regimes, such as the scope of state responsibility.

State Responsibility and Family Violence

The discussion below only briefly touches upon the complicated question of state responsibility in the case of non-state actors, which is a central concern for women in human rights. In gender asylum law, the question is addressed in some of the most significant and most recent case law.

Much of refugee law—and especially gender asylum law—probes

82. Lewis, *supra* note XXX, at XXX.
83. *Id.* at 23.

difficult problems of state responsibility. As a matter of doctrine, both human rights law and refugee law recognize state responsibility for human rights violations by non-state actors (although there is a dissenting, minority position in refugee law).[84] Developments in human rights law have supported long-standing trends in refugee law, which grapples with fundamental questions of whether the failure of state protection arm of "persecution" requires direct or indirect—or any—state complicity, and how to locate responsibility in collapsing states or at times when there is no functioning centralized authority. Although the refugee regime is not concerned with state accountability per se, both refugee and human rights law struggle with similar questions. For example, what should be the standard for assessing the adequacy of state protection (the "due diligence" standard in human rights law)? Should the state be required to provide some actual reduction in the level of risk (a question that must be addressed in refugee determinations where an individual makes a claim for protection, based on concrete, specific circumstances)? Or should formal or reasonable—however ineffective—actions of the state suffice?[85]

As noted, one of the most visible (and prolific) emerging bodies of refugee case law concerns family violence, which remains at the margins of human rights law although it is the most pervasive form

84. *See* ANKER, *supra* note XXX, at 191-99; Jennifer Moore, *From Nation State to Failed State: International Protection From Human Rights Abuses by Non-State Agents* 31 COL. H. RTS. L. R. 81 (1999) (discussing refugee and human rights law doctrine); Walter Kalin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEORG. L. J. 391 (2001) (describing changes and reinterpretations in the non-state actor doctrine in Switzerland and other countries).

85. *Compare* Refugee Appeal No. 71427/99 [2000] N.Z.A.R 545, 568 (para. 62) (New Zealand Refugee Status Appeals Authority) (holding that the standard for assessing state protection requires the risk of serious harm to be below that of a "well-founded fear"), *with* Horvath v. Secretary of State for the Home Department [2001] 1 AC 489, [2000] 3 WLR 379 (U.K.) (suggesting that the refugee standard may be met when a state has a formal system of protection in place, irrespective of the applicant's well-founded fear). There is some indication that the U.K. authorities may be moving away from a stricter reading of *Horvath*. *See* Secretary of State for the Home Department v. Klodiana Kacaj [2001] INLR 354 (U.K.) (suggesting that the existence of state protection mechanisms, although presumptively adequate, may not be sufficient if the refugee claimant can show that they are practically ineffective and have not eliminated the reality of risk). Thanks to Rodger Haines for bringing *Kacaj* to my attention.

of violence against women.[86] In cases of violence by husbands and male domestic partners, the question of state protection is especially complex due to different levels of interweaving responsibility and enabling of the "private" harm by the State. This complexity is paradigmatic of gender-specific violence, committed by private actors.[87] "For most women, indirect subjection to the state will almost always be mediated through direct subjection to individual men or groups of men."[88]

In *Shah and Islam*, the House of Lords considered how broader patterns of discriminatory treatment structurally enabled the specific violence the applicants feared from their husbands as well as the husbands' threatened use of anti-adultery laws.[89] In Refugee Appeal No. 71427/99, the New Zealand authorities analyzed in detail state patterns that condone family violence and discriminate against women, even where the State constitution does not formally relegate women to second-class status.[90] It evaluated the "cumulative effect" of various laws including legal provisions regarding marriage, divorce, custody, and provisions of the criminal code.[91] In *Minister for Immigration and*

86. *See Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences,* Comm'n Hum. Rts., U.N. GAOR, 52d Sess., Provisional Agenda Item 9(a) ¶¶ 36, 38, 39, U.N. Doc. E/CN.4/1996/53 (1996) (describing family violence as a human rights abuse); *see also* CHARLESWORTH & CHINKIN, *supra* note XXX, at 12, XX; Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture,* 25 COLUM. HUM. RTS. L. REV. 291, XX (1994)(both discussing the pervasiveness of family violence as a human rights abuse against women and the failure of human rights law to address it seriously). *See also* Lauren Gilbert, XXX Pamela Goldberg, *Any Place but Home: Asylum in the United States for Women Fleeing Domestic Violence,* 26 CORNELL INT'L L.J. 565 (1993)(discussing family violence basis for asylum claim); Lauren Gilbert CITE (discussing asylum and other remedies available to survivors of family violence under U.S. law). For a sampling of the refugee case law on this issue, see GENDER ASYLUM DECISIONS *supra* note XXX, at .*See also* MARY CROCK,
87. Macklin, *supra* note XXX, at 25.
88. S. Wright, *Economic rights and social justice: a feminist analysis of some international human rights conventions,* 12 AUSTRALIAN YEARBOOK INT L 241, 249 (1992).
89. R .v. Immigration Appeal Tribunal and another, *ex parte* Shah (United Nations High Commissioner for Refugees intervening), Islam and others v. Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening), [1999] 2 All E.R. 545 [hereinafter Shah and Islam].
90. Refugee Appeal No. 71427/99, [2000] N.Z.A.R 545. 570.
91. *Id.* at XX.

Multicultural Affairs v. Khawar, the Federal Court of Australia found evidence of state acquiescence in discriminatory enforcement of the law—the deliberate failures of the police to respond to a woman's complaints of her husband's violence. (Australia's highest court subsequently upheld the Federal Court's *Khawar* decision)[92] These are some of the issues of structural discrimination that feminist critics of international law have identified as essential to an analysis of state responsibility that includes the experiences of women.[93]

The Convention against Torture (CAT or Torture Convention), which as a human rights instrument extensively addresses prevention of torture, also contains a non-return provision.[94] Like the Refugee Convention, it prohibits states parties from returning a foreign national to a country in which he would face torture.[95] The non-return obligation in the Refugee and Torture Conventions is an obvious point of contact between human rights and refugee law. Claims for protection from return to torture often go hand-in-hand with—or follow the denial of—claims for refugee protection and status.[96] Torture is also an

92. Minister for Immigration and Multicultural Affairs v. Khawar ¶¶ 191-93; Minister for Immigration and Multicultural Affairs v. Khawar & ORS (S128/2001) (High Court of Australia).
93. "[Violence against women] is caused by 'the structural relationships of power, domination and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work and in all public spheres.'... The maintenance of a legal and social system in which violence or discrimination against women are endemic and where such actions are trivialized or discounted should engage state responsibility to exercise due diligence to ensure the protection of women. *See* CHARLESWORTH & CHINKIN, *supra* note XXX, at 235 *quoting* CHARLOTTE BUNCH, PASSIONATE POLITICS ESSAYS1968-1986 FEMINIST THEORY IN ACTION, 491 and *citing* also Rebecca Cook, *State Responsibility for violations of women's human rights* 7 HARV. HUMAN RTS. J. 125, 126 (1994).
94. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100–20 (1988), 1465 U.N.T.S. 85, art. 3 [hereinafter Torture Convention].
95. *Id. Cf* ANKER, *supra* note XXX, at 469-70 (describing key differences between the two non-return obligations). Some regional human rights instruments contain non-return prohibitions. Similar non-return provisions as well as and perhaps more importantly in regional instruments). *See id.*, at 472-78.
96. *See, e.g.*, 8 C.F.R. §§ 208.3 (b), 208.16, 208.17 (2001) (providing under U.S. law that an application for asylum filed with the immigration court also will be considered a request for protection under the CAT). *See* generally, ANKER *supra* note XXX, ch. 7 (discussing *inter alia* some

extreme example of serious harm within the meaning of persecution. For both these reasons, the human rights corpus defining torture is incorporated into refugee law.

The CAT includes a requirement of official action, consent or acquiescence.[97] The Committee against Torture, which monitors compliance with the Torture Convention, as well as some regional bodies, has begun exploring the boundaries of this state action requirement.[98] In some limited instances, refugee claimants fleeing family violence have also been testing those boundaries. As noted, the U.S. Board of Immigration Appeals in *Kuna* granted a request for protection from return under the CAT to a woman fleeing years of violence by her husband. Her husband, who had governmental ties, had previously committed crimes with impunity. As a result, the Board found state acquiescence even where the wife did not seek state protection because she reasonably believed that it would be futile,[99] and that the international legal definition of torture can, under some circumstances, include violence within the family.[100] The failure of human rights law to clearly designate violence against women as torture (which is both a "paradigmatic" right and a norm of *jus cogens*), has been central to the feminist critique.[101]

Conclusion

This Article only suggests some of the international women's rights issues that refugee law is now addressing. There is a growing body of refugee case law considering other forms of violence against women—including forced marriage, forced sterilization, forced abortion, forced prostitution, bride burning, and honor killings—and

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case law under the CAT and the European Human Rights Convention, involving rejected asylum claimants seeking non-return protection under the CAT).

97. CAT, *supra* note XXX, art. 1 (requiring that the relevant acts be "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").
98. *See* ANKER *supra* note XXX, at 500-07.
99. *In re* Kuna, A76491421 (unpublished decision)(BIA Apr. 25, 2000) (on file with author).
100. *See In re* Kuna, A76491421) (unpublished decision) DATE (on file with author).
101. *See, e,g.*, CHARLESWORTH & CHINKIN, *supra* note XX, at 218-17, 246; *see also id.* at 234 (arguing that the CAT's state action requirement excludes most cases of violence against women; as noted, interpretation of that provision in the refugee context has in some instances embraced inter-family and other forms of violence against women, where the state is the enabler rather than the immediate perpetrator).

in gender as well as other contexts, discriminatory denials of education, employment and health care.[102] The refugee status inquiry is deeply and necessarily contextualized. The case law, UNHCR interpretations, and governmental guidelines all emphasize the intensely factual nature of any refugee determination. In the discrimination context, for example, the violations often must be cumulative and of an extreme nature.[103] In all cases, the violation must be sustained or systemic;[104] the normal relationship between state and citizen or resident must be ruptured. The refugee is fundamentally marginalized, unable to enjoy basic rights or vindicate them through change or restructuring from within her society.[105]

The next—or current—stage in refugee law may increasingly implicate economic and social rights.[106] As refugee law continues to mature, it may raise new state responsibility questions and interact more closely with human rights instruments, including not only the Convention against Torture, but other conventions as well.[107] Trafficking cases and refugee cases under the CAT, as well as refugee claims based on the right to health, hold some promise of shifting the focus away from practices in the sending countries of the South and shining the spotlight on receiving countries of the North.[108]

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102. For some examples, see ANKER , *supra* note XXX, at 252-66, 365-75, 388-93; CRAWLEY, *supra* note XXX, at 107-29, 147-60; REFUGEE LAW CENTER, GENDER ASYLUM DECISIONS, *supra* note XXX, at XXX; SYMES, REFUGEE CASELAW, *supra* note XXX, at 114-16.
103. *See* SYMES, REFUGEE CASELAW, *supra* note XXX, at 114-16; UNHCR HANDBOOK, ¶¶ 54-55.
104. See discussion *infra* notes XXX and accompanying text.
105. *See* HATHAWAY *supra* note XXX, at XXX; Andrew Shacknove, *Who is a Refugee, in* 95 ETHICS 274 (1985).
106. *See, e.g.,* Chen Shi Hai v Minister for Immigration and Multicultural Affairs [2000] HCA 19; 92000) ALR 553 at para 29 (recognizing that denial of access to food, shelter, medical treatment as well as education for children "involve such a significant departure from the standards of the civilised world as to constitute persecution").
107. *See, e.g.,* Kalin, supra note XXX, at (mentioning for example, articles XXX of the ICCPR, *supra* note XXX).
108. In asylum claims based on trafficking, some of the harm the claimant fears may be from traffickers located in the country of refuge. Similarly, the country that returns a person to face substantial health risks may be the more significant agent of harm, rather than the country of origin, which cannot provide the needed care; the serious harm is constituted in the act of removal itself. For example, the European Court of Human Rights determined that sending a dying AIDS patient back to his home country and depriving him of treatment he was receiving constituted

With respect to some human rights issues, refugee law has been innovative. Of course, refugee law will only continue to contribute to the elaboration of human rights norms to the extent that it develops within a human rights framework. Explicit and structured application of a human rights paradigm in refugee law is new and limited. Indeed, all the developments described in this article are nascent, contingent, and fragile. Commentators worry that harmonization in Europe may narrow the interpretation of refugee doctrine. Harmonization may even result in the shaping of refugee law by intra-state bodies instead of human rights institutions.[109] The solidification of non-entrée regimes has been closely linked to evolutions in doctrine.[110] There are many limitations to refugee law, and embeddedness in domestic immigration law and structures has been one of the most salient. Refugee law is especially vulnerable to political backlash. At times, refugee law and policy has been highly politicized, especially during certain ideologically charged eras such as the Cold War.[111] We may be entering another such era, and it will be interesting to see how much of a buffer the new refugee law, which came of age during the interim years, will provide.

Civil society has been an important force in the refugee field. The case of Haitian women in the United States, discussed above, is one example where broad political activism has contributed to the advancement of more inclusive and internationalized interpretations of the law. The Canadian gender guidelines were the direct product of the work of NGOs and women in the government.[112] The U.S.

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inhuman, or degrading treatment or punishment under the European Human Rights Convention. *See* D. v. United Kingdom, 24 Eur. H.R. Rep. 423, ¶ 49 (1997) (Eur. Ct. H.R.).

109. *See, e.g.*, CRAWLEY, *supra* note XXX, at 15; *see also* UNHCR, *An Overview of Protection Issues in Western Europe* (UNHCR, European Series No. 3, Geneva).
110. Hathaway non-entrée article; others.
111. *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990) (arguing generally that the political and other interests of Western states dominated in shaping the Refugee Convention); *see also* GIL LOESCHER & JOHN A. SCANLON, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986); Norman L. Zucker & Naomi Flink Zucker, The Guarded Gate: The Reality of American Refugee Policy (1987); Arthur C. Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 17 U. MICH. J.L. REF. 243 (1984) (all describing problems of politicization in U.S. refugee policy, including during the Cold War.
112. *See* Lisa Gilad, *The Problem of Gender-Related Persecution in* Indra,ed., *supra* at 334, 335 (1999).

Guidelines, inspired by the Canadian model, were the product of a continuing political and legal movement for refugee rights that began (at least) twenty years ago. Those efforts resulted in protection and status for tens of thousands both within and outside the formal terms of the Refugee Convention.[113] The Refugee Women's Legal Group, an NGO founded in part by refugee women living in the United Kingdom, wrote gender guidelines that became the basis for those of the UK Immigration Appeals Authority.[114] Critical to all of the political/legal refugee rights movements has been the human rights conceptualization of refugee law, including the call for state parties to meet their international obligations under the Refugee Convention.

The human rights and refugee rights movements are intrinsically connected. Increasingly, contact between the two regimes—and especially between human rights and refugee practitioners—is becoming unavoidable. Refugee lawyers and adjudicators are making extensive use of human rights reports. Human rights monitors are being called upon to give expert testimony and affidavits in refugee cases.[115] Human rights NGOs are focusing more on states' compliance with their obligations under the Convention, such as the treatment and protection of refugees, especially in counties of the North.[116]

Tensions between the refugee and human rights movements, however, remain inevitable. The Western media have, at times, used refugee cases to sensationalize practices such as FGS. In family violence cases, the media have told caricatured stories of women at war with their cultures.[117] Refugee lawyers can advocate for their clients with awareness of the larger human rights context, and try to guard against cultural judgments. Refugee and human rights activists can work together on issues such as trafficking, which implicate polices in the North as well as in the South.

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113. The United States, for example, has various subsidiary protection laws (granting either temporary or permanent protection or status, outside the human rights/asylum context). Persons covered include members of groups disproportionately excluded under past asylum policies. *See generally* Anker, Law of Asylum, *supra* note XXX, at 572-74.
114. *See* UK Appellate Gender Guidelines, *supra* note XXX, at back cover (acknowledging the work of the Refugee Women's Group and the origins of the appellate guidelines in those of the NGO).
115. Academics and medical professional, among others, are also providing such testimony, involving them in complex ethical issues surrounding advocacy and human rights. *See, e.g.*, Sidney Waldron, *Anthropologists As 'Expert Witnesses' in* Indra, *supra* note XXX, at 343 (1999)(describing tensions in providing expert testimony for Somali refugee claimant).
116. Human Rights Watch, Amnesty—find on web sites.
117. Globe article.

The problem of cultural relativism may lie at the heart of these conflicts between the two regimes. While refugee law may be formally non-intrusive and non-judgmental, it does make a determination of a state's willingness and ability to protect a particular citizen or resident, and in so doing lays claim to an *international* human rights standard. When the legalized refugee regime consists exclusively of states in the North determining refugee claims from the South, these purportedly international human rights-based judgments seem one-sided, patronizing, and hypocritical. This discrepancy is especially pronounced in gender persecution cases since violence against women (including intra-family violence) is prevalent throughout the world. As Audrey Macklin has commented, Western countries may be unwilling to believe that their own mechanisms of protection are inadequate, as "the phenomenon of gender persecution challenges the self-understanding of so-called 'non-refugee producers.'"[118]

In a similar vein, Peter Rosenblum has argued that refugee law's human rights claim may send a destructive message to women's rights communities in the South by making judgments that lack nuance and even stereotype under cover of an international standard. But in this respect, refugee law is not unique. Like all legal regimes, it makes a particularized assessment that tends towards bounded categorizations and incomplete portrayals of individuals' and societies' circumstances. While refugee law uses limited, legal categories, its factual scope is necessarily broad and complex—more so perhaps than many other areas of the law. As Lord Hoffman commented in *Shah*, "[Refugee law's] adjudication is not a conventional lawyer's . . . exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."[119] Refugee law does embrace some of this complexity; it recognizes, for example, that identities may be socially constructed and multifaceted. The refugee definition does not fix a refugee claimant's individual or group identity. Rather, it emphasizes the persecutor's *perception* of the refugee claimant's social status or opinion.[120] Furthermore, it does not force a choice of one particular ground of persecution, as claims can be based on any combination of the five grounds.[121]

Refugee law reflects the human rights community's own analyses of human rights conditions in various countries. It also reflects the

118. Macklin 264.
119. Shah and Islam, supra note XXX, at (Lord Hoffman).
120. *See generally*, HATHAWAY, *supra* note XXX, ch. 5.
121. UNHCR HANDBOOK, *supra* note XX, at paras. 66, 67.

human rights community's own tensions and dilemmas, as the FGS example illustrates. Hope Lewis, for one, has commented, "[t]he social, economic, and political conflicts that underlie the conflict over Western feminist involvement on FGS are as deeply rooted as the cultural basis of the practice itself. The discussion must be restructured to expose the conflicts in order for progress to be made on this issue."[122] Refugee law offers a particular structuring that confronts the human rights questions, but less contentiously than under the human rights regime's more ambitious framework. Refugee law does not seek to reform states and does not address root causes. Its role is palliative; it represents the interests of the individual in dissociating herself from her community and her State. This is not to deny that the broader goals of the human rights community are important or that refugee law may at times make an indirect contribution to them.[123] Refugee law may also complicate the work of human rights lawyers and activists, especially when its purposes are misunderstood. Moving forward will require greater clarity about the differences, as well as the similarities, between the two regimes.

122. Lewis 21.
123. Haitian 126

V

REPORTS FROM IARLJ CHAPTERS

AMERICAS CHAPTER OF THE IARLJ

Founding Meeting & First Conference

The Americas Chapter of the IARLJ held its founding meeting August 21, 2003, in Washington, D.C. The President of the IARLJ, Allan Mackey, was in attendance, as was the Head of the UNHCR in Washington, D.C., Madame Guenet Guebre-Christos, and Deputy Head, Eduardo Arboleda, and other UNHCR staff. The founding meeting reviewed, amended and approved the Governance documents of the Americas Chapter of the IARLJ, including, its Statement of Purpose and the Objects of the IARLJ Americas Chapter.

The founding meeting of the IARLJ Americas Chapter also established a number of Standing Committees, in addition to the Management Committee, which is the Regional Chapter's Steering Committee. The five Standing Committees of the IARLJ Americas Chapter are:

Conference Committee – which is charged with planning and organizing the Americas Chapter's biennial regional conferences.

Professional Development Committee – which is responsible for outlining a programme of training for IARLJ Americas Chapter refugee and asylum law judges and decision-makers.

Membership Committee – which has the duty not only to retain the existing members of the IARLJ in the Americas, but also to expand the IARLJ membership to all States within the Americas.

Fundraising Committee – which is tasked with raising funds through various sources to maintain the operating and programme expenses of the Americas Chapter.

Translation Committee – which translates the Regional Chapter's key documents from English to Spanish and *vica versa*.

The IARLJ Americas Chapter founding meeting agreed to hold its First Conference as soon as practical and before the IARLJ World Conference in 2005. It was also agreed that the First Conference should include a Conference Training Workshop for refugee and asylum law judges and decision-makers. Supreme Court of Costa Rica Justice, Ana Virginia Calzada Miranda, agreed to host the IARLJ Americas Chapter First Conference.

From June 9th to 11th, 2004, the IARLJ Americas Chapter held its First Conference in San Jose, Costa Rica. The First Conference was an outstanding success with over 60 refugee and asylum law judges from 19 countries in North and South America and the Caribbean. The theme of the First Conference was "Emerging Trends and Sharing Best Practices" and featured former President of the Inter-American Court of Human Rights, Mr. Justice Antonio Cancado, as the keynote speaker. The IARLJ Americas Chapter First Conference was followed by a Post-Conference IARLJ Training Workshop for new refugee and asylum law judges and decision-makers from Latin America and the Caribbean.

The first historic General Meeting of the IARLJ Americas Chapter, held immediately after the First Conference, unanimously approved the IARLJ Americas Chapter's Governance documents as well as the composition of its Management Committee. Jean-Guy Fleury was acclaimed as the Chairperson of the IARLJ Americas Chapter Management Committee, Lori Scialabba, as the Vice-Chairperson, and Gaetan Cousineau, as the Secretary-Treasurer. The first General Meeting of the IARLJ Americas Chapter also approved a number of reports tabled at the meeting, including, the Chairperson's Report, the Treasurer's Report and the Management Committee's Priorities and Plans 2004 – 2006 Report.

The Americas Chapter of the IARLJ: Priorities and Plans 2004 – 2006

The IARLJ Americas Chapter Management Committee's Priorities and Plans 2004 – 2006 Report outlines a number of major initiatives to be undertaken by the Americas Chapter over the next two years. These initiatives are all in keeping with the IARLJ Americas Chapter's principal objectives: to advance the professional development of IARLJ members in the Americas; to expand membership in the IARLJ to all States in the Americas, and; to exchange expertise and best practices within the Americas.

One such major initiative by the IARLJ Americas Chapter is the International Protection Project for the Americas (IPPA). IPPA is a multi-year professional development initiative that is modelled on the highly successful IARLJ Europe Chapter's Justitia Project, that was funded

by the European Union (EU) to train judges in EU ascension States. The IARLJ Americas Chapter is in the process of seeking to obtain funding for this multi-year professional development initiative that seeks to develop the judicial capacity of nascent refugee and asylum determination systems in Latin America and Caribbean States.

Another major priority for the IARLJ Americas Chapter is to develop a self-sustaining base of funding necessary to maintain its regional operations and programmes. To this end, it is working closely with the IARLJ Executive and Council to ensure that it can access resources to finance its operations.

Expanding the membership of the IARLJ to all States within the Americas is especially challenging, given the relatively small number of States in the Americas with formal refugee and asylum determination systems or procedures currently in place. Nevertheless, the Membership Committee of the IARLJ Americas Chapter is engaged in seeking innovative and creative ways to attract new members to the IARLJ.

In addition, the IARLJ Americas Chapter Conference Committee is in the process of planning its Second Conference and Workshop in Mexico City. The Mexico City IARLJ Americas Chapter Second Conference will be chaired by Miriam Morales, Coordinadora General of COMAR, and Cynthia Cardenas, Jefe de Oficiales de Proteccion COMAR, will be the Conference Administrator. Lois Figg, a member of the IARLJ Americas Chapter Management Committee, is co-ordinating and chairing the international teleconference calls for the IARLJ Americas Chapter's Second Conference in Mexico City.

It is anticipated that the translation requirements of the IARLJ Americas Chapter will likely increase over time as the activities of the IARLJ in the Americas, on behalf of the IARLJ members there, continues to expand. The challenge for the IARLJ Americas Chapter Translation Committee will be to expand, not only, its membership but also to find other IARLJ members who will be able to translate its documents.

The Americas Chapter of the IARLJ: Future Directions

The IARLJ Americas Chapter is engaged in long-term planning. For instance, it is actively considering a number of possible venues in South America for its third conference. The IARLJ Americas Chapter has yet to hold a Regional Conference in either South America or the Caribbean. The IARLJ Americas Chapter Management Committee has already approached a number of officials from South American and Caribbean States who have expressed an interest in hosting a future IARLJ Americas Chapter conference.

The IARLJ Americas Chapter is also contemplating how best to address the issue of full membership within the Regional Chapter. It has been noted that the IARLJ has adopted a narrow and strict

interpretation of the Association's Constitution on this point. The Membership Committee of the IARLJ Americas Chapter has called for a broader interpretation of the Association's Constitution to allow departmental officials full voting rights and participation in the activities of the IARLJ as a whole, and its Regional Chapters, in particular.

The IARLJ Americas Chapter will need to resolve its concerns for obtaining sustaining sources of base funding for its operations and its various special projects, such as IPPA. Some of these funds will undoubtedly come from those who take out membership in the IARLJ from the Americas.

As the IARLJ Americas Chapter continues to develop, it will inevitably require full-time staff support. For instance, IPPA envisages a full-time programme manager who would work closely with the IARLJ Americas Chapter Management Committee to ensure the effective and efficient management of this multi-year project. The Immigration and Refugee Board of Canada has agreed, as part of the IPPA proposal, to provide a full-time programme manager for the duration of this project. However, with the expansion of the IARLJ's membership and its activities within the Americas the requirement of full-time staff support will become inevitable. The requirement for full-time staff support will not only be a challenge for the IARLJ Americas Chapter, as well as the other Regional Chapters, but it will also be a challenge for the Association as a whole. This issue raises some fundamental questions as to how the IARLJ should be structured and organized in order to make the most effective use of its limited resources.

Several options are clearly evident. One possible option would be to add full-time staff support to the IARLJ Secretariat in Haarlem, The Netherlands, to deal specifically with Regional Chapter matters. Another possible option would be to establish IARLJ Regional Chapter offices that would report directly to the IARLJ Secretariat in Haarlem, The Netherlands. It seems inevitable that at some point, the IARLJ will have to address this issue and examine and consider what would be in the IARLJ's members' best interests.

The challenges confronting the IARLJ Americas Chapter over the next several years will be formidable. However, with the dedicated efforts of the IARLJ members in the Americas and the able leadership of the IARLJ Executive and Council, we are confident that we will successfully address all of these challenges.

April 2005

AUSTRALASIAN REPORT

Since the last meeting of the IARLJ there have been some dramatic changes in the workload and jurisdiction of the Federal Court of

Australia in relation to refugee matters. During that time, the High Court has ruled that the Government's attempt to oust the jurisdiction of the Federal Court cannot cover decisions tainted by jurisdictional error (*S157 v Commonwealth* [2003] HCA 2; 211 CLR 476).

This period has also seen the Federal Magistrates Court become the primary refugee court. Concurrent jurisdiction of the Federal Magistrates Court has resulted in a decline in the number of migration matters filed in the Federal Court. Only half as many matters were filed in the period June 2004 to the end of February 2005 as in the corresponding period a year ago. However, as a number of these in the earlier period were remittals from the High Court, the true decline is more like 33%.

The Federal Court has also been transferring migration cases back to the Federal Magistrates Court. In 2003, almost 300 cases were transferred; and half that number in 2004. The decrease in matters has led to a decrease in transfers, although the same percentage of refugee matters is involved. Although the concurrent jurisdiction of the Federal Magistrates Court has reduced the burden on the Federal and High Courts, many cases return to the Federal Court by way of appeal.

The Court spokesman advised that there appears to have been an increase in the overall numbers of special leave applications made to the High Court, although the figures are volatile and vary markedly from month to month. As a result of the High Court's decision in *S157*, the many cases before the High Court, under its constitutional writ jurisdiction, were remitted back to the Federal Court.

Prior to any appeals reaching the courts, the binding decisions on refugee status are made by the Refugee Review Tribunal. At the time of the last IARLJ Conference in November 2002, Australia had already witnessed a substantial decline in its refugee applications after the decisive actions taken by the Government a year earlier to prevent the arrival of asylum-seekers by boat. This was reflected in the application figures for 2001-02 (just under 5,000 – down from 6,700 the year before) and particularly in detention cases, which declined nearly 40%. (Asylum-seekers arriving in Australia without proper travel documents are subject to mandatory detention).

At the time of the last conference, the Tribunal's caseload was handled by 44 full-time and 29 part-time members. Despite falling applications (although the Tribunal still had a substantial backlog at the time), another two full-time and 16 part-time members were appointed in July 2003. On 30 June 2004, the terms of 70% of members expired. The low application rates meant that drastic cuts were inevitable. There are now 15 full-time and 14 part-time members engaged in refugee decision-making.

During 2003-04, applications declined a further 30% from the year before: 3,300 applications were lodged, and of those, 20% were not

new applicants, but rather, applications from those (mainly Afghans) who had been found to be refugees in 2000 or 2001 and whose temporary protection visas were expiring. These cases were heard afresh to decide if these applicants still held a well-founded fear of persecution in their homeland despite substantial changes since the time of their departure (and the Afghans were found to do so in about 90% of the cases). At this moment, the Afghan caseload has all but finished, and is being replaced by an Iraqi one. This "further protection caseload" is a significant part of our work at present. Apart from that, China and India, and decreasingly Indonesia, remain our major source countries. There is no backlog of cases.

New Zealand has seen a similar decline in application numbers and consequently in appeal numbers, consistent with worldwide trends. By way of example, the Government received 116 applications per month in 2001-02, 80 in 2002-03, 59 in 2003-04 and currently 32 in 2004-05. The downward trend is seen as a combination of the global decline in refugee numbers together with NZ govt's more recent tightening up of border controls, particularly offshore.

The caseload of appeals continues to include a significant number of Iranian claims and a number of cancellation cases where the Government has either cancelled its own grant of refugee status from which the individual has appealed, or brought an application to Refugee Status Appeals Authority (RSAA) to cancel our grant. Cancellations are brought primarily on the grounds that the grant may have been obtained by fraud or misleading information. Under our domestic legislation, these applications/appeals require us first to determine whether the grant *may* have been obtained by fraud, and, if so, whether the appellant/applicant is now a refugee.

A report on the Australasian Chapter's Third Conference, held in June 2004 in Sydney, Australia, was published on the IARLJ website last year.

EUROPEAN CHAPTER

The IARLJ European Chapter finds itself in a somewhat remarkable position as twenty six of the approximately forty countries on the European continent are Members of the European Union. By 2007 Bulgaria and Romania are scheduled to join and other countries, such as Turkey, are awaiting the outcome of their applications for Membership.

The harmonisation of the asylum process has been an objective of the European Union since 1999. The Treaty of Amsterdam provided for the introduction of, inter alia, directives relating to qualification

for refugee status and to, procedures. The Qualifications Directive was adopted by the European Counsel in April 2004 and entered into force on 1st October 2004. The directive must be implemented by Member States on or before the end of September 2006. While some Member States may postpone implementation until 2007, Courts of all Member States will be implementing European law as opposed to national law. The ultimate arbiter will not be the domestic courts of the Member States but at the European Court of Justice, Luxembourg.

As Members of the European Chapter we have an obligation to reach a common understanding of the rationale and objectives of the Qualifications Directive and, ideally, to agree on an interpretation of the directive that is consistent to all Member States.

The significance of the Qualifications Directive has been recognised by our Members and since its foundation in 2002 the European Chapter has held conferences and workshops in Dublin, at the Europäische Rechtsakademie, Trier, and in Edinburough. At all of these three conferences the main theme centred around the then draft Directives on Qualifications and Procedures. The effect of the Qualifications Directive is to provide for a single system of international protection for Member States of the European Union and combines claims by those seeking protection pursuant to the 1951 Convention Relating to the Status of Refugees (as amended by 1967 Protocol), and for those who seek protection on human rights grounds.

It is quite obvious that the Qualifications Directive will require the closest of scrutiny for the European Chapter over the next few years. We must acquaint ourselves with key judgements both from the European Court of Justice and from the ECHR and avail of any opportunities for joint training and judges exchange programmes. Over the past two years the European Chapter has, with the assistance of the UNHCR, taken part in training seminars in Poland, Hungary, Czech Republic, Slovakia, Romania and Spain. We are hopeful that we can continue this work with our colleagues throughout Europe.

Finally, I am delighted to inform you that our Hungarian colleagues at the Budapest Municipal Court have offered to host the next conference of the European Chapter which will be held in Budapest, on 4th , 5th , 6th November 2005. The Conference will be organised in collaboration with the European Chapter of the International Association of Refugee Law Judges. The Conference Chairperson is Judge Judit Papai of the Budapest Municipal Court.

Eamonn Cahill
Irish Refugee Appeals Tribunal
29th March 2005

VI

WORKING PARTY REPORTS

IARLJ INTER-CONFERENCE WORKING PARTY PROCESS

CO-ORDINATOR'S REPORT
James C. Simeon

Introduction

The IARLJ Inter-Conference Working Party Process is one of the most vital activities of the IARLJ. It is fully expected that all seven IARLJ Working Parties will be presenting conference papers at the IARLJ World Conference in Stockholm, Sweden, April 21st to 23rd, 2005. There are many challenges that impact directly on the IARLJ Inter-Conference Working Party Process. These challenges require creative solutions on the part of all concerned.

It is obvious that the activities of the IARLJ will likely continue to expand over time, as will the number of IARLJ Working Parties. In order to assist the IARLJ Working Parties with completing their activities and operations, I call on the IARLJ to retain another staff person at the IARLJ Secretariat, which would be dedicated to servicing the needs of the IARLJ Working Parties. It is very much hoped the IARLJ Executive and Council will consider accepting this recommendation.

Between World Conferences: From Wellington to Stockholm

At the last IARLJ World Conference in Wellington, New Zealand, in October 2002, the Inter-Conference Working Party Process held a breakfast meeting that was chaired by IARLJ President Allan Mackey. The meeting included the Working Party Rapporteurs and participants

as well as members of the IARLJ Executive and Council. This pivotal biennial meeting of the Inter-Conference Working Party Process addressed a number of concerns, including, how the Inter-Conference Working Party Process might be improved so as to better fulfill its key role within the Association. The Working Party Rapporteurs and other participants at the meeting generally agreed that what the Inter-Conference Working Party Process required was a more structured approach to the organization and operations of the IARLJ Working Parties. There was also general agreement that the IARLJ Working Parties should not be expanded but, rather, consolidated, until systems and procedures were properly implemented by the Association to help ensure that the existing IARLJ Working Parties could operate more effectively.

To that end, it was agreed that all IARLJ Working Parties should have an overall plan to guide their research efforts between World Conferences. Further, to increase the level of active participation on each of the IARLJ Working Parties, it was suggested that a letter be sent to the respective heads of the refugee and asylum law courts or tribunals in selected States. It was submitted that if the heads of these States' courts and tribunals nominated judges and decision-makers to serve on an IARLJ Working Party, this would help to ensure that these participants would actively participate on their assigned IARLJ Working Party. Furthermore, it was also suggested that role descriptions for the Working Party Rapporteur and Working Party Participant positions be drafted and submitted to the IARLJ Executive and Council for approval, and then posted on the IARLJ website. [391]

Accordingly, a letter was drafted and sent to the heads of the refugee and asylum law courts and tribunals in a number of States. The role descriptions for the Working Party Rapporteur and Participant positions were prepared and, subsequently, approved by the IARLJ Executive and Council and posted on the IARLJ website. In addition, a detailed priorities and planning document for the Inter-Conference Working Party Process was prepared for the period 2003 to 2005. The IARLJ Executive and Council approved this document at its meeting held in Trier, Germany, in May 2003, and it was, subsequently, also posted on the IARLJ website.[392]

Following the 2002 IARLJ World Conference in Wellington, New Zealand, there were a number of Rapporteur positions vacant on various Working Parties. These vacant Rapporteur positions were,

391. IARLJ Inter-Conference Working Parties Process, The Role of the Working Party Rapporteur, http://www.iarlj.nl.

392. IARLJ Inter-Conference Working Parties Process, Project Plan 2003-2005, May 2003, http://www.iarlj.nl.

later, filled from the nominees received from the heads of the respective refugee and asylum law courts and tribunals that had responded to the letter that was sent to them by the IARLJ.

The IARLJ Executive and Council also approved the appointment of Associate Rapporteur positions for each of the Working Parties. Associate Rapporteurs assist Rapporteurs in leading and directing their Working Party and replace the Rapporteurs, if they cannot perform their duties. Previous IARLJ Working Party experience has demonstrated the necessity of having Associate Rapporteurs for each of the IARLJ Working Parties, to ensure that there is continuity and consistency on each of the Working Parties in the event that a Rapporteur can no longer fill his or her position.

The IARLJ Executive and Council meeting held in May 2003, in Trier, Germany, also approved the list of proposed Rapporteurs and Associates Rapporteurs for each of the IARLJ Working Parties.

In August 2003, a number of Rapporteurs, Associate Rapporteurs and Working Party participants met at the IARLJ Americas Chapter founding meeting in Washington, D.C. Other interested participants at the IARLJ Americas Chapter founding meeting, from the Caribbean and Central and South America, were introduced to the IARLJ Inter-Conference Working Party Process. At a breakfast meeting of the IARLJ Inter-Conference Working Party Process, that was held the next day, it was agreed that the IARLJ Working Parties should have an opportunity to present their conference research papers at the next IARLJ World Conference and that this should be communicated to the IARLJ Executive.

In January 2004, the IARLJ, in conjunction with the United Kingdom (U.K.) Immigration Law Practitioners Association (ILPA) and the U.K. Medical Foundation (MF), held a seminar in London on country and medical expert evidence in refugee and asylum law. Following this highly successful joint seminar, the IARLJ Inter-Conference Working Party Process held a breakfast meeting, in which it was agreed that a new IARLJ Working Party should be established on Expert Evidence. It was also agreed that Geoffrey Care, Immediate-Past President of the IARLJ, and John Barnes, U.K. Immigration Appeal Tribunal Vice-President and author of one of the papers presented at the joint IARLJ/ILPA/MF seminar in London, should serve as Rapporteur and Associate Rapporteur, respectively, of the new Expert Evidence Working Party.

At the IARLJ Executive and Council meeting held in Geneva, Switzerland, in March 2004, the IARLJ Executive and Council formally approved the establishment of an Expert Evidence Working Party. The IARLJ Executive and Council also considered a proposal for the establishment of a Publications Committee. It was agreed that given

the IARLJ's growing number of publications it was time to begin to catalogue as well as to put greater effort into marketing its publications. The IARLJ Publication Committee was also formally approved at the IARLJ Executive and Council meeting in Geneva, Switzerland.

At the IARLJ Executive and Council meeting in Paris, France, in April 2004, the nominees for the vacant Working Party Rapporteur and Associate Rapporteur positions were approved. The IARLJ Executive and Council also fully endorsed the research projects and plans of each of the Working Parties.

The IARLJ Americas Chapter held its First Conference, after its founding meeting held in Washington, D.C., in August 2003, in San Jose, Costa Rica, in June 2004. The Inter-Conference Working Parties Process held a meeting at the IARLJ Americas Chapter's First Conference for all those who were interested in the research projects being conducted by the Working Parties. A number of IARLJ Working Party Rapporteurs and Associate Rapporteurs were in attendance at this meeting.

During this meeting, it was suggested that the IARLJ Working Parties should consider taking a common thematic approach to their research work for the next IARLJ World Conference. It was agreed that the common topic that all IARLJ Working Parties should turn their minds to is how security concerns, after September 11, 2001, have affected refugee and asylum determination from the perspective of their substantive issue areas. This proposal was then put before the Rapporteurs at the first international teleconference call that was held after the San Jose, Costa Rica, meeting and it was adopted. The IARLJ Executive and Council meeting held in Edinburgh, Scotland, in November 2004, subsequently, formally endorsed this common thematic approach for the Inter-Conference Working Party Process for the 2005 Stockholm World Conference.[393]

The IARLJ also formally constituted a Publications Committee, Chaired by Dr. Hugo Storey, for the express purpose of consolidating and better managing all IARLJ publications. The Publications Committee is also tasked with disseminating the latest ideas, concepts and research findings in the field of international asylum and refugee law to IARLJ members. In order to do so, the Publications Committee is considering such things as an IARLJ journal, occasional paper series and, of course, the publication of the IARLJ World Conference and its Regional Chapter Conference proceedings.

393. IARLJ Inter-Conference Working Parties Process, Progress Report, IARLJ Executive and Council Meeting, Thursday, November 11, 2004, Edinburgh, Scotland, http://www.iarlj.nl.

Since the last IARLJ World Conference in Wellington, New Zealand, considerable effort has been expended coordinating the activities of the IARLJ Working Parties. In addition to the face-to-face meetings that were held in Washington, D.C., London, England, and San Jose, Costa Rica, the IARLJ Working Party Rapporteurs have held international teleconference calls on at least a quarterly basis. In the months preceding the Stockholm IARLJ World Conference, these international teleconference calls were being held on a monthly basis.

There has also been direct liaison and coordination with the Stockholm IARLJ World Conference organizing committee. As Coordinator of the IARLJ Inter-Conference Working Parties Process, I have participating in a number of international teleconference calls of the IARLJ Stockholm World Conference organizing committee. Anna Giertz, Conference Administrator for the Stockholm 2005 IARLJ World Conference, has also participated in a number of IARLJ Working Party Rapporteurs international teleconference calls. These mutual exchanges have assisted in facilitating the arrangements for the IARLJ Working Parties' participation at the 2005 IARLJ World Conference.

The Working Parties' Contributions to the 2005 World Conference

Expert Evidence Working Party

Rapporteur: Geoffrey Care, United Kingdom
Associate Rapporteur: John Barnes, United Kingdom

The Expert Evidence Working Party is "considering whether, and if so, what general principles apply in the form of reception and evaluation of expert evidence, including medical evidence and country background materials by decision makers in claims for recognition as refugees and related claims." The Expert Evidence Working Party has worked collaboratively with the U.K. Medical Foundation and other outside authorities on this crucial topic.

The overall goal of the Expert Evidence Working Party is to eventually produce a best practice protocol on the subject of expert evidence. The Expert Evidence Working Party's 2005 IARLJ World Conference research paper sets out its efforts to achieve this goal.

The Expert Evidence Working Party has proved to be a model IARLJ Working Party. It has been led by the highly respected Immediate-Past President of the IARLJ, Geoffrey Care. The Working Party has held numerous meetings and has engaged in a vigorous exchange of views on a number of pertinent topics related to their research. The Expert Evidence Working Party has not only met but also exceeded its deadlines for the submission of its conference paper.

Human Rights Nexus Working Party

Rapporteur: Paulah Dauns, Canada
Associate Rapporteur: Tony North and Roderick Madgwick, Australia

The Human Rights Nexus Working Party, more than any other IARLJ Working Party, has focussed on the common thematic approach adopted by the Inter-Conference Working Party Process for the 2005 IARLJ World Conference. The Human Rights Nexus Working Party has received submissions on the topic of how security concerns post-9/11 have impacted refugee and asylum determination from a number of jurisdictions, including: Australia, Canada, New Zealand, the United States, and the United Kingdom. The Working Party has thoroughly examined this topic and has prepared a conference paper that thoughtfully analyses how security concerns have contributed to the reduction of refugee flows to Western Europe, North America and Australia and New Zealand.

Membership in a Particular Social Group Working Party

Rapporteur: Juan Osuna, United States
Associate Rapporteur: Michael Ross, Canada

The Membership in a Particular Social Group Working Party is taking a two-track approach to the 2005 IARLJ World Conference. It is examining the common topic of how security concerns post-9/11 have affected refugee and asylum determination from the perspective of the Membership in a Particular Social Group Working Party, as well as updating developments in this issue area since the 2002 Wellington, New Zealand, IARLJ World Conference. Rapporteur Juan Osuna has sent a number of e-mails to the Membership in a Particular Social Group Working Party in an effort to solicit as broad a response as possible to the most recent developments in its substantive issue area.

Non-State Agents of Persecution Working Party

Rapporteur: Rolland Bruin, The Netherlands
Associate Rapporteurs: Muhammad Hassin and Tjerk Damstra, South Africa

The Non-State Agents of Persecution Working Party will seek to make a contribution to the common thematic approach of the Inter-Conference Working Party Process from the perspective of non-state agents of persecution. In addition, the Non-State Agents of Persecution Working Party will seek to update the most recent developments in

this area as evident in the European Union's Qualification Directive. The Rapporteur of the Non-State Agents of Persecution Working Party has sent a number of e-mails to the participants on this Working Party and received a number of responses.

Vulnerable Categories Working Party

Rapporteur: Edward Grant, United States
Associate Rapporteur: Lois Figg, Canada

The Vulnerable Categories Working Party Rapporteur, Edward Grant, is preparing a conference paper on the topic of subsidiary protection. While Associate Rapporteur, Lois Figg, is preparing a paper on assessing the claims to Convention refugee status of those who fall within a vulnerable category. She will also outline the Immigration and Refugee Board of Canada's planned guidelines for vulnerable claimants.

Internal Protection Alternative Working Party

Rapporteur: Kim Rosser, Australia
Associate Rapporteur: Erik Lempert, Sweden

The Internal Protection Alternative (IPA) Working Party will examine recent developments in this substantive issue area since the 2002 IARLJ World Conference in Wellington, New Zealand. For instance, the recent EU Qualifications Directive incorporates IPA within its Articles. There have also been developments in this substantive issue area in a number of jurisdictions, including, Canada, the U.S.A., and Australia.

Asylum Procedures Working Party

Rapporteur: Michael Creppy, United States
Associate Rapporteur: Phillip Williams, United States

The Asylum Procedures Working Party will examine how security concerns post-9/11 have affected asylum procedures in various jurisdictions around the world. The Asylum Procedures Working Party is also examining the inquisitorial versus the adversarial models for refugee and asylum determination.

The efforts of each of these IARLJ Working Parties will be made available to the IARLJ World Conference delegates and published as part of the 2005 IARLJ World Conference proceedings. However, there is also some consideration being given to a separate publication on the topic of the impact of security concerns on asylum and refugee determination following the tragedy of 9/11. Each of the Working Parties will have an opportunity to revise their Stockholm IARLJ

World Conference papers, taking into consideration the comments and suggestions that are received from the delegates at IARLJ World Conference.

Charting the Way to the next IARLJ World Conference

In order to fulfil its mandate, the IARLJ Inter-Conference Working Party Process must confront and overcome a number of formidable challenges. To do their jobs effectively, the Working Parties must sustain the level of activity and interest among their Working Party participants between IARLJ World Conferences. Working Party participation is, of course, voluntary and entirely dependent on the availability of refugee and asylum law judges and other interested participants. As we know, most IARLJ members and associate members are extremely busy with their high volume caseloads and other commitments and often do not have the time necessary to devote to their Working Party's research activities. Moreover, as in all organizations, there is a natural attrition rate within the Working Parties. The participants on a Working Party are not constant over time. There are any number of reasons for this, but it is evident that refugee and asylum law judges and decision-makers do eventually retire from the profession or move on to other courts and/or tribunals and areas of the law.

Other factors also militate the effective operation of the IARLJ Inter-Conference Working Party Process. Since all Working Parties consist of participants from around the world, staying in contact with Working Party participants is not always a simple or easy task. For instance, when Working Party participants are located in different date and time zones, it is not always easy to find a convenient time for everyone to participate on international teleconference calls.

Thus, maintaining an up-to-date contact list of Working Party's participants, as members' come and go, is an ongoing task. However, it is crucial that a core group of active participants stay involved with their Working Party throughout the period between IARLJ World Conferences. Setting a schedule for international teleconference calls, well in advance of the calls, is necessary to help to ensure maximum participation within a Working Party. Confirmations and the supporting materials for the teleconference call (draft agenda, draft notes, participants list, etc.) must always, of course, be sent to the teleconference call participants in advance of the scheduled call.

Although there is a rhythm to the level of activity and work of the IARLJ Inter-Conference Working Party Process that typically will wax, immediately before, and wane, immediately after, IARLJ World Conferences, the challenge is to ensure that the Working Parties continue to operate at a fairly consistent pace between IARLJ World

Conferences. With the establishment of viable Regional Chapters in Europe, Australia-New Zealand, the Americas and, soon, Southern Africa, there will be additional opportunities, at Regional Chapter Conferences and seminars, for Working Party participants to sustain their activities between IARLJ World Conferences.

The IARLJ membership will likely continue to grow for the foreseeable future. Likewise, the level of activity within the IARLJ will also continue to increase. One might safely predict that the IARLJ, eventually, would likely also have other Regional Chapters formed, for example, in Asia. It is also reasonable to assume that new Working Parties will likely be formed as well.

With the predictable increased membership and level of activity within the IARLJ over the next few years and the formidable challenges confronting the IARLJ Inter-Conference Working Parties Process, I should like to suggest that the time has come to expand the staff resources at the IARLJ Secretariat in Haarlem, The Netherlands. The IARLJ, I would like to suggest, has now reached a point where there is a need for dedicated staff resources at its Secretariat to service the critically important work that is being undertaken by the IARLJ Working Parties.

A Modest Proposal

The IARLJ Secretariat, presently, has one staff person who is tasked with a number of duties that covers the entire gamut of the Association, from membership to assisting in organizing the biennial World Conference. With seven active Working Parties and soon likely four active Regional Chapters this will inevitably place a greater burden on our single full-time staff person.

In order to take the work of the Association, and, in particular, the IARLJ Inter-Conference Working Party Process, to a new level, I should like to suggest that another full-time staff person be retained for the IARLJ Secretariat. This new staff person at the IARLJ Secretariat would be dedicated to servicing the Working Parties and their activities. This person would work closely with the IARLJ Inter-Conference Working Party Process Coordinator to ensure that the Working Parties are actively engaged in their IARLJ Executive and Council approved research projects. This person would also be responsible for assisting Working Party Rapporteurs in arranging for their meetings, whether face-to-face or *via* teleconference. In addition, this staff person would also work closely with the Chairperson of the Publications Committee to ensure that the conference papers, seminar reports, monographs, etc., are ready for publication.

There would be a natural division of labour within the IARLJ Secretariat, with Liesbeth van de Meeberg, the senior staff person,

working closely with the IARLJ Executive and Council and arranging for all key meetings and the business management activities of the Association. However, with the establishment of at least four viable Regional Chapters, Liesbeth van de Meeberg, duties would inevitably encompass, in part, the coordination of Regional Chapter activities as well. The second staff person appointed by the IARLJ Executive and Council would have the responsibility for IARLJ Inter-Conference Working Party Process and the IARLJ Publications Committee. Ideally, the person should have a research background in refugee and asylum law as well as an editing and publication background.

The IARLJ Inter-Conference Working Party Process requires dedicated staff resources to be able to successfully meet the challenges that it will inevitably face over the period leading to the next IARLJ World Conference. This new staff person could assist Working Party Rapporteurs with maintaining their contact with their Working Party participants, ensure that Working Party participants provide materials and feedback for their research projects, and all of the other activities undertaken by Working Party Rapporteurs with respect to their Working Parties' mandates. The staff person could assist the IARLJ Inter-Conference Working Party Coordinator arrange for international teleconference calls for Working Party Rapporteurs and help to ensure that the IARLJ Working Parties submit their work within the prescribed timeframes. The staff person would also assist the Chairperson of the Publications Committee ensure that all conference papers and other materials are in the proper form for publication.

Conclusions

The IARLJ Inter-Conference Working Party Process will present Working Party conference papers that address the common thematic topic of how security concerns, post 9/11, have affected refugee and asylum determination in various States at the IARLJ World Conference in Stockholm, Sweden. A number of new IARLJ Working Parties have been established after the last IARLJ World Conference in Wellington, New Zealand. An Expert Evidence Working Party and a Publications Committee has been established since the last IARLJ World Conference.

Each of the seven active IARLJ Working Parties will present a conference paper at the IARLJ Stockholm World Conference. These conference papers will be published as part of the IARLJ Stockholm World Conference proceedings.

With the growth of the IARLJ and its various activities, the IARLJ Secretariat will require additional staff resources to be able to properly service its members. This report calls for the Association to retain one additional staff person at the IARLJ Secretariat in Haarlem, The Netherlands, to work with the Coordinator of the Inter-Conference

Working Party Process, Working Party Rapporteurs and the Chairperson of the IARLJ Publications Committee. This dedicated staff resource would help to ensure that IARLJ Working Parties and the Publications Committee meet their objectives on behalf of the IARLJ and its members.

It is hoped that the IARLJ Executive and Council will consider this recommendation for retaining an additional staff person at the IARLJ Secretariat. This IARLJ staff resource person could prove invaluable in the operation of the IARLJ Inter-Conference Working Party Process and its Publications Committee in the period leading to the next IARLJ World Conference.

REPORTS

I. Report by the Expert Evidence Working Party to the IARLJ Conference at Stockholm 21-23 April 2005 upon the principles relative to the provision of expert evidence in asylum and human rights. Principal author: John Barnes.

Terms of Reference

> "This Working Party has been established to consider whether, and if so what, general principles apply to the form, reception and evaluation of expert evidence, including medical evidence, and country background material by decision makers in claims for recognition as a refugee and related claims."[394]

Preparation of Report

In this Report we identify a working list of a number of principles which we consider are of general application to the way in which expert evidence should be approached by asylum judges worldwide. We would emphasise, however, that in part they cover issues which require considerably more research, particularly into the practical problems and the approaches which we consider may be explored for more detailed future best practice suggestions. In its practical application, the subject is so far-reaching that it would be pointless to seek to do more than stimulate discussion and future more detailed consideration.

Nevertheless, as will appear from our conclusions in Part 12, we believe that there are certain principles which are of such universal application, irrespective of which model of court procedures are followed by individual jurisdictions, that they may form a basis for a more immediate limited best practice protocol which should form the initial focus of further consideration. These are the principles which are discussed in Parts 1, 2 and 11 of this paper and relate to the basic duties of the expert witness to the court or tribunal in which his evidence is to be received. They relate to the general procedure rules which have been developed within the English jurisdiction (Part 1)

394. The Inter-Conference Working Parties Process is examining the question of how security concerns, post-9/11, have affected refugee and asylum adjudication across jurisdictions/States for the IARLJ 2005 World Conference in Stockholm, Sweden. To that end, this Working Party has also given thought to this question from the perspective of their own terms of reference and their conclusions are recorded at the end of this Report.

and requirements of structuring expert evidence particular to medical issues (part 12).

The principles which we have considered are as follows:

1. The approach to expert evidence in English Law
2. Is this a potentially relevant international model?
3. The scope and reception of expert evidence
4. The relevance of expertise gained by asylum judges
5. The degree of deference to be accorded to expert testimony
6. The duty of the expert witness to refugee courts
7. The competency of the expert witness
8. The relevance of expert evidence in refugee courts. When is it admissible?
9. The limits of the role of expert witness
10. Country experts
11. Medical experts
12. Conclusions

As will be made clear below, in seeking to elicit this working list of principles, we have taken as our start point the analysis by John Barnes of the main principles which have been identified within UK jurisprudence. We believe his paper, originally written for an IARLJ London seminar in January 2004 and since revised so as to incorporate comments from the Working Party and others, furnishes valuable groundwork for the eventual publication of a best practice protocol on the subject of expert evidence.

It is not our intention in developing this working list to set out a specific IARLJ position on expert evidence with which all members of the Association can agree in full. It is rather to set out the results of work done under IARLJ auspices on the subject so as to reflect what progress we have felt able to make so far.

The focus of our discussions within the Working Party on expert evidence has been on whether the principles identified in John Barnes' paper could be applied either directly or with certain modifications in other countries.

Whilst we do not consider we have had sufficient time to address all the relevant issues, we do think that the principles we have identified above and which are elaborated in John Barnes' paper below, do have general application, albeit there will be a need for modification in order to adapt to different national legal systems.

Geoffrey Care
Rapporteur
March 2005.

II: REPORT OF EXPERT EVIDENCE WORKING PAPER: THE PAPER

This report has been prepared by John Barnes[395], the Associate Rapporteur of the Working Party, and as already noted is in part derived from the paper which he delivered at the Joint ILPA/IARLJ Seminar held in London on 22 January 2004 at which responses from Dr Anthony Good, a social anthropologist and Professor at Edinburgh University, and David Rhys Jones and Sally Verity Smith of the Medical Foundation for the Care of Victims of Torture (London) were also presented. These papers are published in the International Journal of Refugee Law, Volume 16 Number 3 of 2004 at pp. 349-410.

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395. John Barnes' background is that after some 35 years in private practice as a solicitor in England, he was appointed as a part time Adjudicator to the Immigration Appellate Authority in 1995, taking up a full-time post on 1 July 1997. In January 2000 he was appointed a Vice President of the Immigration Appeal Tribunal which, until the revision of the UK asylum judicial system, heard appeals from the Adjudicators. Since 4 April 2005 he serves as a Senior Immigration Judge in the new single-tier Asylum and Immigration Tribunal which replaces the former two tier structure.
This paper is written from the perspective of his experience in the United Kingdom Immigration and Asylum Tribunal system which has exclusive jurisdiction in appeals from state decisions relating to asylum and conjoined human rights appeals. In the case of asylum appeals the remit of the jurisdiction is to consider whether refoulement of an asylum claimant would be in breach of the United Kingdom's international obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Refugee Convention'). Since the coming into force of the Human Rights Act 1998 on 1 October 2000, the provisions of the principal Articles of the 1950 European Convention on Human Rights including subsequent Protocols as defined in the Act ('the European Convention') have been incorporated into United Kingdom Law so that from that date the Immigration Tribunals have also been concerned with whether removal or refusal of entry or of variation of terms of entry would be in breach of the provisions of the European Convention. In practice the effect of the 1998 Act has meant that the United Kingdom Immigration Tribunals will almost always be required to take into account the non-derogable Article 3 rights (prohibiting torture or other inhuman or degrading treatment or punishment) which are in practice generally treated as in line with rights under the Refugee Convention (save that no Refugee Convention reason is required and the exceptions in, for example, Article 1F and Article 33 do not apply) and also to take into account the effect of any rights to private or family life which may have been established in the United Kingdom since arrival of the claimant.

The members of the Working Party are listed in Annexe 1. Following an initial draft report, the present report has been prepared on the basis of numerous teleconferences and individual input by members of the Working Party with particular indebtedness to the contributions from Allan Lutfy FCJ (Canada) and R G Care, past President of the IARLJ.

1. The approach to expert evidence in English law

The law defining the role and responsibilities of the expert witness is largely derived in the UK jurisdiction from the principles enunciated by Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep. 68, which are themselves largely distilled from earlier case law. They form the basis for Part 35 of the English Civil Procedure Rules (CPR) which is reproduced in full at Annexe 2 to this paper. They are supplemented by a Practice Direction which is also included in that Annexe.

The principal provisions of the Civil Procedure Rules for our purposes may be highlighted as follows:

Rule 35.1– Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

Rule 35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Rule 35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.

Rule 35.5 (1) Expert evidence is to be given in a written report unless the court directs otherwise.

Rule 35.6 (1) A party may put to ... an expert instructed by another party ... written questions about his report. ...

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

Whilst in consequence the areas with which the United Kingdom Asylum judges are concerned may be wider than apply in some other jurisdictions, it does not seem to the writer that the principles governing the approach to expert evidence will necessarily differ from those in the United Kingdom. Moreover, whilst the United Kingdom's procedures remain currently adversarial in nature it may well be that the use of inquisitorial or interventionist procedures in some European and other jurisdictions which do not apply the Common Law model, is unlikely to make any essential difference to the principles and practice governing expert testimony in United Kingdom jurisdictions.

Rule 35.7 (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.

Rule 35.10 (1) An expert's report must comply with the requirements set out in the relevant practice direction.

(2) At the end of an expert's report there must be a statement that

(a) the expert understands his duty to the court; and

(b) he has complied with that duty.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

Rule 35(11) Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

Rule 35(13) A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

Rule 35.14 (1) an expert may file a written request for directions to assist him in carrying out his function as an expert.

It is also appropriate to quote parts of the current Practice Direction here:

Expert Evidence – general requirements

1.1 It is the duty of an expert to help the court on matters within his own expertise: Rule 35.3(1). This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom he is paid: rule 35.3(2).

1.2 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

1.3 An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.

1.4 An expert should consider all material facts, including those which might detract from his opinion.

1.5 An expert should make it clear:

(a) when a question or issue falls outside his experience; and

(b) when he is not able to reach a definite opinion, for example because he has insufficient information.

1.6 If after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

Form and content of expert's reports

2.1 An expert's report should be addressed to the court and not to the party from whom the expert has received his instructions.

2.2 An expert's report must:

(1) give details of the expert's qualifications;

(2) give details of any literature or other material which the expert has relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(4) make clear which of the facts stated in the report are within the expert's own knowledge; ...

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinion, and

(b) give reasons for his own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give his opinion without qualification, state the qualification; and

(9) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty.

2. Is this a potentially relevant international model?

The views expressed in this section must necessarily be tentative but the Working Party covers a broad spectrum of both adversarial, inquisitorial and interventionist court systems and no-one within the Working Party has suggested that the United Kingdom approach, generally, to the receipt of expert evidence and the duties of expert witnesses is not of validity for international refugee law purposes.

The debate on this issue can of course be extended with the wider dissemination that this paper will achieve at the Conference and the Working Party would be pleased to receive and take into account the views of delegates because it is hoped that this paper may be the first step in seeking to draw up a best practice protocol for adoption internationally.

It is not, for the reasons expressed in the conclusion to this Report, suggested that such a protocol should extend further than the scope of the English Civil Procedure Rules and Practice Directions, which are set out above, whether or not to be differently expressed.

It is for this reason that the conceptual basis has been isolated in the first part of this Report, while specific concerns relating to the

nature of the expert evidence likely to be met in the refugee law courts are considered subsequently by way of additional commentary on what it is hoped will be matters of mutual interest and concern to Delegates.

In the United Kingdom the Asylum and Immigration Tribunal system has exclusive jurisdiction in appeals from decisions by the State (the Home Office) relating to all immigration decisions as well as asylum and conjoined human rights and/or anti-torture appeals. This range of exclusive jurisdiction is in essence similar to that in USA, Canada, Australia, and New Zealand and, in regard to asylum appeals, also in Belgium.

Where there is a dedicated tribunal asylum judges (as we will refer to them) will at one or more stages be triers of fact as well as law. They will usually be specialists with a professional or academic legal qualification – sometimes with limited security of tenure.

In some countries, such as the Netherlands, the asylum judges are judges of civil, commercial and criminal courts who have been seconded for a period to the asylum court. In other countries, notably in Central Europe, the District and Regional Courts have jurisdiction. In most countries a further appeal lies to an appellate Court usually limited to a question of law. This appeal may be to the normal appeal courts or to a superior administrative court or tribunal.

Although there are other systems, most will receive evidence in some form or another, though not always oral (vide Switzerland).

This Report does not attempt to deal with or prescribe for references and decisions by supranational courts or tribunals such as those in the EU or the East African Court of Appeal, but it recognises that such regimes do exist.[396] It is also recognised that each country's specialist asylum courts or tribunals will have their own procedure rules. Where such procedure rules deal with the issue of expert evidence, what is said here must, of course, be subject to such specific rules. But, if this Report can act as a starting point towards an international consensus on the procedural rules appropriate to expert evidence, then it is to be hoped that greater uniformity on such a model may ultimately be achieved.

Whilst the areas with which the asylum judges in different countries deal may vary (e.g. in UK they deal with immigration and asylum and human rights issues) the principles governing the approach to expert evidence do not seem to differ materially so that the Working Party considers that there is scope at least to consider a move towards

396. For a discussion of the reception of expert evidence in such courts, see Chapter 2 of the Medical Documentation of Torture edited by Michael Peel and Vincent Iacopino published by Greenwich Medical Media Ltd in 2002.

such an international consensus through the auspices of the Association.

This will necessarily, however, be subject to the requirements, which different trial procedures may have on the way in which expert evidence is obtained, received and evaluated in different jurisdictions.

For example, the Canadian model at first instance is primarily an inquisitorial model: the decision-maker sits on the Immigration and Refugee Board, an independent Tribunal, and receives evidence from the claimant usually in the absence of a government representative whose presence would create an 'adversarial' setting. This contrasts with exclusion cases where there is sometimes a 'Minister's Representative' when the Board recognises the adversarial nature of the hearing. Whilst the Canadian model includes a 'Refugee Protection Officer' he is an employee of the Board and his mandate is to assist in a neutral role. In such an inquisitorial setting, the asylum judge might require some guidance as to how best to ensure that evidential rules framed for an adversarial procedure need to be respected within the bounds of procedural fairness. In the Canadian procedure there is unlikely to be the level of objection raised by one party in the event of a perceived breach of the evidential rules by the non-existent other party who would more usually take such a point in the adversarial model. It may be that the point can be met by the asylum judge making it clear that he has been guided by the principles governing expert evidence in assessing the weight to be given to such evidence but, absent the usual impact of the adversarial model, some special attention may be required to show that the principles governing expert evidence have been respected.

We turn now to consider specific issues which have been raised in the course of the Working Party's deliberations but which, unlike the earlier part of this Report, are not considered appropriate for any action (save in relation to the Istanbul Protocol referred to in the section on medical evidence) but are offered simply as commentaries on topics relevant to expert evidence in refugee law and may, perhaps, stimulate future debate within the Association. In some cases it will be apparent that one or more of the provisions of Part 35 the United Kingdom's CPR and Practice Direction set out above are highly relevant to such specific issues.

3. The scope and reception of expert evidence.

We are concerned to set out here what it is believed will be issues common to most refugee law systems but the writer has then made comments on the basic propositions by reference to the United Kingdom position.

Delegates will be able to form their own view as to the degree to

which the United Kingdom position is relevant to their own refugee court systems.

First, the disputes with which we are concerned are not between private citizens but are always concerned with an administrative decision taken by the State who is a party (usually the respondent) to the proceedings.

Administrative Law is not a concept with which the United Kingdom courts are traditionally particularly familiar. It is certainly becoming of increasing importance, not only in specialised tribunals like the Asylum and Immigration Tribunal, but also in general terms so that there is now an Administrative Division of the High Court. But, it does not have the settled and defined status which, for example, applies in many European systems. It tends to arise initially from references to various specialist tribunals and reaches the general court system on appeal from such tribunals' decisions. Some refugee courts and tribunals include in their composition members with specific expert experience relevant to the issues to be decided but that does not apply in the Unite Kingdom asylum and human rights jurisdiction where legal appointment is exclusively to those with professional legal experience of requisite length or, exceptionally, to those considered to have equivalent legal experience, most notably academic law experience. Lay members in the United Kingdom tribunal sit on panels chaired by an Immigration Judge but their experience is only rarely specific to asylum and human rights or specific country issues.

Secondly, the State party does not, save exceptionally, bear any burden of proof which remains throughout on the claimant. It may be for this reason that the United Kingdom government very rarely commissions its own expert evidence and usually confines its role to questioning the expertise of the testimony put forward by the claimant. In this sense, there is as a matter of deliberate policy by the State party not to allow such equality of arms as one would normally expect in civil litigation.

Thirdly, the broad concepts and requirements of asylum and human rights law must be applied by the asylum judges, whether at first instance or on appeal or judicial review, to the specific evidential review and assessment of the individual appeal. Such application requires specialist legal knowledge in this arcane jurisdiction. The meaning in law of 'persecution', 'inhuman and degrading treatment or punishment', 'particular social group', 'sufficiency of protection', 'the reasonableness of internal relocation', etc. do not have the ordinary every-day meaning which the layman might apply to them. They require the application of what may perhaps be termed specialist analytical or diagnostic tools for lawyers – that is the principles or ratios to be drawn from decided case-law as informing the meaning

of the body of relevant case law, statutory and international materials applicable in this jurisprudence.

In this sense, most commentators rightly express the limitations on the proper role of expert evidence and of opinions given which trespass either into such specialist territory or into the judicial realm of fact finding in a specific case.

For this reason it will almost always be wrong in principle for expert witnesses to seek to pronounce on the effect in United Kingdom law of the expert conclusions or opinions which they seek to draw either from the information within their expertise or that specifically provided to them for the purposes of their evidence in a given case. To the extent that they seek to do so their conclusions may carry little weight as they have moved outside the realms of their own expertise.

Fourthly, insofar as the expert's conclusions are based on an acceptance of the factual account of the claimant, it will be generally subordinate to the judicial fact-finding role as the more reputable expert reports invariably recognise.

Nevertheless, the asylum judge must be careful to distinguish between those cases where the expert seeks to usurp the judicial fact-finding role and those where his own expertise may inform the plausibility of the claimant's account against the country background information which he sets out.

4. The relevance of expertise gained by the asylum judges

In any refugee law system where there are expert tribunals or courts, it is considered that the asylum judge will build up his own expertise in this arcane jurisdiction based upon the length of his experience within it.

In the writer's original paper presented in January 2004, he had sought to make the point that the commentaries on the subject of the role of the expert omitted to make any reference to the expertise which asylum judges acquire through their practice in this jurisdiction. Dealing with the United Kingdom experience in the then current two tier system, the following comments were made:

> "The Immigration Appeal Tribunal is recognised as possessing its own level of expertise as a specialist tribunal, not only in the legal issues for its determination, but also in its knowledge of country situations and, to a lesser extent perhaps, in consideration and evaluation of medical reports.
>
> Such a level of expertise has been recognised in the higher courts, who have also accepted that it is a valid part of the Tribunal's jurisdiction to produce judgments intended to be determinative of particular factual issues as at the date of the hearing for the purpose of informing and guiding determinations at adjudicator level on similar issues. See *SSHD*

v S & Others [2002] EWCA Civ 539 and, e.g., *Sugar v SSHD* [2002] EWCA Civ.

> The Tribunal is in a unique position in the judicial hierarchy to claim an overview of the most contentious issues in asylum and human rights claims because each full-time legal member considers in excess of 1600 adjudicator determinations each year. Importantly, in such consideration whether at the stage of application for permission to appeal or at a full substantive hearing of a permitted appeal, the Tribunal also has the benefit of input by the parties by way of challenges mounted against the adjudicator determination.
>
> This Tribunal overview is reinforced by frequent discussions in the collegiate atmosphere in which full-time legal members operate, where consistency of approach, after full evidential review, is sought."

Those comments are subject to certain caveats; firstly, they specifically relate to the then current United Kingdom judicial experience; secondly, both the medical expert and anthropological responses took issue with this assumption of an area of judicial expertise, pointing out that it depended in appellate recognition of judges commenting upon the role of judges; and, thirdly, that the judicial expertise claimed lacked the very expert input and training which was claimed by the two other primary disciplines (country and medical) producing expert reports.

Whilst acknowledging that there is some force in those last two points, it remains the case that the degree of judicial experience in assessing such expert evidence leads to an ability to evaluate on proper forensic grounds the weight to be attached to claimed expert testimony. By the very nature of their specialist jurisdiction, asylum judges do properly build a level of expertise in assessing the conditions in the countries with which they are principally dealing by reason of the diversity of the evidential testimony of individual claimants and their supporting 'expert' testimony which they receive in evidence, and it is considered that there is no reason why they should not rely upon it provided they disclose their views and are prepared to hear and consider countervailing argument.

5. The degree of deference to be accorded to expert testimony

In cases where expert evidence tendered complies with the principles set out in Part 1 above, the proper foundation for the giving of authoritative 'opinion' evidence will have been established. But, there is a clear danger of abuse where an expert becomes partisan in his approach to his duty. Whether such problems arise other than in an adversarial system may be open to question but, because they do create real problems in the United Kingdom system, it is appropriate to refer to this issue under a separate head because of

the important impact on the proper weight to be accorded to the expert testimony.

Born out of the judicial experience in the English civil jurisdiction, the higher courts have traditionally shown a deference to expert testimony customarily tested against competing expert reports, by cross-examination in the course of civil trials, and by a concentration upon its relevance to a past demonstrable factual matrix as opposed to the asylum judge's concern with the forward looking concept of future risk. To that extent such traditional deference to the expert witness does not reflect the experience of the United Kingdom asylum judges or the nature of the asylum and human rights jurisdiction with which they are concerned.

This jurisdiction, with its remit in administrative law – a term which has only recently become current in English jurisprudence in contrast to the European approach where it has long been recognised as an important branch of the body of law in its own right – differs from the usual English Common Law model. Yet it operates still on an adversarial basis which sometimes sits uneasily with the perception of the functions so clearly stated in, for example, *Karanakaran v SSHD* [2000] Imm AR 271 where Sedley LJ said this at p.304:

> "... The question whether an applicant for asylum is within the protection of the 1951 Convention is not a head-to-head litigation issue. Testing a claim ordinarily involves no choice between two conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant's case. It is conducted initially by a departmental officer and then if challenged, by one or more tribunals which, though empowered by statute and bound to observe the principles of justice, are not courts of law. Their role is best regarded as an extension of the initial decision-making process ... Such decision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go beyond the testimony of the applicant and include in-country reports, expert testimony and – sometimes – specialised knowledge of their own (which must of course be disclosed). No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the Convention issues. Finally, and importantly, the Convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions. ..."

The clear differentiation from the normal adversarial process reinforces the grave responsibilities placed on those who undertake the role of

expert in the asylum and human rights jurisdiction. It also raises the question of whether the adversarial model, given the lack of full equality of arms between the parties by reason of a deliberate position taken by the State party in the United Kingdom system, is one which requires modification.

It may be that if a more interventionist role were to be taken – perhaps with the asylum judge directing the provision of expert testimony in cases where it was found necessary for the just disposal of the claim – this would overcome such a lack of equality of arms and the danger of expert testimony lacking impartiality. Alternatively, perhaps a wider use of the power to put specific questions to a party's expert as envisaged by CPR 35(6) or of the court's power to direct evidence from a single jointly appointed expert (CPR 35(7)) would go far to overcome the perceived problems in the United Kingdom jurisdiction.

This is, of course, an issue to which the practices in Delegates' courts may have provided a solution. It is another issue on which input from Delegates would be of assistance in the Working Party's future consideration.

In the United Kingdom the Immigration Appeal Tribunal was able, through its extensive overview of Adjudicator decisions, to detect what it considered to be difficulties with the quality of certain of the reports produced in the jurisdiction. A minority raised grave concern as to the objectivity of the expert reports in question and little or no weight was ultimately given to them in the evaluation of the claimant's case. In each case the concerns of the Tribunal were very clearly spelled out in the determinations given. It is not yet known to what extent this broad overview will be lost in the new single tier Asylum and Immigration Tribunal.

6. The duty of the expert witness to the refugee court

Whilst the proper role of the expert in the jurisdiction is not in doubt, the need for full observance of the principles set out in the CPR Rules and Practice Direction is clear. It is arguably of even greater importance that its precepts be followed where there is a perceived lack of equality of arms.

In the meantime, what is essential is that the approach taken by the expert should reflect an understanding of the concerns of the judiciary for evidence of that impartiality of approach which will support the perception that the testimony is intended to assist the decision maker in performing his task of evaluation of the totality of the evidence rather than simply designed to further the interest of the individual claimant who has commissioned the report.

7. The competency of the expert witness

It has so far been assumed that the expert testimony has been produced at the request of the specific claimant. Provided that it is impartial and objective in its approach, and subject to the caveat as to whether it reflects the facts as found by the asylum judge, it is entitled to be viewed on the basis that the expert witness may put forward opinions based on hearsay in addition to his personal knowledge in areas where his expert competence is demonstrated. That is a privileged position in terms of evidential weight to be accorded to him and the asylum judge is entitled to look carefully at the question of whether such expertise is properly demonstrated by that evidence.

Where, however, an expert report is produced in support of a claim in respect of which it has not been prepared by the expert for the purposes of that claim but has been included without any evidence of his specific consent on behalf of a claimant, the United Kingdom view is that it normally loses the cachet of expert testimony. Thus in *Kapela* [1998] Imm AR 294, the United Kingdom Immigration Appeal Tribunal dealt with such purported expert evidence as follows:

> "The question whether or not to classify Mr S as an "expert" is not in point; that is a question which arises only in proceedings bound by the strict rules of evidence, where an "expert" may give evidence (chiefly hearsay and opinion) which would be inadmissible if it came from anybody else. In our proceedings the evidence is certainly admissible. The question is whether, in the context of all the evidence in the case, it is this evidence which is to be preferred. This must be a matter for the individual finder of facts. We have to say, however, that the mere fact that a letter or report emanates from a person with substantial knowledge of the matter in question does not of itself make it persuasive in an individual case. No doubt Mr S's knowledge and experience are entitled to respect from any Adjudicator or the Tribunal. But a fact-finder is entitled to bear in mind the purpose for which a letter or report was or appears to have been made; and where the written evidence is not supported orally, the fact-finder is entitled to take account of the fact that it has not been subject to cross-examination. Any question which arises on it is a question which remains unanswered. ... There is no suggestion that the assertions in the report are not true, but it is only by putting them beside other material, or by quizzing the writer of the report, that a general picture can emerge."

The above passage is, at least in the context of country reports, in principle properly also applicable to such reports specifically produced for the claimant where the maker of the report is not called to give oral evidence unless its contents are conceded by the State party or are generally supported by other objective evidence produced by the parties. It is arguable that medical reports may require a modified approach to their evidential weight insofar as they depend upon

recorded physical or mental observation to support an expressed clinical opinion but, again, they also need to be demonstrably impartial and objective in their approach.

8. The relevance of expert evidence in refugee courts – when is it admissible?

In order to maintain judicial control over the asylum process, we consider that the admissibility of expert evidence must be an issue for the asylum judge and not one for the discretion of the parties to the process.

It will be remembered that admissibility of expert evidence is the first issue dealt with in Part 35 of the English Civil Practice Rules where Rule 35(1) provides that "expert evidence shall be restricted to that which is reasonably required to resolve the proceedings". It is reinforced by Rule 35(4), which provides that "no party may call an expert or put in evidence an expert's report without the court's permission."

We consider that these provisions are essential to the court retaining control of the proceedings before it. This result may, of course, be more easily obtained in an inquisitorial court procedure. To date in the United Kingdom jurisdiction, parties have in general been given the freedom to introduce such evidence as they wish to be taken into account. In the new single tier system now being operated, however, there is a requirement for each appeal to be subject to a case management review at which both parties are expected to appear and in which there is power to give directions limiting the issues which are to be addressed and the number and length of documents on which a party may rely at a hearing (Rule 45(4)(f) Appeal and Immigration Tribunal (Procedure) Rules 2005). This will enable the Tribunal to regulate its proceedings in line with the CPR if considered appropriate.

There are a number of important considerations for the asylum judge in deciding to what extent expert evidence should be admitted. We would suggest that the following are matters which should inform the asylum judge's approach:

(*a*) the expert evidence must be relevant to the issues for decision;
(*b*) such evidence must also be necessary in order to assist the immigration judge in his trying of the factual issues before him; he will wish to know what the expert can say that is not already within his knowledge or cannot otherwise be ascertained by him; where there is documentary evidence filed, how will the expert evidence bear on that documentary evidence; is its validity a matter which is in issue?

(*c*) what is the special or unique knowledge which the proposed expert has compared to that which the asylum judge already possesses in issues relevant to the particular appeal; the expert's experience and credentials may be relevant in this connection;
(*d*) there should be borne in mind the distinction between the expert's role (provision of specialised opinion on factual issues) and that of the asylum judge (to reach findings on the credibility of those factual issues and to apply the law to such findings).

It is suggested that these considerations serve to emphasise the importance of the retention of judicial control on the nature and extent of the expert evidence sought to be adduced if unnecessary cost and time is to be avoided.

9. The limits of the role of the expert witness

Following on from the previous section, it is suggested that there are a number of additional general points in relation to the admissibility of expert evidence which can properly be considered when the authorisation to adduce that expert evidence is sought.

First, admissibility will be for consideration on a case by case basis. Expert testimony which meets admissibility criteria in one case may not do so in another. Further, the range of expertise of the proposed witness needs to be considered against the factual situation propounded – the qualifications and relevance of the expert will be affected by the subject matter of the claim. In principle, it is for the party seeking permission to adduce the evidence to demonstrate its relevance both by reference to the nature of the claim and the asserted expertise of the proposed witness. Expert evidence is in general fact specific and not generic in nature. Its impact on a specific claimant is ultimately a matter for the trier of fact and not the expert witness.

Secondly, if the purpose of the expert evidence is to support the authenticity of documentary evidence, or to resolve the weight to be given to competing documents, a general level of expertise in the country conditions is unlikely to make such evidence relevant. Such issues will normally require specialised knowledge of the workings of government and judicial bodies in the country concerned and of the practical administrative way in which their functions are discharged.

Thirdly, it should be borne in mind in considering whether to admit expert evidence that experts can be both distracting and time-consuming. The more esoteric the subject, the less is likely to be the knowledge of the advocates and the asylum judge; this may lead to confusion of the issues by the advocates embarking on 'fishing'

expeditions. There is also a danger of uncritical acceptance of an expert's evidence in such circumstances. The judge considering admissibility will need to consider the probative value of the evidence against the potential prejudice both to the hearing and to the parties. Potential prejudice may be hidden behind impressive credentials.

Once the decision to admit expert evidence has been taken, the trier of fact should bear in mind the following precepts:

(*a*) the expert witness is there to inform the trier of fact, not form a conclusion;

(*b*) the limits of the witness's expertise should be clearly investigated so as to establish the parameters within which his evidence is to be evaluated;

(*c*) the expert should be required to explain his points in simple and comprehensible language so as to provide the trier of fact with information which will enable him to draw his own conclusions – the trier of fact should be tutored in how to reach the finding as opposed to being told the answer by the expert;

(*d*) there is an inherent risk in the expert providing the answer to specific scenarios – if the scenario is not accepted by the trier of fact the answer is irrelevant; thus, asking for an opinion may be counterproductive and it is preferable to ask for background information and the reasoning process which the expert applies to that background information;

(*e*) it should be remembered that expert testimony is only of assistance where the non-expert would reach erroneous findings from the same factual matrix; it is therefore important to ascertain not only the expert's qualifications but the methodology employed; in this context there is a clear distinction between what the expert has determined by that methodology as opposed to what he puts forward as hearsay evidence derived from what he has been told; the validity of the expert's methodology will be an important element in determining the weight to be given to his evidence as will the degree to which it is founded on independently proven facts;

(*f*) the more the expert evidence is based on opinion and hypothesis rather than on proven facts, the less the weight to be given to it; where there are vague assertions such as 'there have been many reported detentions and ill-treatment of unidentified people said to be in a position analogous to the claimant', the greater the need to ascertain precise evidence as to the sources of such assertions and the degree to which they are independently corroborated by other evidence.

10. Country Experts

In the case of country evidence, the expert is not the sole source of that evidence before the court. There will almost always be other evidence going to similar issues even if not as focussed on the claimant's account as the expert report is likely to be. The expert evidence can therefore be evaluated against other material, much of which although of more general application will have been produced by other experts in the field.

We have already touched on the issue of the weight to be given to expert evidence prepared for another appeal in Part 7 above. Where it has previously been considered in a Country Guidance or Lead Case system (see below), it will derive its authority from the weight accorded to it in that earlier guidance decision so far as still applicable. Otherwise, under the principles enunciated above, it will be for the asylum judge to consider whether it should be admitted as expert evidence and, if so, the weight to be accorded to it. In general terms a party seeking to introduce such evidence would be well advised to have obtained the written consent of the maker of the original report, which would have the added value of establishing whether its maker considers it can be used without further qualification in light of any supervening events.

As such an approach is currently applicable in some jurisdictions (see the United Kingdom Country Guidance system dealt with in some detail below and Lead Case systems such as exist in, for example, Canada), the question of 'factual' precedent is one further matter under this head, which may be of interest to Delegates.

Where there are substantial numbers of claimants from one country – as has applied, for example, in recent years with Sri Lanka, Turkey, Iran and Iraq – there will be a limited number of underlying themes to the various individual claims put forward.

There is a real danger that hearings will be substantially extended by hearing evidence which relies on a similar matrix of background facts. In order to overcome the problem of constantly seeking to 'reinvent the wheel', the United Kingdom tribunals have sought, through the former Immigration Appeal Tribunal, to develop the concept of 'Country Guidance' (CG) cases in which evidence as to the country situation is taken in depth – often in a number of appeals which have been consolidated to give a broad factual spread on the specific theme – in order to issue general guidance as to the conditions applying in the country concerned at the time of the hearing in relation to a specific common scenario relied upon by claimants seeking international surrogate protection.

Determinations categorised as giving such country guidance were

then to be followed both by the Tribunal and Adjudicators in future cases based on similar facts in the absence of new evidence not previously considered by the Tribunal in giving country guidance, or evidence on which the subsequent individual case could properly be distinguished from that of the earlier CG case.

To provide precedents binding on a factual as opposed to a legal basis was in the United Kingdom jurisdiction a novel experiment but its validity was, subject to the safeguards set out in the judgment, formally recognised by the Court of Appeal in *SSHD v S and Others* [2002] EWCA Civ 539. The relevant passage from the judgment of Laws LJ was as follows:

> "26 ... the notion of a judicial decision which is binding as to *fact* is foreign to the common law, save for the limited range of circumstances where the principle of res judicata (and its variant, issue estoppel) applies. ... This principle has been evolved – we put the matter summarily – to avoid the vice of successive trials of the same cause or question between the same parties. By contrast, it is also a principle of our law that a party is free to invite the court to reach a different conclusion on a particular factual issue from that reached on the same issue in earlier litigation to which, however, he was a stranger. The first principle supports the public interest in finality in litigation. The second principle supports the ordinary call of justice, that a party has the opportunity to put his case: he is not bound by what others might have made of a like, or even identical, case.
>
> 27 The stance taken by the Immigration Appeal Tribunal here, to lay out a determination intended in effect to be binding upon the appellate authorities as to the factual state of affairs in Croatia absent a demonstrable change for the worse vis-à-vis the plight of Serbs, to an extent sacrifices the second principle to the first. By no means entirely: an applicant will of course be heard on any facts particular to his case, and ... evidence as to any deterioration would be listened to. Otherwise, however, the debate about the conditions in Croatia generally affecting Serbian returnees or potential returnees has been had and is not for the present to be had again.
>
> 28 While in our general law this notion of a factual precedent is exotic, in the context of the Immigration Appeal Tribunal's responsibilities it seems to us, in principle, to be benign and practical. Refugee claims vis-à-vis any particular State are inevitably made against a political backdrop which over a period of time, however long or short, is, if not constant, at any rate identifiable. Of course the impact of the prevailing political reality may vary as between one claimant and another, and it is always the appellate authorities' duty to examine the facts of individual cases. But there is no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and, therefore, wasted expenditure

> of judicial and financial resources upon the same issues and the same evidence.
>
> 29 But if the conception of a factual precedent has utility in the context of the Immigration Appeal Tribunal's duty, there must be safeguards. A principal safeguard will lie in the duty to give reasons with particular rigour. ... when it determines to produce an authoritative ruling upon the state of affairs in any given territory, it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real, as opposed to fanciful, bearing on the result and explain what it makes of the substantial evidence going to each such issue. In this field opinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists. ..."

Whilst specific decisions in the CG system have been the object of criticism by human rights lawyers and its development still requires fine-tuning, it is a path which is now accepted as lawful in the United Kingdom and one which the Asylum and Immigration Tribunal remains committed to continue and to refine. Where there is a relevant CG decision, it is an error of law for it not to be applied unless it can be distinguished. It also, of course, reduces the occasions when expert evidence will be appropriate unless such evidence properly raises additional issues which have not been considered at CG level.

As mentioned, Canada has a concept of 'lead' cases but we are not sure to what extent other jurisdictions may have adopted similar procedures. It is a matter on which international input would be potentially helpful since it may in the future be an initiative which the Association would wish to consider further.

11. Medical Experts

In contrast to country expert reports, there will be no similar breadth of evidence to assist in the evaluation of expert medical evidence, particularly perhaps of such evidence as goes to the mental state of the claimant.

For those Delegates who are interested, the writer's paper and the Medical Foundation response published in the International Journal of Refugee Law deal with the different types of medical evidence and the problems associated with the reception and evaluation of such evidence in some detail. The area of major difficulty was concerned with human rights claims that by reason of a claimant's medical condition removal to their own country would be in breach of their human rights under Articles 3 or 8 of the European Convention. From a United Kingdom point of view, this is now of much less

importance as a result of two important leading cases in, respectively, the Court of Appeal (*N v SSHD* [2003] EWCA Civ 1369 holding that only the most exceptional compassionate circumstances to a standard similar to that engaged in the European case of *D v UK* [1997] 24 EHRR 423 would serve to engage Article 3 rights), and of the House of Lords (*R (Razgar) v SSHD* [2004] UKHL 27 holding that a similarly high standard amounting to a flagrant denial of Article 8 rights was required to engage Article 8 claims and then only in the most exceptional cases).

It was not generally known until the London seminar in January 2004, however, that the medical profession had already recognised many of the concerns explained in relation to expert medical evidence – particularly that of a psychiatric nature – and had taken appropriate steps to deal with them in what is known as The Istanbul Protocol. Its subtitle is a Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and it was submitted to the United Nations High Commissioner for Human Rights on 9 August 1999.

Its introduction describes its purpose and provenance in the following terms:

> "This manual includes principles for the effective investigation and documentation of torture, and other cruel, inhuman or degrading treatment or punishment. These principles outline minimum standards for States in order to ensure the effective documentation of torture. The guidelines contained in this manual are not presented as a fixed protocol. Rather, they represent minimum standards based on the principles and should be used in taking into account available resources. The manual and the principles are the result of three years of analysis, research and drafting, undertaken by more than 75 experts in law, health and human rights, representing 40 organization or institutions from 15 countries. The conceptualisation and preparation of this manual was a collaborative effort between forensic scientists, physicians, psychologists, human rights monitors and lawyers working in Chile, Costa Rica, Denmark, France, Germany, India, Israel, the Netherlands, South Africa, Sri Lanka, Switzerland, Turkey, the United Kingdom, the United States of America and the occupied Palestinian territories."

Whilst the whole Protocol contains much informative material of general relevance to refugee law practice, which informs the approach of the asylum judge to expert medical testimony and the issues which it should be expected to cover, the section on the 'Components of the psychological/psychiatric "evaluation" at paragraphs 274 to 290 is particularly helpful in the evaluation of this most difficult area of expert testimony.

In particular paragraph 286, dealing with clinical impression, merits

setting out here because it covers those areas which should be included in the psychological and psychiatric evaluation but which, in the writer's experience, are rarely to be found with the clarity which is recommended in the Istanbul Protocol:

> "In formulating a clinical impression for the purposes of reporting psychological evidence of torture, the following important questions should be asked:
>
> (*i*) are the psychological findings consistent with the alleged report of torture?
> (*ii*) Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
> (*iii*) Given the fluctuating course of trauma-related mental disorders over time, what is the timeframe in relation to the torture events? Where is the individual in the course of recovery?
> (*iv*) What are the coexisting stressors impinging on the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role)? What impact do these issues have on the individual?
> (*v*) Which physical conditions contribute to the clinical picture? Pay special attention to head injury sustained during torture or detention.
> (*vi*) Does the clinical picture suggest a false allegation of torture?

In tandem with the principles contained in the CPR Rules and Practice Direction, we would suggest that if the Association wishes to explore further the preparation of a protocol in relation to expert evidence on an international basis, the Istanbul Protocol should be considered for incorporation in relation to best practice in expert medical reporting.

12. Conclusions

Whilst the Working Party hope that the material included in this report will be of general interest to the Delegates at the Conference and other members of the Association, the only areas which in our view are sufficiently uncontroversial so as to be capable of consideration for incorporation in a best practice Protocol at some future date must be limited to the principles covered by the English CPR (modified as appropriate to cover the different types of judicial model in use within the Association's members) and parts of the Istanbul Protocol as to the minimum requirements for standards to be met in medical reports.

Both these areas would need to be the subject of further research

with input from all countries represented if possible.

Beyond this, there are, of course, important areas that could usefully be the subject of further discussion and an exercise in comparative law to see how they are related to a common experience among members.

The Working Party would welcome the views of members generally on matters within their remit.

As to the general question posed as to whether the events of 9/11 have affected refugee and asylum adjudication across jurisdictions, we do not consider that there is anything within the remit of this Working Party which has been so affected. Expert evidence from State parties relating to security sensitive material, although rarely tendered, was in our experience treated exceptionally in most jurisdictions prior to 9/11.

John Barnes
AssociateRapporteur
20 March 2005

ANNEXES TO THE REPORT

ANNEXE 1
List of the members of the Working Party

Geoffrey Care Immediate Past President IARLJ –Rapporteur

John Barnes Vice President Immigration Appeal Tribunal UK – Associate Rapporteur

Allan Lutfy Chief Justice Federal Court of Canada

Lord (Kenneth) Cameron of Lochbroom PC Senator College of Justice Scotland

Jean Massot Conseiller President CRR France

Catriona Jarvis Vice President IAT UK

Edward Grant Member Board of Immigration Appeals USA

Sue Zelinka Refugee Review Tribunal Australia

David Rhys-Jones Legal Advocacy Officer (Refugee Issues) Medical Foundation for the Care of Victims of Torture UK

Ex Officio

James Simeon Chair Working Parties Committee

Allan Mackey President IARLJ

Erik Lempert Chief Judge Lund Sweden Organiser 5th World Conference Stockholm

ANNEXE 2

Civil Procedure Rules Part 35 and Practice Direction England

Civil Procedure Rules

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See also Practice Direction 35

Part 35

EXPERTS AND ASSESSORS

Contents of this part

Duty to restrict expert evidence

35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

Interpretation

35.2 A reference to an 'expert' in this Part is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.

Experts – overriding duty to the court

35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Court's power to restrict expert evidence

35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When a party applies for permission under this rule he must identify –

(a) the field in which he wishes to rely on expert evidence; and

(b) were practicable the expert in that field on whose evidence he wishes to rely.

(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).

(4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

General requirement for expert evidence to be given in a written report

35.5 (1) Expert evidence is to be given in a written report unless the court directs otherwise.

(2) If a claim is on the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

Written questions to experts

35.6 (1) A party may put to –

(a) an expert instructed by another party; or

(b) a single joint expert appointed under rule 35.7,written questions about his report.

(2) Written questions under paragraph (1) –

(a) may be put once only;

(b) must be put within 28 days of service of the expert's report; and

(c) must be for the purpose only of clarification of the report,unless in any case –

(i) the court gives permission; or

(ii) the other party agrees.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where –

(a) a party has put a written question to an expert instructed by another party in accordance with this rule; and

(b) the expert does not answer that question,the court may make one or both of the following orders in relation to the party who instructed the expert –

(i) that the party may not rely on the evidence of that expert; or

(ii) that the party may not recover the fees and expenses of that expert from any other party.

Court's power to direct that evidence is to be given by a single joint expert

35.7 (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to given by one expert only.

(2) The parties wishing to submit the expert evidence are called 'the instructing parties'.

(3) Where the instructing parties cannot agree who should be the expert, the court may –

(a) select the expert from a list prepared or identified by the instructing parties; or

(b) direct that the expert be selected in such other manner as the court may direct.

Instructions to a single joint expert

35.8 (1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.

(2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.

(3) The court may give directions about –

(a) the payment of the expert's fees and expenses; and

(b) any inspection, examination or experiments which the expert wishes to carry out.

(4) The court may, before an expert is instructed –

(a) limit the amount that can be paid by way of fees and expenses to the expert; and

(b) direct that the instructing parties pay that amount into court.

(5) Unless the court otherwise directs, the instructing parties are jointly and severally liable (GL) for the payment of the expert's fees and expenses.

Power of court to direct a party to provide information

35.9 Where a party has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to –

(a) prepare and file a document recording the information; and

(b) serve a copy of that document on the other party.

Contents of report

35.10 (1) An expert's report must comply with the requirements set out in the relevant practice direction.

(2) At the end of an expert's report there must be a statement that–

(a) the expert understands his duty to the court; and

(b) he has complied with that duty.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged (GL) against disclosure but the court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

Use by one party of expert's report disclosed by another

35.11 Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

Discussions between experts

35.12 (1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to –
(a) identify and discuss the expert issues in the proceedings; and
(b) where possible, reach an agreed opinion on those issues.
(2) The court may specify the issues which the experts must discuss.
(3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing –
(a) those issues on which they agree; and
(b) those issues on which they disagree and a summary of their reasons for disagreeing.
(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.
(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

Consequence of failure to disclose expert's report

35.13 A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

Expert's right to ask court for directions

35.14 (1) An expert may file a written request for directions to assist him in carrying out his function as an expert.
(2) An expert must, unless the court orders otherwise, provide a copy of any proposed request for directions under paragraph (1)–
(a) to the party instructing him, at least 7 days before he files the request; and
(b) to all other parties, at least 4 days before he files it.
(3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.

Assessors

35.15 (1) This rule applies where the court appoints one or more persons (an 'assessor') under section 70 of the Supreme Court Act 1981(1) or section 63 of the County Courts Act 1984(2).
(2) The assessor shall assist the court in dealing with a matter in which the assessor has skill and experience.
(3) An assessor shall take such part in the proceedings as the court may direct and in particular the court may –
(a) direct the assessor to prepare a report for the court on any matter at issue in the proceedings; and
(b) direct the assessor to attend the whole or any part of the trial to advise the court on any such matter.
(4) If the assessor prepares a report for the court before the trial has begun –
(a) the court will send a copy to each of the parties; and

(b) the parties may use it at trial.

(5) The remuneration to be paid to the assessor for his services shall be determined by the court and shall form part of the costs of the proceedings.

(6) The court may order any party to deposit in the court office a specified sum in respect of the assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.

(7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

FOOTNOTES

1. 1981 c.54.
2. 1984 c.28. Section 63 was amended by S.I. 1998/2940.

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See also Part 35

PRACTICE DIRECTION – EXPERTS AND ASSESSORS
THIS PRACTICE DIRECTION SUPPLEMENTS CPR PART 35
Contents of this Practice Direction

Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by a single expert. Permission of the court is always required either to call an expert or to put an expert's report in evidence.

EXPERT EVIDENCE – GENERAL REQUIREMENTS

1.1 It is the duty of an expert to help the court on matters within his own expertise: rule 35.3(1). This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom he is paid: rule 35.3(2).

1.2 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

1.3 An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.

1.4 An expert should consider all material facts, including those which might detract from his opinion.

1.5 An expert should make it clear:
(a) when a question or issue falls outside his expertise; and
(b) when he is not able to reach a definite opinion, for example because he has insufficient information.

1.6 If, after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

FORM AND CONTENT OF EXPERT'S REPORTS

2.1 An expert's report should be addressed to the court and not to the party from whom the expert has received his instructions. 2.2 An expert's report must:
(1) give details of the expert's qualifications;
(2) give details of any literature or other material which the expert has relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
(4) make clear which of the facts stated in the report are within the expert's own knowledge;
(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
(6) where there is a range of opinion on the matters dealt with in the report –
  (a) summarise the range of opinion, and
  (b) give reasons for his own opinion;
(7) contain a summary of the conclusions reached;
(8) if the expert is not able to give his opinion without qualification, state the qualification; and
(9) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty.

2.3 An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 2.2(8) and (9) above.

2.4 The form of the statement of truth is as follows:"I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

2.5 Attention is drawn to rule 32.14 which sets out the consequences of verifying a document containing a false statement without an honest belief in its truth. (For information about statements of truth see Part 22 and the practice direction which supplements it.)

INFORMATION

3 Under Rule 35.9 the court may direct a party with access to information which is not reasonably available to another party to serve on that other party a document which records the information. The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance.

INSTRUCTIONS

4 The instructions referred to in paragraph 2.2(3) will not be protected by privilege (see rule 35.10(4)). But cross-examination of the expert on the contents of his instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents to it). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in

the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice to do so.

QUESTIONS TO EXPERTS

5.1 Questions asked for the purpose of clarifying the expert's report (see rule 35.6) should be put, in writing, to the expert not later than 28 days after receipt of the expert's report (see paragraphs 1.2 to 1.5 above as to verification).

5.2 Where a party sends a written question or questions direct to an expert, a copy of the questions should, at the same time, be sent to the other party or parties.

5.3 The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under rule 35.6. This does not affect any decision of the court as to the party who is ultimately to bear the expert's costs.

SINGLE EXPERT

6 Where the court has directed that the evidence on a particular issue is to be given by one expert only (rule 35.7) but there are a number of disciplines relevant to that issue, a leading expert in the dominant discipline should be identified as the single expert. He should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines.

ASSESSORS

7.1 An assessor may be appointed to assist the court under rule 35.15. Not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

7.2 Where any person has been proposed for appointment as an assessor, objection to him, either personally or in respect of his qualification, may be taken by any party.

7.3 Any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in paragraph 6.1 and will be taken into account by the court in deciding whether or not to make the appointment (section 63(5) of the County Courts Act 1984).

7.4 Copies of any report prepared by the assessor will be sent to each of the parties but the assessor will not give oral evidence or be open to cross-examination or questioning.

ANNEXE 3
Istanbul Protocol

[This is too long to incorporate and therefore copies will be available at Stockholm]

ANNEXE 4
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HUMAN RIGHTS NEXUS WORKING PARTY REPORT

PAULAH DAUNS AND ELIZABETH LACEY

The Changing Face of Refugee Determination Our World Post-September 11, 2001

International Association of Refugee Law Judges
April 2005

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The analysis and opinions in this paper are solely those of the authors and do not represent the position of the IRB, the Australian Federal Court or the IARLJ. This paper was a collaborative effort prepared with the contribution and assistance of others. These people should be acknowledged for their substantial contribution to the paper. Justice A.M. (Tony) North of the Australian Federal Court and Associate Rapporteur of the Human Rights Nexus Working Party, James Simeon, Coordinator of the Inter-Party Working Group for the IARLJ, Jean-Guy Fleury Chairperson of the IRB also the Chairperson of the America's Chapter of the IARLJ, Gaetan Cousineau, Deputy Chairperson of the IRB also a member of IARLJ Council, Warren Woods, Special Advisor to the Chairperson of the IRB, Joyce Chia, Research Associate at the Federal Court of Australia and Bonnie Daniels, Member Assistant to the IRB Western Region whose attention to detail and formatting were indispensable. We wish to acknowledge the Members of the HRNWP for their submissions and contributions to this paper. Our thanks go to all of those who have assisted us in drafting this paper in the context of a continually evolving area of the law.

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The Changing Face of Refugee Determination
Our World Post-September 11, 2001

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Justice Marco Gerardo, Colombia
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INTRODUCTION

September 11, 2001

"The world will never be the same again following the events of September 11, 2001, in the United States. This is true, not only for the immediate victims, their families and governments directly involved in the terrorist incidents, but for millions of people who were already among the most vulnerable in the world — refugees and asylum seekers in every part of the globe..."[397]

The September 11, 2001 attacks on the United States (9/11) have been described as "crimes against humanity". Governmental responses to the attacks have however raised serious concerns amongst the UNHCR and human rights organisations[398] that tightening immigration policies and rushed implementation of legislation has risked human rights and freedoms and has compromised hard won legal protections for refugees.[399] Former UNHCR High Commissioner Ruud Lubbers repeatedly warned that the *1951 Refugee Convention* offered safeguards to prevent terrorists from infiltrating the international asylum system and that refugees were normally the *victims* of terrorism, not its *perpetrators*.[400]

According to Erika Feller, Director of the Department of International Protection for the UNHCR:

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397. *"The September Terror: A Global Impact: Afghanistan's Agony"*, Refugees, Vol 4 Number 125, 2001.
398. *"No Safe Refuge"* The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide" Human Rights Watch Backgrounder, October 18, 2001.
399. UNHCR Refugees, March 25, 2004. In several countries, anti-terrorism legislation permits indefinite detention for those suspected of terrorist acts. Countries vary on whether this virtually unlimited detention violated domestic or international rights and freedoms.
400. UNHCR Refugees, *"After the Terror – The Fallout"* Issue 125, 22 March 2005. *(emphasis added)*

Efforts to curb illegal migration have also spawned restrictive legislation, multiplying obstacles to accessing asylum procedures, denying due process to detainees or enabling discriminatory approaches to recognition of refugee status. Prevailing legislation in some countries now slips easily into confusing the concepts of cessation of refugee status, cancellation of refugee status and exclusion from refugee status. Both in the North and in the South, dislike of asylum-seekers and refugees continue to manifest itself in xenophobia and violent incidents.[401]

Certainly, global governmental responses in the aftermath of 9/11 appeared to support the UNHCR High Commissioner's concerns:

- Governments urgently debated anti-terrorism legislation the implementations of which could affect refugees and asylum seekers.[402]
- Spain publicly equated the war against terrorism with the fight against illegal immigration.[403]
- British Home Secretary David Blunkett vowed to stop Afghan refugees from "spreading across the world" and equated asylum seekers with terrorists.[404]
- Some countries proposed increased use of prolonged detention with limited judicial review.
- The European Union (EU) proposed a package of new measures with a definition of "terrorism" that was "so broadly drawn that it threatens to undermine legitimate protest and speech based on long established rights to free expression, assembly and association."[405]
- Australia excised geographical territories from its "migration zones" – and its immigration law to abrogate responsibility for asylum seekers arriving by boat, usually from Indonesia.[406]

401. *Infra*, footnote 14.
402. *Supra*, footnote 4.
403. *"No Safe Refuge"* The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide" Human Rights Watch Backgrounder, October 18, 2001, at page 5.
404. *Ibid.*
405. *"No Safe Refuge"* The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide" Human Rights Watch Backgrounder, October 18, 2001, at page 5.
406. The government introduced legislative amendments to restrict the scope for judicial interpretation of the provisions of the 1951 Convention, authorized interdiction at sea and withdrew remote areas on its own

— Canada introduced a new anti-terrorism bill that gave wide new powers to the police and courts.
— The US temporarily slowed the granting of visas to able-bodied men from 26 Arab and Muslim nations and a program which annually welcomed as many as 80,000 refugees was suspended, as the US undertook a comprehensive security review, blocking (from September to late November 2001) an estimated 20,000 people waiting to be accepted into the US.[407]

The Human Rights Nexus Working Party

The Human Rights Nexus Working Party (HRNWP) of the International Association of Refugee Law Judges (IARLJ) has a mandate to undertake leading edge research.[408] Following consideration of the human rights concerns raised above, this report seeks to draw together some of the legislative changes to migration and security laws and statistical trends evident in refugee applications and determinations in member countries post-9/11.

Research was completed by some HRNWP member countries and the United States, Denmark, Norway and Finland.[409] The material prepared was provided to the authors, for collation and analysis. Meetings of the HRNWP took place on a regular basis to review and discuss the material that was produced. The clearest trends in industrialised nations were apparent in relation to amendments made to security legislation and in numbers of refugee applications and

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territory – Christmas Island, Cartier Islands, Cocos Islands and Ashmore Reef – from a so-called 'immigration zone' thus denying foreigners arriving there the right to make asylum claims in liberal courts. (UNHCR – March 22, 2005).

407. UNHCR Refugees, "*After the Terror – The Fallout*" Issue 125, March 22, 2005.

408. "IARLJ Working Parties operating collectively, under the direction of the Executive, are mandated to undertake leading edge research on issues and questions that are both narrowly focussed and strategic in nature, in order to have the greatest impact on the promotion of standardization of practice procedure and interpretation of refugee and asylum law and practice throughout the world." (James Simeon, IARLJ Executive and Council Meeting Progress Report, November 11, 2004: *Towards a Thematic Approach.*)

409. Also considered: IARLJ 5th World Conference Papers, 2002 and Rudge, Philip, former Director of the European Council on Refugees and Exiles (ECRE): "*Some Reflections on Detention in European Asylum Policy*" at Appendix 4 (p. 160) which comments upon ten refugee protection concerns in the aftermath of 9/11.

determinations made post-9/11, though not as the sole consequence of 9/11.[410]

It cannot be said that this paper paints a conclusive picture of the "effect of 9/11 on refugee determinations and security legislation" across the participating countries, neither was this the authors' intent. Rather, some serious trends in security legislation are apparent, and a downward trend in refugee numbers is plain. These two findings, although unable to be directly attributed to 9/11, indicate that concerns raised by human rights organisations and the UNHCR post-9/11 ought further to be explored on a global level.

Obviously, the impact of 9/11 on legislative reform and refugee numbers cannot be considered in isolation from other events, which occurred or were occurring in each country considered below. Accordingly, on a country-by-country basis, wherever possible we have set out some relevant contextual factors, followed by an outline of the relevant statistics and the legislative changes indicated by member countries. Finally, we have sought to reach conclusions on what trends appear to be emerging and what, if any, might be said to be the effects of such trends.

AUSTRALIA

Contextual Factors

1. Processing Of Applications For Refugee Status

Under *Australia's Migration Act* 1958 (Cth) (the *Migration Act*), asylum seekers' claims for protection are assessed first by a delegate of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), which may be appealed on the merits to the Refugee Review Tribunal (RRT), after which judicial review may be sought in the Federal Court or Federal Magistrates' Courts and finally by leave to the High Court.

410. Submissions were received from Australia, Canada, Colombia, Denmark, Finland, New Zealand, Norway, UK, and the United States. We also considered a paper by Erika Feller, Director, Department of International Protection, UNHCR entitled: *Effective Protection in Today's World*, October 2003, a paper from Human Rights Watch entitled: "*No Safe Refuge* – The Impact of the September 11 attack on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide" and Professor James Hathaway's "Framing Refugee Law in the New World Disorder". For a complete listing of all papers considered, please see the Bibliography at Appendix 5.

2. The Tampa Incident, 9/11 and The Bali Bombings

In August 2001, the Australian federal government refused to allow a boatload of 438 (mainly Afghan) asylum seekers to land on Australian territory after they were rescued from a sinking Indonesian vessel by the Tampa, a Norwegian freighter that answered their distress call. Australia's strict border protection policies highlighted by this incident must also be considered in analysing the legislative and policy reforms implemented post-9/11.

In the wake of Tampa and 9/11 Australia's then defence Minister Peter Reith stated that "you've got to be able to control [entry to Australia by asylum seekers arriving by boat] otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities".[411]

The government has subsequently attempted to justify its tough border protection policies as necessary in a post 9/11 world because terrorists could be amongst asylum seekers arriving in Australia without authorization. The government could not therefore be confident that such persons do not pose a national security risk.[412]

The deaths of 88 Australians in the Bali bombings in October 2002 are also relevant to changes to Australia's security and immigration policies.

3. Detention

Australia has, since 1992, detained "unlawful non-citizens", defined under the *Migration Act* as those who arrive without a visa, overstay a visa, or have a visa cancelled. 9/11 did not precipitate Australia's controversial detention policy.

Detention is justified on the basis that "Australia sets the criteria and standards to be met by all foreign nationals who wish to come to Australia" which "reflects Australia's sovereign right under international law to determine which non-citizens are admitted or permitted to remain in Australia and the conditions under which they may be removed".[413] It is also said that applicants ought not enter the community until their identity has been assessed and a visa granted, and that detention ensures applicants are readily available throughout

411. 13 September 2001, Transcript of the Hon Peter Reith MP, radio interview with Derryn Hinch – 3AK, available at <http://www.minister.defence.gov.au/ReithSpeech>.
412. Taylor, S. *"Australia's Response to Asylum Seekers in the 'Age of Terrorism'"*, La Trobe University; Atkins, 2001; Seccombe, 2001; *supra*, footnote 400.
413. DIMIA Managing the Border: Immigration Compliance (June 2004). This report is available at <http://www.dimia.gov.au/illegals/mtb/index.htm>.

the processing of visa applications for removal if their application is unsuccessful, and for health checks.[414]

Australia's detention policy has been strongly criticized by human rights groups.[415] The Australian Human Rights and Equal Opportunity Commission (HREOC) prepared a *Report of the National Inquiry into Children in Immigration Detention: A Last Resort?*[416] which found that children in Australian immigration detention centres have suffered numerous and repeated breaches of their human rights and that Australia's immigration detention policy has failed to protect the mental health of children, to provide adequate health care and education and to protect unaccompanied children and those with disabilities.[417] The High Court has held that detention of children seeking asylum is lawful.[418]

In *Behrooz's* case the appellants argued, unsuccessfully, that their escape from a detention centre did not contravene the *Act* because conditions in the centre were punitive, and punitive detention is not authorized by the *Act*. The High Court determined that harsh conditions do not provide a defence to a charge of escaping from immigration detention.[419]

In 2002, HREOC prepared a report on visits to immigration detention facilities which called for an urgent review of long term detention, changes to the *Migration Act* to set specific time limits on

414. *Ibid.*

415. For instance, Human Rights Watch report *"By Invitation Only:"Australian Asylum Policy* available at <http://hrw.org/reports/2002/australia/australia1202>; Amnesty International's preliminary report "The impact of indefinite detention: the case to change Australia's mandatory detention regime", 23 March 2005 available at <– HYPERLINK "http://www.amnesty.org.au/whats_happening/refugees" —http://www.amnesty.org.au/whats_happening/refugees>. which states that the selective release of some long-term detainees fails to address the unjust and inhumane nature of Australia's immigration detention system, describes indefinite detention as "an appalling reality" and finds that Australia's mandatory detention regime violates a series of fundamental human rights, including: civil and political rights; economic, social and cultural rights; children's rights and refugee rights.

416. The report was tabled in the Australian Federal Parliament on 13 May 2004 and can be found at <http://www.hreoc.gov.au/human_rights/children_detention/>.

417. *Ibid.*

418. *Re Woolley; Ex parte Applicants* M276/2003 by their next friend GS, [2004] HCA 49 (7 October 2004).

419. *Behrooz* v. *Secretary of DIMIA and Ors*, [2004] HCA 36 (6 August 2004).

detention, and interim measures to be put in place to alleviate prolonged detention of those awaiting safe return to their countries of origin or a third country.[420]

The scope of the executive's power to indefinitely detain asylum seekers in immigration detention was confirmed by the High Court in *Lim*[421] and upheld by a 4-3 majority in *Al-Kateb* v. *Godwin*.[422] The two appellants in *Al-Kateb* were asylum seekers who wished to leave Australia after their appeal options were exhausted, but no arrangements could be reached between Australia and another country to allow removal. The majority of the High Court held that one of the purposes of immigration detention was eventual removal of unlawful non-citizens, and that indefinite detention was not prohibited by the Constitution because it could be for the purpose of eventual removal.

Recently the Minister announced a change to the regulations which allow the release of a small number of detainees on "bridging visas" which aims to provide the Government greater flexibility in dealing with "unlawful non-citizens" in the situation of the appellants in *Al-Kateb*.[423] The Minister stated that the policy "maintain[s] our commitment to mandatory detention and our highly successful measures to deter people smuggling"[424] and reiterated that "the Government's offshore strategy to deter people smuggling has been effective. For example, unauthorized boat arrivals have virtually ceased. It is important that to protect our border we remain vigilant and send no signal to people smugglers that would lead to a resurgence of the regular boat arrivals experienced between 1999 and 2002."[425] The policy has been criticized as inadequate by Amnesty International.[426]

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420. Available at <http://www.hreoc.gov.au/human_rights/asylum_seekers/>.
421. *Chu Kheng Lim* v. *The Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1.
422. [2004] HCA 37 (6 August 2004).
423. *Ibid.*
424. Bridging visas will not be available to detainees with current visa applications, or those challenging decisions through review or the courts.
425. *Supra*, at footnote 26.
426. Amnesty International's preliminary report *"The impact of indefinite detention: the case to change Australia's mandatory detention regime"*, 23 March 2005 available at <–HYPERLINK "http://www.amnesty.org.au/whats_happening/refugees" —http://www.amnesty.org.au/whats_happening/refugees>.

Statistics Concerning Grants Of Visas

A marked reduction in the number of protection visa (PV) applications lodged and granted by primary decision makers in Australia since 2001 is demonstrated:[427]

Year	*PV applications lodged*	*PVs granted (primary decision maker)*	*PVs refused (primary decision maker)*
2001-2001	9230	2905	6967
2002-2003	5010	380	6813
2003-2004	3670	266	3198

DIMIA has also provided statistics on the breakdown of grants of humanitarian assistance visas to Australia's five categories of asylum seekers.

Refugee Visas granted to persons identified under the UNHCR as in need of resettlement include *only* those who apply for protection from outside Australia.[428]

1999-00	*2000-01*	*2001-02*	*2002-03*
3,802	3,987	4,160	4,376

Special Humanitarian; Special Assistance; and Safe Haven Temporary Humanitarian Visas have been granted as follows to those who have "suffered discrimination amounting to gross violation of human rights, and have strong support from an Australian citizen or resident or a community group in Australia":

	1999-00	*2000-01*	*2001-02 (estimate)*	*2002-03*	*2003-04*
Special Humanitarian	3,051	3,116	4,258	7,280	7,000 (est)
Special Assistance	649	879	40	0	0 (est)
Safe Haven,Temp. Humanitarian Concern	1.980	164	6	3	0 (est)

427. Figures as at 31 October 2004 provided by a department spokesperson on 14 January 2005 re Protection Visa (PV) Activity in the period 2001-02 to 2002-03.

428. *Ibid.*

In 2003, under its Humanitarian Program, Australia granted visas to some 12,000 refugees, most from Africa, the Middle East and South West Asia.[429] This was a 45% increase in the number of visas granted to people from the African region in 2002.[430]

Onshore Protection Visas (OPVs) are granted to those who arrive without a visa and then apply for protection. There has been a marked decline in the number of OPVs granted in Australia since 9/11. The government has welcomed the reduction in OPVs as a result of its stricter "border protection" policies, including the excise of various Australian territories from the migration zone.[431]

1999-00	*2000-01*	*2001-02*	*2002-03*	*2003-04 (est)*
2,458	5,577	3,885	869	750 (est)

The number of asylum seekers detained in Australia has also fallen (4,709 in 2001-02 to 641 in 2002-03). The federal government attributes this to the sharp decline in boat arrivals from late 2001.[432]

A DIMIA spokesman has advised that post 9/11 more protection visa applications are finalised within DIMIA's time standard but states this is not related to the events of 9/11 but to the decline in numbers of unauthorised boat arrivals and applications made by people in the community, and continued streamlining of the processing of visa applications.[433]

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429. Announced by Minister for Immigration and Multicultural and Indigenous Affairs, 1 January 2004.
430. DIMIA website <http://www.dimia.gov.au/illegals/mtb/index.htm>.
431. See below under "Legislative Amendments"; *Ibid.*, and per DIMIA spokesperson on 14 January 2005.
432. DIMIA Managing the Border: Immigration Compliance (June 2004). This report is available at <http://www.dimia.gov.au/illegals/mtb/index.htm>.
433. Per a DIMIA spokesperson on 14 January 2005, for applicants not detained, DIMIA aims to finalize 80% of applications within 90 days of lodgement, where there are not factors outside DIMIA's control that prevent finalisation. 78.8% of the caseload for 2003-2004 (as at June 30, 2004) was finalized within 90 days, whereas only 76% of that caseload was finalized in 2001-02 (as at June 30, 2001). For detained applicants, DIMIA aims to finalize 60% of applications within 42 days of lodgement, where there are not factors outside DIMIA's control, which prevent finalisation. DIMIA finalized 88.4% of this caseload in 2003-04 within 42 days (as at 30 June 2004) compared to 40.2% in 2001-02 (as at 30 June 2001).

Legislative Changes Post- 9/11

1. The Migration Act

The Australian government commenced legislative amendment to the *Migration Act* in 1994 but closely following from the Tampa and 9/11 the seven reforming acts were passed in late September 2001, and commenced on 2 October 2001.[434]

The amendments passed in September 2001 were aimed at further deterring unauthorised asylum seekers and included: allowing adverse inferences to be drawn when visa applicants fail to provide supporting documentation; prohibiting migration-related class actions; narrowing significantly the meaning of the term "refugee"; providing for a new visa regime; and imposing minimum prison terms for people smugglers.[435]

Incredibly, the amendments excise certain territories from Australia's migration zone (Christmas Island, Ashmore Reef, Cartier Islands, the Cocos Islands) to prevent asylum seekers, usually arriving by boat from Indonesia (as with those involved in the Tampa incident), from landing in Australian territories or applying to Australia for protection visas. However Australia maintained its rights to detain asylum seekers within the excised zones and to remove asylum seekers from them. Asylum seekers who spend seven days or less in transit in a "safe country" cannot make visa applications to Australia and "adverse inferences" can be made against asylum seekers arriving without documentation.

The government credits these amendments with stopping the flow of "unauthorised boat arrivals" such as those on the Tampa.[436] Only one boat of asylum seekers, which was prevented from landing, has

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434. *Migration Amendment* (Excision from Migration Zone) 2001 (Cth).
Migration Amendment (Excision from Migration Zone)(Consequential Provisions) 2001 (Cth).
Migration Legislation Amendment (Judicial Review) 2001(Cth).
Migration Legislation Amendment Act (No. 1) 2001(Cth).
Migration Legislation Amendment Act (No 5) 2001(Cth).
Migration Legislation Amendment Act (No. 6) 2001(Cth).
Border Protection (Validation and Enforcement Powers) 2001(Cth).

435. Karas, Steve, Principal Member of the RRT and MRT: *"Dealing with immigration and refugee cases post September 11: the experience of the Australidn Refugee Review Tribunal and the Migration Review Tribunal"* (paper presented to the Council of Canadian Tribunals (CCAT) Third International Conference, Toronto Canada, June 20, 2004).

436. DIMIA website <http://www.dimia.gov.au/illegals/mtb/index.htm>.

attempted to arrive onshore since late 2001.[437] The number of unauthorised air arrivals to Australia has also fallen by 46 percent in the last four years.[438] No explanation is provided as to the reason for this dramatic decrease.

A "privative clause" (s. 474) was also introduced to the *Migration Act* which restricted asylum seekers' access to judicial review of RRT decisions by removing from the courts' jurisdiction previously specified grounds for review of decisions relating to protection visas including: denial of natural justice, unreasonableness, taking irrelevant considerations into account or failing to take a relevant consideration into account, reasonable apprehension of bias or an abuse of power.

The legality of the clause was unanimously determined by the High Court in *S157* v. *Commonwealth*[439] when it was held that the clause does not allow the "Parliament or the Executive to avoid, or confine, judicial review".[440] The High Court upheld the validity of s. 474 but only on the basis that it did not exclude the Court from setting aside refugee decisions tainted by jurisdictional error.

2. *Anti-Terrorism Legislation*

Before 9/11 and the Bali bombings Australia had no federal terrorism laws. A package of counter-terrorism legislation introduced in Australia since 9/11 has been trenchantly criticized for failing to safeguard adequately against human rights abuses being committed in pursuit of national security.[441] The new legislation is relevant to the HRNWP's analysis because the Australian Security Intelligence Organisation (ASIO) conducts security assessments of all "unauthorised arrivals" to Australia, including asylum seekers who then apply for onshore protection visas. However, none of the 5986

437. DIMIA Managing the Border: Immigration Compliance (June 2004). This report is available at <http://www.dimia.gov.au/illegals/mtb/index.htm>.
438. Available at <http://www.immi.gov.au/facts/74unauthorised.htm>.
439. [2003] HCA 2; 211 CLR 476.
440. Per Gaudron, McHugh, Gummow, Kirby and Hayne JJ [103].
441. *Australian Security Intelligence Organisation Act 1979* (Cth).
Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth).
Border Security Legislation Amendment Act 2002 (Cth).
Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth).
Security Legislation Amendment (Terrorism) Act 2002 (Cth).
Suppression of the Financing of Terrorism Act 2002 (Cth).
Telecommunications Interception Legislation Amendment Act 2002 (Cth).
Taylor, *op cit* at footnote 16.

security assessments of unauthorised arrivals conducted between July 1, 2000 and August 16, 2002 assessed the entrant as a threat to national security.[442]

Under the anti-terrorism legislation, Australians not suspected of any offence can be detained by ASIO for questioning, without the right to legal advice for the first 48 hours of their detention. ASIO now has powers of coercion and detention. A wide range of new offences has been introduced including: engaging in a terrorist act; engaging in acts preparatory to a terrorist act; providing or receiving training for, or possessing things connected with, an actual or potential terrorist act; and being a formal or informal member of, or assisting, a terrorist organisation.[443] The legislation is available for mobilization against both citizens and non-citizens.[444]

In New South Wales, Australia's most populous state, legislation granting specific anti-terrorism powers was passed in 2003. Police were given power to hold and detain persons on "general suspicion".

Conclusions

As a signatory to the 1951 *United Nations Geneva Convention* and 1967 *Protocol* relating to the Status of Refugees (Refugees *Convention*), Australia provides protection for those to whom it has obligations under the *Convention*. This approach has not altered post 9/11.[445] Neither has the fact that assessments of claims for refugee status are made on an individual basis, in a non-adversarial environment, using all available and relevant information concerning the human rights situation in the applicant's home country.

It is a longstanding requirement that asylum seekers in Australia undertake character and security checks before they can be found to be owed refugee protection. These requirements were not introduced as a result of the events of 9/11.[446]

It cannot be denied, however, that Australia's detention policy, its tough border protection measures, the legislative changes introduced including the excision of territories from the migration zone, the attempted reduction of grounds for judicial review of administrative decisions and the introduction of tough security legislation indicates erosion of the rights of asylum seekers in Australia. The reduction in numbers of on-shore asylum applications is clear. There is no clear indication that this can be said to be the result of 9/11. However, it certainly seems

442. Taylor, *op cit.*
443. Per *Security Legislation Amendment (Terrorism) Act* 2002 (Cth).
444. Taylor, *op cit.*
445. Per a DIMIA spokesperson on 14 January 2005.
446. *Ibid.*

that the events of 9/11 and the fear of terrorism have been used to justify some of the tough policy and legislation changes made by Australia in recent years.

CANADA

Contextual Factors

1. Processing Of Applications For Refugee Status

The Refugee Protection Division (RPD) is one of three decision-making divisions within the Immigration and Refugee Board (IRB). The IRB is an independent Tribunal. The RPD makes the initial decision of who is a Convention refugee or a person in need of protection pursuant to the *Immigration and Refugee Protection Act* (in this respect it is different from many other tribunals in that it is a first level decision-making body). With leave – granted in approximately 16% of cases – the decision may be brought by way of Application for Judicial Review to the Federal Court of Canada – Trial Division (FCTD). The court may send the case back for determination by the RPD but may not substitute its own decision. If the Federal Court certifies a question of general importance then the case can proceed to the Federal Court of Appeal (FCA). With leave, a case can go to the Supreme Court of Canada (SCC). As part of the governmental priorities outlined in the National Security Policy, the appointment process for Members of the IRB and the refugee determination process have been streamlined and de-politicized.

2. Detention

Asylum seekers in Canada are detained rarely and only where identity cannot be established, they are unlikely to appear for hearing, or they pose a danger to the community. Space in immigration detention centres is limited so detainees sometimes have to be placed in criminal detention centres. As this is contrary to the spirit of the *Convention* it is avoided wherever possible. Children are only detained in foster homes or juvenile detention centres where they pose a flight risk, or identity has not been established.

Detainees are entitled to regular review of their detention and are rarely detained for more than a brief period (except those held on security certificates – discussed below – who can be detained indefinitely).

3. Security Certificates

Since 1991, a controversial "security certificate" system has been in place in Canada under which certificates may be issued allowing the removal of individuals from Canada if they pose a security threat.

Certificates are issued based on security intelligence reports indicating the individual is a significant threat to Canada's security, that sufficient information is available from multiple and reliable sources and that sufficient releasable open-source information is in the Department's possession. Issue of a certificate suspends all immigration proceedings, including a claim for refugee protection.

Security certificates have been criticized on a number of levels. They cannot be issued against Canadian citizens but apply only to foreign nationals and permanent residents. The subject can be (and usually is) detained indefinitely until his/her case is determined.[447]

Foreign nationals who are the subject of a certificate are automatically detained. Permanent residents may be detained if a warrant for arrest and detention is issued or there are reasonable grounds to believe that the permanent resident is a danger to national security or the safety of any person or is unlikely to appear at a proceeding for removal. There is also a delay in the processing of a subject's refugee claim, pending security clearance which may take weeks or months.

Issued certificates are reviewable by the Minister of Public Safety and Emergency Preparedness and require her signature and that of the Minister of Citizenship and Immigration. Issued certificates go to the Federal Court of Canada where a designated judge may hear evidence in the absence of the person named if, in the judge's opinion, disclosure would be injurious to national security or the safety of any person. The judge provides the subject with information on the evidence heard in his/her absence which has to enable the subject to be informed of the circumstances giving rise to the certificate but not including material which may be injurious to national security or to the safety of any person. The subject can be heard in an open hearing and may present evidence. If the judge considers that the certificate

447. "Canadian citizens with suspected terrorist ties could also be subjected to so-called "control measures" such as house arrest that are currently being developped for immigrant terror suspects, Justice Minister Irwin Cotler said yesterday. The new measures, inspired by Britain's recent move to tone down its anti-terrorism laws, would expand the range of options authorities have to deal with non-citizen immigrants who are arrested as security threats to include measures such as electronic ankle bracelets and house arrest. The changes are aimed at providing a less Draconian option than jailing such suspects indefinitely. But Justice Minister Irwin Cottler revealed yesterday that he is considering expanding their use to Canadian citizens, not just non-citizen immigrants. (*"Cotler seeks expanded anti-terror arsenal"*, by Clark Campbell, The Globe and Mail, March 24, 2005.

is "reasonable" it automatically becomes a removal order. The Federal Court's decision may not be appealed.

Since 1991, 27 security certificates have been issued (for 26 different people). Twenty certificates have been considered "reasonable" and 17 have resulted in deportation.[448] Seven cases remain "active", four of which have been deemed "reasonable" (*Jaballah, Mahjoub, Almrei* and *Suresh*) while three remain undecided (*Harkat*[449], *Charkaoui*, and *Zundel*).[450]

Certificates have been directed at Islamic terrorists, Russian nationals engaged in espionage, Sikh terrorists, Hindu extremists in support of the Liberation Tigers of Tamil Eelam, secular Arab terrorists and a right-wing extremist.

4. Danger Opinions

Danger opinions pre-date 9/11 and are issued where the Minister of Public Safety and Emergency Preparedness believes a person is a danger to the Canadian public or to security and can be issued against Convention refugees facing removal or claiming protection. The person's history is reviewed to determine whether the danger posed outweighs the risks of removal to the country from which the applicant fled the alleged persecution and nullifies the refugee process for the individual.

5. Co-operation Between Canada and The US

Canada is one of the US's closest geographical and political neighbours and so was bound to be greatly affected by 9/11. Pre-9/11 the Canadian TIPOFF/TUSCAN[451] program commenced to scan photographs of suspected terrorist detained from foreign service posts

448. It is unclear what happened to the final three, given that the Federal Court's decision may not be appealed.
449. *Harkat (Re)* 2005 FC 393, 22 March 2005, per Dawson, J. where the court found that Mr. Harkat was "a liar and a security threat to Canada" and ordered him to remain in detention pending his removal. Justice Dawson found further based on the secret evidence she had heard that "it is clear beyond any doubt that Mr. Harkat lied under oath to the court in several important aspects". He is a suspected al Qaeda operative.
450. These statistics are from a CBSA document: *From Selling the West to Protecting the West*, Security Review Immigration Intelligence, 2004. See also *"The Case of the Seven Men the Government is Holding on Security Certificates and Wants to Deport"*, The Ottawa Citizen, December 12, 2004. Ernest Zundel was removed on consent to Germany a few weeks ago and is facing a trial as a Holocaust denier in Germany.
451. This program began in 1987. In 1998 the US began sharing names from the database with Canada under a program called TUSCAN. Each program has significantly enhanced border security.

into the TIPOFF/VIPER counter-terrorism database. In 1998, when the US began sharing names from the database, Canada had 13,641 entries. Since information sharing with the US commenced entries have increased to 69,341.[452]

Under the *Smart Border Declaration*,[453] Canada and the US have agreed to combine efforts to quickly and effectively detect persons or goods that can pose a threat to national security. In January 2004, in keeping with Canada's new *National Security Policy*,[454] the National Risk Assessment Centre[455] (NRAC) was established (within the newly created department of Canada Border Services Agency (CBSA)[456] to act as interface between international and national offices and protect Canadians against "current and emerging threats".[457] Sophisticated intelligence gathering techniques and technology are credited with reducing the flow of high-risk people and goods following NRAC's establishment.

A *Statement of Mutual Understanding on Information Sharing* (SMU) signed by the USINS (United States Immigration and Naturalization Service), the Department of Citizenship and Immigration Canada and the United States Secretary of State, this SMU, permits the sharing of immigration-related information and records on a case-by-case basis. It was agreed between the US and Canada to improve the programs in both countries and as an anti-terrorism measure.[458] Many refugee claimants arrive in the US and Canada improperly documented, or undocumented. The SMU is

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452. As at July 2004.
453. Enacted December 12, 2001. See also <http://www.canadianembassy.org/border/declaration-en.asp>.
454. April 2004. See also <http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf>.
455. Which operates 24 hours a day, seven days a week.
456. Canada Border Services Agency (CBSA) is an agency under the Minister of Public Security and Emergency Preparedness (PSEP) and is responsible for the intelligence, interdiction and immigration enforcement program. Prior to December 2003, the program was under the responsibility of the Minister of Citizenship and Immigration (CIC).
457. *Managing Access to Canada*, Fact Sheet: March 2004, from the Canadian Government website: <http://www.cbsa-asfc.gc.ca/newsroom/factsheets/2004/0311ManagingAccess-e.html.>
458. Introduced in 2003, the Statement of Mutual Understanding on Information Sharing (SMU) replaced the information sharing arrangements that had been in effect since 1999.
See also <http://www.cic.gc.ca/english/opolicy/smu/smu-bkgrnd.html>.

geared toward "preventing illegal migrants and other undesirables from entering Canada from the US."[459]

Canada and the US have committed to cooperate to provide a more secure border and North American perimeter.

The *Safe Third Country Agreement (STCA)*[460] between the two countries is one of many steps taken in this direction. Although the UNHCR has approved the Agreement in concept, it has been opposed by many groups.[461] As a result, many exceptions are included in the agreement. The Agreement does not apply to ports, airports or inland applications but strictly to the movement of persons at land borders.

Statistics On Visa Applications

After years of unprecedented increases in refugee claims in Canada, a steady decline has occurred since 2001, including a marked decline in 2004, as follows:

	2001	2002	2003	2004
Applications for refugee protection received nationally	43,846	31,310	39,937	25,750
Drop in application from previous year		4,536	7,373	6,187
Drop since 2001				18,096

This represents a 42% drop in applications overall since 2001.[462] The exact cause of the decrease is unclear. It may be attributable to increased security on airlines in "refugee producing" countries and the increased use of Migration Integrity Officers (MIOs). Canada employs 45 MIOs who:

459. *Ibid.*

460. *The Safe Third Country Agreement* (between Canada and the US) means that as of December 29, 2004, refugees who land in the US must seek status there, rather than using it as a jumping-off point to get into Canada. The agreement also works the other way, but the majority of refugee traffic has been into Canada from the US. There are many exceptions set out in the agreement. While NGOs remain opposed to the agreement, the UNHCR is on record as agreeing in concept with it.

461. For example, the American Immigration Lawyers of America (AILA) has written a critique of the STCA. (See <http://www.aila.org/fileViewer.aspx?docID=16465. The Minnesota Advocates for Human Rights (see http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/EOIR Safe Third Country Reg Comments.PDF>). The European Council on Refugees and Exiles (ECRE) and Amnesty International have both expressed concern about the STCA.

462. See Appendix 1.

"... work with other government departments, international partners, local immigration and law enforcement agencies and airlines to combat irregular migration, including people smuggling and trafficking. CBSA claims that the work of these officers has resulted in an interdiction rate of 72% in 2003. This means that of all those attempting to travel to Canada by air, using improperly issued documents, 72% (more than 6,400 individuals) were stopped before they got to Canada. These officers have been trained to recognize false documents and to share this information with airline personnel."[463]

However, the consequences of this program are of concern:

"This has led to an increase in would-be claimants being unable to leave from the country in question. Given that many genuine refugees do rely upon false passports this can have the effect of making it impossible for genuine refugees to get to Canada. Numbers of refugee claimants in Canada have reduced markedly and the inability of refugee claimants to flee their countries may well be a major factor in the reduction." [464]

Legislative Reform Post-9/11

The "tightening" of laws post 9/11 has been justified by the government on the basis of a need for heightened security and a tighter North American perimeter.

Security Review measures were adopted the day after the attacks for closer screening of refugee claimants immediately upon their arrival at land borders and airports. In November 2001, Front End Screening commenced at all Ports of Entry (POE) across Canada. Previously, they had been allowed to enter the country and report for processing at a later date.[465] All refugee claimants already in Canada were screened and all new refugee claimants are now vetted for security concerns. MIO and other intelligence reports are analysed to identify claimants likely to pose a security threat. Before this process was put in place refugee claimants were not screened until they applied for Canadian residence.

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463. *Supra,* footnote 61.
464. *Ibid.*
465. UNHCR Refugees Magazine, Issue 125 (September Terror) – cover story: *"After the Terror ... The Fallout,"* January 1, 2002. <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=MEDIA&id=3ccd58429&page=publ>.

1. The Anti-terrorism Act

The *Anti-terrorism Act*[466] was passed hastily after 9/11[467] and provides new powers to police to gather intelligence on terrorist threats at home and abroad. It establishes several new categories of crime, including participating in, financing and otherwise facilitating a terrorist activity. Thirty-four terrorist organizations are prescribed by the *Act*, including Colombia's FARQ and the Al Jihad Organization based in Egypt. The *Act* allows cabinet to usurp judicial power and determine whether certain groups are terrorist organizations, strip them of charitable status and seize their assets. It also gives courts authority to imprison terrorists for life.

Twenty federal statutes were amended to make way for these new powers, reshaping important legal concepts such as arrest without warrant, detention without charge and limiting the right to remain silent. Thus the legislation has altered the landscape of Canadian criminal law.[468] These restrictions on the rights of Canadian citizens may herald a yet stronger impact on non-citizens.

The key objectives of the *Anti-terrorism Act* are: preventing terrorists from getting into Canada; protecting Canadians from terrorist acts; bringing forward tools to identify, prosecute, convict and punish terrorists; preventing the Canada-US border from being held hostage by terrorists therefore impacting the Canadian economy; and working with the international community to bring terrorists to justice and address the root causes of such hatred.

In December 2004, a parliamentary committee began a mandatory review of the *Anti-terrorism Act* to consider the success or otherwise of the *Act* with respect to these objectives. One of the issues to be debated is whether the definition of "terrorism" is sufficiently precise because "ideology, politics and religion" are listed as possible precursors to terrorist involvement.[469] The *Act* has been criticized as being incisively intrusive and lacking in civilian oversight to safeguard individual rights.

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466. *Anti-terrorism Act*, S.C. 2001, c.41, December 8, 2001, also known as Bill C-36.
467. Enacted October 15, 2001, approximately one month after the 9/11 attacks in an emotionally charged climate which some say made it difficult to conduct a thorough and thoughtful discussion of concerns raised (see: *"It's time to protect disturbing flaws in Anti-Terrorism Act"* by P. Hartnagel and J.O. Smith, Edmonton Journal, March 21, 2005).
468. See: *"Security at a Price"*, The Vancouver Sun, December 13, 2004 by Ian Macleod: *Anti-terrorism Act*, Civil Liberties, basic rights, and traditions of justice are under threat.
469. P. Hartnagel and J. Orion Smith, *supra*, footnote 71.

2. The Immigration and Refugee Protection Act

The *Immigration and Refugee Protection Act (IRPA)*[470] was not enacted as a response to 9/11 but its implementation was delayed in part because of 9/11 and some of the sections have impacted refugee determination. For example, sections 112[471] and 115.[472] *IRPA* expanded the scope of

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470. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, June28, 2002.

471. 112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

(2) Despite subsection (1), a person may not apply for protection if
(*a*) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;
(*b*) they have made a claim to refugee protection that has been determined under paragraph 101(1)(*e*) to be ineligible;
(*c*) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or
(*d*) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

(3) Refugee protection may not result from an application for protection if the person
(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;
(*b*) s determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;
(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or
(*d*) is named in a certificate referred to in subsection 77(1).

472. 115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group

the Immigration and Refugee Board of Canada's refugee protection mandate.

In April 2004, Canada's National Security Policy: *Securing an Open Society* was introduced. This Policy articulates, "core national security interests and proposes a framework for addressing threats to Canadians. It allegedly does so in a way that "truly respects and supports key Canadian values of democracy, human rights, respect for the rule of law and pluralism."[473]

3. Case Law

In December 1999, *Ahmed Ressam* was caught trying to cross the Canadian-American border (stretching for over 4,000 miles it is the longest international border in the world) at Port Angeles, Washington, with explosives in his car. Ressam belonged to a Montreal-based terrorist cell thought to be linked to both the Algerian terrorist group Armed Islamic Group (GIA) and al-Qaeda which was apparently planning a millennium terror attack at Los Angeles International Airport. In April 2001 Ressam was convicted in Los Angeles of conspiracy to commit terrorism, document fraud and possession of deadly explosives.

The ease with which Ressam and his fellow terror cell members entered and left Canada and Ressam's ability to assemble bomb-making materials in Canada heightened concerns about border security. Armed with a fraudulent French passport Ahmed Ressam

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or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

473. Prime Minister Paul Martin when the Policy was launched. *Supra*, footnote 58.

had entered Canada in 1994 claiming refugee status. He abandoned his claim and lived underground in Canada for years before being apprehended in December 1999. He remains in a US jail.

Maher Arar case caught the attention of international human rights groups. Arar is a Canadian citizen born in Syria in 1970 with a Master's Degree in engineering. On a stopover in New York on his way back to Canada he was detained by US officials who claimed he had links to al-Qaeda. He was handed over to Jordanian officials by US authorities on the understanding that he would be sent from Jordan back to Syria. He alleges he was detained in Syria for a year and tortured, causing a review in Canada of why he was deported from the US to Jordan, rather than back to Canada and what if anything, Canada's role was in the process. Arar accuses the Canadian federal government of withholding information that reflects well on him.[474]

Both the US and Canada were criticized as they are signatories to the *Convention Against Torture*, which prohibits the removal of any person to a country where there are substantial grounds for believing that she/he would be in danger of torture. The United States and Canada have long protested the use of torture in Syria. Indeed, the President of the United States' November 6, 2004 speech to the National Endowment for Democracy specifically mentioned the problem of torture in Syria.[475] Mr. Arar is now back in Canada and involved in an internal review of Canadian authorities' involvement in his case. No recommendations or findings have been released at the date of writing.

In the case of *Mahjoub, Mohamed Zeki* v. *M.C.I and S.G.C.* (F.C., no. IMM-6880-04), Dawson, January 31, 2005; 2005 FC 156, the applicant was found to be a Convention refugee in 1996. In 2002, the Minister of Citizenship and Immigration and the Solicitor General of Canada each signed a security certificate based on a security intelligence report. That report expressed that the applicant was a member of various inadmissible classes under the *Immigration and Refugee Protection Act* and set out its grounds. The Minister's delegate concluded that the applicant should be removed to Egypt under section 115 of *IRPA* as he was a danger to the security of Canada and although he would be at substantial risk

474. CBC News: *"In Depth: Maher Arar: Timeline,"* November 26, 2004.

475. *"U.S. Alleged Transfer of Maher Arar to Syria"* <http://hrw.org/doc/?t=americas&c=canada.> – Letter to the US Department of Defense General Counsel Haynes signed by Amnesty International, The Center for Victims of Torture, Human Rights Watch, International Human Rights Law Group, International Justice Mission, International League for Human Rights, Lawyers Committee for Human Rights, Minnesota Advocates for Human Rights, Physicians for Human Rights, RFK Memorial Center for Human Rights, protesting Arar's removal to Syria.

of ill treatment and human rights abuses. On judicial review to the Federal Court of Canada, the Court, in allowing the application, found the conclusion of the Minister's delegate that the applicant was a danger to the security of Canada was not supported by the evidence, as she did not have before her the documents referred to in the security intelligence report. Conflicting evidence, if any, needed to be weighed by the Minister's delegate and reasons given for rejecting evidence. Lawyers for the federal government argued he was a "bin Laden loyalist" (and a former employee of bin Laden) who posed a "serious and substantial threat" to national security. They argued that even the most restrictive bail conditions would not prevent him from either fleeing or reconnecting with fellow terrorists.[476]

The Court held that once the danger to the security of Canada was assessed it must be weighed against the risk to the applicant of torture or other mistreatment, which was not done in Mr. Mahjoub's case.

In *Re Charkaoui* (F.C. no. DES-3-03), Noël, February 17, 2005; 2005 FC 248, at Mr. Charkaoui's fourth detention review since a security certificate was issued, the Court referred to the following principles: (1) The standard of proof which must be met for release is that there are reasonable grounds to believe. (2) The principles set out under the *Immigration Act* dealing with interpretion of "danger to the security of Canada" remains applicable under the *IRPA*. (3) "Danger to the safety of any person" includes the possibility of preventing an act before it takes place, which broadens the concept of "danger to the public" and no longer limits it to persons who have been convicted of a serious crime. (4) The evidence must be analyzed by considering whether the danger is still present. (5) To assess whether a release with terms and conditions is warranted, the judge must be satisfied that the person concerned is not a danger to national security or to the safety of any person.

If there is a danger, release cannot be contemplated, even with extraordinary terms and conditions attached. The Court accorded some weight to Mr. Charkaoui's testimony about his travels, contacts, personal life, contacts with the CSIS and his family situation, and found that, for the time being, the danger seemed to have been neutralized. The Court found that "the detention, the passage of time, the media coverage of the proceedings, the family's presence, the community support and the testimony of the person concerned" were relevant to its assessment of whether a danger remains.

476. See: *"Mahjoub would flee if released on bail"* The Ottawa Citizen, March 23, 2005.

The Court added that the imminence of the danger could decrease over time and here was neutralized at the time of the Court's assessment. The Court concluded that Mr. Charkaoui would likely appear for proceedings and imposed strict terms and conditions including: payment of a $50,000 security deposit, compliance with a curfew, refrain from use of a cell phone or computer; an electronic bracelet to track movements; allowing entry into his residence at all times; confiscation of his passport, not leaving the Island of Montreal and having no contact with individuals named in the Court order.

Conclusions

Security issues in Canada have assumed greater importance since 9/11 but the same key principles of the previous *Immigration Act*[477] remain embodied in the new legislation outlined, including: respect for multiculturalism, human rights and the integration of immigrants. Providing fair consideration to those who enter Canada seeking asylum from persecution is a "fundamental expression of Canada's humanitarian ideals".[478] The new legislation maintains Canada's commitment to offering a safe haven to persons with a well-founded fear of persecution and to those at risk of being subjected to torture, to a threat to their lives or to cruel and unusual treatment or punishment and recognizes that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted.[479]

Some argue that new anti-terrorism laws have weakened individual civil liberties of both Canadians and non-citizens. There is merit to this argument, particularly as the legislation relates to delay in the issuance of security certificates and reviews, and the possible violation of natural justice that could occur in the interests of national security.[480]

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477. 1976, *Immigration Act*, R.S.C. 1985, C. I-2, as amended and enacted by R.S.C. 1985 (4th Supp.), c.28, s.18.
478. Subsection 3(2) *Immigration and Refugee Protection Act (IRPA)*.
479. Subsection 3(2)(a).
480. The British House of Lords struck down a similar provision in their anti-terrorism law on detaining foreigners suspected of terrorism. The law Lords said a law allowing authorities to arrest foreign nationals suspected of terrorism and detain them without trial is invalid because it violates international human rights laws. Canadian Justice Minister Irwin Cotler is reviewing the British ruling because of similar provisions in Canadian law allowing federal cabinet ministers to issue security certificates to detain terrorist suspects who are not Canadian citizens (see: *"British Ruling Prompts Anti-Terror Law Review"*, The Globe and

Further, "enforcement activities" Canada imposes in conjunction with the US and through the use of MIOs have likely been a strong factor in the reduction of the flow of many refugee claimants who would otherwise have arrived in Canada without proper documentation, if any and now do not arrive at all. Enforcement activities are geared toward "preventing illegal migrants and other undesirables from entering Canada".[481] Generally, it appears that the tight new focus on Canada's sovereign right to protect its borders which has been more strongly pushed post-9/11 may be failing to balance appropriately the need for refugee claimants to flee to Canada from persecutory regimes.

COLOMBIA

Contextual Factors

Justice Marco Gerardo Monroy-Cabra of the Constitutional Court of Colombia advises that Colombia has been a signatory to the *Geneva Convention*, the *1967 Protocol* and the *Cartagena Declaration* since 1961, 1979 and 1984, respectively. Colombia accepts the principle of "non-refoulement".

The Decree-2450 (2002) establishes a Commission (*Comisión Asesora para determinar la Condición de Refugiado*) which considers the situation of refugees in Colombia and determines their status. The process of refugee determination is administrative and without the intervention of a judge.

In 1997 Colombia adopted Law 387, which prevents and protects persons displaced by internal conflict in Colombia. Colombia's limited resources are focused on domestic rather than international issues, as it has been in internal conflict for fifty years. A consequence of this conflict is approximately two million internally displaced persons and a governmental policy is in place to protect displaced persons. Nevertheless, in many cases displaced persons suffer violations of their human rights.

Displaced persons may file a constitutional action called *"Acción de Tutela"* in order to obtain protection of their fundamental rights. Since 1997 the Colombian Constitutional Court adopted eighteen sentences to protect the violations of fundamental rights of refugees.

Mail, December 17, 2004 by Jeff Sallot). The government's Anti-Terror Bill passed after a mammoth 30-hour debate in the British Parliament, on March 11, 2005. The same day, ten individuals held in custody under anti-terror laws were released from custody, where they had been held since 2001.

481. *Ibid.*

Statistics On Visa Applications For Refugee Status

Since 1950 only 195 persons have applied for refugee protection in Colombia.

In April 2003, 44 petitions for refugee status were made, sixteen were granted, eleven denied, two in recess and fifteen in administrative proceedings.

Colombia excludes terrorists and other serious criminals from refugee protection because it refuses asylum to persons indicted by an international criminal court, where there is an extradition request, or where the applicant faces prosecution.

Conclusions

There are no noteworthy impacts on Colombia's refugee determinations directly or indirectly attributable to 9/11. However, the serious problem of internal conflict means that Colombia faces huge numbers of internally displaced persons and this problem continues to require international aid.

DENMARK

Contextual Factors

Dorte Malmros of the Secretariat for Refugee, Immigration and Integration Affairs, advised us of the process for refugee determination in Denmark.

1. Processing Of Applications For Asylum Claims

In the first instance the Danish Immigration Service hears applications for asylum. An application, which is rejected, is automatically forwarded to the Refugee Board. The Refugee Board is the final avenue for appeal in asylum cases where the decision of the Danish Immigration Service can be contested.

The Refugee Board is an independent quasi-judicial body. The Board is independent of the political decision-making process and does not receive directions from the Government or the Danish Parliament. Since July 1, 2002, the cases are heard by a panel comprised of a chairman or a deputy chairman (a Judge) and two members, one of whom is appointed by the Minister for Refugee, Immigration and Integration Affairs and the other of whom is appointed upon nomination from the Council of the Danish Bar and Law Society.

In order to obtain asylum in Denmark, an applicant must fulfil the conditions listed in the United Nations Refugee *Convention*, section 7(1), or the conditions for protection status as named in section 7(2) of the *Danish Aliens Act*.

Statistics

The statistics on refugee applications in Denmark (all types of asylum cases and residence permits of asylum granted by both instances):

	1991	*2000*	*2001*	*2002*	*2003*	*2004*
Asylum seekers	12,331	12,200	12,512	4.069	4,593	3,222
Granted asylum	4,443	5,156	6,263	6,187	2,447	1,607

Legislative Reform Post-9/11

Section 7(2) of the *Danish Aliens Act* took effect on July 1, 2002 so that a residence permit will be issued to an alien if the alien risks the death penalty or may be subjected to torture or inhuman or degrading treatment or punishment if returned to the country of origin. All foreigners seeking a residence permit on and after July 1, 2002 will be considered under these rules. For those foreigners who have submitted their applications prior to July 1, 2002, the old regulations will continue to apply.

The resolution of the Security Council number 1373 of September 28, 2001, concerning initiatives against terrorism have resolved in some changes of the *Danish Aliens Act*. The changes are primarily rules of procedure and do not seem to have relevance for the number of asylum seekers or for the number of granted residence permits of asylum.

Conclusion

As with the other Scandinavian countries, Denmark has seen a sharp decline in asylum claims since 9/11. No other noteworthy changes were reported.

THE EUROPEAN UNION

Contextual Factors[482]

Promises of protection for refugees were delivered by EU Heads of State at the Tampere Summit in 1999 and the EU is now drawing to the end of the first phase of harmonizing its member countries' asylum and immigration laws. It has adopted a package of laws criticized as failing to tackle the need for shared responsibility for the receipt of

482. As no submission was received specifically dealing with the EU as a whole, what follows is a brief overview of material as a very preliminary entry point for readers and researchers interested in EU trends.

refugees or meeting national practice standards.[483] It is alleged that member countries have pursued narrow national agendas at the cost of adequate safeguards for refugee protection and in favour of fighting against illegal immigration.[484]

The terrorist attacks in Madrid on 11 March 2004 have, of course, affected the EU's approach to security and refugee issues. On 15 March 2004 President of the European Council, Mr. Bertie Ahern "condemn[ed] utterly those who planted the bomb" and stated that "the attacks in Madrid were an attack against the very values on which the Union is founded". He also vowed to address security issues immediately.[485]

Statistics Concerning Grants Of Visas[486]

The UNHCR produces annual statistics on asylum applications lodged in Europe which indicate that application levels have decreased by 21 per cent, from 396,800 in 2003 to 314,300 in 2004. The EU countries recorded 19 per cent fewer asylum requests in 2004. In Europe and the EU countries, the number of asylum-seekers in 2004 was the lowest since 1997. France, the third largest asylum-seeker receiving country in 2003, became the main destination country for asylum-seekers in 2004.

Since a peak in 2001, the EU countries received 36 per cent fewer requests in 2004 compared to 2001, while Europe as a whole registered a 36 per cent decline. The fall in asylum requests in the 10 new EU member countries was smaller.

During 2000-2004, the EU received 4.2 asylum-seekers per 1,000 inhabitants. Italy, the Baltic countries, Poland, Portugal and Spain received significantly fewer asylum-seekers on a per capita basis than the EU-average. Compared to national population size, the sharing of asylum responsibilities within the EU is thus far from equitable.

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483. *"Broken Promises - Forgotten Principles: An ECRE evaluation of the development of EU minimum standards for refugee protection Tampere 1999"* Brussels 2004; Ruud Lubbers, UN High Commissioner for Refugees, UNHCR Press Release: Lubbers calls for EU asylum laws not to contravene international law, 29 March 2004; Kofi Annan, UN Secretary General, Address to the European Parliament, 29 January 2004.
484. *Ibid.*
485. Statement from the Irish presidency website: European Council to Focus on Fight Against Terrorism.
486. All statistics in this section are sourced from *"Asylum Levels and Trends in Industrialised Countries, 2004"*, March 1, 2005, UNHCR Population Data Unit/ PGDS, Division of Operational Support, UNHCR, Geneva. The caveats and notes in that report should be considered by the reader.

Policy and Legislative Change Post- 9/11

At the Extraordinary Justice and Home Affairs Council Meeting of 20 September 2001, the European Commission urgently examined the relationship between safeguarding internal security and complying with international protection obligations and instruments. The Council developed an "Action Plan on the fight against terrorism" which covered external, economic/financial, transportation and Justice and Home Affairs policy. Judicial co-operation, co-operation between police and intelligence services, financing of terrorism, border control, issuing of identity documents, residence permits and visa, and the functioning of the Schengen Information System (SIS) were addressed.

A new EU border control plan was agreed in spring 2002 under which the chiefs of EU border police will coordinate sixteen different groups working on different aspects of border control, including operations at land borders, sea borders and international airports and mass joint expulsion exercises.

According to ECRE, the act of seeking asylum in Europe has effectively been criminalized by changes made in the EU's attempts to harmonize member's asylum and immigration laws.[487] The EU has adopted a requirement to grant asylum to all persons who qualify as refugees under the *Convention*, to grant subsidiary forms of protection and to recognise non-State actors of persecution. Nonetheless, some provisions appear to derogate from minimum standards and would lead to breaches in States' obligations under the Convention.[488]

Growing public hostility towards asylum seekers, fuelled by hostile and inflammatory media coverage and a lack of political leadership on asylum across Europe, may have contributed to the establishment of a trend of deterrence at EU level. The impact of global events in recent years leading to the "war on terror" has also placed security concerns at the top of the agenda for States worldwide.

Conclusions

There has been a significant decrease in the number of asylum seekers entering the EU since 1997 and worrying trends emerging in attempts to harmonize refugee legislation across member States. Rather than adopting best practice in such legislation it appears that minimum standards are instead being accepted at the cost of adequate safeguards for refugees. The EU has been criticized by the UNHCR for not taking its fair share of refugees.

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487. *Ibid.*

488. For example, the Directive on Family Reunification has failed to guarantee the protection of the family and respect of family life.

FINLAND

Contextual Factors

Finland does not have a national approach to refugee determinations post 9/11 since it is an EU member state. Judge Juta Ruitiainen of the Helsinki Administrative Court advises that Finland has not seen any noticeable change in its courts' approach to refugee processing since 9/11. The number of applicants and caseloads in the courts has not changed radically.

Statistics On Visa Applications

The number of applicants per annum is as follows:

2000	*2001*	*2002*	*2003*	*2004*
3170	1651	3443	3221	3861

As can be seen, other than an anomalous significant drop in 2001, there has been a steady rate for every other year.

The breakdown of the 2004 statistics provided by Judge Ruitiainen indicates the total number of decisions made on refugee applications was 4758. Of these, 546 withdrew or did not remain in Finland. 3422 negative decisions were made; of these, 1610 of which were "Dublin cases"[489] (in which an applicant has applied for asylum in another EU country, Norway and Iceland and is not accepted by Finland but deported to the country in which the application was made); 322 of the applicants were considered to be from a "safe country of origin"; 753 were determined to be manifestly unfounded; and 737 were identified as "normal, realistic" cases.

790 positive decisions were made, 29 of which resulted in a grant of asylum. 206 were found to be in need of protection. These statistics indicate an acceptance rate of less than 1% in Finland. However, acceptance rates could be considered as high as 51.7% granted to those from the "realistic" pool of applications.

Judge Ruitiainen indicated the other Scandinavian countries have similar acceptance rates, which was confirmed by representatives of Sweden.

Conclusions

It is difficult to ascertain whether there has been a noticeable change in refugee processing in Finland. The statistics appear to

489. Also known as EU Council regulation (EC) No 343/2003 of February 2003.

indicate no change in the numbers of applicants, however the EU statistics indicate otherwise.

NEW ZEALAND

Statistics Concerning The Grants Of Visas

There has been a discernable decrease in the number of refugee applications received in New Zealand from January 2000 to December 2004.

For the two years prior to 9/11, over 100 refugee applications were received per month in New Zealand on average, whereas the average number of applications has now fallen to below 100 per month and in 2004 dropped further to around 50.[490]

Legislative and Policy Changes Post- 9/11

Prior to 9/11, approximately 5% of refugee applicants in New Zealand were detained. On September 19, 2001 the New Zealand Immigration Service (NZIS) issued an Operational Instruction to immigration officers concerning the detention of refugee claimants under section 128(5) of the *Immigration Act*, 1987. Subsequently, for a number of months, around 94% of refugee applicants were detained.[491]

Section 128 of the *Immigration Act* applies to a person who arrives in New Zealand, requires a permit but fails to apply for, or is refused a permit, is a stowaway or whose pre-cleared permit has been revoked. Such person must be detained and placed in custody pending departure from New Zealand on the first available craft. If detention is to exceed 48 hours a warrant must be sought allowing further detention, which must not exceed 28 days.

The *Operational Instruction* stated that a warrant may be sought where detention is "required to protect national security or public order" and in a wide range of circumstances.

On 16 April 2003 the questions whether section 128(5) authorized detention, and the validity of the *Operational Instruction* were appealed but the Court of Appeal held that section 128(5) authorized detention and that the operational instructions were lawful.[492]

In June 2002 the *Transnational Organised Crime Bill* was passed, amending the *Immigration Act 1987* and providing for conditional release of persons detained under section 128 of the *Immigration Act*.

The percentage of spontaneous refugee claimants detained in 2004 averaged around 50-75%. This is lower than the average in 2001 to

490. Detailed statistics are set out at Appendix 2.
491. See Appendix 3.
492. *Attorney-General* v. *RCNZ* (CA107/02, 16 April 2003).

2003, but considerably higher than the average prior to September 11, 2001. Of the 50-75% detained, most are released within a month, provided they live at a fixed address and report to police weekly.

Immediately following 9/11, all women and children claimants were detained, however by 2002 only 50% were detained, in 2003 around 25% of women and 12% of children were detained and in 2004 no children were detained but 4 of the 17 female claimants were detained.[493]

Caselaw

In October 2004 the New Zealand Court of Appeal considered the balance of individual rights of a refugee with security considerations.[494] An appeal was brought by the Crown to determine whether the Inspector-General was amenable to judicial review of his duties and powers in respect of a review of a security risk certificate issued for *Ahmed Zaoui*.

The Attorney-General submitted that judicial review was precluded and the proper course was for Mr. Zaoui to wait for the Inspector-General's review to be completed, then, if the certificate was confirmed, to seek leave to appeal to the Court on a point of law[495] which would have prevented the Court from reviewing the Inspector-General's decision, even for an error of law. The Court held this submission was untenable and unanimously dismissed the appeal.

The Court rejected the submission that the Inspector-General was not required to consider the Refugee Convention as 'clearly untenable'[496] and found that the trial judge erred in determining that the Inspector-General could decide what relevance and weight he accorded international human rights instruments, at least in as far as it extended to Article 33.2 of the *Convention*.[497] The Court referred to a presumption that legislation should be read consistently with New Zealand's international obligations[498] and accepted that Article 33.2 of the *Convention* requires that the Minister consider seriousness of the risk to national security and balance it against with the consequences to the individual of confirmation of the certificate.

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493. See Appendix 4.
494. The authors are grateful for the summary provided by Sarah Murphy of *AG v Zaoui* (1 October 2004), per Anderson, Glazebrook and William Young, NZCA.
495. *Ibid* at [29].
496. *Ibid* at [123].
497. *Ibid* at [124] and [125].
498. *Ibid* at [126].

The Court also found, in response to a cross appeal brought by Mr. Zaoui, that the Inspector-General ought not be concerned with where the refugee would be sent if expulsion was necessary and that it was for the Minister to decide such matters.

Conclusions

Clearly the number of refugee applications received in New Zealand has decreased markedly over the past fours years and the issue of detention of asylum seekers including women and children, is one which has confronted the New Zealand immigration system.

NORWAY

Contextual Factors

Mr. Paul Nils Skoglund submitted information relative to asylum claims made in the first instance and Appeals Board decisions. The total number of residence permits given in Norway in 2004 was 4130 of which 510 were for Convention refugee status. Subsidiary protection was granted to 1330 applicants and permission was granted based on humanitarian grounds to 2290 applicants. He was not able to provide the total number of rejections made in the first instance or by the Appeal Board in 2004.

Conclusions

Mr. Skoglund has advised the authors that there has been no marked change in Norway with respect to refugee determination since the attacks on September 11, 2001.

UNITED KINGDOM

Contextual Factors[499]

1. Processing Of Applications For Asylum Claims

The Immigration Appellate Authority (IAA) is a tribunal that hears appeals against decisions made by the Home Secretary (and his officials) in asylum and immigration matters. The main types of appeal heard are against decisions to: refuse a person political asylum in the UK; refuse a person entry to, or leave to remain in, the UK for permanent settlement; deport someone already in the UK and refuse a person entry to the UK for a family visit.

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499. As no submission was received specifically dealing with the United Kingdom, what follows is a brief overview of material as a very preliminary entry point for readers and researchers interested in UK trends.

The IAA has two tiers: The Immigration Adjudicators and The Immigration Appeal Tribunal. The Adjudicators hear the first level appeals, which may then be appealed to the Appeal Tribunal. Applications for leave to appeal against an adjudicator's determination are made to the second tier of the IAA (The Immigration Appeal Tribunal). An appeal will usually require a hearing at which all sides attend before a panel of three people. The panel normally comprises of a legally qualified chairman and two lay members, who will decide whether to uphold or overturn the adjudicator's determination.

2. *Concerns*

The UNHCR has noted with alarm that the number of asylum seekers coming to the UK has plummeted by 61 per cent in the last two years. However they go on to say:

"UNHCR is very impressed by the government's transparent approach in allowing us to work with them to find areas where the overall status determination process can be improved and expedited," said Anne Dawson-Shepherd, UNHCR representative to the UK. "By ensuring that asylum claims are decided using sound legal principles and accurate country of origin information, extensive and costly recourse to the appellate level may be avoided."[500]

Since the September 11 attacks, the former British Home Secretary David Blunkett put in place a series of measures that restricted entry into the country. The Home Secretary indicated that in order to prevent terrorism it might be necessary to curb the appeal rights of those refused entry into the United Kingdom. This could prevent asylum seekers from having their claims for refugee status assessed fully and fairly. Most individuals currently recognized as refugees in the UK only received that recognition after appealing an initial negative decision.[501]

The Home Office has announced that proposals for new security measures would soon be introduced. These would include enhanced arrest powers for police to interrogate anyone suspected of having knowledge of terrorists' activities, indefinite detention for those suspected of or associated with terrorist activity, and the restriction of judicial appeal for migrants turned away at airports.[502]

Racist attacks against Afghans and other Muslims living in the UK increased dramatically immediately following September 11, 2001. Such attacks have included damage to property and bomb threats against

500. Source: The UNHCR website related to the UK. <http://www.unhcr.org.uk/press/press_releases2005/pr11March05.htm>.
501. *Supra*, footnote 2, at pages 9 and 10.
502. *Ibid.*

mosques, physical and verbal abuse of Muslim women wearing headscarves, and gang assaults targeting Arab and South Asian men. Prime Minister Tony Blair met with leaders of the Muslim community in Britain on September 27, 2001. During the meeting he strongly condemned the attacks on members of the Muslim, Arab, and South Asian communities in the UK, which he described as "despicable" and referred to the "minority who are only too happy to use recent events as a convenient cover for racism." The former British Home Secretary David Blunkett also announced immediate legislation to extend the law on incitement to racial hatred to cover religious hatred, and the creation of a new group of offences, such as violent assault aggravated by religious hatred, that will carry a higher penalty in the courts.

Admittedly, those were in the early days post 9/11 and it is clear that the UK has stepped up efforts to avoid a continuation of racist backlash.

Statistics

The UNHCR's statistics indicate that the UK dropped to third last year among industrialised countries receiving only 40,200 asylum seekers, well behind France and the USA, and falling from second place in 2003. On a per capita basis, the UK ranked 11th last year among EU states receiving asylum seekers.

Recent Policy Reforms

The United Kingdom's five-year strategy for immigration and asylum, entitled *"Controlling Our Borders: Making Migration Work for Britain"* was announced on February 7, 2005 as part of the government's comprehensive reform of the UK's immigration and asylum system, which the Home Secretary, Charles Clarke, describes as "a fair but practical system of controls".[503]

The policy establishes a wide-ranging plan: to ensure only those who "benefit Britain" come to the UK to work or study; to strengthen the UK's borders; to crack down on abuse and illegal immigration and to increase removals.

The UK government proudly states that asylum applications are down 67 per cent from a peak at October 2002. It also notes that four out of five new asylum claims are now decided in two months rather than the twenty months it took in 1997 and that the number of asylum

503. *"Controlling Our Borders: Making Migration Work For Britain' the Home Office Strategy for Asylum and Immigration"* can be found at <http://www.official-documents.co.uk/document/cm64/6472/6472.htm> and on the Home Office website at <www.homeoffice.gov.uk.>.

claims outstanding is at a ten-year low and numbers receiving support continue to fall. Border controls have been tightened with the introduction of detection technology and UK immigration officers in mainland Europe. Enforcement action on illegal working has been stepped up and the removal of failed asylum seekers and illegal immigrants has doubled since 1997.

The Home Secretary stated that the measures have been introduced to increase public confidence. Security measures have been introduced: "over the next five years we will use new technology to transform our immigration control including the roll-out of e-borders and fingerprinting everyone who applies for a visa". The government states that it will "build on our achievements with asylum, cracking down further on those who seek to exploit our system. More claims will be fast-tracked and we will have tighter controls throughout the process. People who are genuinely fleeing persecution will be able to find a safe haven in this country but we will be tough on those trying to exploit the system".[504]

In response, the Refugee Council has called on the UK to remain a safe haven for refugees fleeing violence, torture and persecution. It calls for the UK asylum system to give fair hearings, make good quality decisions at first instance, and help refugees who are allowed to stay to fully integrate into British society.

The Refugee Council has urged the government to: restate its commitment to protecting refugees; concentrate on producing fair decisions on asylum claims; avoid detention unless in extreme circumstances; support and help refugees with integration into their local community; and allow asylum seekers to work while their asylum claim is being assessed. The Refugee Council have also noted:

The UK government has established a resettlement scheme for vulnerable refugees who are in need of long-term protection. The programme, which started in March 2004, is an extension of existing schemes, which operate around the world under the auspices of the UN High Commissioner for Refugees (UNHCR), which together resettle around 100,000 refugees every year, allowing people to rebuild their lives safely and securely. [505]

As Jeff Crisp of the UNHCR pointed out, "immigration is not appreciated, however, when it involves large numbers of people who enter the country in an irregular or illegal manner and who appear to bring little financial or social capital with them. And that, of course, is

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504. *Ibid.*

505. Source: UK Refugee Resettlement Program.
See: <http://www.refugeecouncil.org.uk/refugeecouncil/what/resettlement.htm>.

how asylum seekers are generally perceived today in the industrialized states."

While this argument has a certain element of truth, he goes on to say that it hides a more "uncomfortable reality," which is the "reality of racism, religious prejudice and the inequitable nature of global power relations". Is the current outcry about asylum seekers in the UK and other European countries really because the people concerned have come to the country without a visa and have thrown away their passport? Or, is it because a considerable proportion of them are young men, originating from countries in the Middle East and Central Asia, which are associated in the public mind with radical Islam and political violence? In this respect, it could be argued that an important connection exists between the 'war of terror' and the mounting challenge to asylum since the events of '9/11'.[506]

Conclusions

The UK has seen a significant drop in refugee applications and they have re-doubled their efforts to reduce the number of non-*bona fide* refugees from entry thereby clogging the immigration system. The UNHCR has recognized the serious efforts the UK has made to remain transparent in its process. However, as with the EU, there is concern that the UK may not be taking in its fair share of refugees.

THE UNITED STATES OF AMERICA

The United States has a history that embraces individual freedoms. George Washington, its first President said that theirs was the land whose "bosom is open to receive the persecuted and oppressed of all nations". To say that the world, and the United States in particular, has moved into an era of overwhelming concern regarding terrorist attacks, is to understate the current situation.

The United States considers for admission as refugees persons of special humanitarian concern who can establish that they have experienced past persecution or have a well-founded fear of future persecution in their home country on account of race, religion, nationality, membership in a particular social group, or political opinion. The legal basis of the refugee admissions program is the *Refugee Act of 1980*, which embodies the American tradition of granting refuge to diverse groups suffering or fearing persecution. The *Act* adopted the

506. New Issues in Refugee Research: Working Paper #100, *"A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime"* by Jeff Crisp, Head, Evaluation and Policy Analyst Unit, UNHCR, December 2003.

definition of "refugee" contained in the 1951 U.N. *Convention Relating to the Status of Refugees* and its 1967 *Protocol*.[507]

Increased racist and xenophobic attacks, harassment and threats against Muslims, Sikhs and people of Middle Eastern and South Asian descent had been reported in the US immediately following the September 11 attacks. For example, in Mesa, Arizona a Sikh man was killed in a shooting rampage, with additional shots fired at a Lebanese clerk and the home of an Afghan family. An Egyptian-American grocer was shot and killed near his store in San Gabriel, California and a storeowner from Pakistan was shot dead in Dallas, Texas. A gasoline bomb was thrown into the home of a Sikh family in California. SAALT(South Asian American Leaders of Tomorrow) reported that in the first week after the September 11 attacks the press reported 645 incidents of backlash attacks and harassment against persons of South Asian or Middle Eastern descent.[508] President George Bush, Attorney General John Ashcroft, New York City Mayor Rudolph Giuliani and other US officials have called on the public to reject national or religious stereotyping and have strongly condemned acts of racist violence and intolerance.[509]

Contextual Factors

Molly Groom, Chief of the Refugee and Asylum Law Division, Department of Homeland Security (DHS) submitted an overview of the current situation in the United States post 9/11. The United States, more than any other country, has predictably, seen the most significant change to its processes, legislation and screening.

Judge Stephen Reinhardt of the US Federal Court, 9th Circuit, presented a paper to the IARLJ 5th World Conference in Wellington, New Zealand.[510] Some of his comments were applicable to this section, and the authors have considered his work.

1. Processing Of Applications For Asylum Claims

All three branches of the US government has a role to play in the asylum process. The Executive Branch is charged with the administration of the process. It performs the principal functions,

507. United States Department of State Report Appendix E: *"Overview of U.S. Refugee Policy International Religious Freedom Report"* released by the Bureau of Democracy, Human Rights, and Labor, 2004.

508. See http://www.saalt.org/, increased racist and religious stereotyping.

509. *Supra*, footnote 2 at page 12.

510. *Stemming the Tide or Keeping the Balance — The Role of the Judiciary*, IARLJ publication of the 5th World Conference Papers, Wellington New Zealand, *"Judicial Independence and Asylum Law"*, Judge Stephen Reinhardt, 2002.

which would normally be considered judicial in nature, and it does so in a manner that is "contrary to the concept of judicial independence".[511] The Congress has passed a number of laws that limit the ability of the Federal Courts fully and fairly to review asylum decisions and the US Supreme Court has adopted doctrines that require federal judges to give almost "unbounded deference to the actions of the Executive Branch in asylum cases".[512]

The US Supreme Court, in keeping with Australian decisions, has held that asylum-seekers who are intercepted before they reach US territorial waters, have no rights at all under the *US Constitution* and may therefore be turned away by US personnel notwithstanding any provisions of the Refugee *Convention* and *Protocol*.[513] Those who arrive by plane, car, boat or otherwise, but who have not entered the United States, have a little more protection; they may assert asylum claims but the determination by the immigration officer or sometimes an immigration judge, is in almost all instances unreviewable by the US Federal Courts.[514]

Asylum cases are handled administratively rather than "judicially" in that they are adjudicated by immigration judges who are employees of the Department of Justice, the department responsible for administrating asylum laws. Their decisions are reviewable by the Board of Immigration Appeals (BIA). The BIA's decision may in turn be reviewed on a limited basis by federal judges sitting on federal courts of appeals. In only the rarest of instances will the US Supreme Court grant further review to the case, and then, invariably, only when the government is dissatisfied with the decision.[515]

In this scenario, it has been argued that immigration judges are not independent because of their employment relationship to the Department of Justice headed by the Attorney-General. These judges

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511. *Ibid*, at page 327.
512. *Ibid*, page 330.
513. A ruling of the US Supreme Court in 1993 which upheld the validity of the US interdiction policy of Haitian boat people has set a most unfortunate precedent. The Court held that the US' obligations under the 1967 Protocol to the Refugee Convention were not engaged as long as an asylum-seeker remained on the High Seas and had not entered the territory of the State – even when it was the US authorities themselves who had blocked access to the State's territory and jurisdiction. Interdiction of this sort poses a threat to a fundamental premise of international refugee protection – that no-one shall be expelled or returned (*refouler*) to a place where his/her life or freedom is at risk. (*Supra*, footnote 2.)
514. *Supra*, footnote 113, at page 337.
515. *Ibid.*

take in the evidence, make the record, question the asylum seeker and then make the critical initial decision. The immigration judge's decisions are difficult for the Federal Court to overturn. In two-thirds of deportation cases, the deportee is unrepresented.[516]

The immigration judge is responsible for applying the law fairly and most take the title of "judge" literally – more literally than the statutory scheme under which they are appointed may have envisioned. None is protected by the constitutional guarantees necessary to ensure independent decision-making. Immigration judges are in fact administrative decision-makers employed by an administrative agency without the benefit of life tenure or fixed terms of office.[517]

The BIA is the highest administrative body for interpreting and applying immigration laws. The judges in the BIA have far more influence on the outcome of refugee cases than do immigration judges. Its basic purpose is to correct errors made by immigration judges and to resolve complex legal questions concerning the administration of the immigration and refugee laws. The BIA is essentially the court of last resort for many asylum seekers. Under the *Chevron*[518] doctrine the Federal Courts must give special deference to the legal conclusions of an administrative agency's interpretation of statute, even if the Federal Court would have decided the question differently.

The Attorney-General has stated:

> The Board acts on the Attorney-General's behalf rather than as an independent body. The relationship between the Board and the Attorney-General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court.[519]

2. *Changes to the Processing Of Refugee Applications*

According to Justice Reinhardt:

> The events of September 11th have necessarily affected the judgements that many federal judges make. We can only hope that to the extent

516. *Ibid.*
517. The organization the represents immigration judges in the US recently sought to make its members independent of the Department of Justice by placing its members in a separate department as are all other Administrative Law Judges. This has not been implemented to date.
518. *Chevron US Inc.* v. *National Resources*, 1984 (United States Supreme Court) the bench recognised an evolving situation in administrative law by laying down some rules of judicial deference. If the enabling statute was ambiguous then the administration had a right to form a legally valid opinion on it as long as that view was rational.
519. *Supra*, footnote 113.

> possible all of us will try, at all times—in times of crisis as well as in ordinary times—to bear in mind the fundamental principles of our *Constitution* and the necessity of maintaining the integrity of our *Bill of Rights*.[520]

Molly Groom has reported that refugee admissions were delayed temporarily following 9/11. In addition, the Attorney-General adopted an extremely narrow interpretation of the *Convention Against Torture* thereby undermining the claims of many asylum seekers from Haiti and elsewhere.[521]

Ms. Groom has indicated that the US has, since 9/11, implemented procedures that permit greater certainty in identity verification of those who apply for refugee status offshore. In-person interviews are conducted of all refugee claimants abroad to determine whether the applicant meets the definition of Convention refugee and is admissible to the US. Fingerprints and name checks of applicants 14 years and older are captured as part of a security screening process. Department of State (DOS) consular officers conduct security name checks.

The Consular Lookout Automated Support System (CLASS) contains entries from FBI, CIA and other intelligence agencies, Drug Enforcement Administration (DEA), DOS, DHS and consular officers who use these resources to confirm identity of a refugee claimant. Males aged 16 to 50 of "certain nationalities" require a higher-level clearance Security Advisory Opinion for processing. All refugees admitted to the US are fingerprinted at the Port of Entry (POE).

In an attempt to enhance the scrutiny of refugee relationships, the Refugee Access Verification Unit (RAVU) was created. RAVU is used in family reunification cases to combat fraud. There has been a rise in refugee admissions even with the implementation of stricter verification processes. However, as of April 1, 2005 background checks must be cleared before a decision on asylum may be made. Concern has been expressed in immigration circles that this will hold up decisions of many applicants, including those in detention.

Ms. Groom advised that it is important to distinguish between the US refugee program (those processed from outside of the US) and their domestic asylum program (those processed from within the US). The distinction could cause confusion in analyzing their statistics. The number of domestic asylum applications has dropped while the number of overseas refugees has doubled this past year from the previous two years. This has brought the refugee numbers back to pre-9/11 numbers.

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520. *Ibid.*
521. See footnote 117.

It should also be noted that their asylum program considers applications for certain relief for Nicaraguans under *NACARA* (*Nicaraguan Adjustment and Central American Relief Act*).

3. Detention of Asylum Seekers

It is clear that detention of asylum seekers should ideally be the exception, rather than the norm. Under the US *Immigration and Nationality Act*, which contains legislation implementing the Refugee Convention in the US, Congress has authorized the detention of asylum seekers under far broader circumstances, and in fact has given immense discretionary power to immigration officials to detain such individuals.[522] The DHS now has responsibility for determining detention of asylum seekers and is now responsible for prosecuting cases brought before an immigration judge. Over the course of several months following the attacks of 9/11 the Federal Bureau of Investigation (FBI) arrested and detained approximately 1,000 non-citizen men of Middle Eastern, South Asian, and North African origin, mostly on immigration charges.[523]

The Justice Department adopted a policy under which none of these men could be released from detention until the FBI had determined that they were not involved in any way with the terrorism investigation. Because they were only charged with routine immigration violations, they were generally entitled to be released on bond (absent evidence they presented a danger to the community or posed a risk of flight). Nonetheless, they were incarcerated until "cleared" of any involvement in terrorist acts.

According to Judge Reinhardt, "although in many cases the immigration judges had no evidence to justify holding the individuals ... they complied with the Justice Department's directive."[524] In some cases the judges apparently stated they were denying release because they had been instructed by their superiors to hold the men in question until the FBI had cleared them.

Unaccompanied minors are not detained with adults in immigration detention centres. They are whenever possible placed in foster care or in an immigration group home. If they are older minors nearing eighteen years of age, they may find themselves detained in an immigration detention centre, particularly if their age has not been verified. In certain parts of the country, there are insufficient numbers

522. *Supra*, footnote 113, page 335.
523. According to the ACLU, 8,000 Arab and South Asian immigrants were interrogated because of their religion and ethnic background not because of any wrongdoing.
524. *Supra*, footnote 113, page 332.

to warrant separate immigration detention facilities and the populations can therefore be mixed in with the criminal population. Asylum seekers who are detained are theoretically meant to be separated from the general criminal prison population, however according to a US official, there are times when this has not happened.

Statistics On Visa Applications For Refugee Status

In fiscal year (FY) 2004 the US admitted 52,868 refugees, exceeding the goal of 50,000 and the 28,422 admitted in FY 2003. In FY 2005 it is predicted that the US will again exceed its goal of admitting 50,000 refugees.

In FY 2004 the US conducted refugee interviews in 50 countries around the world and deployed nearly 140 temporary duty officers overseas to supplement their refugee adjudicators permanently stationed abroad. By the end of August 2004, the DHS officers had conducted refugee status interviews of nearly 70,000 individuals from more than 80 nations. Their cases broke down as follows: Africa (24,373); East Asia (3,590); Europe and Central Asia (8,452); Latin America and Caribbean (2,686); Near East and South Asia (2,477) for a total (as of August 31, 2004) of 41,578.[525]

The US numbers appear to demonstrate an increase in applications, which is contrary to information obtained from virtually all other contributors to this paper. It was explained by a US official that efforts to secure the southern border with Mexico have not been completely successful and this may account in part, for the fact that applications have increased or remained stable.

Legislative Amendments Post 9/11

The most significant legislative amendment is the introduction in October 26, 2001 of the *USA Patriot Act*.[526] The *USA Patriot Act* was passed nearly unanimously by the Senate (98-1), and the House (357–66), with the support of members from across the political spectrum. Impacted are many entrenched rights including: First (religion, speech, assembly, press); Fourth (search and seizure); Fifth (life, liberty, property, due process); Sixth (counsel, speedy trial, impartial jury, informed of facts and confront witnesses); Eighth (excessive bail, cruel and unusual treatment or punishment); and Fourteenth (due process

525. *"Summary of Refugee Admissions, Fiscal Year 2004"* US Department of State Bureau of Population, Refugees, and Migration: August 31, 2004.

526. H.R. 3162 signed by President Bush on October 26, 2001. Much has been written about the *Patriot Act*. For a thorough analysis see: < http://www.fas.org/irp/crs/RS21203.pdf >.

to all persons in the US and equal protection before the law) Amendment rights.

The *Act* expands the definition of "terrorism" to include domestic acts, which could subject a US citizen and non-US citizens, including asylum seekers, to surveillance, wiretapping, harassment and racial profiling. It expands law enforcement powers to secret searches, wide powers of telephone and Internet surveillance, access to highly personal medical and banking records, and jailing of non-citizens on mere suspicion.

According to the American Civil Liberties Union (ACLU):

Just 45 days after the September 11 attacks, with virtually no debate, Congress passed the *USA Patriot Act*. Many parts of this sweeping legislation take away checks on law enforcement and threaten the very rights and freedoms that we are struggling to protect. For example, without a warrant and without probable cause, the FBI now has the power to access your most private medical records, your library records, and your student records... and can prevent anyone from telling you it was done.

The Department of Justice is expected to introduce a sequel, dubbed *Patriot II* that would further erode key freedoms and liberties of every American.[527]

In 2004, the US Congress passed the *Specter Amendment*,[528] which broadened the categories of refugees eligible for special consideration as religious minorities. This program was formerly known as the "Lautenberg Program" and was put in place to provide protection to religious minorities in the former Soviet Union. Asylum seekers who establish membership in one of the enumerated grounds found in the *Geneva Convention* are put to a lower threshold degree of evidence than is applied to refugee adjudications generally. This year the

527. From the American Civil Liberties Union (ACLU) website: <http://www.aclu.org/SafeandFree/SafeandFree>.

528. The US Congress recently passed the *Specter Amendment* which adds "members of a religious minority in Iran" to the list of categories of aliens who may benefit from the reduced evidentiary standards for demonstrating a well-founded fear of persecution in refugee processing. It was established pursuant to the "*Lautenberg Amendment*" contained in Section 213 of the *Foreign Operations, Export Financing, and related Programs Appropriations Act*, 1990 (P.L. 101-167). That legislation requires the Secretary of Homeland Security, after consultation with the Secretary of State, to identify categories of Iranian religious minorities whose refugee claims will be adjudicated in accordance with a reduced evidentiary burden. The category designation is now under consideration at DHS.

program has been extended to included religious minorities from Iran.[529]

The US has also begun hiring a corps of "refugee officers" in FY 2005 who will adjudicate and process refugee applications. The corps is designed to bring new resources and continuity in the processing of refugee claims overseas and increases program responsiveness and flexibility of the United States' refugee program.[530]

Conclusions

Ms. Groom submits that it would appear that despite the challenges presented by the attacks on September 11, 2001, the US has implemented a series of laws and policy initiatives to ensure that a balance is struck between the admission of refugees and the careful assessment of any possible security risks in its refugee-processing program.

Judge Reinhardt conceded that it would be wrong to leave a bleak picture or a false impression of the asylum process, post 9/11. "Aliens who succeed in coming within our borders, whether they enter illegally or overstay their visas, are afforded a substantial measure, though not all, of the legal rights granted to Americans by our *Constitution*. Our courts retain the fundamental obligation to ensure that these constitutional protections and procedures are met and that due process rights are complied with."[531]

He does concede that the Federal Courts are divided on how to deal with the "excesses of the Executive Branch" in that while some have reined them in, others have found the exceptional steps taken by the Attorney-General to be warranted by "exceptional circumstances" in the US. Judges both trial and appellate in various parts of the US have issued orders both prohibiting and permitting secret detentions, secret trials and secret deportations, which would suggest the presumption that each case will turn on its own particular

529. USC 1157 (b)(1)(C) adds Iranian religious minorities as a protected category. The law defines this category as: "aliens who are or were nationals and residents of the Islamic Republic or Iran who, as members of a religious minority in Iran, share common characteristics that identify them as targets of persecution in that state on account of race, religion, nationality, membership in a particular social group, or political opinion."

530. *"Proposed Refugee Admissions for Fiscal Year 2005"*, Report to the Congress. Submitted on Behalf of the President of the United States to the Committees on the Judiciary, United States Senate and United States House of Representatives.

531. *Supra*, footnote 113, at page 337.

circumstances, is being maintained. The courts have also disagreed on the extent of the right to counsel to be afforded individuals the government has sought to hold incommunicado. These decisions have made clear that generally "the *Constitution* applies in times of crisis as well as in others."[532]

Some questions remain such as which nationalities require "higher level clearance" for security purposes; whether there have been significant increases to detention including of children; the status of the detainees at Guantanamo Bay, the acceptance rates for asylum claims now versus before 9/11; and whether those suspected of being terrorists have been barred from the asylum process. Ms. Groom is employed by the Refugee and Asylum Law Division of the DHS, which does not deal with enforcement.[533]

LESSONS LEARNED – THE LAST WORD

In her annual report, Irene Khan, Secretary General of Amnesty International had this to say about human rights in the world today.

"On 19 August 2003 the UN High Commissioner for Human Rights, Sergio Vieira de Mello, was killed in a bomb attack on the UN building in Baghdad, almost 10 years after the Office of the High Commissioner was established to uphold and promote human rights.

As one of the most prominent international human rights defenders lay dying in the rubble, the world had good cause to ponder how the legitimacy and credibility of the UN could have been eroded to such a fatal degree. Bypassed in the Iraq war and marginalized in its aftermath, discredited by its perceived vulnerability to pressure from powerful states, the UN seemed virtually paralysed in its efforts to hold states to account for their adherence to international law and their performance on human rights.

We must resist the backlash against human rights created by the single-minded pursuit of a global security doctrine that has deeply divided the world. There is no path to sustainable security except through respect for human rights. The global security agenda promulgated by the US Administration is bankrupt of vision and bereft of principle. Sacrificing human rights in the name of security at home, turning a blind eye to abuses abroad, and using pre-emptive military force where and when it chooses have neither increased security nor ensured liberty.

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532. *Ibid,* at page 338.
533. Immigration and Customs Enforcement (ICE) has authority over this area and the authors were not able to get input from the ICE department to meet their deadline.

Human rights are about changing the world for the better. Using the powerful message of human rights, Amnesty International has launched a joint campaign with Oxfam and the International Action Network on Small Arms (IANSA) to achieve global control of small arms. To those who say this will not work, we point to the coalitions that led to the banning of landmines and the creation of the International Criminal Court. Combining public pressure and government support, we are determined to bring about change.[534]

Ms. Khan is challenging the international community not to fall into the trap of ignoring human rights in their effort to protect national and international security. The two must not be mutually exclusive. As Blanche Dubois said in the infamous, oft quoted line from *A Streetcar Named Desire,* humans (particularly refugees) are reliant upon "the kindness of strangers". If their numbers are dwindling in the Western world as some statistics above might suggest, we need to be ever vigilant to ensure we, as signatories to the Geneva Convention, are mindful of our international obligation to protect *bona fide* refugees from persecution or serious harm. We share that burden to the extent that we are able.

A parallel and worrying development has been the growth in a number of countries of restrictive asylum systems, marked by contestable interpretations of the refugee definition, barriers to accessing asylum procedures and substitution of discretionary forms of protection for protection based on universal principles. Interdiction or interception of person, including refugees, trying to enter a territory is a growing practice. While every state has the sovereign responsibility to protect its own population as well as its borders from abuse, interdiction policies, which preclude access to effective protection systems for self-serving reasons and in the absence of the adequate judicial safeguards, cannot be regarded as compatible with international obligations.

The UN has repeatedly cautioned that asylum seekers have been adversely impacted by the world's reaction to the events of 9/11. For the third year in a row, asylum seekers in the industrialized world have reached the lowest level in sixteen years, a development that should undermine public campaigns that seek tighter controls on immigration.[535]

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534. Amnesty International's Secretary General, Irene Khan *"Why Human Rights Matter"* Report for 2004. Her report can be found at <http://www.amnesty.org/>.

535. *"Asylum seekers in industrialized world reach lowest level in 16 years"* - UNHCR report, March 1, 2005. The report (including these statistics) can be found at: <http://www.un.org/apps/news/story>.

"This really should reduce the pressure by politicians, media and the public to make asylum systems more and more restrictive to the point where many genuine refugees have enormous difficulty getting access to Europe, or getting recognized once they are there," said Raymond Hall, Director of the Europe Bureau of the UN High Commissioner for Refugees (UNHCR). In most industrialized countries it should simply not be possible to claim there is a huge asylum crisis any more."

The numbers bear repeating here. At 368,000, the total number of asylum seekers arriving last year in the 38 industrialized countries for which comparable historical statistics are available was the lowest since 1988. In the six non-European countries, the total was the lowest since 1986. The numbers arriving in Europe are also back down to the levels of the late 1980s, although still higher than they were for a couple of years in the mid-1990s.

Asylum claims in industrialized countries last year fell by 22 per cent, reflecting a similarly steep decline in 2003. In the European Union (EU), the number fell by 19 per cent (in the UK alone by 67 percent), in North America by 26 per cent (in Canada by 42 per cent) and in Australia and New Zealand by 28 per cent. France was the top receiving country in 2004, with an estimated 61,600 asylum seekers. The United States, which was the top receiving country in 2003, came second with 52,400. Britain fell to third with 40,200, and Germany, the top asylum country in 13 of the past 20 years, was fourth with 35,600. Canada came in fifth with 25,500.

The largest group of asylum seekers was from the Russian Federation with 30,100, the majority of them Chechens, followed by Serbia and Montenegro (22,300), many of them from Kosovo; China (19,700); Turkey (16,200) and India (11,900). The 10 leading asylum seeker nationalities all recorded a significant drop. Perhaps most striking, the number of Afghans, the top group in 2001 with more than 50,000, has fallen by 83 percent in the past three years. They now stand in 13th place with 8,800 asylum seekers in 2004.

The reduction in numbers of asylum claims internationally cannot be ignored. The reasons why are harder to pin down. However, if countries could considering devoting more resources to improving the quality of their refugee determination system in this time of low numbers, their stated commitment to protecting refugees might be realised. In particular, the EU might consider working towards a system of greater responsibility and burden sharing. In that way, if and when there is a similar crisis they would be in a much better position to help the international flow of refugees.

What is apparent after a careful analysis of the reports submitted, is that more refugee claimants are being detained in industrial

countries and fewer are able to leave their country of persecution. In addition, the resources of industrialized nations are not equitably distributed in relation to the global demand by refugees seeking protection. It may be time for the International Association of Refugee Law Judges to pass a resolution to meet as a group in furtherance of this singular issue, at its next World Conference, when one can only hope, the world will be a better place for refugees.

APPENDIX 1 – CANADA
Refugee Status Determinations, 1989 to December 2003 (Calendar Year) Déterminations du statut de réfugié, 1989 à décembre 2003 (année civile)

		Referred/ Déférées	*Accepted/ Acceptées*	*Rejected/ Rejetées*	*Abandoned/ Désistements*	*Withdrawn/ Retraits*	*Finalized/ Réglées*	*% Accepted / % Acceptées**
In February 1993, refugee status determination was changed from a two-hearing to a single-hearing process. Prior to that, an initial hearing determined whether the claim had any credible basis and, if so, a second hearing determined refugee status. The statistics for 1989 to 1992 reflect only the second hearing.	**1989**							
	Montréal	3927	1615	353	14	23	2005	81%
	Ottawa/Atl	508	174	16	0	6	196	89%
	Toronto	6408	2481	302	21	45	2849	87%
	Calgary	361	210	22	1	9	242	87%
	Vancouver	888	360	66	9	5	440	82%
	National	**12092**	**4840**	**759**	**45**	**88**	**5732**	**84%**
	1990							
	Montréal	6034	3770	1093	60	41	4964	76%
	Ottawa/Atl	1049	493	184	8	18	703	70%
	Toronto	11952	5313	1064	83	102	6562	81%
	Calgary	493	316	34	3	15	368	86%
	Vancouver	1518	537	373	39	25	974	55%
	National	**21046**	**10429**	**2748**	**193**	**201**	**13571**	**77%**
En février 1993, le processus de détermination du statut de réfugié qui comportait alors	**1991**							
	Montréal	10791	5710	2717	208	353	8988	64%
	Ottawa/Atl	1984	1325	307	16	27	1675	79%

deux étapes a été modifié pour n'en compter plus qu'une. Auparavant, un tribunal examinait à l'instruction préliminaire si la revendication avait un minimum de fondement. Le cas échéant, elle était déférée à la deuxième étape du processus de détermination du statut de réfugié, soit l'instruction sur le fond de la revendication. Les statistiques de 1989 à 1992 ne reflètent que cette deuxième étape.

Toronto	14082	11682	3686	378	267	16013	73%
Calgary	492	390	172	9	23	594	66%
Vancouver	1659	806	725	54	59	1644	49%
National	**29008**	**19913**	**7607**	**665**	**729**	**28914**	**69%**
1992							
Montréal	9984	5589	3472	292	293	9646	58%
Ottawa/Atl	1962	1306	318	39	86	1749	75%
Toronto	17335	9958	5100	423	603	16084	62%
Calgary	610	389	156	6	9	560	69%
Vancouver	1454	368	944	52	63	1427	26%
National	**31345**	**17610**	**9990**	**812**	**1054**	**29466**	**60%**
1993							
Montréal	10064	4549	3671	658	427	9305	49%
Ottawa/Atl	2303	1013	484	74	123	1694	60%
Toronto	20052	7942	6536	1384	1852	17714	45%
Calgary	789	360	200	23	28	611	59%
Vancouver	2494	339	774	171	180	1464	23%
National	**35702**	**14203**	**11665**	**2310**	**2610**	**30788**	**46%**
1994							
Montréal	8161	4857	1555	549	272	7233	67%
Ottawa/Atl	1155	1583	248	158	151	2140	74%
Toronto	11081	7785	4157	1049	941	13932	56%
Calgary	548	375	119	29	50	573	65%
Vancouver	1430	698	551	242	253	1744	40%
National	**22375**	**15298**	**6630**	**2027**	**1667**	**25622**	**60%**

	Referred/ Déférées	*Accepted/ Acceptées*	*Rejected/ Rejetées*	*Abandoned/ Désistements*	*Withdrawn/ Retraits*	*Finalized/ Réglées*	*% Accepted / % Acceptées**
1995							
Montréal	12514	3481	1499	879	304	6163	56%
Ottawa/Atl	1121	623	128	66	47	864	72%
Toronto	10712	4605	2173	887	730	8395	55%
Calgary	576	328	60	26	22	436	75%
Vancouver	1484	667	191	284	143	1285	52%
National	**26407**	**9704**	**4051**	**2142**	**1246**	**17143**	**57%**
1996							
Montréal	12042	3601	3362	1741	937	9641	37%
Ottawa/Atl	1026	611	190	113	73	987	62%
Toronto	10123	4312	3116	1217	661	9306	46%
Calgary	804	318	89	24	29	460	69%
Vancouver	2103	777	339	316	165	1597	49%
National	**26098**	**9619**	**7096**	**3411**	**1865**	**21991**	**44%**
1997							
Montréal	9382	3903	4291	1673	1121	10988	36%
Ottawa/Atl	935	638	334	95	38	1105	58%
Toronto	9391	4727	3850	1052	893	10522	45%
Calgary	754	253	182	26	34	495	51%
Vancouver	2255	517	391	519	300	1727	30%
National	**22717**	**10038**	**9048**	**3365**	**2386**	**24837**	**40%**
1998							
Montréal	8861	5260	5688	1951	912	13811	38%

Ottawa/Atl	1317	835	348	98	43	1324	63%
Toronto	9996	5618	3232	1078	784	10712	52%
Calgary	813	305	265	39	54	663	46%
Vancouver	2912	911	721	913	340	2885	32%
National	**23899**	**12929**	**10254**	**4079**	**2133**	**29395**	**44%**
1999							
Montréal	10546	4888	4620	1488	617	11613	42%
Ottawa/Atl	1362	795	247	68	55	1165	68%
Toronto	13346	5873	2966	1061	938	10838	54%
Calgary	852	470	367	64	67	968	49%
Vancouver	3343	958	1189	924	326	3397	28%
National	**29449**	**12984**	**9389**	**3605**	**2003**	**27981**	**46%**
2000							
Montréal	10692	4700	3897	879	562	10038	47%
Ottawa/Atl	1669	760	257	150	61	1228	62%
Toronto	18276	7191	4080	982	1050	13303	54%
Calgary	907	486	359	59	51	955	51%
Vancouver	2751	865	1613	605	311	3394	25%
National	**34295**	**14002**	**10206**	**2675**	**2035**	**28918**	**48%**
2001							
Montréal	12844	4657	3236	832	667	9392	50%
Ottawa/Atl	1736	656	315	87	85	1143	57%
Toronto	25010	6501	4761	1098	1794	14154	46%
Calgary	1027	528	333	61	45	967	55%
Vancouver	3229	1043	937	576	223	2779	38%
National	**43846**	**13385**	**9582**	**2654**	**2814**	**28435**	**47%**

	Referred/ Déférées	*Accepted/ Acceptées*	*Rejected/ Rejetées*	*Abandoned/ Désistements*	*Withdrawn/ Retraits*	*Finalized/ Réglées*	*% Accepted / % Acceptées**
2002							
Montréal	11165	4193	4250	573	695	9711	43%
Ottawa/Atl	1155	576	409	108	94	1187	49%
Toronto	23452	9208	5012	1930	2149	18299	50%
Calgary	1117	508	471	42	38	1059	48%
Vancouver	2421	734	980	430	281	2425	30%
National	**39310**	**15219**	**11122**	**3083**	**3257**	**32681**	**47%**
2003							
Montréal	7880	4925	5374	649	784	11732	42%
Ottawa/Atl	748	765	548	119	99	1531	50%
Toronto	19732	10953	10319	2754	1727	25753	43%
Calgary	1059	392	647	40	56	1135	35%
Vancouver	2518	647	1106	339	234	2326	28%
National	**31937**	**17682**	**17994**	**3901**	**2900**	**42477**	**42%**
Total since / Total depuis 1989	**429526**	**197855**	**128141**	**34967**	**26988**	**387951**	**51%**

APPENDIX 2
New Zealand

Month Tendered	*Principle Applicant/Application*
2000-01	49
2000-02	99
2000-03	128
2000-04	86
2000-05	185
2000-06	171
2000-07	195
2000-08	164
2000-09	118
2000-10	131
2000-11	93
2000-12	103
2001-01	142
2001-02	126
2001-03	165
2001-04	165
2001-05	159
2001-06	142
2001-07	113
2001-08	93
2001-09	116
2001-10	272
2001-11	172
2001-12	126
2002-01	98
2002-02	54
2002-03	97
2002-04	106
2002-05	95
2002-06	99
2002-07	83
2002-08	76
2002-09	77
2002-10	78
2002-11	101
2002-12	45
2003-01	91
2003-02	97
2003-03	78
2003-04	83
2003-05	62
2003-06	82
2003-07	55
2003-08	50

Month Tendered	*Principle Applicant/Application*
2003-09	79
2003-10	68
2003-11	46
2003-12	53
2004-01	51
2004-02	83
2004-03	70
2004-04	62
2004-05	41
2004-06	56
2004-07	32
2004-08	47
2004-09	48
2004-10	48
2004-11	27
2004-12	19

APPENDIX 3
New Zealand

Month	*Spontaneous Claimants*	*Detained*	*Granted Permit*
Jul-01	31	0	31
Aug-01	34	0	34
Sep-01	25	2	23
Oct-01	20	18	2
Nov-01	11	11	0
Dec-01	29	29	0
Jan-02	20	18	2
Feb-02	16	15	1
Mar-02	14	14	0
Apr-02	23	19	4
May-02	17	17	0
Jun-02	31	23	8
Jul-02	13	11	2
Aug-02	28	20	8
Sep-02	22	17	5
Oct-02	11	7	4
Nov-02	23	13	10
Dec-02	36	14	22
Jan-03	30	18	12
Feb-03	25	10	15
Mar-03	31	15	16
Apr-03	24	11	13
May-03	17	7	10
Jun-03	3	3	0
Jul-03	11	11	0
Aug-03	18	16	2
Sep-03	11	8	3
Oct-03	10	10	0
Nov-03	7	6	1
Dec-03	20	12	8
Jan-04	7	4	3
Feb-04	13	7	6
Mar-04	23	10	13
Apr-04	13	9	4
May-04	4	4	0
Jun-04	8	5	3
Jul-04	5	5	0
Aug-04	12	5	7
Sep-04	7	7	0
Oct-04	8	6	2
Nov-04	11	7	4
Dec-04	0		
YTD	**43**	**30**	**13**

APPENDIX 4
New Zealand

Total	*Jul-01*	*Aug-01*	*Sep-01*	*Oct-01*	*Nov-01*	*Dec-01*
Female	4	7	4	6	1	5
Minor	1	3	2	2	0	4
Detained						
Female				6	1	5
Minor				2	0	4

Total	*Jan-02*	*Feb-02*	*Mar-02*	*Apr-02*	*May-02*	*Jun-02*	*Jul-02*	*Aug-02*	*Sep-02*	*Oct-02*	*Nov-02*	*Dec-02*
Female	5	1	4	4	4	5	1	6	3	1	7	10
Minor	2	2	0	2	2	9	2	3	2	2	2	2
Detained												
Female	4	1	4	3	4	2	1	3	2	0	1	0
Minor	2	2	0	2	2	7	0	0	0	0	0	0

Total	*Jan-03*	*Feb-03*	*Mar-03*	*Apr-03*	*May-03*	*Jun-03*	*Jul-03*	*Aug-03*	*Sep-03*	*Oct-03*	*Nov-03*	*Dec-03*
Female	5	7	6	4	4	1	2	3	2	1	0	6
Minor	2	4	1	3	1	0	0	1	2	0	0	2
Detained												
Female	0	0	1	0	1	1	2	2	1	1	0	2
Minor	0	0	0	0	0	0	0	1	0	0	0	1

Total	*Jan-04*	*Feb-04*	*Mar-04*	*Apr-04*	*May-04*	*Jun-04*	*Jul-04*	*Aug-04*	*Sep-04*	*Oct-04*	*Nov-04*	*Dec-04*
Female	1	2	4	3	0	2	2	1	0	1	1	0
Minor	2	2	3	1	0	1	0	5	0	1	2	0
Detained												
Female	0	0	0	1	0	1	2	0	0	0	0	0
Minor	0	0	0	0	0	0	0	0	0	0	0	0

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REPORT OF THE IPA/IRA/IFA WORKING PARTY
All over the place: four years after the Experts' Roundtable *

A. Introduction

In October 2002 at the IARLJ Conference in Wellington, New Zealand, Hugo Storey presented a comprehensive and insightful paper[536] addressing the state of IPA/IRA/IFA[537] analysis, particularly focusing on the Summary Conclusions of the San Remo Experts' Roundtable on IFA which took place in September 2001. In his paper, Dr Storey also discussed other issues relevant to the consideration and application of an IFA analysis, including issues arising from the Michigan Guidelines on the Internal Protection Alternative (the Michigan Guidelines), the appropriate human rights framework for the analysis of IFA, the concept of protection and the burden and standard of proof.

So, where are we in terms of IFA analysis four years on from the Experts' Roundtable?

This paper considers developments in relation to the IFA since the last IARLJ conference, focusing in particular on UNHCR's Guidelines on Internal Flight (UNHCR IFA Guidelines)[538], Article 8 of the EU Council

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* Senior Member, Refugee Review Tribunal, Australia. Rapporteur, IPA/IRA/IFA Working Party. The views expressed in this paper are my own and do not necessarily represent those of the RRT or those of IARLJ. I am indebted to James Simeon, John Guendelsberger (Senior Counsel to the Chairman to the Board of Immigration Appeals in the United States), Hugo Storey and Daimhin Warner (New Zealand Refugee Status Appeals Authority) for their assistance.

536. H Storey, '"From Nowhere to Somewhere": An Evaluation of the UNHCR 2nd Track Global Consultations on International Protection: San Remo 8-10 September 2001 Experts' Roundtable on the IPA/IRA/IFA Alternative. IARLJ 5th Conference Wellington New Zealand 2002. (Hugo Storey's 2002 Paper).

537. In the rest of this paper I have used the term IFA ('Internal Flight Alternative'), largely because this is the term used by Hugo Storey (who in his 2002 paper stated that Internal Flight Alternative is the best-known name for the test), even though Internal Protection or Relocation is arguably the preferable term.

538. UNHCR "Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the Convention and/or 1967 Protocol relating to the Status of Refugees". HCR/GIP/03/04 23 July 2003.

Directive 2004/83/EC of 24 April 2004[539] and more recent cases involving consideration of IFA in various jurisdictions.[540]

B. UNHCR IFA Guidelines

Background

In the preamble to its IFA Guidelines, UNHCR notes that the Guidelines supplement the UNHCR Handbook and supercede UNHCR's 1999 Position Paper 'Relocating Internally as a Reasonable Alternative to Seeking Asylum – (The So-Called "Internal Flight Alternative" or "Relocation Principle"'). It also notes that the Guidelines result, *inter alia*, from the San Remo Experts' Roundtable.[541]

The Introduction to the Guidelines indicates that they have been designed "to offer decision-makers a more structured approach to analysis" and states that "[t]he question of whether the claimant has an internal flight or relocation alternative may...arise as part of the refugee status determination process".

According to the IFA Guidelines:

> The concept of IFA...refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life.

The Guidelines propose what are referred to as "two main sets of analyses" to determine whether or not there is a "relocation possibility", once a well-founded fear of persecution for a Convention reason has been established in a localised area of the country of origin.

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539. Official Journal of the European Union, 30.9.2004, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
540. It should be noted that IFA analysis is not relevant in cases arising under Article 1(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969*, which defines a refugee as "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order *in either part or the whole of his country of origin or nationality*, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality". [Emphasis added].
541. A reading of the Summary Conclusions together with the IFA Guidelines indicates that the Guidelines incorporate and expand upon the points made in the Summary Conclusions.

Framework for analysis

The proposed analyses are summarised as follows:

I. The Relevance Analysis

(*a*) *Is the area of relocation practically, safely, and legally accessible to the individual?* If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.

(*b*) *Is the agent of persecution the State?* National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.

(*c*) *Is the agent of persecution a non-State agent?* Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

(*d*) *Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?* This would include the original or any new form of persecution or other serious harm in the area of relocation.

II. The Reasonableness Analysis

(*a*) *Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?* If not, it would not be reasonable to expect the person to move there.

Scope of the assessment

The IFA Guidelines state that the determination of whether an IFA exists in a particular case requires an assessment to be done over time, which takes account not only of the circumstances that gave rise to the feared persecution and prompted flight from the original area, but also considers whether the proposed area provides a meaningful alternative in the future.

The relevance analysis

In relation to the relevance analysis, the IFA Guidelines make the following points:

— An IFA does not exist if barriers to reaching it are not "reasonably surmountable". This means, for example, that claimants should not be required to encounter physical dangers en route to the proposed IFA area.

- An IFA does not exist if a claimant would have to pass through the original area of persecution in order to get there.
- A claimant must have the legal right to travel to, enter and remain in the proposed IFA area.
- An IFA would normally be precluded if the feared persecution emanates from or is condoned by State agents, unless there are exceptional circumstances clearly establishing that the risk of persecution stems from a State authority whose power is clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country.
- If a claimant fears persecution from a non-State agent, the main inquiries should include an assessment of the motivation of the persecutor, the ability of the persecutor to pursue the claimant into the proposed IFA area and the State protection available to the claimant in the proposed IFA area.
- Refugee status should not be denied on the basis that a particular area is under the control of an international organisation on the assumption that an individual could be protected by the organisation.
- It is also inappropriate to find that a claimant would be protected by a local clan or a militia which is not recognised as the local authority and/or where that group's control over the area is only temporary.
- There must be reason to believe that the persecution is likely to remain localised and outside the proposed area of IFA.
- Claimants are not required to suppress their political or religious views or other protected characteristics to avoid persecution in the proposed area of IFA.
- A claimant cannot be expected to relocate to an area where he or she could face serious harm, irrespective of whether or not there is a link to one of the Convention grounds.
- There is no IFA if conditions in the proposed area are such that the claimant may be compelled to return to the original area of persecution or to another area where persecution or serious harm is possible.

Reasonableness analysis

In relation to the reasonableness analysis, the Guidelines make the following points:

- The "reasonableness test" is a "useful legal tool", which "has proved sufficiently flexible to address the issue of whether or not, in all the circumstances, the particular claimant could reasonably be expected to move to the proposed area to overcome his or her well-founded fear of being persecuted".

— The reasonableness test is not based on what a hypothetical reasonable person should be expected to do. The question is what is reasonable, both subjectively and objectively, given the individual claimant and the conditions in the proposed internal flight or relocation alternative.
— In determining whether the claimant could live a relatively normal life without facing undue hardship, it is necessary to consider the claimant's personal circumstances, the existence of past persecution, safety and security, respect for human rights and the possibility of economic survival.

Personal circumstances

The Guidelines indicate that a broad range of factors should be taken into account in considering a claimant's personal circumstances, stating that:

> The personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area. Of relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects. In particular, lack of ethnic or other cultural ties may result in isolation of the individual and even discrimination in communities where close ties of this kind are a dominant feature of daily life. Factors which may not on their own preclude relocation may do so when their cumulative effect is taken into account. Depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.[542]

Respect for Human Rights

In relation to this aspect of the reasonableness analysis, the Guidelines state:

> Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in the proposed area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an

542. UNHCR IFA Guidelines, supra note 3, paragraph 25

assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.

Burden of proof

The Guidelines indicate that the burden of proof in relation to IFA must be, consistently with paragraph 196 of the *Handbook*, that the burden of proving an allegation rests on the one who asserts it. According to the Guidelines, the decision-maker bears the onus of proof of establishing that an analysis of IFA is relevant to the particular case, must identify a proposed area of IFA, must provide evidence that it is a reasonable alternative for the claimant, and must given the claimant notice that IFA is under consideration.

The Guidelines also indicate that IFA is not appropriate in accelerated procedures or in deciding admissibility to a full status determination process.

Positive aspects of the IFA Guidelines

There are a number of aspects of the IFA Guidelines that represent a clear advance on UNHCR's previous position on the issue, as articulated in its 1999 Position Paper. In relation to this, the IFA Guidelines:

— Endorse a structured approach, which requires an analysis of the individual claimant's circumstances and the conditions in the proposed IFA location in his or her country of origin.
— Indicate that while the circumstances which gave rise to the feared persecution and prompted flight from the original area are relevant, a forward-looking assessment is required.
— Identify safe, practical and legal access to the proposed area of IFA as a requirement of the analysis.
— Address the importance of a claimant not being expected or required to suppress their religious or political views or other protected characteristics in the IFA.
— Identify that an IFA will not exist if conditions are such that a claimant will be forced to return to the original area of persecution or to another area in which persecution is possible.

Drawbacks of the IFA Guidelines

Given that the IFA Guidelines have incorporated the Summary Conclusions to the extent that they have, it is not surprising that the criticisms that can now be made of the Guidelines are essentially those

that Hugo Storey made of the Summary Conclusions in his 2002 paper.[543]

In relation to this, Dr Storey articulated a number of major criticisms of the Summary Conclusions. Firstly, he observed that they failed to reflect the strong consensus (including at Experts' Roundtable) that there are serious drawbacks to the 'IFA' label, as it does not make clear that IFA is a prospective and not an historic test.

The IFA Guidelines refer to both "internal flight alternative" and "relocation". They also indicate that a forward-looking assessment is required. However, given the continued prominence given to the IFA label in the Guidelines, it may have been better for the point about the prospective nature of the assessment to have been made more forcefully.

Dr Storey's second criticism of the Summary Conclusions was that they failed to condemn the use of the IFA test "as a 'free-floating' one capable of rendering someone a refugee on compassionate and discretionary grounds rather than on the basis of objective legal criteria". This particular criticism is allied to the fourth criticism of the Summary Conclusions made by Dr Storey, that is, their failure to identify as wrong IFA approaches relying on a very subjective notion of "reasonableness" and their failure to identify an underlying human rights-based set of criteria by reference to which terms such as "reasonableness", "undue hardship", "meaningful protection" and so forth could be interpreted.

There is a reference in the introduction to the IFA Guidelines to the "object and purpose of the 1951 Convention". There is also a reference (in a footnote) to the right not to be returned to a country where there is a risk of torture or cruel or inhuman treatment as articulated in a number of human rights instruments.[544] In addition, there is a paragraph relevant to the reasonableness analysis which states that a proposed IFA area cannot be considered a reasonable alternative if "respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic".[545]

However, in spite of these references to human rights standards, the breadth of the factors the Guidelines considers it appropriate to consider under the category of "personal circumstances"[546] and the

543. H Storey, supra note 1. I have not attempted to undertake a thorough critical analysis of the IFA Guidelines, but have simply picked up on some of the points noted by Hugo Storey in his paper which flow through to the Guidelines from the Summary Conclusions.
544. IFA Guidelines, supra note 3, footnote 9.
545. Ibid, paragraph 28.
546. Ibid, paragraph 25, quoted at page 5 supra.

lack of a conceptual framework against which to measure those factors appear to perpetuate the problem identified by both Dr Storey and other commentators.[547] There is nothing in the Guidelines which tie the consideration of personal circumstances to an identifiable human rights framework. Nor do the Guidelines suggest that the reasonableness analysis should be tied to the definition of a refugee and to the Refugee Convention's purposes.

Another of the criticisms of the Summary Conclusions made by Dr Storey related to the use of words importing discretion, thereby failing to clarify that a structured analytical framework is a prerequisite of any valid IFA assessment. Thus the use in the Summary Guidelines of the formulation that IFA "can sometimes be a relevant consideration" could incorrectly be read by some States as meaning that the IFA is not an integral part of the refugee definition.

The IFA Guidelines do provide a structure for considering IFA. However, the introduction to the Guidelines starts with the following sentence:

> Internal flight or relocation alternative is a concept that is increasingly considered by decision-makers in refugee status determination.

Such a formulation seems to suggest that IFA is not an integral part of the definition of the refugee definition and that there exists a discretionary element in its consideration.

Dr Storey also criticised the Summary Conclusions on the basis that they were overly dogmatic on some points. For example, the Summary Conclusions articulate the presumption that an IFA will not exist where the persecution feared emanates from the State. This presumption is also found in the Guidelines, although the Guidelines do make it clear that such a presumption could be rebutted if it is clearly established that the risk of persecution stems from an authority of the State whose power is limited to a specific geographical area, where the State itself only has control over certain parts of the country, where a local State authority has no reach outside its own region and there are particular circumstances explaining the national government's failure to counteract localized harm.

Overall, while UNHCR's IFA Guidelines represent an advance in

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547. See, for example, G de Moffarts, "Refugee Status and the Internal Flight or Protection Alternative", *Refugee and Asylum Law: Assessing the Scope for Judicial Protection* Nijmegen 9-11 June 1997; H Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined" (1998) IJRL 499; J Hathaway and M Foster "Internal Protection / Relocation / Flight Alternative as an Aspect of Refugee Status Determination", September 2001 (Discussion Paper for Experts' Roundtable).

that they provide an approach against which an analysis of IFA can be undertaken, they do not resolve underlying issues which have emerged from the jurisprudence and expert commentary.[548] In addition, how much of an impact the Guidelines are likely to have outside UNHCR's own refugee status determination processes is unclear, particularly given the jurisprudence which has developed in a number of jurisdictions. The various approaches arising from the jurisprudence in these jurisdictions would not easily accommodate the analysis proposed in the Guidelines. In addition, the impact of the political process within the European Union – as evidenced by the EU Council Directive 2004/83/EC of 29 April 2004 will potentially have a much greater impact on refugee law generally in Member States of the EU, including on the IFA aspect of refugee law.

C. Application of IFA in Canada, Australia, New Zealand and the United States[549]

1. Canada

IFA test

The key concepts of the IFA test under Canadian law come from two leading cases, *Rasaratnam*[550] and *Thirunavukkarasu*.[551] The IFA test in Canada is two-pronged and both prongs must be satisfied before it can be found that the claimant has an IFA:

1. "...[t]he Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists."[552]
2. Moreover, conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, to seek refuge there.[553]

548. For a discussion of unresolved issues in the approach to IFA, see Hugo Storey's 2002 paper, supra note 1.
549. Time constraints have prevented a wider and more comprehensive analysis. For a detailed discussion of the applicable law in a number of jurisdictions, See European Legal Network on Asylum (ELENA), "Research Paper on the Application of the Concept of Internal Protection Alternative", 1998 (updated 2000).
550. *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 F.C. 706 (C.A.).
551. *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 589 (C.A.).
552. *Rasaratnam, supra,* footnote 1 at 710.
553. *Ibid,* at 709 and 711.

A number of other principles emerge from Canadian case law, including:

- The determination of whether a claimant has a well-founded fear of persecution in his or her home area is not a prerequisite to the consideration of an IFA.[554]
- The second prong of the IFA test requires a determination of whether it would be unduly harsh to expect the claimant to move to another, less hostile part of the country before seeking refugee status abroad.[555]
- The test is an objective one.
- An IFA must be a realistic and attainable. The claimant cannot be expected to undergo undue hardship in travelling to or remaining in the IFA area. However, *Thirunavukkarasu* sets a high threshold: it is not enough for a claimant to state that he or she does not like the weather there, that he or she has no relatives or friends there, or that he or she may not be able to find suitable work there.[556]
- The decision maker must raise the issue of IFA with the claimant before or during the hearing. It is a breach of natural justice to tell the claimant that IFA is not an issue and then make an adverse finding on that issue.[557]
- While the burden of proof is on the claimant, a finding that an IFA exists, in the absence of sufficient evidence, cannot be made solely on the basis that the claimant has not fulfilled the onus of proof.[558]

There is extensive case law relevant to the interpretation and application of the IFA two-pronged test.

In relation to the first prong of the IFA test, the considerations are basically the same as when the determination is made in relation to the original area. However, the case law makes it clear that in determining whether an IFA exists, the applicant's particular circumstances and the circumstances of people in the IFA similarly situated to the claimant must be considered. In addition, the situation

554. *Kanagaratnam, Parameswary v MEI* (FCA., no.A-356-94), Strayer, Linden, McDonald, January 17 1996. Reported: *Kanagratnam v Canada (Minister of Employment and Immigration)* (1996) 36 Imm.L.R. (2d) 180 (F.C.A.).
555. *Thirunavukkarasu, supra,* at 596-599
556. *Ibid.*
557. *Moya, Jaime Olvera v M.C.I* (F.C.T.D., no. IMM-5436-01), Beaudry, November 6, 2002.
558. *Chauhdry, Mukhtar Ahmed v M.C.I* (F.C.T.D., no IMM-3951-97), Wetson, August 17 1998.

of family members of the claimant who have sought refuge in the proposed area of the IFA may also be considered. [559]

In relation to the second prong of the IFA test, whether an IFA is "reasonable in all the circumstances", the Canadian Court of Appeal has stated that the circumstances cannot be catalogued in the abstract and will vary from case to case.[560] Relevant factors identified in the case law are set out in Chapter 8 of the Immigration and Refugee Board's *Interpretation of the Convention Refugee Definition in the Case Law* as follows:[561]

> ...[W]hether certain factors are relevant to the determination of whether a given IFA would be "objectively reasonable" is an issue that transcends the particular facts of a given case. Therefore, the appropriate standard of review is "correctness" in cases where the issue is what factors the CRDD considers in assessing an IFA. The Federal Court, however, has provided the following general guidance:
>
> (*a*) The test is a flexible one that takes into account the particular situation of the claimant and the particular country involved. The evidence, before the Refugee Division, of circumstances in the IFA must be more than general information and must be relevant to the claimant's specific circumstances.
> (*b*) There must be some discussion of the regional conditions which would make an IFA reasonable.
> (*c*) The presence or absence of family in the IFA is a factor in assessing reasonableness, especially in the case of minor claimants. However, the absence of relatives in an IFA would have to jeopardize the safety of a claimant before that factor would make an IFA unreasonable.
> (*d*) A destroyed infrastructure and economy in the IFA, and the stability or instability of the government that is in place there, are relevant factors. Instability alone is not the test of reasonableness, nor is a disintegrating infrastructure.
> (*e*) An IFA is not reasonable if it requires the perpetuation of human rights abuses.
> (*f*) Hardship in accessing the IFA must be assessed.
> (*g*) There is no onus on a claimant to personally test the viability of an IFA before seeking protection in Canada.

559. For further discussion of aspects of Canadian case law relevant to this issue, see Legal Services, Immigration and Refugee Board, *Interpretation of the Convention Refugee Definition in the Case Law* December 31 2002, Chapter 8, at 8.4.1.
560. *Canada (Minister of Employment and Immigration) v Sharbdeen* (1994), 23 Imm.L.R (2d) 300 (F.C.A.) 300 at 301-2.
561. *Supra* at 8.4.2 (NB. Footnotes not included).

> Dealing with specific cases, the Court has indicated it is appropriate for the CRDD to consider, in various ways, factors such as: the claimant's age, appearance (including gender), religion, political profile, the employment situation, the type of residence available, the ability to speak the language, the ability to raise a family, the crime rate, the physical and financial barriers, the composition of the "family" unit (it appears this may also go to fear of persecution), previous residence in the IFA area, familiarity with the IFA area, the capacity of the claimant to re-establish him or herself, whether there is a similar group located in the IFA area, race or ethnicity of the claimant (this may also go to fear of persecution), having a registration card, being registered with the police, ability to move from one residence to another (e.g. legal restrictions), and the health and financial situation of the claimant.
>
> Other factors identified by the Court as being relevant to a determination of this issue include the claimant's business and social contacts in the potential IFA area; and medical and psychological reports that provide objective evidence that it would be "unduly harsh" to expect a claimant to move to a potential IFA area.

Recent case law

Recently decided cases in Canada apply the established legal principles. For example, in *Urgel*[562] the Court reiterated that the concept of IFA is inherent in Convention refuge definition and that it is the claimant's responsibility to demonstrate, on the balance of probabilities, that he or she is in danger of persecution everywhere in the country. The Court found that the panel did not err when it applied common sense in concluding that the applicant could get a job in another city; that since the applicant had failed to show that her life was in danger in every city in Mexico, the panel did not err in finding that her life would not be threatened if she settled in another city in Mexico and that since the applicant was able to leave Mexico with no difficulty from the city she was in, it was not unreasonable to expect that she would be able to return to another city in Mexico without this placing too great a burden on her.

In *Arunagirinathan*[563] the applicant, a thirty-eight year old male Tamil from Sri Lanka, alleged a fear of persecution at the hands of the

562. *Urgul, Maria Elena Lobaton v M.C.I* (F.C. no. IMM-10141-03), Teitelbaum, December 23, 2004; 2004 FC 1777.

563. *Arunagirinathan, Anton Charles v M.C.I* (F.C., no. IMM-2843-03), Mosely, June 24, 2004; 2004 FC 904.

SLA and the LTTE. The Board determined that he had an IFA in Colombo. The applicant argued that the Board breached the duty of fairness in not giving proper notice that IFA was an issue and erred in adopting an approach where the absence of relatives in the proposed IFA was not a valid consideration. The Court held that when the Board raised the possibility of IFA no longer being a relevant consideration, it was clear that it had remained an important issue at the hearing and the Board did not err in relation to its consideration of the relevance of the applicant's lack of relatives in Colombo. The reasons indicate that the Board considered this fact a relevant consideration, but balanced it against its view of the applicant's resourcefulness and employability in various trades. However, the Court found that the Board had failed to deal with the applicant's claim that he had been of interest to the SLA in Colombo in the past. It found that the Board's reasons indicate that it did not consider the first branch of the IPA test, that is, whether the applicant was at risk in the IPA area. The application was allowed.

2. *United States*

The legal framework in relation to IFA in the United States is significantly different to that which operates in Canada.

In the US, the statutory framework for asylum and withholding of removal does not directly mention IFA. However, the Attorney-General regulations address in some detail the factors to be considered in relation to the reasonableness of IFA. The burden of proof depends on whether the applicant establishes past persecution or a fear of future persecution by the government or government agents.

In either of those situations, there is a presumption that IFA would not be reasonable and the burden is on the Department of Homeland Security (DHS) to rebut that presumption. In such cases, the burden is on the DHS to establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. If past persecution is not established and the fear of persecution does not emanate from the government or government agents, the applicant has the burden of establishing that IFA would not be reasonable. [564]

In relation to reasonableness, 8 CFR §1208.13 provide that

> (3) ...[A]djudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of the

564. See 8 Code of Federal Regulations (CFR) § 1208.13 Establishing asylum eligibility.

suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

Recent case law

Recent case law in the US applies the regulatory framework governing the approach to IFA. For example, in *Awale*[565] the applicant, a Somali woman, testified that in 1991 soldiers of the militia controlled by the dominant clan in her home area of Mogadishu had raped her and her cousin, beaten her mother and shot and killed her father and brother. After the attack the applicant and her family left Mogadishu for Baidoa, where they lived for four years without incident. After a UN peacekeeping force left Baidoa in March 1995, the militia whose members had attacked the applicant in 1991 overran the city. The applicant left Baidoa in November 1995.

The Immigration Judge found the applicant credible, but rejected the application on the basis that that there had been a failure to demonstrate that the harm inflicted on the applicant was based on the applicant's membership of a particular social group, political opinion or other protected ground. The Board of Immigration Appeals affirmed on the basis of internal relocation without resolving the issue of past persecution or nexus. The Board found that even assuming past persecution, the applicant's ability to live in Somalia for a further four years without incident was sufficient to overcome the regulatory presumption of future persecution.

The Court found the Board's IFA analysis deficient because it "ignored the broader relocation inquiry mandated by the regulatory framework...for considering 'reasonableness of internal relocation'." The Court noted that "the relocation inquiry is inherently complex in Somali asylum cases because there is no central government and local conditions reportedly depend on the effectiveness of regional clan-based authorities". The Court found that the four year stay in Baidoa did not establish that the applicant could reasonably relocate because, *inter alia*, the same militia had taken over Baidoa by force. The Court further found that if the applicant had suffered past persecution, an issue which the Board had left unresolved, substantial evidence did not support its decision that the government rebutted the resulting

565. *Awale v Ashcroft* 384F.3d 527 (8th Cir. 2004)

regulatory presumption of a well-founded fear of persecution. The matter was remanded for further evidence of the circumstances in Somalia.

In *Knezevic*[566] the applicant was an ethnic Serb and citizen of Bosnia-Herzogovina. He alleged past persecution during the civil war and claimed a well-founded fear of persecution if required to return there. The applicant fled his hometown when it was attacked by Croat army forces. He claimed that if he were forced to return, he would be persecuted by invading Croats for reasons of his ethnicity.

The Immigration Judge denied the application, finding that the applicant was a displaced person forced from his home by civil strife, who had not suffered past persecution because he did not demonstrate that he would be singled out for persecution on return. The Immigration Judge also found that the applicant could reasonably relocate to Serb-held parts of Bosnia-Herzogovina. The Board summarily upheld the Immigration Judge's decision.

The Court found that the Immigration Judge erred in requiring the applicant to prove that he would be singled out for persecution. The Court proceeded to address IFA as a two-step inquiry. It stated that the first step under the regulation was whether the applicant could safely relocate to Serb-held parts of Bosnia-Herzogovina. The Court found that the applicant could do so safely without fear of the Croats or the Muslims. It stated that the second question under the regulation – one not addressed by the Immigration Judge of the Board – was whether it would be reasonable to require the applicant to do so taking into consideration the factors set out in the regulations. The Court noted that the applicant and his wife were 75 and 66 years old, had no home, business, possessions or family in the region. The Court concluded that "to expect the [applicants] to start their lives over again in a new town, with no property, no home, no family, and no means of earning a living is not only unreasonable, but exceptionally harsh". The Court remanded the case to the Board for further consideration of the issue of reasonableness of internal relocation.

3. Australia

In Australian refugee law the IFA concept is referred to as relocation[567]. The leading case in relation to the issue is *Randhawa*[568]. In

566. *Knezevic v Ashcroft*, 367 F.3d 1206 (9th Circ.2004)
567. Background information on this area of the law is contained in Legal Research, Refugee Review Tribunal, *Guide to Refugee Law*, Chapter 6, "Relocation".
568. *Randhawa v MILGEA* (1994) 52 FCR 437. The leading judgement is that of Black CJ with whom Whitlam J agreed.

that case, Black CJ observed that the focus of the Refugee Convention is not upon the protection that the applicant's country of nationality might be able to provide in particular regions, but upon a more general notion of protection by the whole country, stating that:

> If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country when real protection could be found within those borders.[569]

There is no requirement in Australian law for a determination to be made that an applicant actually has a well-founded fear of persecution before an IFA can be found to exist. In *Syan*[570] the Court found that the Refugee Review Tribunal had not committed an error of law by considering the issue of relocation without first having determined the existence of a well-founded fear of persecution for a Convention reason.

That said, if this approach is taken, before an IFA finding can be made sufficient findings concerning an applicant's claims need to be made to support a conclusion that the harm the applicant fears is localised in nature. Where an applicant claims to fear persecution throughout his or her country of nationality, it is necessary to reject that claim in respect of some particular area before the relocation issue can be properly addressed.[571] In addition, if an applicant claims to fear persecution on more than one basis, it is necessary to make findings that the harm feared on all the claimed grounds is localised in nature, before the existence of an IFA can be found.[572]

The test laid down in *Randhawa* is essentially that of "reasonableness in all the circumstances". In relation to this, Black CJ cited paragraph 91 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*. Black CJ held that given the humanitarian aims of the Refugees Convention the question to be determined is whether the applicant could be reasonably expected to relocate to another area. Beaumont J agreed that relocation must be a reasonable option, stating that "if relocation is, in the particular circumstances, an unreasonable option, it should be taken into account to answer the claim of persecution".[573] The Court held in *Randhawa* that if it is not reasonable for a person who has a well-founded fear in part of a country to

569. *Ibid* at 441.
570. *Syan v RTT and Anor* (1995) 61 FCR 284
571. *Singh v MIMA* [2000] FCA 1014 (Mansfield J, 31 July 2000).
572. *NABM of 2001 v MIMIA* [2002] FCAFC 294 (Sackville, Hely and Stone JJ, 18 September 2002).
573. *Randhawa* supra at 451.

relocate to another part of the country, then the person's fear of persecution in relation to the country as a whole is well-founded.[574] Conversely, if it is reasonable for the applicant to relocate to another part of the country then the applicant's fear of persecution is not well-founded. [575]

The Court in *Randhawa* did not attempt to determine the factors that needed to be considered in relation to IFA, but financial and logistical barriers and the genuineness of domestic protection were identified as relevant considerations.[576] However, the case law makes it clear that a wide range of factors may potentially be relevant. For example, in *Zamora*[577] Madgwick J held that the Tribunal erred in finding relocation was reasonable without considering the range of realities as they subjectively affected the applicant.[578] In *NNN v MIMA*[579] the Court stated that the "practical realities" of the situation had to be considered, as had to be the "extent of any association between the applicant and a suggested area of relocation".[580] In that decision the Court considered that the RRT had applied the correct test. It declined to overturn the Tribunal's decision on the basis that the Tribunal did not regard the applicant's health or means as crucial facts on which the final determination must turn.

By way of contrast, Tamberlin J in *Franco-Buitrago v MIMA*[581] held that the applicant's son's ill-health was centrally relevant to the reasonableness of internal relocation. The Court held that because the son's health was specifically raised by the applicants as a matter for

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574. *Ibid* at 443.
575. Under Australian law, the reference to "protection" in the second limb of Article 1A(2) of the Convention has been held to be a reference to "external protection", such as diplomatic or consular protection extended abroad by a country to its nationals, and not to "internal protection" provided within the country from which an asylum seeker has departed. See *MIMA v Khawar* (2002) 210 CLR 1 (per Gleeson CJ and McHugh and Gummow JJ) and *MIMA v Respondents S152/2003* (2004) 205 ALR 487. The joint judgment of Gleeson CJ and Hayne and Heydon JJ in *MIMA v Respondents S152/2003* indicates that if the country of nationality provides its citizens with the requisite level of protection, fear of harm will not amount to a fear of persecution. Kirby J's analysis also relates failure of protection to the concept of persecution.
576. *Ibid* per Black CJ at 442.
577. *Zamora v MIMA* (1998) 48 ALD 41.
578. At 45-46.
579. *NNN v MIMA* [1999] FCA (Madgwick J, 15 September 1999)
580. At [7].
581. *Franco-Buitrago v MIMA* [2000] FCA 1525 (Tamberlin J, 27 October 2000).

consideration, practical considerations arising from this could limit the places suitable for relocation. The Court considered, for example, that it would not be reasonable for the family to be expected to relocate to an area remote from the types of medical services normally available in a large city.

Overall, the Australia case law on IFA indicates that what is reasonable in all the circumstances will depend largely on the case put by the applicant and that a list of relevant factors cannot be prescribed. Accessibility to an IFA is an important factor[582]. However, generally speaking it is not necessary to identify a specific place in which an applicant can relocate or live.[583]

Recent case law

Recent case law concerning IFA reiterates the test laid down in *Randhawa.*

For example, in *NAOI v MIMA*[584] the applicant was a citizen of Bangladesh. He claimed to fear persecution in Bangladesh for reasons of his political opinion arising from his support for the Awami League in his local region which was located about fifty kilometres from Dhaka, the capital of Bangladesh. The applicant also claimed to fear persecution because of his Hindu religion, his support for a religious human rights organisation and his work for a non-government organisation raising awareness of HIV/AIDS. He claimed to fear persecution from supporters of the Bangladesh Nationalist Party ("BNP") and an Islamic fundamentalist party.

The Tribunal accepted that the applicant had been a local member and activist in the Awami League. It further accepted that the applicant's family suffered during the liberation war. However, it found that it was reasonable in the circumstances, having regard to the applicant's claimed fear of local BNP opponents after their election victory, for the applicant to relocate to Dhaka. The Tribunal noted that Dhaka is a major urban centre, and that the applicant could distance himself there from those who might have wished to harm him in his home area. The Tribunal did not accept that the applicant's political opponents would pursue him once he left his own locality In so doing, the Tribunal took into account the fact that the applicant had been absent from Bangladesh for sixteen months at the time of the RRT hearing. The Tribunal also took into account, in considering the feasibility of relocation, the applicant's high level of education as a

582. *Ismail v MIMA* [2000] FCA 194 (Emmet J, 23 February 2000).
583. *Umerleebe v MIMA* (unreported, Federal Court of Australia, Marshall J, 28 August 1997) at p 6. *Montes Granados v MIMA* [2000] FCA 60 at [10].
584. *NAOI v MIMA* S2554 of 2004, 7 April 2004

university graduate, and the fact that his occupational skills were well suited to work in a large urban settings such as Dhaka and would enable him to adjust, in general terms, to that sort of environment. The RRT found that there was no real chance that the applicant would be seriously harmed in Bangladesh, in the foreseeable future, for his political opinion.

The applicant was unsucessful in his appeal to the Federal Magistrate's Court. On appeal to the Federal Court, the Court noted that the Tribunal's reasons indicated that the Tribunal was conscious of the principles stated by the Full Court in *Randhawa*. The Court rejected the applicant's claim that the Tribunal had not accorded him procedural fairness and found that the applicant had been put on notice that relocation to Dhaka was a relevant issue.

The Court also noted that the RRT had specifically addressed the question of the position of the applicant as an individual. The Court found that this had been demonstrated in the language of the Tribunal's findings and conclusions, and also in the transcript of the hearing. The Court further found that there was no indication in the material before it that relocation was not a reasonable and practicable alternative in all the circumstances. The application was rejected and the Tribunal's decision was upheld.

In *NAIZ*[585] the applicant was an Indo-Fijian woman. She claimed that her native Fijian neighbours had driven her from her home by harassment and assault. The RRT found that it was reasonable for the applicant to relocate within Fiji. The Tribunal found that in spite of the applicant's claim that her two sons in Fiji would be unable to assist her, the applicant's daughter, who lived in Australia, had assisted her financially in the past and could assist her to relocate within Fiji. The RRT was satisfied that if the applicant moved away from her present neighbours she would not be at the same risk of harm as she had been in the past.

The Federal Magistrates Court found that the RRT had not erred in making factual findings that were open to it relating to relocation. On appeal to the Full Federal Court, the Court by majority found that the RRT had erred in asking the wrong question and had misconceived the elements of the test for determining whether the applicant was a person "to whom Australia owed protection obligations"[586].

585. *NAIZ v MIMA* [2005] FCAFC 37, (11 March 2005).

586. This statutory pre-requisite to the grant of a protection visa (that is, the visa granted to refugees and their spouses and dependants) is set out in section 36(2) of the *Migration Act* 1958, which relevantly states at subection 36(2):

Specifically, the Court found that the RRT did not give consideration to the practical realities facing the applicant with respect to accommodation and care should she seek to relocate within Fiji. The Court held that the Tribunal's reasons for decision gave no explicit consideration to how, even with financial assistance from her daughter, the applicant could find a new home and access such support as she might reasonably require to live in that home.

In dissent, RD Nicholson J held that the Tribunal had committed an error of law by not considering the realities of the applicant's relocation. However His Honour held that this error in the Tribunal's reasoning was not a jurisdictional error and dismissed the appeal.

New Zealand

The leading case in New Zealand in relation to IFA is that of the Court of Appeal in *Butler v Attorney-General*[587]. The Court stated that:

> 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...[588]

In relation to IFA, the Court of Appeal found that:

> The various references to and tests for "reasonableness" or "undue harshness" (a test stated by Linden JA in *Thirumavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FC 589, 598 FCA) must be seen in context or, to borrow Brooke LJ'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* para 18. It is not a stand alone test, authorising an unconfined inquiry into all the social, economic

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(2) A criterion for a protection visa is that the applicant for the visa is:
(*a*) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol...

In the recent High Court decision of *NAGV and NAGW of 2002 v MIMA* [2005] HCA 6, it was held (per Gleeson CJ, McHugh, Hayne, Callinan & Heydon JJ) that the phrase "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention.

587. *Butler v Attorney-General*, (1999) NZAR 205, 13 October 1997
588. *Ibid* at [47].

> and political circumstances of the application including the circumstances of members of the family. The test is for instance sharply different from the humanitarian tests provided for in the Immigration Act ss63B and 105. It does not in particular range widely over the rights and interests in respect of the family: the refugee inquiry is narrowly focused on the persecution and protection of the particular claimant. In no case to which we were referred were international obligations in respect of the family seen as being linked to the definition of refugee. While family circumstances might be relevant to the reasonableness element, there is no basis for such a link on the facts of the present case. We note as well that New Zealand had not become bound by the Convention on the Rights of the Child at the time of the decision of the Authority.
>
> 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 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. [589]

Subsequent to the *Butler* decision, the New Zealand Refugee Status Appeals Authority (RSAA) reconsidered the concept of IFA in *Refugee Appeal No. 71684/99*. In applying the views about the reasonableness requirement expressed in *Butler*, the RSAA decided to adopt (subject to New Zealand statutory provisions in relation to the burden of proof) the *Michigan Guidelines on the Internal Protection Alternative* [590] developed under the guidance of Professor James Hathaway by a group which included the chairman of the panel which decided *Refugee Appeal No. 71684/99*, Mr Rodger Haines QC.

The RSAA located the issue of IFA in the "protection" limb of the refugee definition, an analysis which had not been criticised in *Butler*.[591]

589. *Ibid* at [49] and [50]
590. Available at http://www.refugeecaselaw.org/guidelines.pdf
591. This contrasts with the approach taken under Australian law. See note 40 above.

In relation to the assessment of meaningful protection, the RSAA noted that this implies not just the absence of a risk of harm, but the provision of basic norms of civil, political and socio-economic rights. The RSAA considered that these should be the basic rights that should be accorded to refugees as set out in the text of the Refugee Convention itself and in particular in Articles 2 to 33.[592]

In relation to the reasonableness inquiry, the RSAA found that:

> If as held in *Butler* there is no free-standing assessment of reasonableness, and if the issue of reasonableness must be tied back to the refugee definition and to the issue of protection, the question which must be asked is whether reasonableness has any part to play in the proposed internal protection analysis. Our view is that as the inquiry mandated by the Convention is whether the refugee claimant can genuinely access domestic protection which is meaningful, there is no conceptual basis for the retention of a reasonableness element. The more so given the rigorous nature of the inquiry into the protection issue which we and the *Michigan Guidelines* now propose. The conclusion we have come to is that if the putative refugee can genuinely access domestic protection which is meaningful in the sense we have earlier explained, there is no place for a super-added assessment of reasonableness. See further the *Michigan Guidelines*, para 23. The reasonableness assessment is therefore to be abandoned by the Authority.[593]

The RSAA formulated the test to be applied as follows:

> [W]here the issue of an internal protection alternative arises, the third and final issue is to be addressed is:
>
> ... Can the refugee claimant genuinely access domestic protection which is meaningful?
>
> In particular:
>
> (*a*) In the proposed site of internal protection, is the real chance of persecution for a Convention reason eliminated?
> (*b*) Is the proposed site of internal protection one in which there is no real chance of persecution, or of other particularly serious harms of the kind that might give rise to the risk of return to the place of origin?
> (*c*) Do local conditions in the proposed site of internal protection meet the standard of protection prescribed by the Refugee Convention?

592. For a critique of this approach, see Hugo Storey's 2002 paper, supra, note 1.
593. *Refugee Appeal No. 71684/99* at [68].

As each of these three requirements is cumulative, an internal protection alternative will only exist if the answer to each question is Yes.[594]

Recent case law

The approach articulated in *Refugee Appeal No. 71684/99* continues to be followed in New Zealand.

In *Refugee Appeal No 75349*[595] the appellant was a Bangladeshi national. His claim was that he was at risk of serious harm at the hands of a local leader of the Bangladeshi National Party (BNP) who had used violence against him in the past, in an attempt to force him to switch his political allegiance from the party he supported, the Jatiya Party (Ershad) (JPE) to the BNP. Although the RSAA had some reservations about the credibility of the appellant's evidence, it nevertheless accepted his evidence as credible and accepted that he had a well-founded fear of persecution for a Convention reason. In considering whether the appellant had a viable internal protection alternative available to him, the Board applied the test set out in *Refugee Appeal No. 71684/99*. On what it referred to as the "IPA issue (i)" the Authority found that there was no real evidence that the appellant would be pursued wherever he was in Bangladesh. In relation to "IPA issue (ii)" it found that available country information suggested that members of the appellant's political party were not specifically targeted for mistreatment by the BNP and that he would be able to continue to engage in political activities without there being a real chance he would be persecuted. In relation to "IPA issue (iii)" the Authority noted that it was not aware of any information to suggest that the local conditions in other parts of Bangladesh were such that appellant will be denied the minimum standards of protection prescribed under the Refugee Convention.

In *Refugee Appeal No 75188*[596] the appellant was a thirty-one year old Albanian man from the city of Mitrovica in the north of Kosovo, Serbia. Amongst other problems the applicant had encountered was arrest on suspicion of belonging to the Kosovo Liberation Army (KLA). The appellant, along with other Albanians, had been expelled from Mitrovica and became involved with the KLA when the war began. He worked as a medical orderly and was not a combatant. In brief, the appellant's claim was that if he returned to Serbia he feared being seriously harmed by Serbian paramilitary and military forces. In particular, he claimed that he was at risk of being detained and

594. *Ibid* at [73].
595. *Refugee Appeal No 75349* 28 January 2005
596. *Refugee Appeal No 75188*, 8 December 2004.

seriously harmed or killed because of his past membership of the KLA. The RSAA was satisfied that the appellant had a well-founded fear of persecution for a Convention reason in Kosovo, and applying the IPA test used by the authority, determined that he did not have a viable IPA anywhere in Kosovo or elsewhere in Serbia.

Overall, the case law in Canada, the US, Australia and New Zealand indicates that neither the Experts' Roundtable nor UNHCR's IFA Guidelines have had any impact on the concept of IFA in those jurisdictions. Meanwhile, developments in the European Union suggest that the Roundtable process and the IFA Guidelines may be unlikely to have a significant impact on European refugee law in the future.

D. Developments in the European Union

Various aspects of cooperation between European governments concerning asylum policy led to the adoption of a legal basis for "measures of asylum" in the 1997 Amsterdam Treaty[597], which obliged the adoption within five years of minimum standards concerning procedural and material aspects of asylum law. In 1999 the European Council agreed to establish the "Common European Asylum System", based on the "full and inclusive application of the Geneva Convention".[598] The day before the deadline set by the Amsterdam Treaty, Member States reached a political agreement on asylum procedure standards. These standards are set out in EC Council Directive 2004/83/EC of 29 April 2004.[599]

The recital to the Directive sets out a number of principles on which standards are to be based, including:

> (6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.
>
> (7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.

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597. Treaty of Amsterdam, 2 October 1997, O.J 1997 C 340/1
598. Presidency Conclusions Tampere European Council, 15 and 16 October 1999, SN 200/99 of 16 October 1999.
599. EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

> (8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.
>
> (9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.
>
> (10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.
>
> (11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination...
>
> (15) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.
>
> (16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

However, in spite of the positive aspects of the recital, the Directive was not well received by organisations such as UNHCR, the European Council on Refugees and Exiles, Human Rights Watch and Amnesty International. In relation to this, Anja Klug observed:

> The UNHCR, who had readily embraced EU harmonization as the most promising effort for strengthening refugee protection – not only in Europe but globally as an example for other countries – and had offered advice and input from the outset, was forced to correct its overly positive approach. The agency not only expressed its disappointment with the low level of harmonization achieved, but had already raised a number of serious concerns during the negotiation process. Since few of them were actually addressed by the Council,

UNHCR had to reiterate them after the process was completed....UNHCR in a press release stated that "a key piece of European Union asylum legislation [...] may lead in practice to breaches of international refugee law". It condemned the result of the process as falling short of the commitments of the Tampere Summit. With regard to the Asylum

Procedures Directive, UNHCR found that it contained "no finding commitment to satisfactory procedural standards" and thus allowed "scope for States to adopt or continue worst practices in determining asylum claims". Not surprisingly, NGOs' comments were not less harsh. Three major refugee and human rights organizations, the European Council on Refugees and Exiles (ECRE), representing 76 refugee organizations across Europe, Amnesty International and Human Rights Watch expressed their deep concerns that the measures would allow Member States of the European Union denial of protection and breach of international law and asked for withdrawal of the Asylum Procedure Directive.[600]

The relevant provisions of the Council Directive which relate to IFA are contained in Article 8, which provides:

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

Although it is too early to determine how Article 8 will be implemented in the Member States, the content of the Article is clearly problematic. It is also clear that the political process has had a significant impact on the final content of the Article. In relation to this, it is worth noting that the Article on IFA contained in a proposed EU Refugee Qualification Directive differs significantly from the final Article 8.[601]

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600. A Klug "Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?"
601. See Hugo Storey's 2002 paper, supra note 1, footnote 6. The proposed Directive referred to IFA as "internal protection", clearly proposed a prospective test, contained a presumption that an IFA did not exist in cases where the agent of persecution is the national government or an agent of the national government, and in relation to the reasonableness of IFA referred to factors including security, prevailing political and social circumstances, respect for human rights and the personal circumstances of the applicant, including age, sex, health, family

Article 8 of the Directive, as well as other provisions contained in it, has been subjected to significant criticism. In its commentary on the Directive, UNHCR stated:

> Article 8 (1) recognizes that an assessment needs to be made as to whether the applicant is safe from persecution or real risk of suffering serious harm in another part of the country. Apart from considering whether the applicant would not have a well-founded fear of persecution or would face serious harm in the area, it should also be considered whether the applicant could safely and reasonably relocate, without undue hardship. UNHCR suggests that these considerations be reflected explicitly when implementing the Directive.
>
> Subparagraph (3) which foresees the applicability of an internal relocation or flight alternative in cases where return to the proposed part of the country is not possible due to "technical obstacles to return", is problematic in UNHCR's view and should not be implemented in national law or practice. The effect of this provision is to deny international protection to persons who have no accessible protection alternative. In UNHCR's view, this is not consistent with Article 1 of the 1951 Convention. An internal relocation or flight alternative must be safely and legally accessible for the individual concerned. If the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be reasonable. [602]

Anja Klug comments further on Article 8 in her paper on the EC Directive:

> Article 8 para.2 of the Directive requires examination of the general situation in the relevant area on the one hand and the personal circumstances of the individual case on the other. The specific area must

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situation and ethnic, cultural and social links. Hugo Storey noted that under the July 2002 Danish Presidency's proposed amendments, Member States could look for a portion of the country of origin which would be safe, rather than assess whether the persecution would be confined to a specific area; the test would be whether return to that area would be "unduly harsh", rather than whether "the applicant could reasonably be returned"; the provision setting out a "strong presumption against" the internal protection alternative where the agent of persecution was the state or associated with the state was deleted; the principle could apply in spite of "technical obstacles to return" and the list of circumstances Member States needed to consider before applying IFA was greatly reduced.

602. UNHCR, "Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted". (OJ L 304/12 of 30.9.2004).

> be free of persecution and risk of suffering serious harm. Unfortunately, the article does not provide further guidance. The formula "the applicant can reasonably be expected to stay in that part of the country" leaves the decision as to the necessary minimum level of standards of treatment to the Member States. The Directive is also not sufficiently clear about the period in which the conditions permitting internal relocation must be fulfilled. The use of the present tense "there is no well-founded fear" and "the applicant must reasonably be expected" indicates an examination of the present situation. However, the wording "the applicant can reasonably be expected to *stay* [...]" (emphasis added) instead of return could be interpreted as a backward view. The latter interpretation, however, would not be in line with the 1951 Convention, which is based on an assessment of a present well-founded fear of persecution.

In relation to Article 8 paragraph 3, Klug comments:

> Especially problematic is Article 8 para. 3, which allows for a refusal of refugee status even if return to the area of internal relocation technically is not possible. Refugee protection can therefore be denied even if the applicant has at the time of the decision no accessible protection alternative. Thus, Article 8 para. 3 is not an expression of the principle of subsidiarity mentioned above but has a different intention. It retroactively punishes the applicant's decision of seeking asylum abroad and not availing himself of protection available in his country of origin. According to the provision, it is not even necessary for the applicant to have known about the internal relocation alternative. Article 8 para. 3 creates an exclusion clause not in line with the 1951 Convention, which does not require threatened individuals to first exhaust all options within their own country before seeking asylum. [603]

Overall, Article 8 of the Directive appears unlikely to lead to an advance in the concept of IFA as it is implemented in the European Union. While the fact that the Directive represents an agreement on minimum standards means that the implementation of IFA in individual Member States will not necessarily become more restrictive, it is clear that this could occur, particularly given the political imperative to restrict rather than expand the rights of asylum seekers.

Conclusion

Four years after the San Remo Experts' Roundtable, the analysis and implementation of IFA in international jurisprudence still lacks coherence. While some advances have been made in identifying the need for an analytical approach to IFA based on clear criteria, there remains no consistent approach to IFA in asylum law. In the conclusion to his 2002 paper, Dr Storey commented on the need for further international

603. A Klug, supra note 60.

collaboration to achieve additional progress in relation to IFA, suggesting that this collaboration should be in the form of a specifically judicial initiative, ideally conducted under UNHCR auspices. Given the developments since 2002, it is unclear whether this approach could achieve positive outcomes. Since 2002, UNHCR has released its Guidelines, which are unlikely to have a significant impact on the jurisprudence in many jurisdictions. Legislative provisions and judicial interpretation of the law have settled particular interpretations of IFA in a number of jurisdictions. Furthermore, the political process in the European Union is likely to have a much more significant impact on the interpretation of principles of asylum law than judicial collaboration.

This is not to say that nothing could be achieved by further discussion and debate, particularly within the IARLJ. However, it is clear that there are a number of obstacles to a coherent analysis of IFA. Four years on from the Experts' Roundtable, having moved from "nowhere to somewhere", IFA analysis has not traveled much further down the road to consistency. IFA remains pretty much all over the place.

List of cases

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Thirunavukkarasu v Canada (Minister of Employment and Immigration) [1994] 1 F.C 589 (C.A.)

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Urgul, Maria Elena Lobaton v M.C.I (F.C. no. IMM-10141-03), Teitelbaum, December 23, 2004; 2004 FC 1777.

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Zamora v MIMA (1998) 48 ALD 41.

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NAOI v MIMA S2554 of 2004, 7 April 2004

NAIZ v MIMA [2005] FCAFC 37, (11 March 2005)

NAGV and NAGW of 2002 v MIMA [2005] HCA 6

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Refugee Appeal No. 71684/99

Refugee Appeal No 75349, 28 January 2005

Refugee Appeal No 75188, 8 December 2004

List of IPA / IRA / IFA Working Party participants (from IARLJ website)

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Petrus Retief	South Africa
Judge J. de Coulon	Schweizerische Asylrekurskommission
Mrs C. Cotting-Schalch	Schweizerische Asylrekurskommission, ern-Zollikofen, Switzerland

WORKING PARTY ON NON-STATE AGENTS

REPORT

RONAL BRUIN (RAPPORTEUR), RON WITTON,
ROCCO FANIGLIETTI, PAUL TIEDEMANN

We did not make a full report and discussion. In this paper we mention some developments on our topic and point out some possible questions for further discussion. We tried to think over if the international issue of terrorism effects our topic. I think we can conclude that there is no direct influence. But there will be of course indirect influence. For example on matters of burden of proof and exclusion when is taken into account whether the asylum-seeker himself is related to a presumed terrorist organisation or fears from such an organisation. An other factor can be the question whether the State of his nationality is known to be a terrorist organisation or has links to one.

In our working party we asked ourselves the next questions:

1. In the evaluation of the well founded fear of persecution under the Refugee Convention definition, are there additional grounds which fall within your jurisdiction that allow you to consider acts of persecution not emanating from the State or parties/organisations controlled by the State, but rather from non-state agents?
2. Has there been a (recent) change in opinion on this topic in your jurisdiction (in legislation of legal decision-making/ jurisprudence)? Can you specify when these changes took place? Can you indicate the relevant decision that was an important step in the change of opinion?
3. (*a*) What kind of criteria are used to answer the question whether there is enough protection by the state (or other organisations?) against acts of persecution by non-state actors to conclude international protection is not obliged? What is the burden of proof for the asylum-seeker in this respect?
   (*b*) How does your legislation or jurisprudence deal with the notion of adequacy of state protection when considering non-state agents of persecution? Are there differences in the concept of adequacy of State protection if persecution was at the hands of State agents?
4. Do security concerns, related to terrorist organisations, affect in one way or another the answers to these questions?

(*a*) Does the fact that the non-state agent itself is a (known) terrorist organisation have any influence?
(*a*) Is it a relevant factor that the asylum-seeker himself is known to be related to a terrorist organisation?
(*c*) Is it a relevant factor of consideration with regard to protection against non-state actors, that the state (or parties/ organisations controlling the State) is known to be a terrorist organisation?

5. Under what circumstances does your country consider the application of the *exclusion clauses* in deciding the application of the Convention-Refugee definition. Have these considerations changed within the past few years?

In this brief paper, we will point out first some information about the European Union. After that we will give the answers members of the working party gave on these questions. Beside the given information, also Muhammad Hassim gave a reaction from South Africa, but there ison this topic in their jurisdiction no relevant development.

II. European Union

In the European Union came into force on the 20th of October 2004 the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Official Journal L 304/12/30-9-2004, accesible at www.eu.int). This directive will bind all member states. The Court of Justice of the European Union will have competence under the EU-treaty to decide on matters of interpretation, that will bind all judges in the EU.

The Directive is also known as "Definition Directive". It is a codification of the legal opinion in the European Union on interpretation of the Geneva Refugee Convention beside some other topics like granting subsidiairy protection status based on for exemple article 3 Convention against torture and article 3 of the European Convention on human rights. It is meant to bring a uniform interpretation of the refugee definition. So it has some political compromises on every matter.

In principle is accepted the concept that relevant harm can emanate from non-state agents, defined as non-State actors. On the other hand also interpretation is given to the relevant protection and the concept of internal flight alternative.

In the articles 6 and 7 are set out rules on the actor of persecution and the actors of protection. In article 8 are set out provisions for an internal flight alternative. These articles are placed chapter II

"Assessment of application for international protection", that is common to all kinds of international protection. That's the reason that in these articles no connection is made to the convention grounds in article 1A Refugee Convention. But for qualifying as convention refugee there must also in the context of the Directive a relation to race, religion, nationity, etc

III.

From diverse jurisdictions came this answers to the questions under par. I.

A. Australia (Ron Witton)

Questions 1-2:

In Australian refugee law, the agent of persecution is traditionally the State or an agent of the State. However, the State need not itself be the agent of harm. The High Court of Australia has confirmed that "although the paradigm case of persecution contemplated by the Convention is persecution by the state or agents of the state, it is accepted in Australia, and in a number of other jurisdictions, that the serious harm involved in what is found to be persecution may be inflicted by persons who are not agents of the state"[604].

It is enough that the State is unable or unwilling to provide effective protection from persecution. In *Chan v MIEA*, McHugh J said:

> The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution ...[605]

However, persecution by private individuals or groups does not bring a person within the Convention unless the State either encourages or is or appears to be powerless to prevent that private persecution. In *Applicant A & Anor v MIEA & Anor*, the High Court stated:

> A person ordinarily looks to "the country of his nationality" for protection of his fundamental rights and freedoms but, if "a well-founded fear of being persecuted" makes a person "unwilling to avail himself of the protection of [the country of his nationality]", that fear must be a fear of

604. *MIMA v Respondent S152/2003* (2004) 205 ALR 487 at [18] per Gleeson CJ, Hayne and Heydon JJ, following *MIMA v Khawar* (2002) 210 CLR 1. See also McHugh J in *Respondent S152* at [75] and Kirby J at [116].

605. (1989) 169 CLR 379 at 430. The availability and efficacy of State protection can also be a relevant question in establishing whether an applicant has a well-founded fear of persecution.

> persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent....Thus the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality.[606]

> The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.[607]

More recently, a majority of the High Court has held that the willingness and ability of the state to protect its citizens may be relevant to whether the conduct giving rise to the fear amounts to persecution.[608] In *MIMA v Respondent S152/2003*, Gleeson CJ, Hayne and Heydon JJ cited with approval the House of Lords decision of *Horvath v Secretary of State for the Home Department*,[609] where a majority found that the adequate level of state protection available to the applicant meant that the harm feared did not amount to persecution.[610]

Thus, although the agent of persecution need not be the State, the persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality.

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606. *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 233, per Brennan CJ, referred to with approval in *MIMA v Respondent S152/2003* (2004) 205 ALR 487 at [19].
607. *Ibid*, at 257-8 per McHugh J. Note that in *MIMA v Khawar* (2002) 210 CLR 1, Gleeson CJ and Kirby J adopted a broadly consistent view. However, Gummow and McHugh JJ appear to suggest a slightly different view on this issue.
608. *MIMA v Respondent S152/2003* (2004) 205 ALR 487 at [21]-[23].
609. [2001] 1 AC 489
610. *MIMA v Respondent 152/2003* (2004) 205 ALR 487 at [21]. The Court at [20] made it clear that this should not be confused with the distinct question of whether the claimant is unable or unwilling to avail himself of State protection. McHugh J at [64] disapproved of *Horvath*, finding that it does not represent the law in Australia. McHugh J also disagreed with the reasoning of Gleeson CJ, Hayne and Heydon JJ, concluding at [65] that the absence of state protection is not relevant to whether the conduct amounts to persecution.

Discriminatory Failure of State Protection as Persecution

Failure of State protection can also, in some circumstances, constitute persecution within the meaning of the Convention, where such failure is itself for a Convention reason.

The question of whether an applicant has been persecuted by reason of a failure of state protection for a Convention reason has frequently arisen in the context of women fleeing domestic violence from their husbands, but is equally relevant where harm occurs in the context of other personal relationships. In many cases, the initial harm does not appear to be Convention related because it is solely connected to or motivated by the personal relationship. However, if the State is aware of the harm and does not act to prevent it or protect the victim, an issue can arise as to whether this failure on the part of the State of itself can constitute persecution for a Convention reason.

Importantly, s.91R(1)(c) of the Migration Act of Australia states :

> For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
>
> ...
>
> (c) the persecution involves systematic and discriminatory conduct.

The Act thus refers to systematic and discriminatory **conduct**. *Mere* inaction would not suffice - however *discriminatory* inaction would not amount to *mere* inaction. This is also the position under the Convention as interpreted by Australian Courts.[611]

The leading case on this point is *MIMA v Khawar*.[612] The claimant in that case claimed a fear of persecution from her abusive husband and members of her husband's family, and that police refusal to enforce the law against such violence or otherwise offer her protection was part of systematic discrimination against women which was both tolerated and sanctioned by the State. The Full Federal Court upheld

611. See *MIMA v Khawar* (2000) 101 FCR 501 at [10], [129]. At [10] Hill J stated that "*Persecution involves the doing of a deliberate act, rather than inaction. The decision of the High Court in Chen might, at first blush, suggest otherwise. There, as will shortly be noted, the persecution held to exist consisted of the denial by the State of access to food, education and health beyond a basic level. Denial of basic human needs is, however, positive inaction, not inaction. State complicity in the ill-treatment may likewise be distinguished from mere inertia*". In *MIMA v Khawar* (2002) 210 CLR 1, Gleeson CJ stated that conduct may include inaction. However, this will depend upon the circumstances and whether there is a duty to act.

612. (2002) 210 CLR 1.

Branson J's view at first instance,[613] that the refusal or failure of State law-enforcement officers to take steps to protect members of a particular social group from violence was itself capable of amounting to persecution within the meaning of the Convention.[614]

The High Court upheld the Full Federal Court decision, confirming that the Convention test may be satisfied by the selective and discriminatory withholding of State protection for a Convention reason from serious harm that is not Convention related.[615] The judgments provide varying analyses on the categorisation of the interrelated concepts of persecution and state protection.

Gleeson CJ was of the view that persecution *may* result from the combined effect of the criminal conduct of private individuals and the state or its agents; and that a relevant form of State conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm.[616] According to his Honour:

> I do not see why persecution may not be a term aptly used to describe the combined effect of conduct of two or more agents; or why conduct may not, in certain circumstances, include inaction.
>
> Whether a failure to act amounts to conduct depends upon whether there is a duty to act. It depends upon the circumstances; and a relevant circumstance might be what would ordinarily be expected, or whether the person who remains silent has a legal or moral duty to speak. Similarly, the legal quality of inaction in the face of violence displayed by one person towards another might depend on whether there is a duty to intervene.[617]

His Honour considered that it would not be sufficient to show maladministration, incompetence, or ineptitude, by the local police, but if an applicant could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then persecution may be made out.[618]

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613. *Khawar v MIMA* (1999) 168 ALR 190. Her Honour expressed similar views in *Mendis v MIMA* (2000) 59 ALD 84.
614. (2000) 101 FCR 501 per Hill J at [10], [76], and per Mathews and Lindgren JJ at [121], [123]-[124], [160]. Although Hill J delivered a dissenting judgment, his views on the issue of state complicity were not in conflict with majority.
615. *MIMA v Khawar* (2002) 210 CLR 1, per Gleeson CJ, McHugh, Gummow and Kirby JJ. Callinan J dissenting.
616. *Ibid*, at [30] per Gleeson CJ.
617. *Ibid*, at [28] per Gleeson CJ.
618. *Ibid*, at [26] per Gleeson CJ.

Kirby J took a similar approach. His Honour adopted the formula "Persecution = Serious Harm + The Failure of State Protection".[619]

On questions 4 and 5 Ron Witton answered that Australian law was not affected by questions of terrorism yet.

B. Canada (Rocco Famiglietti)

1. Since June 2002, the *Immigration and Refugee Protection Act (IRPA)* grants the Immigration and Refugee Board jurisdiction with respect to claims for refugee protection. Claims for protection may be based on three grounds referred to as the « consolidated grounds »:

(*i*) Well-founded fear of persecution for a Refugee Convention ground (*Section 96*)
(*ii*) Danger of torture (*Section 97 (1)(a)*)
(*ii*) Risk to life of cruel and unusual treatment or punishment (*Section 97 (1)(b)*)

More specifically relating to *Section 97 (1)(b)*, it is not required that the risk be at the hands of a state agent whereas in *Section 97 (1)(a)* this is required.

2. Before June 2002, claims that had no nexus with the Convention refugee definition and the five grounds could not be considered for Convention refugee. As an example, victims of crime, corruption and vendettas could not generally establish their fear of persecution on one of the five grounds of the definition. An analysis was made if the claimant was part of a particular social group based on the interpretative foundation provided by the Supreme Court of Canada decision of Ward[620]. In these cases it was the Minister that assessed the risks of return.

One issue of concern was domestic violence which brought the issuance of *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution which were updated in 1996*. These Guidelines are a positive, enlightened, and necessary effort by the Refugee Division to ensure

619. *Ibid*, at [118] per Kirby J, referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 653, per Lord Hoffmann and *Horvath v SSHD* [2001] 1 AC 489 at 515-516, per Lord Clyde. In *MIMA v Respondents S152/2003* (2004) 205 ALR 487 at [100], Kirby J stated that his formula "represents the alternate theory of "persecution" accepted by most contemporary elaborations of the Convention ("the protection theory")", he also confirmed at [109] & [101] that "protection of that country" in Article 1A(2) refers to external protection, however internal state protection is relevant to whether the applicant holds a well-founded fear of persecution.

620. Ward v. Canada, 1993, 2 S.C.R. 689, 103 D.L.R. (4th), 20 Imm L.R. (2d) 85.

knowledgeable and sensitive consideration of women claiming refugee status because of domestic violence.

3. As for protection, this issue was extensively canvassed by the Supreme Court of Canada in Ward[621]. The issue of protection must be analysed whether the claim is under Section 96 or 97. The state's ability to protect a claimant is a crucial element in determining whether the fear of persecution is well-founded. The presumption is that except in situations where the State is in a situation of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by « clear and convincing » evidence of the state's inability to protect.

The parameter for « clear and convincing » proof is that the claimant has taken all steps reasonable in the circumstances, taking into account the context of the country of origin in general, the steps taken and the claimant's interactions with the authorities. A claimant is required to approach his or her state for protection in situations in which protection might reasonably be forthcoming. It also follows that the burden of proof to establish absence of state protection is « directly proportional to the level of democracy in the state in question »[622].

On the issue of adequacy of state protection with regards to non-state agents of persecution the burden of proof remains the same. In one case that addressed the issue the court stated:

> « ...when the agent of persecution is not the state, the lack of state protection has to be assessed as a matter of state capacity to provide protection rather than from the perspective of whether the local apparatus provided protection in a given circumstance. Local failures to provide effective policing do not amount to lack of state protection. However, where the evidence, including the documentary evidence situates the individual claimant's experience as part of a broader pattern of state inability or refusal to provide protection, then the absence of state protection is made out. »[623]

The adequacy of State protection was not discussed in the Supreme Court of Canada decision in Ward, however there have been decisions from the Court of Appeal that have elaborated on the concept of adequate state protection as "adequate though not necessarily perfect"[624]. The court stated:

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621. *Ibid.*
622. M.C.I. v Kadenko, Ninal (FCA, A-388-95), Hugessen, Décary, Chevalier, October 15, 1996.
623. Zhuravlvev, Anatoliy v MCI (FCTD, IMM-3603-99), Pelletier, April 14, 2000.
624. *Ibid;* also MEI v. Villafranca, Ignacio (FCA, A-69-90), Hugessen, Marceau, Décary, December 19, 1992.

> « No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all its citizens at all times. Thus it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation »[625].

The courts have agreed that it would not be reasonable to impose on other states a standard of « effective » protection that police in our own country, regrettably, sometimes only aspire to.

On another point, there is inconsistency in the case law dealing on the issue as to whether the claimant needs to seek protection from sources other than the state. There have been a number of decisions that have accepted that the availability of protection from non-state sources may, nevertheless, be relevant to establishing an objective basis for the claim. In other words it is reasonable to require claimants to exhaust avenues of protection and redress in addition to the police where it is available.

4. a. This issue was directly addressed by a decision of the courts. It states:

> « Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil ...where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection ».[626]

The burden of proof is the same whether it be a state or non-state agent of persecution.

4.b If the asylum seeker is known to be associated with a terrorist organisation then the exclusion clauses are analysed. The burden of establishing serious reasons for considering that international offences have been committed falls on the Government. The standard of proof is more than simple suspicion and less than a balance of probabilities. The applicable Exclusion clauses would most likely be: *Article 1F(a) and or 1F(c).*

In the assessment of the consolidated grounds the standard of proof is that the claimant must establish, on a balance of probabilities, that there are good grounds for fearing persecution or a reasonable chance for fearing persecution.

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625. Villafranca, supra, 132.
626. *Ibid*, pages 132-133.

4.c If the state is itself considered to be a terrorist organisation this will be considered in the evaluation of the availability of state protection.

5. It should also be noted that *Section 98* of the IRPA renders the exclusion clauses, sections E and F of Article 1 of the Refugee Convention applicable to the consolidated grounds. There have been Court decisions that have further clarified Article 1F(b) dealing with serious « non-political crimes ».

The decisions of the Federal Court can be found on *www.decisions.fct.cf.gc.ca*

The Supreme Court of Canada found no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations and thus is not subject to exclusion under Article 1F(c)[627].

As for the issue of complicity, whether it is Article 1F(a), 1F(b) or 1F(c), the same principles apply[628].

C. Belgium

Katelijne Declerck abswered the questionaire. She accompanied the answers with relevant domestic jurisprudence from the Belgium Permanent Refugee Appeals Commission in the original language, which I do not enclose.

Question n°1

According to the majority of the decisions of the Permanent Refugee Appeals Commission, there is no difference between a persecution emanating from the State (or parties, organisations controlled by the state) or from non-state agents.

As you will read in the hereunder published extracts of jurisprudence (the full text of these decisions can be found on our website www.vbv.fgov.be) there is in case of persecution by a non-state agent, an analysis to verify if the persecution falls within the scope of the Geneva Convention and if the State is able / or is willing to protect the asylum seeker and/or if the asylum seeker did seek the protection of that State.

(-VB/00-2164/W6956, Rusland, 5 maart 2001; -CPRR 01-0089/F1374, 22 mars 2002, Djibouti ; -CPRR 01-0721/F1512, 23 mai 2003, Arménie; -CPRR 03-2592/R12136, 24 juin 2004, Russie ; -VB/04- 1680/E530, Mongolië, 2 december 2004)

627. Pushpanathan v. Canada, 1998 1 SCR 982.
628. MCI v. Bazargan, Mohammad Hassan (FCA, A-400-95), Marceau, Décary, Chevalier, September 18, 1996.

Question n°2

There has been no jurisprudential changes.

Question n°3

Every case will be analysed individually, taking into consideration the specificities of every case.

(VB/00-1900/W6922, 7 maart 2001, Rusland; -CPRR 02-0019/R10452, 22 mai 2002, Bulgarie ; -VB/02-0005/W7521, Algerije, 19 februari 2002; -VB/02-0333/W7620, Algerije, 26 april 2002; -VB/ 02-1678/W8133, Algerije, 13 december 2002)

Question n° 4

Do security concerns, related to terrorist organisations, affect in one way or another the answers to these questions?

Security concerns, related to terrorist organisations, are not object of a specific separate or additional attention but part of an all included exercise. The jurisprudence accepts that 'terrorist act' can be qualified as 'crime against peace, a war crime, or a crime against humanity' or 'as non-political crime' or as 'acts contrary to the purposes and principles of the United Nations' as mentioned in art. 1F a, b and c of the Geneva Convention.

(a) a. Does the fact that the non-state agent itself is a (known) terrorist organisation have any influence?
    b. It is in all cases a balancing factor between prosecution and persecution
    (VB/04- 0680/E528, Colombia, 18 november 2004)

(b) Is it a relevant factor that the asylum-seeker himself is known to be related to a terrorist organisation?

The principles used remain the same:

Complicity can stem from the 'collective responsibility' of members of a State institution or a criminal organization, if they were aware of the criminal objectives of these structures and no individual circumstances exonerated them from responsibility.

If possible an individual defendant or a member of a group, declared criminal in nature have been refused as refugees on the basis of prosecution and not persecution. These judgements have been written as exclusion cases as to be very clear on the nature of the case and not to let any doubt that all facts have been taken under consideration.

The probability of prolonged detention and the possibility of a trial that would not meet all the internationally recognised standards is balanced against the crimes imputed to the applicants and considered

that the gravity of these human rights violations committed voluntarily and systematically, outweighed the expected risk of persecution.

(c) Is it a relevant factor of consideration with regard to protection against non-state actors, that the state (or parties/ organisations controlling the State) is known to be a terrorist organisation?

See above: the same principles of balancing apply.

See Somalia decision in annex:

The Belgian jurisprudence has a differentiated approach towards persons in positions in authority: its insistence on the need to look into the effective possibilities of exercising such authority and a view to preventing or stopping the commission of excludable crimes.

Question n°5

There has been no changes in the evaluation of the exclusions clauses

however see also 4b.

(CPRR 01-0771/R11074, 9 janvier 2003, Autorité Palestienne)

D. Germany (Paul Tiedemann)

It does not seems to me to be sensible to send cases on the issue of non state agents because the legal situation in Germany has changed and there are no new decisions on the basis of the new law. But it could be helpful to study the new legal regulation in Germany: our new Act of Residency, which came in force at Jan. 1, 2005. These are the most relevant sections in English translation: Section 25 (2) and Section 60. Most important is Section 60 (1), sencence 4 c).

The complete new immigration act (including the Act of Residence) can be obtained http://www.auswaertiges-amt.de/www/de/willkommen/auslaenderrecht/zuwanderung_html > Immigration Act (pdf, 316 kb).

Section 25 Residence on humanitarian grounds

(2) A foreigner shall be granted a residence permit if the Federal Office for Migration and Refugees has incontestably established that the conditions of Section 60 (1) are met. Sub-section 1, sentences 2 to 4 shall apply mutatis mutandis.

Section 60 Prohibition of deportation

(1) In application of the Convention of 28 July 1951 relating to the Status of Refugees (Federal Law Gazette 1953 II, p. 559), a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions.

This shall also apply to foreigners who enjoy the legal status of foreign refugees in the Federal territory or are recognised as foreign refugees outside of the Federal territory within the meaning of the Convention relating to the Status of Refugees. When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group.

Persecution within the meaning of sentence 1 may emanate from

(*a*) the state,
(*b*) parties or organisation which control the state or substantial parts of the national territory, or
(*c*) non-state parties, if the parties stated under letters a and b,

including international organisations, are demonstrably unable or unwilling to offer protection from the persecution, irrespective of whether a power exercising state rule exists in the country, unless an alternative means of escape is available within the state concerned.

E. The Netherlands

In the Netherlands the latest major change of law was the new Act on immigration (Vreemdelingenwet 2000) that entered into force in April 2001. That law made no change in the national interpretation of the topic on non-state-agents. Major change was that no longer only the District Court of The Hague (with subsection in all Dutch districts courts) but in second instance also the Judicial Division of the Council of State decides in asylumcases.

Before 2001 the District Court overruled in its decision of 27.8.1998 (JV 1998/157) in a Somali case earlier jurisprudence of the Judicial Division, dating from 1996. The District court stated that article 1A Refugee Convention does not lead to the conclusion that there can be no persecution ment in article 1A, when the persecution emanated from third parties and protection against that harm is impossible because of the fact that no factual State exists anymore, if that persection is related to one (or more) convention grounds mentioned in article 1A. On the other hand the court stated, that in this circumstances, where no (factual) authority exists, protection can also be given by other parties than the State. For that reason the asylum-seeker will not be given international protection under the Refugee Convention, when he or she can obtain protection by others than a State authority if that protection is effective and durable.

The Judicial Division of the Council of State did not overrule this juriprudence anymore. So in a recent Somali case (9-2-2004, JV 2004, 228) of a member of the minority of Reer Hamar there is no explicit point of view from the Judicial Division on the issue, but implicitly is

accepted that also in the Somali context, where no (factual) state authority exists, an asylum-seeker can be granted refugee status. This is of course in accordance with the EU-Directive.

In Somali cases of Reer Hamar the Dutch Minister of Immigration has stated that he does not accept prima facie fear for persecution for this group, but she will, because of the vulnerable position of this group, consider a Reer Hamar asylum-seeker to be a Convention refugee, when there is only little evidence for acts of persecution against this person in the past, if these acts are related tot his ethnical background. In this case the Judicial Division respects this policy point of view that is close to prima facie refugee status, but concludes that the asylum-seeker was (only) victim of banditism. The asylum-seeker did not make acceptable that this acts were related to one of the convention grounds in article 1A Refugee Convention.

In another case (20-1-2004, JV 2004, 98) the Judicial Division – not clear is which nationality the asylum-seeker had – stated that first has to be established, whether the act of persecution of a third party (non state agent) is "based" on one of the convention grounds of article 1A. This examination must be done, so states the Judicial Division, prior to the question whether the state authority provides protection.

4-5

In the Netherlands recently there has been quite a few exclusion cases on article 1F Refugee Convention, for instance against former Khad/WAD officials from Afghanistan. There has also been some cases of presumed terrorists that seek asylum in the Netherlands. In principle there is no difference in the concept of non-state-agents here. But the Minister of Immigration uses in this type of cases information from the Foreign Office and Intelligence Services on relevant facts that is kept secret from the asylum-seeker and his legal counsel. So the terrorist issue has its impact on gathering facts in asylum cases.

IV. Discussion

There still are jurisdictions[629] where in relation to the refugee definition not is accepted that relevant harm does not emanate from a state agent, or is more of less approved by the state. In member states of the European Union the Council Directive 2004/83 decides this former discussion: within that jurisdiction that relevant harm does not have to emanate from a state authority to fullfill the refugee definion.

The discussion will move to the questions

629. For example Switzerland.

(*a*) whether there is a relation to a convention ground mentioned in article 1A when persecution emanates from a non-State agent. Here rises the question whether the non-State actor must himself act because of one of the convention grounds or not;
and

(b) what (lack of) protection (including an internal flight alternative) decides wether international protection must be provided when the harm emanates from a non-state agent.

A subquestion is, on whom lays the burden to prove whether protection can be obtained. Is it on the state to prove (or make acceptable) that there is protection, or must the asylum-seeker make clear that there is no protection.

Roland Bruin, District Court (Rechtbank) Haarlem, The Netherlands, April 2005

Rapporteur

PARTICULAR SOCIAL GROUP WORKING PARTY SELECTED DECISIONS FROM UNITED STATES COURTS OF APPEALS

JUAN P. OSUNA RAPPORTEUR[630]

Persons fleeing persecution who are present in the United States may seek protection by applying for refugee status under the standards set forth in the Refugee Act of 1980. The Act reflects international standards by allowing individuals to be granted asylum if they can show a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

The membership in a particular social group ground of asylum has typically presented an adjudicatory challenge for United States courts and administrative tribunals. In 1985, the Board of Immigration Appeals (BIA) set forth a definition of "social group" in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) that remains widely followed. The BIA held that persecution on account of "membership in a particular social group" is persecution directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic. The BIA noted that the shared characteristic might be an innate one such as sex, color, or kinship ties, or in some cases shared past experiences. The BIA held that whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. *Id. at* 233.

The United States Courts of Appeals have also grappled with social group issues in the past 20 years. In some instances, the courts have applied the definition of social group enunciated in *Matter of Acosta*. In others, the courts have attempted different definitions. The many decisions among the different circuits illustrate the various contexts in which social group issues arise.

Following is a synopsis of selected decisions on social groups from the U.S. Courts of Appeals in the last two decades, organized by circuit.

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630. Any views expressed in this article do not necessarily represent the views of the Executive Office for Immigration Review, the United States Department of Justice, or the United States government.

First Circuit

In *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985), the particular social group claimed was that of a politically active, educated, tribal family. The court stated that "a 'particular social group' normally comprises persons of similar background, habits, or social status....Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies." *Id.* at 626 (internal citations omitted). The court concluded that the facts put forth by the alien brought the claimed particular social group "squarely within this definition." *Id.* In addition, specifically with regard to the alien's claimed particular social group, the court stated that the "threat of persecution arises out of characteristics that are essentially beyond the [alien's] power to change. *Id.*

Eight years later, in *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993), the court appears to have adopted the definition of particular social group set forth in *Matter of Acosta*, by referencing the *Acosta* requirement that the individual in question must be a member of a group of persons all of whom share a common, immutable characteristic. Based on that standard, the court found that the group claimed by the alien, a nuclear family, was a particular social group. In such case, the Ethiopian government persecuted the alien to get information about his brother, who was viewed as an enemy of the state, and the alien was therefore found to have been singled out for mistreatment because of his relationship to his brother.

In *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998), the court found that the claimed particular social group of Haitian youth who possess pro-Aristide political views was not sufficient for asylum purposes, since the alien failed to establish that young students who hold pro-Aristide views constitute a cognizable social group. *Id.* at 56. There was, in essence, no evidence that they are "anything other than a general demographic segment of the troubled Haitian population."

In *Meguenine v. INS*, 139 F.3d 25 (1st Cir. 1998), the alien sought asylum claiming that Islamic fundamentalists in Algeria had targeted health care workers who refused to stop treating government soldiers. The alien claimed that as a health care professional, he felt ethically obligated to treat all injured people. The court stated that "[a] health care worker who refuses to violate the fundamental ethical obligations of his profession may fall into a group of people with a 'mutable trait' which a member of that group should not, in good conscience, be required to change." *Id.* at 27. However, without answering the

question of whether "neutral health care workers" in Algeria constituted a particular social group, the court instead found that the evidence submitted by the alien was insufficient to establish nexus to a protected ground. *Id.* at 29.

Similarly, in *Mediouni v. INS*, 314 F.3d 24 (1st Cir. 2002), the court found that the "son of a former colonial-era military police officer" could establish asylum eligibility. *Id.* at 28. However, the court held that the alien had not presented sufficient evidence establishing that his fear of persecution based on his membership in a particular social group was objectively reasonable.

More recently, in *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004), the court deferred to the BIA's finding that the claimed particular social group of "deported Haitian nationals with criminal records in the United States" would not be sufficient to establish eligibility for relief because whether or not Haitians who commit crimes in the United States are subjected to persecution upon repatriation, as claimed by the alien, "it would be unsound policy to recognize them as a 'social group' safeguarded by the asylum statute." *Id.* at 397.

Finally, in *Silva v. Ashcroft*, 394 F.3d 1 (1st Cir. 2005), the alien claimed the particular social group of those who refused to perform illegal tasks because of pressure from workplace supervisors or employees forced to acquiesce to the demands of corrupt employers or whistleblowers. The alien was an accountant for a government-funded drug rehabilitation center. He created phony invoices to help the chief executive officer (CEO) cover up embezzlement. When the government started an investigation, the CEO threatened him with death if he spoke out. However, the alien gave a statement implicating the CEO. The court stated that none of the above groups fit "comfortably with the concept of a 'recognizable and discrete' social group." *Id.* at 6. However, the court went on to state that "characteristics relating to current or former employment status can, at least theoretically, form the linchpin for assembling a protected social group." The court in its final analysis merely assumed for argument's sake that the "social group" requirement had been met and instead determined that the alien had not established nexus to a protected ground, as it was merely a personal dispute. *Id.*

Second Circuit

In *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991), the court analyzed whether a group consisting of "women who have been previously battered and raped by Salvadoran guerillas," was a particular social group. In generally defining what constitutes a particular social group, the court looked to how the group will be viewed by the "outside

world," meaning that the group must "possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor — or in the eyes of the outside world in general." *Id.* at 664. The court also stated that the "attributes of a particular social group must be recognizable and discrete," as opposed to possession of "broadly-based characteristics such as youth and gender." *Id.* The court ultimately rejected the claimed particular social group stating that the alien "failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics other than gender and youth — such that would-be persecutors could identify them as members of the purported group." *Id.*

Likewise, *Saleh v. U.S. Dept. of Justice*, 962 F.2d 234 (2d Cir.1992), involved the case of a Yemeni national who had, while in the United States, killed another Yemeni national and a Sharia court in Yemen tried and convicted him *in absentia* and sentenced him to death. The alien claimed that he was a member of a particular social group comprised of "Yemeni Moslems residing outside of Yemen upon whom the Islamic authorities in Yemen are attempting to exert their power and control" or, in the alternative, his particular social group was "poor Yemenis who could not afford to pay 'blood money' to buy their way out of a death sentence." *Id.* at 240. The court stated that neither of the claimed groups possessed recognizable and discrete attributes, and instead both groups possessed broadly-based characteristics similar to "youth and gender" that have been held insufficient to constitute a particular social group. *Id.*

Third Circuit

In *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), the Third Circuit accepted the *Matter of Acosta* definition of particular social group. The alien in the case defined the social group as "Iranian women who refuse to conform to the government's gender-specific laws and social norms." *Id.* at 1241. The court appeared to indicate that this may be a social group because "if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as 'so fundamental to [her] identity or conscience that [they] ought not be required to be changed.'" *Id.* However, the court held that in this particular case the alien did not establish that she was a member of the group, *ie.* that she would refuse to conform. The court instead redefined the group that the alien was a part of as that of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them." *Id.* The court then held that the alien failed to establish persecution by being required to comply as

she had not shown that the "requirement of wearing a chador or complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution." *Id.* at 1242.

In *Osuman v. Ashcroft*, 2002 WL 1338076 (3d Cir. 2002), the alien claimed that the applicable particular social group was his nuclear family. In the case, an adjoining land owner in Ghana wanted the alien's father's land and as a result threatened the alien. The court stated that although other circuits have explicitly held that asylum can be based on membership in a nuclear family, "those cases all presented the factual scenarios in which the [alien] faced persecution based on her familial relationship with a person who was persecuted because of a political opinion." *Id.* at 2. Although the alien in this case was threatened because of his familial relationship, the court found that asylum is not appropriately extended to these facts because there was no evidence that the persecutor had anything more that a personal dispute with the alien's family.

In *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003), the court examined the claim by the alien that he suffered past persecution on account of his membership in the particular social group of "children from Northern Uganda who are abducted and enslaved by the [Lord's Resistance Army (LRA)] and oppose their involuntary servitude," and that he has a well-founded fear of persecution by the LRA or the Ugandan government on account of his membership in the particular social group of "former child soldiers who have escaped LRA enslavement." *Id.* at 167. With regard to the first claimed particular social group, the court noted that in defining a group based on age, a problem arises in that "age changes over time, possibly lessening its role in personal identity" taking away its identification as an innate characteristic. *Id.* at 171. In addition, the court noted that children as a class represent an extremely large and diverse group. Most importantly, however, the court noted that a particular social group "must exist independently of the persecution suffered" by the asylum applicant. *Id.* at 172. In such regard, the court specifically stated that "[a]lthough the shared experience of enduring past persecution may, under some circumstances, support defining a 'particular social group' for purposes of fear of future persecution, it does not support defining a 'particular social group' for past persecution because the persecution must have been 'on account of' a protected ground....Therefore, the 'particular social group' must have existed before the persecution began." *Id.* The court further noted that the alien did not establish that the LRA only targets children or that the LRA targets children who oppose abduction. *Id.* at 172-73. The court agreed with the BIA's finding that the LRA targeted the alien due to its need for labor and not an account of his membership

in a particular social group. The court did accept the claimed particular social group of "former child soldiers who have escaped LRA enslavement" as the alien "shares the past experience of abduction, torture, and escape with other former child soldiers. His status as a former child soldier is a characteristic he cannot change and one that is now unfortunately fundamental to his identity." *Id.* at 178.

Fourth Circuit

In *Basma v. U.S. INS*, 155 F.3d 557 (4th Cir. 1998), the alien's claimed particular social group was wealthy Lebanese in Sierra Leone. The court stated that "[f]inancial status is not an immutable characteristic or trait that is so fundamental to an individual's identity that the individual ought not be required to change." *Id.* at 3.

In *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004), the court found that a "family" is a particular social group. *Id.* at 235. However, the alien did not show that he was targeted on account of such membership as the evidence did not establish that a gang targeted him because of his brother's refusal to join.

Fifth Circuit

In *Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992), the court, in determining whether the alien qualified for asylum as a member of the particular social group comprised of the Esubete royal family, found that the alien's fear of persecution was not on account of membership in such particular social group but instead on account of "his particular activities or lack thereof as related to that social group," ie. he refused to accept a position of leadership. *Id.* at 913. The court held that the persecution the alien fears arises from a personal dispute between him and a faction of the Esubete tribe.

Sixth Circuit

In *Dombov v. INS*, 165 F.3d 27 (6th Cir. 1998), the aliens claimed the particular social group was successful capitalists, and they feared persecution from organized crime figures. The court stated that they were not targeted because of a protected status but they were instead targeted by criminals due to their wealth.

Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003), involved an alien who in the United States joined the MS 13 gang and received some tattoos identifying him as a gang member. He then left the gang and moved away. The alien claimed tattooed youth in Honduras are targeted because they are assumed to be gang members and therefore criminals — the targeting is a form of "social cleansing." The alien defined his particular social group as former member of a gang. The court adopted the *Matter of Acosta* definition of a particular social group.

The court then concluded that the alien, based on the evidence, was really arguing that tattooed youth are targeted and persecuted, so that was the particular social group. The court concluded that such group does not constitute a particular social group because "tattooed youth do not share an innate characteristic, nor a past experience, other than having received a tattoo." *Id.* At 549. Tattooed youth "cannot be seen as constituting a collection of people closely affiliated with each other, who share a 'common, immutable characteristic.'" *Id.*

In *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004), the court found that the daughter of the lead applicant has a well-founded fear of female genital mutilation (FGM), and therefore, the alien is also entitled to asylum because she has a well-founded fear due to the fact that she would have to witness the pain and suffering of her daughter in having FGM performed on her.

Seventh Circuit

In *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992), the court defined particular social groups generally as "discrete, relatively homogeneous groups targeted for persecution because of assumed disloyalty to the regime." *Id.* at 1132. However, in concluding that the claimed social group of "drug trafficker" was not a particular social group the court also concluded that "[w]hatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do." *Id.*

In *Sharif v. INS*, 87 F.3d 932 (7th Cir. 1996), the court did not question whether the claimed social group of a family is a particular social group, but instead found that nexus was not established on that ground. The court also did not address whether the claimed social group of "westernized women" constitutes a particular social group, but instead concluded that the alien failed to show a fear of persecution on that basis as there was "no evidence to suggest that [the alien] is either unable or unwilling to comply with Iranian law when she returns to Iran." *Id.*

Similarly, in *Iliev v. INS*, 127 F.3d 638 (7th Cir. 1997), the alien claimed that his particular social group was his family who advocated anticommunist ideals. The court stated that a family could be a particular social group but that the alien failed to establish that his family was a target for persecution by Bulgarian authorities.

In *Najafi v. INS*, 104 F.3d 943 (7th Cir. 1997), the alien claimed that his particular social group was comprised of Iranians who left the country before the Islamic revolution, were educated in the United States, and refused to return to fight in the revolutionary army. The court stated that it was not clear that this was a cognizable group as the alien, apart from

a "western education and the concomitant exposure to a more liberal political system," did not explain "what traits, ideas, or activities bind his social group together." *Id.*

By contrast, in *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998), the alien argued that the particular social group was parents of Burmese student dissidents. The court determined that it would adopt the *Matter of Acosta* formulation that the common characteristic that defines the group must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences. The court rejected the "voluntary associational" test of the Ninth Circuit (see below) as well as the Second Circuit's requirement of the establishment of the external perceptions of a group. *Id.* at 512. The court, then stated that parents of Burmese student dissidents do share a common, immutable characteristic sufficient to comprise a particular social group.

Yadegar-Sargis v. INS, 297 F.3d 596 (7th Cir. 2002), involved a claim that the particular social group was Christian women who oppose wearing Islamic garb. The court did find that this was a particular social group. However, the court also distanced itself from the rationale enunciated by the Third Circuit in *Fatin* and the Eight Circuit in *Safaie* (see below), which involved very similar claims, when they required that the refusal to wear the garb must be so profound that the women would choose to suffer the severe consequences of noncompliance. *Id.* at 603. The court reasoned that "[a]lthough it would seem appropriate to require that the government-imposed requirement be one that affects a deeply held belief, it is unclear why the victims must be willing to suffer whatever consequence may be visited on them as a prerequisite to claiming persecution. The law does not impose an absolute requirement that one be willing to suffer martyrdom to be eligible for asylum." *Id.* While the court found that the alien was a member of her claimed particular social group, the court also noted that the alien had to show that "complying with the dress code would, for her, rise to the level of persecution." *Id.* at 604. It was not clear that the dress requirements were abhorrent to the alien's deepest beliefs, and she had complied with them in the past.

Finally, in *Lleshanaku v. Ashcroft*, 2004 WL 1088251 (7th Cir. 2004), the alien alleged that she was targeted by gang members to be put into forced prostitution. The alien's claimed particular social group was young women in Albania without male protection. In its determination of whether members of this group share a "common, immutable characteristic" the court stated that the alien cannot change the fact that she does not have any male relatives with gang affiliations who could protect her and her account of repeated contact by gang members supports the conclusion that they targeted her, so her fears

rose above concerns of the general population because the threats were directed to her personally. *Id.* In addition, the court noted that it had recognized social groups that were defined in part by gender, such as in *Yadegar-Sargis*. However, "the *Yadegar* example seems inapposite because the social group recognized in that case was also defined by a political or religious belief. In contrast, [this alien's] claim seems to draw upon just one manifestation of a larger crime problem that Albania faces and, thus, is not the type of conduct for which asylum protection is normally extended," because what she fears is common criminality. *Id.*

Eighth Circuit

In *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994), the court stated that particular social group "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. The principal concern is a voluntary associational relationship among the purported members, which impart some common characteristic that is fundamental to their identity as a member of that discrete social group." *Id.* at 640. In addition, the characteristic should be immutable or should not be required to change. The alien claimed a particular social group of Iranian women. The court stated that the claimed group was too broad because all Iranian women do not have a well-founded fear based solely on their gender. Alternatively, the alien's claimed particular social group was Iranian women who advocate women's rights or who oppose Iranian customs relating to dress or behavior. The court said that women "who refuse to conform and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance may well satisfy the definition" of a particular social group. *Id.* However, in the instant case, the alien did not completely refuse to conform and, therefore, it cannot be concluded that her "compliance with the gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution." *Id.*

In *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003), the alien claimed the particular social group was mentally ill patients. The court found that the alien failed to show that mentally ill Jamaicans, or mentally ill female Jamaicans qualify as a particular social group because they are not a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Id.* at 723. The mentally ill are "too large and diverse a group to qualify." *Id.*

Ninth Circuit

In *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir 1986), the court analyzed whether the social group of young, urban, working-class

males of military age who had maintained political neutrality constituted a particular social group. The court stated "the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a *voluntary associational relationship* among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group." *Id.* at 1576 (emphasis added). The court determined that the alien's group was not the type of cohesive, homogenous group to which particular social group was meant to apply. *Id.* at 1577. "Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." *Id.*

In *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), the court backed away from relying solely on the voluntary associational standard set forth in *Sanchez-Trujillo* and instead combined the *Matter of Acosta* and *Sanchez-Trujillo* standards. In such case, the court considered whether the group of gay men with female sexual identities in Mexico constituted a particular social group. The court, in setting forth its new standard, stated that a particular social group "is one united by a *voluntary association*, including a former association, *or* by an *innate characteristic* that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *Id.* at 1093 (emphasis added). The court in analyzing the particular social group claimed in the case stated that this group "outwardly manifests their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails," and such men are persecuted because they are viewed as taking on the feminine role in gay relationships, not merely because of how they dress. *Id.* at 1094. The court concluded that "[t]heir female sexual identities unite this group of gay men, and their sexual identities are so fundamental to their human identities that they should not be required to change them." *Id.* Accordingly, the claimed social group qualifies as a particular social group.

In *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001), the question posed was whether an immediate family, all of whose members lived together and were subject to abuse by the father, was a particular social group. The court stated that not all family groups constitute a particular social group, but this one does as the "family members are part of an immediate, as opposed to an extended, family unit; they now live or have lived together and are otherwise readily identifiable as a discrete unit; and they share the common experience of all having suffered persecution at the hands of the [] father." *Id.* at 1176.

In *Chen v. Ashcroft*, 289 F.3d 1113 (9th Cir. 2002), the alien's mother owed a debt and the alien feared he would be punished as a result. The court found that the claimed particular social group in this case was the family, and that the family did constitute a particular social group. The court went on to frame the issue in this case as to whether the "punishment of a family member for a crime committed by his mother is punishment for the crime or is punishment 'on account of' membership in the family." *Id.* at 1116. The court stated that the Chinese government may view the punishment as for the crime, but it is "only on account of membership in the family that [the alien] would be deemed punishable." *Id.*

Similarly, in *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004), the alien's mother had a second child in violation of the Chinese government's population control policies, and the alien claimed that he suffered persecution as a result. The particular social group was identified as the nuclear family. While the court did not determine in this case whether the particular social group of the nuclear family was sufficient and instead remanded the case to the BIA, the court did state "[i]n practice, where family membership is proposed as the 'particular social group' status supporting a claim of refugee status, this prong of the test melds with the 'on account of' prong. Where family membership is a sufficiently strong and discernible bond that it becomes the foreseeable basis for personal persecution, the family qualifies as a 'social group.' Where it is not plausibly the basis for such persecution, it will not matter whether the family is a 'social group' or not because refugee status will be denied on the 'on account of' prong in any event." *Id.* at 1029.

In *Thomas v. Ashcroft*, 359 F.3d 1169 (9th Cir. 2004), the South African alien had what she claimed was a white, racist father-in-law who was a boss at a factory, "Boss Ronnie," and who abused his black workers. The claimed particular social group was comprised of relatives of Boss Ronnie. The alien alleged various instances of persecution by black individuals at the factory, and she claimed they happened because of her relationship to her father-in-law. The court stated that "the [alien has] demonstrated that the alleged persecution suffered was a result of the fact that [she is] related to Boss Ronnie. [She is] associated and identified with him by the perpetrators....Therefore, we find that the acts committed against the [alien] were sufficiently linked to [] family membership so as to constitute alleged persecution on the basis of membership in a particular social group....[T]he alien's familial relations are a but-for cause of the alleged or feared persecution." *Id.* at 1178.

In *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005), the court stated that all homosexuals are a particular social group. The court stated

that there is no guarantee that [the alien] would not be persecuted in Lebanon based on his past homosexual acts alone. In addition, the options to either force the alien to face persecution for future homosexual acts or to live a life of celibacy are not acceptable. "[T]he sexual identities of homosexuals are so fundamental to their human identities that they should not be required to change them." *Id.*

In *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005), the alien had been subjected to FGM in Somalia. The court found that the FGM she suffered could be on account of her membership in the particular social group of young girls in the Benadiri clan, or, "because the practice of female genital mutilation in Somalia is not clan specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females," on account of membership in the particular social group of Somalian females. *Id.* at 797-98. The court also found that "persecution in the form of female genital mutilation is similar to forced sterilization and, like that other prosecutory technique, must be considered a continuing harm that renders a petitioner eligible for asylum, without more." *Id.* at 799.

Tenth Circuit

In *Rahman v. INS*, 133 F.3d 932 (10th Cir. 1998), the alien claimed the particular social group of a member of her mother's family. The mother was active in the Jatiyo party and the alien claimed that she was sought because of her mother's involvement. The court did not really decide if it was a particular social group and instead denied the claim because the alien did not show she was being sought out for persecution.

VULNERABLE CATEGORIES WORKING PARTY

Improving Procedural Safeguards for Vulnerable Refugee Claimants in Canada[631]

LOIS D. FIGG RAPPORTEUR[632]

Introduction

Established refugee determination systems recognize that some of the claimants before them are vulnerable. Vulnerable claimants have traditionally been categorized into five distinct groups: women, children (especially unaccompanied or separated minors), detainees, people with mental health problems and victims of torture. Procedures in determination systems have been developed to accommodate these vulnerable categories.

Within the context of asylum procedures the designation of who is "vulnerable" has to do with who might not be able to articulate their story fully. A young child won't be able to articulate his or her story and will likely not even know why he or she is or is not a Convention refugee.[633] People with mental difficulties may not

631. While the writer has striven for accuracy, the information contained in this paper has not been reviewed or approved of by the IRB. Any opinions expressed are those of the writer, and are not meant to represent IRB policy.

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633. The *United Nations High Commission for Refugees (UNHCR) Handbook* at paragraph 214 states: "the question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity." Paragraph 215 make a distinction between children and adolescents and states: "It can be assumed that – in the absence of indications to the contract – a person of 16 or over may be regarded as sufficiently mature to gave a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature."

appreciate the nature of the proceedings[634]; some women may not be able to tell their story for cultural or other reasons; detainees may not be able to access necessary resources to help in telling their story; and victims of torture may not be able to articulate, or articulate "persuasively" what happened to them.

When an individual is designated as "vulnerable" neither the burden of proof (which rests on the claimant) nor the standard of proof changes. What does change is the way in which a decision-maker puts questions to the claimant and the way in which they ought to evaluate some of the claimant's testimony.[635]

The Immigration and Refugee Board (IRB) is now in its second decade of operation and our procedural safeguards are well established. Many people who come before us are vulnerable and our established procedures surely assist some of them. Over time, however, it has become apparent that current safeguards have not adequately assisted all vulnerable claimants. Recognizing this, the IRB is currently in the midst of developing a new set of Chairperson's Guidelines[636] that help will ensure all vulnerable claimants are procedurally protected.

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634. Again the *UNHCR Handbook* is useful here. Pages 49-50 deal with mentally disturbed persons and note that these types of claimants "call for different techniques of examination" (paragraph 206) and that the examiner should, whenever possible, "obtain expert medical advice" (paragraph 208). Paragraph 210 states that it will "be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or form the guardian, if one has been appointed."

635. Paragraph 210 of the *UNHCR Handbook* states that it will be "necessary to lighten the burden of proof normally incumbent upon the applicant." Paragraph 219 states that for unaccompanied or separated minors the examiner may have to apply "liberal application of the benefit of the doubt" in coming to a decision "as the well-foundedness of the minor's fear" of persecution. The burden of proving a claim however still rests on the claimant, even if the claimant is vulnerable. The standard of proof is also the same – that the claimant will have a serious possibility of facing persecution should he reavail himself of his country of origin. What changes is the way in which a decision-maker will judge a claimant's credibility. When someone is vulnerable a decision-maker may, for example, place more emphasis on objective information than s/he otherwise would.

636. The purpose of IRB Chairperson's Guidelines is to promote consistency, coherence and fairness in the treatment of cases at the IRB. While not binding on decision makers, the Guidelines present a recommended

The IRB's current procedural "best practices" regarding the five vulnerable categories

The IRB has taken the following steps to address the five categories of vulnerable people:

(i) Children[637]

The IRB Chairperson issued *Guidelines Concerning Child Refugee Claimants*[638] in September 1996. The Child Guidelines speak to evidentiary and procedural matters when dealing with both accompanied and unaccompanied or separated children. The Guidelines set out the guiding principle that in determining the procedures to be followed when considering the refugee claim of a child, the Refugee Protection Division (RPD) should give primary consideration to the "best interests of the child."

Pursuant to s.167(2) of the *Immigration & Refugee Protection Act* (*IRPA*) a designated representative (DR) is assigned to each and every minor who makes a claim before the IRB[639]. When a minor is "accompanied" usually the DR will be that child's parents. When a child is "unaccompanied" or "separated " the DR will be selected from a roster of approved representatives set up by the Registry, who are paid a stipend from the Chairperson.

The DR is distinct from legal counsel and a child has the right to have both. The primary role of the DR is to:

— retain and instruct counsel (or assist the minor in instructing counsel)
— make decisions regarding the case or assist the minor to make those decisions
— inform the minor about the various stages and procedures in the processing of his or her case

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approach in examining complex issues of national importance, dealing with emerging issues, or resolving an ambiguity in the law. They reflect case law and are developed after extensive internal and external consultation. Decision-makers are expected to follow the Chairperson's Guidelines and are evaluated on their knowledge and implementation of the Chairperson's Guidelines in their reasons for decision.

637. to compare with the procedural safeguards re: minors in the USA see: http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf
638. Child Guidelines: http://www.irb.gc.ca/legal/guidline/childref/index_e.stm
639. RPD Rule 15 deals with DRs: http://www.irb-cisr.gc.ca/en/about/rules/rpdrules_e.htm#15

— assist in gathering evidence to support the minor's case and provide evidence and act as a witness at the hearing if necessary and
— generally protect the interests of the minor and put forward the best possible case to the Division

As much as possible, the DR should inform and consult the minor when making decisions about the case. However, the role of the DR will vary, depending on the level of understanding and maturity of the minor. Minors will vary in their ability to participate in making decisions, depending on the type of decision that has to be made, their age and their maturity.

The Child Guidelines set out the mandatory criteria to apply when designating a representative and the duties of that DR[640].

In practice, an unaccompanied or separated minor is identified as soon as possible after a claim is made and relevant information is referred to provincial child protection authorities. Notices of all hearings and pre-hearing conferences are also forwarded to such authorities. Unaccompanied minors are given priority in the processing and scheduling of claims and a pre-hearing conference is scheduled within 30 days of receiving the child's Personal Information Form (PIF). At that pre-hearing conference a decision-maker will appoint a DR for the unaccompanied minor claimant.

The IRB, in the Ontario region, is currently attempting to develop a creative partnership with one of Canada's largest law firms when it comes to separated minors. The IRB was able to capitalize on this firm's current interest, being a good corporate citizen, to encourage its lawyers to do *pro bono* work for clients who traditionally have difficulty accessing justice. Significantly, this firm is supporting its lawyers in doing so by assigning a billing code with a specific dollar amount attached to such work, thereby allowing their lawyers to account for their *pro bono* work in all-important annual billable hours. The firm was reluctant to offer *pro bono* legal services as it was felt that as a large corporate commercial firm it may be perceived as taking work away from smaller firms, legal clinics and sole practitioners who specialize in the area of immigration and refugee law. However, once approached by the IRB they were agreeable in principle to permitting interested lawyers to act as DRs for all separated minors that come to Canada. In this way the firm will fill a particular and urgent vacuum. Through IRB-facilitated consultation and interface

640. The Commentary to RPD RULE 15 also sets out the criteria for DRs: http://www.irb-cisr.gc.ca/en/about/rules/rpdcomment_e.htm#rule15

with Citizenship and Immigration Canada and other government agencies it is envisioned that the firm's lawyers can take up the role of DR for each separated minor immediately upon his/her arrival in Canada and can assist the child through any and all immigration procedures the child would undergo, not just a refugee claim. This creative partnership is still in development and has not yet been finalized but it is hoped that once piloted in Toronto it may be extended nationally to all IRB regions across Canada.

(ii) Women

The IRB Chairperson issued updated *Guidelines on Women refugee Claimants Fearing Gender-Related Persecution*[641] in November 1996. These guidelines mainly address the evidentiary issues and legal analysis used to connect gender-related persecution to the Convention refugee definition. They do not, as such, enunciate any special procedural safeguards in dealing with this vulnerable category. They do note, however, that given the sensitive nature of testimony in some cases:

> "... it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women. Members should be familiar with the UNHCR Executive Committee Guidelines on the Protection of Refugee Women.32."

Although these guidelines envision the concept of a "specialized panel" of members to hear these kinds of claims, in practice this has not been formally implemented with respect to women refugee claimants nor for any of the vulnerable categories. All members are expected to hear these types of claims with the sensivity necessary to be able to come to a just decision. All female panels are occasionally requested for these types of claims and the Board, more often than not, grants these requests if operational considerations permit. However it is only when the claimant and/or counsel present evidence that the claimant cannot fully present her testimony is the Board compelled to grant the request.

In practice many of the gender claims in Canada concern the issue of domestic violence where a male spouse is the alleged agent of persecution and the claimant is unable to avail herself of the protection of her state. Usually the agent of persecution remains outside of Canada. Where both spouses are pursuing concurrent claims, however, the RPD will disjoin claims. Here the balance between the interests of

641. Gender Guidelines: http://www.irb.gc.ca/legal/guidline/women/index_e.stm

justice, on the one hand, in having all relevant information before the Board is weighed against the potential harm done the claimant, on the other hand. Similarly, in practice the Refugee Division will allow the transfer of PIFs to be entered into evidence in a claim without calling that individual to testify.

Members receive gender-sensitivity training as part of their new member training. Members also receive ongoing training on gender sensitivity from time-to-time as part of their professional development. Members are also evaluated on their application of the chairperson's guidelines and also on whether they treat hearing room participants with sensitivity and respect.

(iii) People with mental health problems

Currently there are no specific Chairperson's Guidelines with respect to dealing with people with mental health problems. However there are procedural safeguards in place. Pursuant to s.167 (2) of the *IRPA* the RPD is required to designate a representative for a claimant who, in the opinion of the Division, is *unable to appreciate the nature of the proceedings*. Pursuant to *IRPA* the DR shall be paid an honorarium fixed by the Chairperson and reasonable expenses, unless the DR is a parent or guardian of the people represented. Pursuant to Rule 15 of the RPD Rules where a claimant's counsel believes that the claimant is unable to appreciate the nature of the proceedings the counsel is required to advise the Division in writing of that belief right away so the Refugee Division can decide whether to designate a representative.

The determination of whether someone is "unable to appreciate the nature of the proceedings" may be based on:

- Admissions by the claimant or counsel about the claimant's inability to understand what is going on
- Observable behaviour at the hearing, including responses to questions asked by the Refugee Division
- Expert testimony or a report of the claimant's mental health or intellectual capacity

In practice Members may ask for a psychological assessment to be obtained if that person is represented by counsel to help in determining whether that person is vulnerable and requires a DR. Sometimes, however, potentially vulnerable claimants are not represented by legal counsel. The Members will question that individual on the record to determine their understanding of the nature of the proceedings.

(iv) Victims of torture

Currently, there are no particular procedures set out for victims of torture in the RPD Rules, *IRPA*, nor any Chairperson's Guidelines with respect to dealing with claimants who are victims of torture. The Federal Court of Canada has handed down case law that guides decision-makers in understanding that in assessing the credibility of a torture victim that the decision-maker must take into account the trauma and inherent difficulties associated with testifying about trying events such as detention and torture. In practice, Members are cautious in their questioning and test credibility regarding the circumstances that may have surrounded the torture, rather than the torture itself. Members receive sensitivity training regarding victims of torture in their new Member training and in their on-going professional development on the Board.

(v) Detainees

Similarly, the Refugee Division of the IRB has no special procedures with respect to the handling of cases of people held in detention.

Rule 26 of the RPD Rules states:

> *The Division may order a person who holds a claimant or protected person in custody to bring the claimant or protected person to a proceeding at the location specified by the Division*

In practice, detainees are given priority handling in the processing and scheduling of claims. They are invariably brought in for a pre-hearing conference under guard in advance of a full hearing. The problems that often arise with detainees are related to the fact that they have historically faced difficulties in accessing legal or other counsel or interpretation services and hence may not have been able to properly submit the requisite documentation in advance of the hearing. A pre-hearing conference allows the Members to explain to a detainee the process, enable him or her to fill out a PIF and set a future date for a full hearing.

In the Ontario region, the IRB has recently been involved in establishing a creative partnership with the legal clinic of a local well-recognized law school. The students at the clinic offer all detainees assistance in completing their PIFs, obtaining interpretation services, obtaining legal aid assistance, and offering guidance throughout the process. All detainees before the Ontario region are now assisted by the legal clinic, if a detainee does not have his/her own legal representation. This partnership has been of tremendous benefit to the IRB as cases of detainees now generally proceed without delay, thereby assisting in the reduction of the postponement rate in these cases, which was traditionally very high. Also, the law school students

gain tremendous experience and most importantly, naturally, the rights of this potentially vulnerable category of claimants to access justice fully have been ensured.[642]

A New Approach: the Proposed new "Chairperson's Guidelines for Vulnerable Persons Appearing Before the IRB"

Despite our best practices, as mentioned above, procedural safeguards for vulnerable people have been, to some extent, uneven and have been developed piecemeal, with some potentially vulnerable clientele being left entirely out of the loop (i.e. the physically challenged). To rectify this situation the IRB is currently developing new Chairperson's Guidelines. At the time of writing this paper they are the subject of stakeholder consultations. They expected to be finalized in the Fall of 2005.

The new Vulnerable Persons Guidelines will take a more global and less "categorical" approach to who is vulnerable and will aspire to ensure that procedural safeguards and procedures will assist all potentially vulnerable claimants. These Guidelines will specifically "catch" those not mentioned in the Child Guidelines or Women Guidelines – i.e. victims of torture, victims of violence and the physically challenged and mentally incompetent claimants.

The new Guidelines will assist in identifying exactly who is vulnerable. The new Guidelines will recognize that vulnerable persons are individuals who have difficulty with the process of appearing at a hearing or other case process

— because they have suffered grave trauma
or
— because they suffer from a specific physical or mental condition *which impairs their ability to participate meaningfully in the process*

This more global approach to identifying exactly who is vulnerable rather than a "basket" approach (i.e. one of 5 identifiable categories) with a broader definition of who is vulnerable is a much-improved approach. For example, in the case of mentally vulnerable adults claimants, currently decision-makers can appoint a DR only where a claimant fails to "appreciate the nature of the proceedings." Yet claimants who suffer from clinical depression, schizophrenia or extreme anxiety, for example, may perfectly well

642. This clinic in Toronto has been approached by the IRB to see if they would expand their role to acting as DRs for claims deemed mentally incompetent. A Memorandum of Agreement is currently being considered.

comprehend the nature of the proceedings but due to their mental or emotional fragility may nevertheless be vulnerable.[643]

The new Guidelines are designed to prevent unnecessary traumatization or retraumatization to vulnerable claimants. The Guidelines will ensure on-going sensitization of decision-makers to the impact of trauma or specific physical or mental conditions on persons.

The new Vulnerable Persons Guidelines will specifically direct that the claims of vulnerable people will receive scheduling priority. The IRB will identify, where it can, claims of vulnerable people at an early triage stage and establish an early liaison with counsel. In the hearing room, all manner of procedural accommodations will be able to be considered by the decision-maker: everything from the setting in the hearing room, the order of questioning, the form of testimony, the presence of family members, the identity of the interpreter, the presence and role of a friend or support person to the extent to which access to a public hearing should be restricted.[644]

The new Guidelines will also speak to assessing and weighing evidence: they will underscore that when it come to assessing the credibility of vulnerable persons, in addition to the principles set out in the jurisprudence,[645] a factor that must be considered is that trauma or mental or physical disabilities can affect memory and can affect the manner in which testimony is presented. Not only could a traumatic event itself have an effect on the way the event is retained in the memory but subsequent reactions to the trauma could have an effect on the retrieval of the memory. The Guidelines will remind decision-makers that they will need to be cognizant that some individuals will find talking about their traumatic experiences to be extremely painful or humiliating.

The need for decision-makers to recognize and take into account several evidentiary difficulties faced by vulnerable persons will be set out new Guidelines, such as:

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643. For example, a relatively recent case before the IRB concerned a Rhodes scholar from the USA and his 8-year-old daughter over whom he had sole custody. The claimant claimed and firmly believed that he and his daughter were long-time victims of surreptitious medical experiments conducted at the hands of the US government. This man was highly intelligent. He did not have legal counsel but elected to represent himself and obviously perfectly well understood the nature of the proceedings. Yet it was clear to the decision-makers that this man was also vulnerable, and his daughter doubly so. The new Guidelines would allow a member to treat this kind of claimant as vulnerable.
644. *IRPA*, section 166(b)(ii).
645. See IRB Legal Services' paper, *Assessment of Credibility in Claims for Refugee Protection*, January 31, 2004, in particular section 2.6.2.

— Where traumatization[646] is the basis of a person's vulnerability, the vulnerable person may have difficulty remembering and recounting the traumatic event.
— The vulnerable person may be suffering from certain symptoms that have an impact on the consistency and coherence of their testimony.
— Vulnerable persons who fear authorities may associate those involved in the hearing process, in particular the decision-makers, with the authorities they fear.
— Depending on the nature of the trauma or the physical or mental disability, the person may be reluctant to talk about it because of age, gender and cultural factors.
— The vulnerable person may have difficulty obtaining corroborative evidence.

The Guidelines will direct decision-makers at the Board to consider whether the evidentiary difficulties may be mitigated or overcome by other evidence in the case.

The new Guidelines are also expected to address the issue of expert evidence in claims of vulnerable people. A medical or psychological report regarding the vulnerable person is an important piece of evidence that must be considered. Where they are provided, they can be of great assistance to the Board, particularly if they address the person's difficulty with coping with the hearing process and if they address the ability of the person to give coherent testimony. The weight given to an expert's report will depend on the expert's qualifications and the quality of the report. An expert's opinion is not proof of the truthfulness of the information upon which it is based. The weight given to the report will depend, among other things, on the credibility of the underlying facts.

Naturally the new Guidelines ought not be interpreted as rigid formula for the hearing of all claims of all vulnerable people. While many torture survivors, for example, will be clearly unable to testify fully due to their vulnerability, other victims of torture may not vulnerable in the way that we have traditionally imagined and may, in fact, want and *need* to testify about the torture "for the record." [647] Akin to victims of torture, some women who claim gender-related

646. *Ibid*, see in particular, section 2.6. This relates to refugee cases but can be adopted, with the necessary modifications, for other types of cases.
647. Sally Verity Smith, an expert on torture survivors from the UK, wrote the following lines concerning the importance of empowering decision-makers to not flinch from being humane, compassionate and objective in the face of distress; to not fear (for themselves) hearing the

persecution (either at the hands of the state or at the hands of a spouse) may also wish and need to testify about their abuse.

At the end of the day new Guidelines are just that – guidelines – and it remains up to the decision-maker to see and treat each and every individual claimant as a distinct person. That said, however, the new Chairperson's Guidelines on Vulnerable Claimants are expected to greatly assist decision-makers and claimants alike in hearing claims of vulnerable persons before the IRB.

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unspeakable and to not fear (for the applicant) any psychic damage when disclosing the unbearable:

I think there is a whole issue around bearing witness and recording testimony on atrocity.

It has a place throughout the survivor's life and it can only promote mental health to be allowed to testify and to have others bear witness to that testimony. Even in asylum procedures. Maybe especially in asylum procedures. Our sister organization in Paris is called the Primo Levi Centre for precisely that reason: "lest we forget." To treat a survivor as an honest and reliable witness, possibly for the first time in his life, is of crucial importance. I think the only damage we do is if we appear shocked, horrified or disbelieving. If the bearer of the testimony remains humane and (above all) listening and acknowledging of the testimony it can do no psychic harm to disclose atrocity - only be part of the path to recovery.

I feel so strongly that lawyers who want the evidence of torture only for the claim to asylum forget that disclosure is for life and we as refugee workers (whether in reception centres or as lawyers or judges) have a role to play in being the bearer of testimony and the start of recovery. To feel HEARD. To have the past ACKNOWLEDGE. Crucial stuff. I would therefore notshy away from hearing (some of) the testimony during refugee proceedings.

Of course, if the survivor is overwhelmed with emotion, it is inappropriate in all but therapeutic setting to continue. But that is not so common as imagined. I am passionate about body language during disclosure. Looking at the survivor, not writing all the time but actually observing him, making him feel heard, pausing to acknowledge a particularly painful episode, showing that you've heard him by showing your humanity either verbally or physically, taking your watch off - never looking hurried (lying basically because you have a waiting room full!!) letting him know that others in the same situation also feel like hell and that he will start to feel better, not shying away from acknowledging that some things never pass: the loss of *a child for example.*

VULNERABLE CATEGORIES AND SUBSIDIARY PROTECTION: RECENT DEVELOPMENTS[648]

EDWARD R GRANT

I. Background and Introduction

A. Codification of "Subsidiary Protection;"[649] Claims Outside the Scope of the Refugee Convention. Extensive papers on the scope of "subsidiary protection" were presented at the previous IARLJ Conferences in Bern (2000) and Sydney (2002). At the risk of repetition, but in order to give the Stockholm conferees a broad survey on this topic, much of the contents of those papers has been included below. However, the contents have been revised to take into account significant legal and policy developments of the past 2-3 years.

1. **EU "Qualifications Directive":** The most significant development is adoption by the Council of the European Union of Council Directive 2004/83.EC (Official Journal of the European Union 30.9.2004), regarding "minimum standards for the qualification and status of third country nationals or stateless persons as refugees *or as persons who otherwise need international protection* and the content of the protection granted." (Hereinafter referred to as the "Qualifications Directive" or "QD"). The QD was issued 29 April 2004, and entered force 20 October 2004, with a mandate that Member States bring their laws, regulations, and administrative provisions in compliance by 10 October 2006.
2. **Immigration and Refugee Protection Act (IRPA) (Canada):** IRPA defines "persons in need of protection" to include

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648. Prepared by Edward R. Grant, Member, Working Party on Vulnerable Categories, International Association of Refugee Law Judges. Opinions and analysis expressed herein are, unless otherwise attributed, solely the responsibility of the author and do not reflect the views of the author's employer. With thanks to Lois D. Figg, a member of the Vulnerable Categories Working Party and a Coordinating Member with the Immigration and Refugee Board (Canada) for substantial contributions on the issue of the intersection of subsidiary protection and vulnerable categories of refugee claimants.

649. This form of protection also has been described as "complementary protection;" "subsidiary protection" is the term employed in the "Qualifications Directive" of the European Union, Council Directive 2004/83/EC (29 April 2004) (effective 30.9.2006)

Convention refugees as well as persons in danger of torture or cruel and unusual treatment and punishment.

3. **United States:** Further development of administrative and judicial case law regarding the scope of protection under U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment. Also, addition of "other serious harm" as a factor for granting asylum status in limited circumstances.
4. **UNHCR:** U.N. Global Consultations and other efforts by UNHCR to address its concern that the Refugee Convention receive "full and inclusive application."
5. While these developments do not portend a *uniform approach* to the issues discussed here, they do suggest a *common understanding* of what issues are significant in the establishment of schemes of subsidiary protection. Discerning what this common understanding may embrace, and what it may not, will be the central focus of this outline paper.
6. While not directly intended, this paper reflects the implementation of the "three pillars" approach to humanitarian protection: refugee law, human rights law, and humanitarian law. (The latter "pillar" was brought into our discussions by the paper of Judge Erik Mose presented at the Bern Conference.) The paper will demonstrate that to a surprising extent, especially given political cross-winds that question the effectiveness of our adjudication systems in speedily separating those genuinely in need of protection from those who are not, acceptance of *some* form of subsidiary protection is now widespread. The factors contributing to this acceptance may include some of the following:
   (*a*) The Convention was drafted and adopted at a time of different geo-political circumstances from those of the present day, and its categories do not meet present realities.
   (*b*) The Convention, while sufficient to meet contemporary needs, has not been given the "full and inclusive" interpretation that would allow it to do so.
   (*c*) The high standard of protection, including eventual right to permanent residency, that has come to be expected for those granted "refugee" status is itself a stumbling block to a fuller and more flexible notion of international protection. Subsidiary protection may allow for a broader, but less deep form of protection that better meets some contemporary needs.
   (*d*) Political institutions have been reluctant to provide full implementation of the 1951 Convention; *or* those same institutions perceive current, expansive interpretations of

the Convention to go beyond the scope of protection that they anticipated when acceding to the Convention.

B. Status of Discussion at Bern and Sydney Conferences: These issues are hardly new to the IARLJ. In preparation for the Bern conference, significant attention was paid to the concept of "complementary protection," including a series of IARLJ-sponsored papers and meetings which addressed this question from three points of view (as suggested by Hugo Storey):[650]

1. Scope:
   (*a*) Whether to afford protection to persons who fall outside the terms of the Refugee Convention, but nonetheless face a significant risk of harm if expelled to their home country.
   (*b*) If so, how to define the criteria for granting such protection, especially in accord with established international human rights instruments and norms..
2. Justiciability
   (*a*) Recognizing that most forms of protection outside the Convention are granted on the basis of ad hoc executive decision-making, whether there should be a move to adjudication of such claims in a manner comparable to decisions on Convention claims.
   (*b*) If such claims are justiciable, should this be a separate process, or part of a single process.
3. Harmonization
   (*a*) Recognizing the lack of clear international norms for granting "complementary protection," is there benefit to establishing such norms?
   (*b*) What potential sources exist to establish such norms?
   (*c*) Will States perceive this as expanding their obligations, and if so, how will this affect their acceptance of further international harmonization in this area?
4. In addition, a panel at the Bern Conference considered whether violations of International Humanitarian Law can suffice to establish eligibility under the Refugee Convention.

(*a*) A corollary to this question is, even if such claims are not cognizable under the Refugee Convention, ought they to be considered sufficient for a grant of subsidiary protection?

(*b*) In posing this question, one assumes that the claims are not

650. *See* Edward Grant, Outline Paper prepared for Colloquy: Perspectives on Complementary Protection, sponsored by IARLJ and Immigration Law Practitioners Association (UK), London, December 6, 1999.

based merely on general conditions of civil strife, but rather, involve a particular and specific violation of, for example, the Geneva Convention Relation to the Protection of Civilians in Time of War.

(*c*) In Europe, the impetus for much of this discussion lay in Conclusions 13 and 14 of the special meeting of the European Council in Tampere, Finland, 15 and 16 October, 1999.

(1) Conclusion 13: Reaffirming importance of the absolute right to seek asylum, and agreeing to work toward a Common European Asylum System, maintaining firm adherence to principle of non-refoulement.

(2) Conclusion 14: Common European Asylum System called for in Conclusion 13 should be complemented with subsidiary forms of protection offering appropriate status to those in need of such protection.

5. Latin America and Africa already had established normative frameworks for granting protection to those outside scope of 1951 Convention.

(*a*) *Convention on the Specific Aspects of Refugee Problems in Africa* (Organization of African Unity, 1975). 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 origin or nationality".

(*b*) *Cartagena Declaration* (Organization of American States, 1985), adopted by 10 Latin American states in 1984, expands Convention refugee definition to include those who flee their country because their "lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that have seriously disturbed public order. The General Assembly of the Organization of American States approved this definition in 1985.

6. United States had no specific norms for subsidiary protection linked to its asylum system, but did have a wide array of alternative relief, some statutory, and some granted by the executive, that constituted an extensive scheme of *de facto* complementary protection.

7. By the time of the Sydney Conference, the proposed EU Qualifications Directive had been drafted, and Canada had adopted the IRPA. (See heading I.A.)

C. Issues to be Discussed in this Paper:

1. Developments since the Sydney conference provide a more clear sense of direction of the issues of scope, justiciability, and harmonization.
   (*a*) **Scope:** Canada's IRPA, the USA's limitation of international humanitarian relief to the Convention Against Torture, and the EU's Qualifications Directive now establish that the scope of subsidiary protection will be defined by objective international legal norms. Within the EU, one IARLJ commentator has declared that the QD will, over time, change judges from being "national" judges" to being "EU judges," with the task of applying EU law.[651] including, but not limited to, those which contain express provisions regarding non-refoulement. Subsidiary protection is to be distinguished from "temporary protection," "leave to remain," as well as other forms of relief granted on principally compassionate or humanitarian grounds. Also, it is apparent that the level of immigration benefits granted to those receiving "subsidiary protection" will be less than that offered to granted refugee or asylum status.
   (*b*) **Justiciability:** Claims for subsidiary protection will be heard in concert with claims for protection under the 1951 Convention, through a system of "consolidated grounds of protection" and/or a "common asylum procedure."
   (*c*) **Harmonization:** Within the EU, the Qualifications Directive resolves the question of harmonization with a set of fixed criteria (albeit flexible in potential application) for adjudicating claims to subsidiary protection. The prospects for a globally-harmonized standard remains uncertain, and will be influenced by the following factors, among others: the further impact of a "human rights-based" approach on future interpretation and application of the 1951 Convention; the prospect for international harmonization of standards, especially when subsidiary protection is based on regional human rights instruments or fundamental domestic law; and the inclusion (or non-inclusion) within subsidiary protection norms on "vulnerable categories" of protection claimants. Political

651. Dr. Hugo Storey, *Asylum Law for Judges – The New Framework: A Commentary on the Harmonisation of Asylum Law*, Paper delivered at the IARLJ European Conference 2004, 12-13 November 2004, Edinburgh, Scotland.

circumstances in individual States will also be highly influential.

II. DEFINING THE SCOPE OF SUBSIDIARY PROTECTION

A. Informal norms for "temporary" or "complementary" protection have been recognized for some time; coverage ranged from protection against torture and cruel, inhuman, and degrading treatment ("CIDT"), to protection against prevailing conditions of civil war or even natural disasters.
   1. These norms emerged on the basis of international understandings, State practice, and international cooperation in addressing particular migration crises.
   2. However, the jurisprudential basis for these norms was less clear, and seemed to depend more on what States actually *do*, individually or collectively, than upon an agreed set of legal principles that are enforced within the legal systems of particular countries, as in the case of the Refugee Convention.
   3. Thus, first issue to examine is whether the emerging scope of subsidiary protection will be limited to threatened violations of specific human rights instruments, or whether such protection can be granted on humanitarian/compassionate grounds without reference to such specific instruments.

B. Developments since the Bern and Sydney conferences clearly establish that schemes of subsidiary protection will be tied to a specific threat of violation of a fundamental human right, specified in an international human rights instrument. However, because several such instruments are regional or multi-lateral, as opposed to global, differences in the scope of coverage will remain. In addition, whether protection should be granted under this emerging system on purely humanitarian or compassionate grounds is not entirely settled, although the consensus seems to be that it should not (without foreclosing other, domestic-based avenues of temporary relief). These issues can be illustrated by reference to recent developments in Canada, the European Union, and the United States.

C. *Canada:* The Immigration and Refugee Protection Act ("IRPA"), effective 28 June 2002, was the first formalized scheme of "consolidated grounds" adjudication of protection claims, including both claims under the 1951 Convention and those for subsidiary protection.

1. Section 97(1) of IRPA extends protection to persons whose removal would subject them personally:
   (*a*) to a danger, based on substantial grounds, of torture within meaning of Article 1 of the Convention Against Torture, or
   (*b*) to a risk to life or a risk of "cruel and unusual treatment or punishment, but only if all of the following conditions are met:
      (1) the person is unable or unwilling to avail themselves of the protection of their country of nationality or last habitual residence;
      (2) the risk would be faced by the person in every part of the country and is not faced generally by other individuals in or from that country;
      (3) the risk is not inherent to lawful sanctions, unless imposed in disregard of accepted international standards; and
      (4) the risk is not caused by the inability of that country to provide adequate health or medical care."
2. Issues of Interpretation
   (*a*) *Nexus/State Agent:* Protection under section 97(1) does not require connection to a 1951 Convention ground, or that the risk be at the hands of a State agent.
   (*b*) *Generally Narrow:* Otherwise, the scope of protection appears be to "very narrow," and "will benefit mainly those claimants who are unable to establish a nexus to the Convention refugee definition and who face a risk which is not generalized or due to inadequate health or medical care."[652]
   (c) *Exemptions from Protection Even in Claim of Torture:* One significant consequence of this "consolidated grounds" approach is that Canada attaches to claims under section 97(1)(a) (danger of torture) the same exclusions for serious criminals, violators of human rights, and (implicitly) terrorists that apply to claims based on the Refugee Convention or for protection against cruel and unusual treatment or punishment. This is in contrast to the "no-exemption" scope of Article 3 of the

652. "Consolidated Grounds in the *Immigration and Refugee Protection Act*: Persons in Need of Protection, *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*," Legal Services, Immigration and Refugee Board (Canada), May 15, 2002, at 12.

Convention Against Torture, and to application of the CAT in the United States.

(*d*) *Civil Strife and Humanitarian/Compassionate-Based Claims:* Section 97(1) does not broaden the scope of protection (beyond that under the 1951 Convention) for claims arising out of civil war situations, or to extend protection on purely humanitarian and compassionate grounds.[653] However, such claims will be part of a "risk-related humanitarian review" following a determination that a refugee claim has failed.

(*e*) Questions of interpretation will likely focus on whether the harm that would be risked is sufficiently severe, and whether there is sufficient *particularization of the risk* in situations, such as civil war, where general risks to the population exist. For example, would a situation of clear violation of the Geneva Convention Relating to the Protection of Civilians in Time of War constitute a sufficiently "particular" risk to meet the standard for "cruel and unusual treatment or punishment?"

1. *Interplay with 1951 Convention:* IRPA confers equivalent "refugee protection" to claims based on Convention grounds, the danger of torture, or the danger of cruel and unusual treatment or punishment. Thus, no specific primacy is granted to claims under the Convention. However, there is ample reason to believe that most successful claims will be on Convention grounds.

   (*a*) In contrast to some European countries, Canada has not been subject to criticism for adopting a restrictive view of the Refugee Convention, and using complementary or subsidiary protection as a form of mitigation.[654] For example, persecution by non-state agents has long been accepted as a viable basis for a refugee claim in Canada.

   (*b*) This tradition of broad interpretation , coupled with the narrow scope for protection under section 97(1), means that the Refugee Convention (covered in section 96 of the IRPA) will likely retain primacy in Canada's new "consolidated grounds" of protection. As one official Canadian explanation states, "[t]here

653. *Id.*

654. *See* Hugo Storey, "The New EU Directive: An Evaluation," unpublished paper, May 2002.

are very few situations where a person facing a risk of torture or a risk to life or cruel and unusual punishment would not find him/herself included in the Convention definition.

(c) However, it remains to be seen whether, in the case of novel claims that would require a further expansive interpretation of the Convention, particularly on issues of nexus (e.g., particular social group), there may be a trend to avoid that issue and grant protection under section 97(1)(b) grounds instead. This is a viable option, as the level of benefits for all granted claims is equivalent.

D. *European Union:* The EU's Qualifications Directive is the culmination of years of effort to create a common European asylum system. Accordingly, its specific objectives are ambitious, and those pertaining to protection under the 1951 Convention are key to understanding those relating to "subsidiary protection."

1. The *"purpose"* of the QD, stated in Article I, is "to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and ensure that a minimum level of protection is available in all Member States for those genuinely in need of it because they cannot reasonably rely on their country of origin or habitual residence for protection." The *"main objective"* of the QD "is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection and, on the other hand, to ensure that a minimum level of benefits is available for these persons in Member States."[655]

   (a) One avenue to this result is establishing a standard interpretation of the following common concepts under Refugee Convention: sources of harm and protection; the availability of internal protection in the home country; the nature of persecution; and the scope of "particular social group"[656]

   (b) The QD also establishes minimum standards for subsidiary protection that "should be *complementary and additional* to the refugee protection scheme enshrined in the [1951] Convention." Specific criteria

655. Qualifications Directive, Preamble, ¶(6).
656. *Id.* at ¶¶ (17), (18), (20), (21)

drawn from international human rights instruments and existing practices in Member States are to define the proper scope of subsidiary protection.[657]

2. *Grounds for Subsidiary Protection:*
   (*a*) Article 18 of the QD requires Member States to grant subsidiary protection to a third country national or stateless person "eligible for subsidiary protection," defined in Article 2(e) as "a person who *does not qualify as a refugee* but in respect of whom *substantial grounds have been shown for believing* that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country or former habitual residence, *would face a real risk of suffering serious harm* . . . and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country."[658]
   (*b*) Article 15 of the QD defines "serious harm" as:
      (1) death penalty or execution;
      (2) torture or inhumane or degrading treatment or punishment of an applicant in the country of origin; or
      (3) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[659]
3. *Humanitarian/Compassionate Grounds:* These criteria are significantly more stringent than those set forth in the 2001 European Commission Proposal for a Council Directive on

657. *Id.* at ¶¶ (24), (25).
658. EU Qualifications Directive, Articles 18 and 2(e).
659. *Id.* Article 15. These grounds differ significantly from those set forth in the Proposed EU Directive available at the time of the Sydney Conference. Under that proposal, Member States were to grant subsidiary protection to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm:
   (a) Torture or inhuman or degrading treatment or punishment; or
   (b) Violation of a human right, sufficiently severe to engage the Member State's international obligations; or
   (c) A threat to his or her life, safety, or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of their human rights

uniform asylum procedures. (The text of these provisions is set forth in the margin.) Notably, the death penalty is added as a separate, specific criterion, but the remaining criteria are tied to a specific threat of casualty as a result of armed conflict, or to pre-existing obligations (as previously accepted by the EU) under the Convention Against Torture and article 3 of the European Convention on Human Rights.

4. Claims based solely on compassionate or humanitarian grounds that fall short of the specified criteria do not fall within the scope of subsidiary protection mandated by the QD. However, Article 3 of the QD permits Member States to 'introduce or retain" more favourable standards for granting refugee status or subsidiary protection, "in so far as those standards are compatible with the [QD]." As Dr. Storey has noted, the QD's provisions on internal relocation and cessation of protected status may require some Member States to make their laws more stringent.[660]
5. *Evidentiary Factors:* QD Article 4 sets forth the factors to be taken into account in assessing a claim to protection. Significantly, these same standards apply to claims for protection under the 1951 Convention as well as to claims for subsidiary protection.
   (*a*) Relevant facts pertaining to the country of origin.
   (*b*) Relevant statements and documentation presented by the applicant.
   (*c*) Individual position and personal circumstances of the applicant, including factors such as background, gender, and age.
   (*d*) Whether the applicant's activities since leaving the country of origin "were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection."
   (*e*) Whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.
   (*f*) Whether, in cases where an applicant's statements are not corroborated by documentary or other evidence, the applicant is generally credible, has made a genuine effort to substantiate the application, has submitted all relevant evidence at his disposal, has explained

660. Hugo Storey, note 4, *supra*, at 3.

satisfactorily the absence of other evidence, has testified coherently and plausibly, and has applied for protection at the earliest possible time.

6. *Benefits to Successful Applicants:* The QD specifies that beneficiaries of subsidiary protection receive a range of benefits parallel but not identical to that afforded those granted refugee status:
   (*a*) Non-refoulement. Basic protection is identical for all categories (Article 21).
   (*b*) Residence permits: Shall be granted to beneficiaries for a period of one year and be renewable; refugees receive permits for three years and renewable.
   (*c*) Travel documents: Those granted subsidiary protection and without a national passport shall be granted travel documents *at least when serious humanitarian reasons require their presence in another State;* this is a lesser benefit than that granted to refugees (travel documents listed in the Schedule to the 1951 Convention.)
   (*d*) Social rights: Those granted subsidiary protection shall be granted access to employment, education, social welfare, and health care, but not to precisely the same extent as those granted refugee status. For example, labour market conditions may affect the granting of specific work permission to those granted SP, and access to other benefits is not equivalent to that of nationals of the Member State, as is the case for refugees.

E. United States:

1. *General Situation:*
   (*a*) The sole form of *justiciable* subsidiary protection currently available is non-refoulement under Article 3 of the Convention Against Torture.
   (*b*) The U.S. previously has adopted relatively expansive interpretations of the 1951 Convention in areas such as persecution by non-state agents and the definition of "particular social group." Accordingly, some of the impetus that existed in some European nations for establishing existing forms of "complementary" protection did not exist in the U.S.
   (*c*) The U.S. has also had to deal with rather large direct refugee flows from adjacent nations in the Caribbean and in Central America. The U.S. historically has extended special forms of protection, most leading to permanent resident status, for certain groups from

these nations whose claims fall outside the scope of the Convention.

(*d*) Unsuccessful applicants under the 1951 Convention may have access to forms of temporary protection or alternative means to claim resident status.

(*e*) As the result of regulatory changes implemented since the Sydney conference, an asylum applicant who has established past persecution, but who no longer has a well-founded fear of persecution due to a change in country conditions, may nevertheless be granted asylum in the exercise of discretion if the applicant "has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. 1208.13(b)(1)(iii)(B).

2. *Justiciability in United States of Protection Claims Under International Law:*

(*a*) In the absence of specific implementing legislation, claims under international instruments such as the Convention Against Torture (CAT) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, or under customary international law, are non-justiciable in U.S. Immigration Courts or in the Federal Courts.[661]

(*b*) The only international agreements including non-refoulement that have been implemented in U.S. are the 1951 Convention and the CAT.

(*c*) Accordingly, absent the unlikely prospect of further Congressional legislation establishing rules of *non-refoulement* premised on violations of human rights, justiciable subsidiary protection under U.S. law will remain more narrow than that available in Europe and Canada.

3. *Convention Against Torture:*

(*a*) *Authorization:* Congress in 1998 adopted legislation requiring the Executive Branch to issue regulations

661. *Matter of H-M-V-*, Interim Decision 3365 (BIA 1998) (CAT not a "self-executing" treaty); *Matter of Medina*, 19 I&N Dec.734 (BIA 1988) (Geneva Convention and customary international law); *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973) (Article 33 of 1951 Convention did not require alteration in then-existing U.S. law); providing protection against persecution). *See also Galo-Garcia v. INS*, 86 F.3d 916 (9th Cir. 1996); *Bradvica v. INS*, 128 F.3d 1009 (7th Cir. 1997); *Echeverria-Hernandez v. INS*,. 923 F.2d 688 (9th Cir. 1991).

implementing the CAT. This superceded the BIA's decision in *Matter of H-M-V-* holding such claims non-justiciable in the absence of such legislation.

(*b*) *Jurisdiction:* Jurisdiction to hear such claims was granted to Immigration Judges and the Board of Immigration Appeals, with right of appeal to the Federal Courts.

(c) *Statutory and Administrative Construction:* U.S., through Senate ratification of the CAT, implementing regulations, and administrative interpretation, has adopted a strict construction of the non-refoulement obligation. One leading case authority is *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).[662] Key points:

(1) Non-refoulement obligation is non-derogable and without exception.

(2) Non-refoulement obligation extends only to situations of torture, and not to lesser forms of cruel, inhuman, and degrading treatment that are also prohibited by the Convention.

(3) For an act to constitute torture, it must:

(*a*) cause severe mental or physical pain or suffering;

(*b*) be intentionally inflicted;

(*c*) be inflicted for a proscribed purpose as set forth in the Convention;

(d) be inflicted by or at the instigation of or with the consent and acquiescence of a public official who has custody or physical control of the victim; and

(*e*) not arise from lawful sanctions.

(4) Applicant must establish that it is "more likely that not" that torture will be inflicted.

(5) Torture must be inflicted with specific intent.

(6) Board held that claimant who would be subject to preventive detention upon return to Haiti, under conditions that would constitute cruel, inhuman, and degrading treatment, did not establish a claim

662. The Attorney General, acting on his authority to certify and review decisions of the BIA, denied claims under the CAT to three claimants from Haiti, Jamaica, and the Dominican Republic. *See Matter of Y-L, A-G-, and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). As none of these claims involved a certain prospect of government custody, they did not raise the full panoply of questions addressed in *Matter of J-E-*. *See also Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

under the Convention because he did not prove it is more likely than not that Haitian authorities would, with specific intent, inflict acts constituting "torture."

(d) *Judicial Interpretation:* Since the Sydney conference, Federal courts have issued several ruling affirming, for the most part, the Attorney General's and the BIA's interpretation of the CAT.[663] However, some courts have rejected the AG's and BIA's interpretation of the "acquiescence" requirement, stating that official government "awareness" the torture may be sufficient to meet the standard.[664] Courts have held, moreover, that a finding of lack of credibility or believability in a prior asylum hearing (claim under 1951 Convention) cannot automatically be applied to a claim under the CAT. Rather, claimant must be given independent opportunity to establish credibility for purposes of the CAT claim.[665]

(e) *Benefits:* Benefits to those granted relief under CAT are not equivalent to those granted *asylum* or *refugee* status in the U.S.:

(1) *Withholding:* CAT claimants who are not barred from relief under the 1951 Convention on the basis of criminal activity, acting as a persecutor, etc., are accorded status equivalent to that under "withholding of removal."[666] Withholding does not provide a path to permanent residency, but does provide work authorization and other attributes

663. *Elien v Ashcroft*, 364 F.3d 392 (1st Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004).

664. *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

665. *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001); *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000); *but see Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002).

666. The U.S. accords three forms of relief under the 1951 Convention. "Refugee" status is granted to applicants outside the U.S. who are subsequently admitted in that status with the subsequent right to apply for permanent residency. Immigration and Nationality Act, § 207. "Asylum," with right to adjust to permanent resident status, may be granted in discretion to any person meeting the definition of "refugee' under the Convention. INA, § 208. "Withholding of removal," with no right to permanent resident status, is designed to implement Article 33 of the Convention, and thus is mandatory for those not excluded from such relief (e.g., particularly serious crime). INA, § 241(b)(3).

of legal, nonimmigrant status. Such claimants may, of course, pursue other available means of attaining permanent resident status.

(2) *Deferral:* CAT claimants barred from withholding relief due to their criminal activity (particularly serious crime in most instances) may have their removal "deferred" if they establish a likelihood of being tortured. This relief is extremely limited, and those granted may continue to be detained if they constitute a danger to the community.

(3) *Rescission of Status:* The INS can seek removal of a grant of relief under CAT by proving that a likelihood of torture no longer remains.

(*f*) *Current Scope of "CAT" Claims:* Experience thus far suggests that most CAT claims fall into the following categories, most readily deniable under prevailing law:

(1) Haitians subject to deportation due to criminal activity and thus subject to mandatory detention upon return. *See Matter of J-E-.*

(2) Criminal aliens of other nationalities for whom CAT is the only possible form of relief, but who have non-specific claims that they will be harmed upon return.

(3) Failed asylum applicants from countries with poor human rights records (e.g., China, Cuba), but with non-specific claims of torture, often alleging that they will be harmed for having departed their country without authorization.

(4) Failed applicants for asylum and/or other forms of discretionary relief who seek protection under CAT as a form of compassionate or humanitarian relief.

(*g*) *Practical Impact of CAT:* Relatively few CAT claims, therefore, present "close" situations where relief is denied under the Convention for a failure of nexus to one of the 5 grounds, but there is clear evidence of specific intent on the part of the Government to seriously harm the claimant.

(1) Where such evidence exists, it will most often be the case that the intended harm *can* be linked to one of the 5 grounds, as interpreted under U.S. law, and the person (unless otherwise disqualified)

granted asylum or withholding of removal on Convention grounds.[667]

(2) The principal beneficiaries of CAT protection, therefore, may turn out to a relatively limited category of otherwise inadmissible applicants (serious criminals, persecutors, national security risks) who can nevertheless establish a genuine risk of torture if removed.

4. *Other Forms of Humanitarian and Temporary Protection*

(*a*) U.S. law provides a range of discretionary relief from removal, as well as formal and informal mechanisms of temporary protection, that may be available to persons who have failed in claims under the Convention. In addition, these is a significant history of special statutory enactments to provide immigration benefits to nationality-based classes of failed refugee claimants.

(*b*) *Adjudicated Humanitarian Relief*: The only justiciable claim for humanitarian/compassionate relief is "cancellation of removal." Enacted in 1996 to replace prior forms of such relief, it requires establishment of "exceptional and extremely hardship" to a qualifying relative who is a U.S. citizen or lawful resident, ensuing from the removal of the claimant. The claimant also must have at least 10 years continuous presence in the U.S. prior to being placed in removal proceedings, and be a person of good moral character. The hardship standard has been strictly construed.[668]

(*c*) *Temporary Protected Status.* Enacted first in 1990, TPS was intended to provide a specific statutory basis for nationality-based temporary relief from deportation. Previously, such relief was granted strictly on an ad hoc basis by the President. TPS also responded to the contemporaneous influx of migrants fleeing civil

667. Under U.S. law, specific intent to inflict serious harm on the part of the Government can constitute prima facie evidence that the Government intends to punish the claimant on account of one of the 5 grounds in the Refugee Convention, or the imputation of such grounds. *See, e.g., Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

668. *See* Immigration and Nationality Act, § 240A(b). For interpretation of these standards, *see Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

conflicts in Central America, particularly in El Salvador; Congress recognized that the rate of asylum grants to such persons was low. Aside from Congress's initial designation of El Salvador, the President retains sole authority to designate those countries whose nationals will benefit from TPS. TPS has recently been granted both in cases of severe civil conflict and humanitarian disasters, such as Hurricane Mitch in Central America.

(d) *Deferred Enforced Departure/Extended Voluntary Departure.* DED and EVD were among the "informal" ad hoc mechanisms for protection of certain nationalities, often in cases of civil conflict. While utilized less frequently today, these forms of relief do remain available.

(e) *Special Legislative Enactments Extending Permanent Resident Status to Persons Not Meeting Convention Refugee Definition*:

(1) Lautenberg Amendment: Enacted first in 1989, sets a standard lower than that of "well-founded fear" for certain categories of *overseas* refugee claimants from Asia, Eastern Europe, and the then-Soviet Union. Claims under this amendment are *not* justiciable in domestic asylum proceedings.

(2) NACARA[669] Adjustment: 1997 legislation conferred near-absolute right to seek adjustment of status (to lawful permanent resident) for natives of Cuba and Nicaragua present in the U.S. since 1995. Among the most generous forms of nationality-based relief ever granted by Congress.

(3) HRIFA[670] Adjustment: 1998 legislation conferred to certain Haitians benefits similar to those previously given to Cubans and Nicaraguans.

(4) NACARA Suspension with Presumption of Hardship: 1997 legislation allowed Salvadorans, Guatemalans, and Eastern European with long-standing asylum claims (including claims already denied) to seek suspension of deportation and permanent resident status under more generous rules with pre-existed over 1996 immigration

669. Nicaraguan and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2193 (1997).

670. Haitian Refugee and Immigrant Fairness Act of 1998, Division A, tit. IX, sec. 602 of Pub. L. No. 105-277, 112 Stat. 2681-538. *See* 8 C.F.R. §245.15.

reforms. Later Department of Justice regulations conferred to Salvadorans and Guatemalans a presumption of extreme hardship, greatly lowering the claimant's burden of proof. Eastern European beneficiaries of NACARA did not receive benefit of this presumption, and thus had to establish extreme hardship on their own.

5. *Recap on United States Developments*
   (*a*) The United States, with the exception of Article 3 of the Convention Against Torture, has not adopted justiciable forms of relief outside the Refugee Convention.
   (*b*) The US, through its ratification and administrative interpretation, has adopted a strict construction of its obligations under Article 3 of the CAT.
   (c) There is no immediate prospect for the US adopting additional forms of justiciable subsidiary protection.
   (d) The US continues to employ Temporary Protected Status and other forms of nationality-based relief from removal in cases of severe civil conflicts and humanitarian disasters.

F. Conclusions:

1. There is a clear trend in the EU and elsewhere to develop objective standards for subsidiary protection that can be adjudicated *in para materia* with claims under the 1951 Convention. These trends are consistent with the principles earlier established by the Organization of African Unity and the Cartagena Declaration. (See section I.B.5 of this outline)
2. The most clearly-defined, and narrowest, scope of such protection is in the United States, where subsidiary protection is limited to claims under the CAT, or to discretionary grants of asylum where an applicant has been persecuted in the past and faces a reasonable possibility of "serious harm," not linked to a Convention ground, if returned to his or her home country.
3. Canada's new immigration legislation provides for a somewhat broader scope of claims, but is also drafted so as to be strictly construed. However, benefits for those granted subsidiary protection are equivalent to those recognized as refugees, in contrast to both U.S. law and the EU Qualifications Directive.
4. The EU Qualifications Directive, in its final version, adopted a more restrictive definition of "serious harm" leading to subsidiary protection than was originally proposed, focusing on the death penalty, torture or CIDT, and serious and

individualized threat to life resulting from indiscriminate violence arising from armed conflict.[671]

5. All of these developments, however, share certain common characteristics:
   (*a*) The scope of subsidiary protection is to be tied to objective, existing norms in international and domestic law. Differences will remain as to whether certain international instruments can give rise to *implied* obligations of non-refoulement, or whether domestic legislation or regulation is required to codify such obligations.
   (*b*) As such, subsidiary protection does not extend to purely "compassionate" or "humanitarian" grounds for protection against removal, although such avenues for relief may exist in domestic law (such as Extended Leave to Remain in the UK).
   (*c*) Subsidiary protection also is clearly distinguished from "temporary protection," which would remain a tool for executive and political branches of government to respond to humanitarian migration emergencies. A chief example of this is Temporary Protected Status in the United States. In the systems discussed here, those granted such temporary protection within the borders of a receiving state would remain eligible to apply for refugee status and available forms of subsidiary protection.
   (*d*) Subsidiary protection does not supplant the availability of protection under the 1951 Convention – although, as will be discussed, the UNHCR among others has expressed concern in this regard.
6. Despite these common threads, the differences between national and regional developments on this question raise questions regarding the future harmonization of subsidiary protection standards (discussed in Heading IV).
7. Among unanswered questions, however, are the following:
   (*a*) Is it legitimate to *infer* obligations of non-refoulement from international human rights instruments that do not positively set forth such an obligation? This appears to be the basis for defining the proper scope of subsidiary protection.[672]

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671. For discussion of the original, broader proposal on this issue, *see* Hugo Storey, *supra* note 7 at ¶ 122.
672. Gregor Noll, "Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection *Rationae Personae*," in SINGLE ASYLUM PROCEDURE, note 4, *supra*.

(*b*) Standards for subsidiary protection are being proposed in relation to existing international *human rights* instruments. As discussed at the 2000 IARLJ Conference, however, an additional reference point for international protection may lie in international *humanitarian* law, particularly that relating to the protection of civilians during time of war. Should emerging standards for subsidiary protection be considered in light of this body of international law as well.

III. ISSUES PERTAINING TO JUSTICIABILITY: THE IMPACT OF A SINGLE ASYLUM PROCEDURE

A. The Trend Toward a Single System of Adjudication: Corollary to the effort to provide objective *grounds* for subsidiary protection is the expectation that such claims will be adjudicated in a single comprehensive asylum and protection procedure.

1. U.S. immigration law traditionally allows claims for permanent or indefinite relief from removal, including protection-based claims, to be adjudicated before Immigration Judges and the Board of Immigration Appeals, with right of appeal to the Federal Courts. It is not uncommon for Immigration Judges to be presented in one hearing with claims for asylum, withholding of removal, protection under the CAT, and cancellation of removal. Often the weaker of these claims will "fall out," but a significant number of cases reach the administrative appellate level with more than one claim for protection at issue.
2. Canada, reacting to criticism of inconsistent decision-making between its Immigration and Refugee Board, having jurisdiction over 1951 Convention claims, and administrative agencies who heard claims for protection on humanitarian and compassionate grounds, adopted the "consolidated grounds" approach in its new Immigration and Refugee Protection Act.[673]
3. The Council of the EU, seeking to harmonize both substantive grounds for protection and systems of adjudication, has called for creation of a common procedure applied to all

673. *See generally*, "Consolidated Decision-Making: The Canadian Experience," in SINGLE ASYLUM PROCEDURE, *supra* note 4; Immigration and Refugee Protection Act, sections 96 and 97.

international protection needs.[674] Both Sweden and the Netherlands have previously adopted "uniform" procedures for the adjudication of protection claims under, and outside, the 1951 Convention.[675]

B. *Advantages and Disadvantages:* A number of commentaries have identified both potential gains and risks from a system of single-procedure adjudication, but the clear consensus is that the upsides will outweigh the downsides.

1. *The Applicant's Point of View:* At first look, it appears that most applicants will benefit from one telling of their story, and one consideration of their evidence, evaluated with regard to all potential forms of relief. This assumes an incentive on the part of the applicant for a rapid determination of their status. However, some realities may intrude on this assumption:
   (*a*) Some national systems, regardless of proposed reforms, will retain procedures where "first instance" consideration of refugee claims remains within administrative agencies, with only refused claims subject to administrative judicial consideration. (This is the prevailing system in the United States, for example.) In these systems, a key issue is whether the administrative judicial (or purely judicial) consideration is *de novo*, or only to review error in the administrative determination. Even where *de novo* consideration is the norm, consideration must be given to whether testimony heard in the first instance proceeding can be used in the judicial proceeding (for example, on issues of credibility).
   (*b*) Some applicants desire anything *but* a rapid determination of their status, as long as they are allowed to remain at liberty, and perhaps with entitlement to work. For such claimants, seriatim consideration of various forms of relief is a distinct advantage.
2. *Impact of Variance in Potential Benefits:*
   (*a*) Under the Canadian system, with an umbrella concept of "refugee" and equivalent benefits to those

674. *See generally*, Goran Hakansson, "Aspects of a Comprehensive Asylum and Protection Procedure," in SINGLE ASYLUM PROCEDURE, supra note 4.

675. *Id.*; "A single procedure and a uniform status: European initiatives and the Dutch Aliens Act 2000," in SINGLE ASYLUM PROCEDURE, *supra*, note 4.

recognized under "Convention" and "subsidiary" grounds, there is no warrant for appeals to be lodged from a denial of a claim under Convention grounds, if subsidiary protection has been granted.

(*b*) Most systems, including the U.S. and Europe, confer different degrees of benefit, as explained above. Thus, even those granted protection, but seeking the "higher" status of "Convention refugee," will have incentive to appeal.

(*c*) A key issue, therefore, is whether such appeals will be allowed. (They are permitted in the United States, both within the administrative system and to the Federal courts.)

3. *Relationship with Refugee Convention:* Some have expressed concern that the "cohabitation" of Convention and subsidiary claims for protection in a single proceeding may undermine the "primacy" of the Convention as the source of international protection. Specific issues:

(a) *Are Applicants Entitled to Protection under the 1951 Convention As Opposed to "Subsidiary" Grounds:*

(1) As will be discussed further in Heading IV, there are compelling arguments in favor of the continued primacy of the 1951 Convention in any scheme of protection.

(2) How far, however, does the obligation extend to grant protection under the 1951 Convention? Where subsidiary protection is clearly available, should an applicant be entitled to press forward and litigate a claim based on novel interpretation of the Convention?

(3) From one perspective, if such claims cannot be pressed, there is a danger that interpretation of the Convention will become stagnant.

(4) From a different perspective, limiting such claims helps to maintain the original scope of the Convention, while still providing protection in cases of severe threat to fundamental human rights.

(*b*) *Sequence of Consideration:* Will adjudicators be required to *first* consider the claim under the Convention before proceeding to consideration of alternate grounds?

(1) In systems where grounds for subsidiary protection are relatively narrow, and traditional interpretation of the Convention has been generous, the Convention-based claim will remain

first in sequence, as it is now. This situation obtains in the U.S. and Canada.

(2) There may be a greater need to establish a firm rubric of "primary consideration" in States where traditional interpretation of Convention grounds has been more narrow, but other international or regional human rights instruments provide a broader scope of subsidiary protection.

(c) *Impact of Different Legal Cultures:* The answer to how subsidiary protection "fits" into consideration of claims under the 1951 Convention will depend largely on the nature of the legal systems at issue.

(1) Common-law systems, accustomed to incremental development of the law through case-by-case adjudication and refinement of precedent, are likely to be receptive to good-faith arguments for expanding protection under the 1951 Convention. However, such systems also adhere to the principle that where judgment (in this case, protection) can be granted on an alternative, narrower, ground, there is no need to consider broader grounds.

(2) Code-based systems, more accustomed to development of legal principle through statute, may see a broader opening for protection under human rights treaties *other* than the Refugee Convention – once such treaties are recognized as providing legitimate grounds for protection.

(3) To a large extent, the answer here will depend on the relative level of benefits conferred under the Convention and under subsidiary forms of protection. If Convention-based protection leads, for example, to permanent residency and other forms of protection do not, then adjudicators will be under a higher obligation to consider every facet of a Convention-based claim before reaching subsidiary grounds.

4. From an adjudicator's perspective, the theoretical risks to primacy of the 1951 Convention are not likely to outweigh the substantial benefits of a consolidated scheme of protection, adjudicated in a single procedure. A somewhat broader scheme of protection against severe violations of human rights is likely to emerge, with grants of "refugee" status limited to those who genuinely fall with the terms of the Convention. From weight of habit and precedent alone,

adjudicators will continue to see interpretation and application of the Convention (and its domestic law instrumentalities) as their primary task.

C. Conclusions:

1. Substantial procedural advantages attend to the creation of a single procedure for protection claims, including maintaining the integrity of the system, preventing seriatim claims by those applicants seeking delay for improper purposes, and enhancing both the stature and uniformity in application of subsidiary protection.
2. Concerns regarding the continued primacy of the Refugee Convention in a "single" system may be addressed by directives requiring Convention-based claims to be taken first in sequence, and to be given full consideration (including to novel interpretations of the Convention) before proceeding to consideration of subsidiary protection.
3. However, it is impractical, and undesirable, to attempt to "micro-manage" the legal cultures within individual States. Part of the price both expanding grounds for protection to include those outside the Convention, and of ensuring "judicial independence" in joint consideration of claims under the Convention along with claims based on instruments such as the CAT and the ECHR, will be some variance in the relative priority given to such claims.

Harmonizing Approaches to Subsidiary Protection and Treatment of Vulnerable Categories

This final section will attempt to outline some of the more difficult questions raised by the emergence of an internationally-recognized scheme of subsidiary protection.

A. Is Human Rights-Based Protection a Potential Threat to the Refugee Convention?

1. The move toward a "single procedure" for determining claims under the 1951 Convention and for subsidiary protection forces consideration of the potential overlap between respective legal standards.
   (*a*) Will the advance of subsidiary protection, as some fear, act to restrict application of the 1951 Convention?[676]

676. Id.

(*b*) Or, will the integrity of the Refugee Convention be better served by avoiding an overly-broad interpretation of its provisions, but with the knowledge that those who face serious threats to human rights, but who fall outside its scope, may eligible for some form of subsidiary protection.

(1) In partial answer to point (b), William Frelick of the U.S. Committee for Refugees noted in the mid-1990s that "there are those who will never stop advocating for a refugee rights regime that would represent anything less than a Cadillac for all asylum seekers and refugees, and who will fault these reform initiatives [aimed at providing a "broader (if shallower) level of protection for most of the world's refugees] for promoting something other than that ideal."[677]

(2) It may be legitimate, therefore, to ask whether questions regarding the "integrity" of the Refugee Convention in light of the growth of subsidiary protection should be "first-order" concerns, if the result of expanding subsidiary protection is to give some form protection to a greater percentage of those that need it.

2. The IARLJ has consistently advocated interpretation of the Convention through the lens of international human rights law, particularly on the question of what constitutes "persecution."
3. Likewise, in discussions prior and subsequent to the Bern conference regarding subsidiary protection, IARLJ participants have generally agreed that international human rights instruments provide a baseline for defining the scope of such protection.
4. For some, including UNHCR, this has raised the prospect that resort to human rights instruments may supplant further development of the 1951 Convention, and be detrimental to refugees.

(*a*) This concern is strongest in those States where, in view of UNHCR, adjudicators have not fully embraced a human rights-based interpretation of the Convention, or the Convention is otherwise not properly applied.

(*b*) It also is based on the absence in other human rights

677. William Frelick, quoted in James C. Hathaway, "Toward the Reformulation of International Refugee Law (Research Report), 1992-1997, at 24-25.

instruments of specific standards regarding the status of those granted protection.

(*c*) The solution, according to UNHCR, is for the Convention "to co-exist and be complemented by these new forms of protection, without them coming to serve as restrictions on the more flexible application of the Convention."[678]

5. Viewed from a different perspective, however, it can be argued that the UNHCR and others want to have it both ways: the maximum possible scope of protection under the 1951 Convention, with its attendant benefits (usually leading to permanent resident status), coupled with "complementary" protection (and like benefits) to those who fall outside even this generous scope of interpretation.
6. To a large extent, resolving this issue depends on whether, taking into account political realities and the challenges of migration control, first priority should be given to fixing perceived deficiencies in application of the Convention, or to creating an overall protection scheme that is "more broad but less deep," and seeks to address all serious threats to violations of fundamental human rights.
7. As a practical matter, the choice set out in (6) will largely depend on the circumstances of a given State: its current interpretation of the scope of the Convention; its cohort of current and likely future protection claimants; its exposure to mass influxes of refugees and other displaced persons; and its specific foreign policy concerns.[679]

C. What is the Prospect for Harmonization of Subsidiary Protection Standards?

1. The contrast between the US, Canadian, and EU standards discussed under Heading II illustrates a central dilemma in the effort to establish a scheme of "international protection" that includes obligations outside the 1951 Convention.
2. The Convention, as is often noted, is the most widely-accepted and honored international human rights instrument.[680] If the scheme of international protection were kept within the terms of the Convention, harmonization efforts, however uncertain

678. Erika Feller, *supra* note 4.
679. While international refugee law clearly seeks to insulate adjudications of refugee status from foreign policy and related concerns, the U.S. Supreme Court has consistently observed that there is an inherent intersection between the two. *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).
680. Storey, *supra* note 7 at ¶ 24.

in result, would proceed from the same textual and interpretative basis.

3. However, limiting the scope of the international protection to scope of the Convention has proved unsatisfactory for an array of reasons, some rooted in international human rights instruments themselves, some arising from the situation "on the ground" in various regions, and some due to successful advocacy for a broader range of protection than has been consented to by currently binding international (as opposed to regional) instruments.
4. Hence, there is a risk of different States and regions establishing schemes of international protection with considerable variance. This poses a clear risk to harmonization of standards, with an uncertain impact on key issues such as burden-sharing between nations and regions.
5. No solution to this difficulty, if difficulty it be, is readily apparent. In fact, the both the doctrinal basis and the current path to implementation of subsidiary protection militate against it.
   (*a*) For example, subsidiary protection in Europe will be based primarily on the ECHR, an instrument obviously not applicable to North America. "Harmonizing" protection between the EU and the US, therefore, could require the US to unilaterally undertake obligations it has not acceded to, under the terms of an instrument it did not help to negotiate.
   (*b*) A solution to this could be an effort to negotiate standards for protection outside the 1951 Convention on a multilateral basis.
   (*c*) At present, there seems little prospect of such negotiation. The efforts of those who oversee the current protection system (chiefly UNHCR) are focused more on achieving a broader and more flexible application of the Convention. UNHCR. Negotiating international standards for a "human rights" based approach to subsidiary protection would likely be seen as inimical to this effort.[681]
6. Finally, it may be the case that the lack of harmonization for subsidiary protection poses less of a difficulty than might be assumed. Until it is seen how the adjudication of such claims works in practice, something which may take to the end of this decade to assess, we will not know the extent of the

681. Erika Feller, *supra* note 4.

practical difference to those seeking and deserving protection. This may be a theoretical difficulty which is more important to those who operate and monitor systems of protection than to those who are served by such systems.

7. A more realistic goal for harmonization, therefore, may be comparative study of "best practices" fort treating claims presented by particular classes of applicants – a concern traditionally considered under the label "vulnerable categories."

C. What is the Impact on "Vulnerable Categories" of Protection Claimants?

1. "Vulnerable categories" of refugee claimants have been classified into 5 categories: women, unaccompanied minors, victims of torture, those in detention, and those with mental health problems. Other potential categories include those who are part of mass migration from conditions of civil war, particularly civilian populations targeted by combatants in violation of the Geneva Convention Relative to the Protection of Civilians in Time of War.
2. Concern for the protection of "vulnerable categories" of refugee claimants has traditionally focused on two different issues:
   (*a*) Ensuring full access to refugee protection procedures for persons whose "vulnerable" characteristic(s) may make it more difficult to gain such access, and to provide accommodation with such proceedings so that they will be able to fully present their claims.
   (*b*) Considering interpretations of the Refugee Convention, particularly on the issues of "persecution" and "particular social group," that would encompass such persons within the scope of the Convention.
3. The "Vulnerable Categories" working party of the IARLJ has focused most on the first issue, since the second is covered by the working parties on "Human Rights Nexus" and "Particular Social Group." The working party has exchanged information on, and discussed, examples of "best practices" for dealing with such vulnerable categories.
4. The emergence of subsidiary protection raises several issues with regard to "vulnerable categories" of refugee claimants:
   (*a*) Does subsidiary protection establish specific categories for protection of vulnerable categories?
      (1) One of the stated goals of subsidiary protection in the European Union is to consolidate in one instrument, and in one determination procedure, norms of

protection for children, women, and other vulnerable categories.[682]

(2) Article 18(3) of the Proposed EU requires that Member States "take into account the specific situation of persons who have special needs, such as minors in general, unaccompanied minors, disabled people, elderly people, single parents with minor children, victims or torture or sexual abuse or exploitation, pregnant women and persons suffering from infirmity, whether mental or physical. Member States shall also take into account the specific situation of single women who are subject to substantial gender-related discrimination in their country of origin."

(3) This requirement could be interpreted as being limited to issues of procedure and access for vulnerable persons. But the Proposed Directive is, at best, ambiguous on this point.

(4) If limited to issues of procedure and access, the list in Article 18 makes sense; if intended to describe categories of persons who deserve special consideration in determining the *scope* of subsidiary protection, it appears to be overly-inclusive.

(5) As discussed previously, if equivalent or near-equivalent protection is available based on "torture" or "cruel, inhuman, and degrading treatment," there may be less need to consider whether victims of such treatment also can establish a nexus to one of the five grounds in the Refugee Convention. This is likely to be most controversial in the case of claims based on gender or sexual orientation as a particular social group.

(*b*) Does subsidiary protection change the focus in protecting vulnerable categories?

(1) Space and research time do not permit a detailed review of procedures for vulnerable categories in various jurisdictions.

(*a*) In summary, the US has published guidelines for handling of asylum claims from women and children. These do not have binding force of law, but are quite influential in administrative asylum proceedings before the Immigration and Naturalization Service. In immigration courts, these

682. Hugo Storey, *supra* note 7 at ¶ 15.

guidelines, and case-by-case accommodations, may affect the course of proceedings in cases of vulnerable category claimants.

(*b*) The proposed EU Directive, as noted, anticipates a range of accommodations for a broad spectrum of "vulnerable" claimants, and that such provisions apply equally to refugee status and

(2) Canada, which has gone the furthest in establishing "consolidated procedures," presents an interesting case study for how the emergence of subsidiary protection may affect the consideration given to vulnerable categories.

(*a*) Lois Figg, a Coordinating Member of the Immigration and Refugee Board (Canada) suggests that it may be time to "re-think how we deal with vulnerable claimants and develop a new perspective on vulnerable claimants," shifting from a category-based approach to a case-by-case approach.

(*b*) As noted, Canada, the US, and the EU all have developed various norms for the treatment of women, children, and other vulnerable categories in refugee-determination procedures. Canada's are among the most formal and binding of such procedures, for example, appointing a "designated representative" and involving provincial child protection authorities in cases of unaccompanied minors.

(*c*) Figg notes that despite Canada's progressive approach to establishing best practices, "not all vulnerable people fall into one of the five categories (of vulnerable claimants) and some claimants who do fall within a category are not vulnerable. Certain accompanied minors, especially those caught in parental custody disputes, are examples of those who may need special consideration, but do not fit one of the 5 established categories, She identifies some torture victims, and some with mental health problems as examples of those who, while vulnerable, may best be served by minimal accommodation and by the opportunity to relate their full story.

(*d*) She proposes that the designation of "vulnerability" be made on a case-by-case basis at the outset of proceedings. This would not supplant

recognition of the standard categories of vulnerable claimants.

(*c*) If subsidiary protection is considered as part of a single asylum procedure (as in EU), or under a scheme of consolidated grounds (Canada), the "best practices" applied to refugee determinations will presumably be applied to claims to subsidiary protection as well. However, to the extent subsidiary protection claims are considered in a different set of procedures, those adjudicators will also have to be sensitive to the concerns of vulnerable categories of claimants.

D. In the Future, Might There be a Need for a New Schema of International Protection?

1. As we consider the relationship between new forms of subsidiary protection and "standard" refugee jurisprudence, we may also consider whether something larger is happening.
2. It is legitimate to ask, particularly with reference to the Canadian "consolidated grounds" model, and the proposed "single asylum system" in the EU, whether a new form of protection is emerging: one that transcends limits imposed by the text of the Refugee Convention to grant protection based on a broader scope of instruments.
3. Most commentators seem not disposed (or even strongly opposed) to consider a scheme of international protection in which the 1951 Convention does not retain primacy. There are many sound reasons for this position, some of which have been mentioned in this paper, and for the time being, it is safe to assume that the primary business of "refugee law judges" will remain the interpretation and application of the 1951 Convention.
4. But current developments portend a serious division of standards not only along national, but also regional, lines. Part of the problem for international, or universal, harmonization, of subsidiary protection standards is that the newly-adopted sources of non-refoulement obligations are themselves regional in nature. This raises the prospect, specific to the proposed EU Directive, of a "Euro-Centric" approach.[683] Europe seems close to an approach that will *infer* non-refoulement from human rights instruments that contain no positive obligations in this regard. The United States and, to

683. Storey, supra note 7.

a lesser extent, Canada, have not adopted such an approach; nor does this approach seem likely to emerge at this point in New Zealand and Australia.

5. On the basis of this reality, two questions can be posed:
   (*a*) Is it a bad thing for harmonization on these issues to take place primarily at the regional level?
      (1) Many would strongly argue that it is, because despite the existence of regional human rights instruments as sources of law, primacy remains with the Refugee Convention and other such universal instruments as the Convention Against Torture, the U.N. Declaration of Human Rights, and the various Geneva Conventions (international humanitarian law).
      (2) A counter-argument might be that, at this point, this is the best that we can do. Practically speaking, there exist no mechanisms that can enforce common understandings and interpretations of even the most universal human rights instruments. The "Committee Against Torture" could be seen as one example of such a body, but not all countries accede to its jurisdiction, and its decisions are not issued in a "precedent" or "rule-making" format.
   (*b*) Will the ferment described herein eventually lead to consideration of a new foundation or "constitution" for the law of international protection? As venerable a document as the 1951 Convention has become, will it eventually require amendment or re-drafting to meet contemporary protection needs?
      (1) Part of the answer to this question may lie in world events and what forms persecution shall take in the future.
      (2) Part of the answer may also lie in how successful – substantively, politically, and practically – the emerging schemes of subsidiary protection are in addressing compelling claims for international protection that lie outside the scope of the Refugee Convention.
6. These questions are not posed as matters of idle speculation, or without regard to the formidable obstacles to any foundational change in the law of international protection. However, they do suggest that the success of the emerging scheme of subsidiary protection may lie in an approach of flexibility and a form of "international federalism" that allows new norms and standards to emerge from below as opposed to being imposed "top-down." Reform of the law of

international of international protection will need spurs from above, but will only be realized in the day-to-day work of nations and their appointed refugee adjudicators.

7. Finally, keeping in mind the issues noted in paragraph (6) on page 2 of this Outline, the goal of providing the maximum level of relief to the maximum number of those in need of protection may be as difficult to attain politically as it is to explain logically. Current moves towards subsidiary protection may be the first manifestation of a move toward "broader but less deep" forms of protection more flexible than those of the past 50 years, and thus more suited to the contemporary situation.

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