



WHERE TO NOW:

**CHARTING THE FUTURE COURSE
OF INTERNATIONAL PROTECTION**

International Association of Refugee Law Judges

The Proceedings of the 8th World Conference of
28 – 30 January 2009
Cape Town
South Africa

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PREFACE

This book contains contributions from a number of judges, scholars, leading members of human rights organisations and senior UNHCR officials made to the 8th Conference of the International Association of Refugee Law Judges in January 2009.

It is hard to imagine a more appropriate or beautiful place to reflect upon the development of refugee law than under the shadow of Table Mountain in Cape Town. In the recent history of South Africa Table Mountain has witnessed one of the worlds greatest affronts to human rights, but has also witnessed the ending of that era and the emergence of new era in which South Africa leads the world in the sophistication of its recognition of human rights in the legal system.

South Africa also has a particular significance for the Association. It is the birth place of the Africa Chapter formed in 2006 - the newest Chapter of the Association. The conference underscored the strong presence of the Africa Chapter in the work of the Association.

This collection begins with the contribution by Navanetham Pillay, the United Nations High Commissioner for Human Rights. The paper, delivered as the conference's keynote address, reflects on the linkages and synergies between refugee law and international human rights law, and details the important role that international refugee law plays in protecting the human

rights of individuals displaced by war, genocide and political persecution.

Then follows works on several of the most urgent issues in international refugee law, including the increasing impact of climate change on the movement of people. This issue was addressed by Professor George Philander, Professor of Geosciences at Princeton University and Research Director of the African Centre for Climate and Earth System Science and Walter Kälin, Member of the United Nations Human Rights Committee.

Gender as a form of persecution is analysed in thoughtful papers by Catherine Branson QC, President of the Australian Human Rights Commission and Justice Nicholas Blake QC, current president of the Immigration and Asylum Chamber of the UK Upper Tribunal.

Perhaps one of the most thought provoking events during the conference was the panel discussion between George Okoth-Obbo, Director of International Protection Services at UNHCR, Justice Isaac Lenaola, a Judge of the High Court of Kenya, Justice James Ogoola from the High Court of Uganda and Justice James O'Reilly, a Judge of the Federal Court of Canada, concerning the role of the judge in extra-curial commentary on international refugee law. This discussion, presented in this book as separate papers by each of the contributors, provides different perspectives on the contribution judges can – and arguably should - make to debates on refugee issues at both an international and domestic level. It reflects the view, which is controversial in some quarters, that judges should take a public stand on human rights issues.

In addition to the speakers' presentations, this conference publication also contains a brief summary of the important work done by the IARLJ Working Parties. Between conferences, the Working Parties continue their critical exploration of various aspects of refugee law and the practice of refugee status determination, and generously share the results of their labours. The IARLJ Conference acknowledged the commitment of those who contribute to the Working Parties, and of Dr James Simeon of York University, Canada, as the Working Party Process Co-ordinator.

The book closes with a poem penned by Justice James Ogoola to commemorate the proceedings in Cape Town. He starts by speaking of the brutality which has been witnessed by the silent gaze of Table Mountain. He goes on however to tell of the sweet relief which comes from the mending of the tattered shreds of history, highlighting the strength of human character as communities build new lives following experiences of persecution.

In his poem Justice Ogoola captures something of the spirit which drives us in the Association to seek to bring fairness to the plight of refugees through our work in the international legal regime which governs the protection of refugees.

Justice A M North
Federal Court of Australia
President of the IARLJ

SESSION 1

Chaired by Justice Tony North
Federal Court of Australia
President IARLJ

Keynote Address

"Promoting a broader understanding of refugee law: the jurisprudence of the human rights treaty bodies as a source of interpretation"

Her Excellency Navanethem Pillay
United Nations High Commissioner for Human Rights

* * * * *

Navanethem Pillay took up the post of UN High Commissioner for Human Rights on 1 September 2008.

Ms Pillay was the first woman to start a law practice in Natal in 1967. Over the next few years, she acted as a defence attorney for anti-apartheid activists, exposing torture, and helping establish key rights for prisoners on Robben Island.

She also worked as a lecturer at the University of KwaZulu-Natal, and later was appointed Vice-President of the University of Durban Westville.

Ms Pillay's thesis for her SJD from Harvard Law School in 1998, entitled the "Political Role of the South African judiciary", questioned the possibility of justice in South Africa when courts were used as political instruments.

In 1995, after the end of apartheid, Ms Pillay was appointed a judge on the South African High Court, and in the same year was chosen to be a judge on the International Criminal Tribunal for Rwanda, where she served a total of eight years, the last four (1999-2003) as President. She played a critical role in the ICTR's groundbreaking jurisprudence on rape as genocide, as well as on issues of freedom of speech and hate propaganda.

In 2003, she was appointed as a judge on the International Criminal Court in The Hague, where she remained until August 2008.

In South Africa, as a member of the Women's National Coalition, she contributed to the inclusion of an equality clause in the country's Constitution that prohibits discrimination on grounds of race, religion and sexual orientation. She co-founded Equality Now, an international women's rights organization, and has been involved with other organizations working on issues relating to children, detainees, victims of torture and of domestic violence, and a range of economic, social and cultural rights.

Ms Pillay has served as a member of the UN Expert Group on Gender Persecution and the UN Expert Group on Refugees. In 1998, Ms Pillay presented a paper at the Human Rights and Forced Displacement conference hosted by the Centre for Refugee Studies at York University.

Promoting a broader understanding of refugee law: the jurisprudence of the human rights treaty bodies as a source of interpretation

Navanethem Pillay

Introduction

It is a great pleasure for me today to address this assembly of refugee law judges. As a former judge myself, I attach great importance to the work of the judiciary in all of its spheres. It goes without saying that the linkages created through the International Association of Refugee Law Judges provide great support to national judges in arriving at a correct interpretation of the 1951 Convention Relating to the Status of Refugees – most specifically its definitional clause.

Over the years, the Association has provided judges such as yourselves with a means of sharing both experience and national jurisprudence on aspects of refugee law. This process has clearly enriched national jurisprudence on the Refugee Convention, as well as rendering it more coherent by reducing divergences. This is commendable. Your invitation extended to me, as High Commissioner for Human Rights, to be with you today in your opening session is an indication of the importance you attach to human rights law in your area of work.

As we celebrated the 60th anniversary of the Universal Declaration of Human Rights last year, it is an opportune time for all of us to reflect on the importance of disseminating a broader understanding of refugee law

which takes full account of international human rights law. We need to think collectively and proactively on a comprehensive and coherent approach to the interpretation of the definition of the refugee, which must accord with international human rights law.

Ten years ago, your Association adopted a resolution encouraging refugee law judges “to utilize international human rights instruments to interpret the term persecution”. It seems that your call has been heard by refugee law judges around the world. However, there are still some who claim that international refugee law and international human rights law are separate and distinct fields of international law, a distinction to be maintained at the national level.

This view, to my mind, is not only counterproductive, but incorrect. The Refugee Convention does not create a self-contained legal regime. It cannot and - as a matter of principle - should not be interpreted in isolation from international human rights law. Clearly, the Refugee Convention provides specific legal protection for refugees. However, these same individuals also benefit from the legal protection of human rights law. Human rights thus supplements refugee law, and in the case of States that are not parties to the Refugee Convention (and there are unfortunately still more than forty of them) international human rights law remains the most important source of legal protection for refugees.

The linkages and synergies between international refugee law and international human rights law are manifold. International human rights law can prove most useful to

refugee law judges in interpreting provisions of the Refugee Convention. The two bodies of law often complement each other in a manner which deserves much greater attention, and indeed use.

The Refugee Convention is a human rights text

A starting point is that the Refugee Convention is in essence a human rights text. The preamble to the Convention immediately recalls the 1948 Universal Declaration of Human Rights and the premise accepted therein that all human beings shall enjoy fundamental rights and freedoms. Preambular language also grounds the Convention in endeavours “to assure refugees the widest possible exercise of these fundamental rights and freedoms.”

In this regard, while Article 1 defines who is a refugee, the remaining provisions of the Refugee Convention focus on the rights and entitlements of those recognized as refugees. In so doing, the Convention thus imposes obligations on States parties to provide human rights protection to a particular category of individuals – namely refugees - in a similar fashion to the Convention on the Rights of the Child vis-à-vis children, and the Convention on the Elimination of All Forms of Discrimination against Women, on women.

Human rights law complements refugee law

The Refugee Convention is based on the same protection principles as all the other human rights instruments, and forms part of the broader body of international human rights law. However, there remain gaps in even the specific

protection afforded to refugees by the 1951 Convention and its 1967 Protocol. For example, there is no provision in the Refugee Convention regarding the rights of refugees in detention.

Refugees in this predicament must look to international human rights law for protection, most relevantly the rights contained in Articles 9 and 10 of the International Covenant on Civil and Political Rights, which has been ratified by more than 160 States. These two provisions grant essential rights to all detained persons, including asylum-seekers and refugees, such as the right to an independent review of the legality of the detention.

Thus the Human Rights Committee has concluded in a line of cases including *A v. Australia*¹ that a decision to keep asylum-seekers in administrative detention must be reviewed periodically and that detention should cease as soon as the State can no longer provide appropriate reasons for it to continue. This is but one example of how the international human rights treaties can fill lacunae in the protection afforded under the Refugee Convention.

The human rights framework of interpretation and treaty law

I would like today to focus on how refugee law judges can and have used human rights instruments in interpreting

¹ See Communication No.560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para.9.4; Communication No.900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para.8.2; Communication No.1014/2001, *Baban and Baban v. Australia*, Views adopted on 6 August 2003, para.7.2; Communication No.1069/2002, *Bakhtiyari and al. v. Australia*, Views adopted on 29 October 2003, para.9.3; and Communication No.1050/2002, *D. and E. v. Australia*, Views adopted on 11 July 2006, para.7.2.

Article 1 of the Refugee Convention. According to the well-known rules of treaty interpretation, 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. Accordingly, while primacy is to be given to the text of the Refugee Convention, this text must be interpreted within its context as set out in the preamble, with its explicit reference to the Universal Declaration of Human Rights.

Consistency of interpretation

There are a number of advantages to adopting a human rights framework for the interpretation of Article 1 of the Refugee Convention. First, it contributes to greater consistency in the application of the law both within and between national jurisdictions. Through the network established by the IARLJ, we are increasingly seeing, as I mentioned earlier, reliance on national jurisprudence of other countries leading to more harmony in the interpretation and implementation of refugee law among various States.

The quest for certainty in the law and its application suggests that refugee law judges around the world strive to apply common standards, i.e. internationally recognised human rights standards, when interpreting the provisions of the Refugee Convention. This process is underway, with a number of examples of national refugee law judges adopting consistent approaches to the Refugee Convention by referring authoritatively to human rights norms.

Problems with the refugee definition – need to use human rights to interpret

Beyond promoting consistency in application, human rights instruments also provide concrete assistance to refugee law judges in construing refugee legislation. There are many instances of the persuasive authority of human rights instruments impacting judicial interpretations of the refugee definition. The clearest practice is in the assessment of the nature and seriousness of harm in a particular case and the likelihood of such harm amounting to “being persecuted”.

The well-known definition of a refugee in Article 1 of the Convention is of a person who:

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

There is no doubt that it is the element of “being persecuted” that has given rise to most difficulties of interpretation as it is not defined in the Refugee Convention, nor in any other relevant international treaty. There is one international definition I would highlight – namely that provided in the “Elements of Crimes” document developed to assist the International Criminal Court in its interpretation of the Rome Statute.

Although concerned only with the context of crimes against humanity, this document defines “persecution” as

the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

It is instructive to note that Article 21 of the Rome Statute requires the Court to apply and interpret the Statute and Elements of Crimes consistently with “internationally recognized human rights”.

Nonetheless, national refugee law judges have turned to human rights law for guidance. Thus, the New Zealand Refugee Status Appeals Authority held in *Refugee Appeal No. 71427/99* that “core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution”. Drawing from human rights law, courts have further elaborated upon the term and shown growing awareness that serious human rights violations encompass “persecution”.

Among the sources of interpretation available to refugee law judges are of course international human rights instruments. The general comments and recommendations, as well of the decisions on individual cases, adopted by the treaty bodies established under these instruments are additional sources of interpretation and constitute persuasive precedent for judges.

Women's rights

There is no doubt that the development of international human rights law in the field of women's rights, for example, has led to refugee law judges taking into account women's experiences as pertinent to the concept of persecution. For instance, the Committee on the Elimination of Discrimination against Women established under the Convention of the same name has explicitly stated on many occasions that female genital mutilation is harmful to the health of women and children and as such, constitutes a violation of Article 12 of the Convention.

This position was established by the Committee in its General Recommendations, particularly numbers 14 on female circumcision, 19 on violence against women and 24 on Article 12, women and health. In these recommendations, the CEDAW Committee has urged States parties to take appropriate and effective measures to eradicate the practice of female circumcision. Most refugee law judges may not have made explicit reference to these recommendations from the CEDAW Committee in decisions involving claimants fleeing female genital mutilation, but the CEDAW jurisprudence is unquestionably an influential source on the point.

When examining asylum cases involving gender-related abuse resulting from traditional or social practices or customs, refugee law judges can also refer to Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women which imposes on States parties the obligation "to modify the social and cultural patterns of conduct of men and women, with a view to

achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". Such a reference would facilitate the exclusion of cultural relativism from refugee adjudication.

Refugee law judges can equally refer to the jurisprudence of the CEDAW Committee which has recently been given competence to deal with individual communications. The Committee has issued Views in several cases involving domestic violence. In *A.T. v. Hungary*,² the Committee recalled its General Recommendation No. 19 on violence against women which states that

under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish such acts of violence, and for providing compensation.

In the case at hand, the Committee noted that the author of the communication had been battered and continued to feel threatened by her former common law husband and father of her two children for several years. She had been unsuccessful in temporarily or permanently barring him from the apartment where she and her children lived. The Committee also noted that she could not ask for a restraining or protection order since neither option existed in Hungary. Moreover, she could not take refuge in a shelter since none were equipped to take her together with

² See Communication No.2/2003, *A.T. v. Hungary*, Views adopted on 26 January 2005.

her children, one of whom was disabled. The Committee concluded that these facts considered together indicated that the author's rights under the Convention had been violated.

With regard to asylum cases involving domestic violence, CEDAW Views provide helpful precedents which can be followed in order to determine whether the treatment in question amounts to persecution. The elements relevant for the refugee definition and consideration of judges of course would be the determination that the concerned State failed to act with due diligence to prevent the harm, threats continued, there was a lack of legal regime entailing restraining orders, and no protective alternatives were available, leading to a conclusion of a violation of established human rights standards, Articles 2, 5 and 16 specifically.

Cruel, inhuman and degrading treatment

Decisions of the Committee against Torture in individual cases may also be of assistance for determining whether particular conduct amounts to persecution, in particular in light of the evolving understanding of what constitutes cruel, inhuman or degrading treatment or punishment. For instance, in the case of *Dzemajl et al. v. Yugoslavia*,³ a group of persons of Roma origin had been harassed and driven out of their homes by the local population after two Romani minors confessed under duress that they had raped an ethnic Montenegrin girl. Their houses were completely destroyed.

³ See Communication No.161/2000, *Dzemajl et al. v. Yugoslavia*, Views adopted on 21 November 2002.

The Committee against Torture considered that the burning and destruction of houses constituted, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. Moreover, such acts had been committed with a significant level of racial motivation. The Committee was of the view that the police had not taken any appropriate steps in order to protect the complainants, and decided that while the acts in question had not been committed by public officials themselves, they had been committed with their acquiescence.

The Committee thus concluded that there had been a violation of Article 16 of the Convention against Torture, specifically prohibiting acts of cruel, inhuman or degrading treatment or punishment. It also noted that no person or any member of the police forces had been tried by the courts of the State party and that the complainants had not been informed of the results of the investigation. It therefore concluded that there had also been a violation of Article 12 on the obligation to proceed to a prompt and impartial investigation.

When examining asylum cases involving violence by non-State actors, refugee law judges can refer to such CAT decisions in order to determine whether the treatment in question amounts to persecution. The elements relevant for the refugee definition and consideration of judges of course would be the finding that the acts of cruel, inhuman or degrading treatment or punishment were committed with the acquiescence of the authorities, there was a lack of a prompt and impartial investigation and the lack of prosecution. Once again, treaty body jurisprudence can be

used to define serious harm within the scope of persecution.

Freedom of thought and belief

A number of asylum applications coming before refugee courts and tribunals involve conscientious objection to military service. Treatment of such claims differs among jurisdictions. In the United Kingdom, the House of Lords in *Sepet* in 2003 held that there was no established right to conscientious objection under international law, and thus no persecution when the asylum claimants sought to avoid military service because of their political opposition to the policies of the then Turkish Government towards the Kurdish people.

A different approach was followed by the Human Rights Committee in 2006 in *Yoon and Choi v. Republic of Korea*,⁴ in which the Committee found a violation of Article 18. Article 18 of the International Covenant on Civil and Political Rights protects freedom of thought, conscience and religion. The Committee had expanded on this Article in its General Comment No. 22.

In this decision concerning two Jehovah's Witnesses, the Committee noted that that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs. The authors' conviction and sentence, accordingly, was deemed to amount to a restriction on their ability to manifest their religion or belief. Considering that under the laws of the State party there was no procedure

⁴ See Communications No.1321 & 1322, *Yoon and Choi v. Republic of Korea*, Views adopted on 3 November 2006.

for recognition of conscientious objections against military service, the Committee concluded that the State party had not demonstrated that the restriction in question was necessary, within the meaning of Article 18, paragraph 3, of the Covenant. This important decision provides additional recognition for the existence of a right to conscientious objection under international law and should offer useful guidance to refugee law judges.

In General Comment No. 22, the Human Rights Committee recalled that Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The Committee distinguished the freedom of thought, conscience and religion from the freedom to manifest religion or belief. Article 18 does not permit any limitations on the former.

Concerning the freedom to manifest one's religion or belief, the Committee recalled that Article 18, paragraph 3, permits restrictions on such freedom only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. It also recalled that such restrictions should be strictly applied.

It follows that an asylum claimant cannot be expected to limit or restrict the manifestation of his or her religious beliefs for reasons other than those spelt out in Article 18, paragraph 3. With regard to refugee claims based on voluntary but protected actions, referring to Article 18 of the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee in General Comment No. 22, should lead to the conclusion that

refugee status cannot be denied by requiring of the claimant that he or she avoid persecution by not manifesting his or her religion of belief.

Economic, social and cultural rights

Another area in which recourse to international human rights law in refugee adjudication is changing our understanding of the concept of persecution is economic and social rights. Interestingly, the new expert body of the Human Rights Council, the Advisory Committee, recently expressed its concern “at the situation of refugees from hunger, who place their lives in danger when they flee from their famine-hit countries, only to find themselves turned back by the countries of arrival even before their cases have been examined”. The Advisory Committee has recommended that the Human Rights Council and the Secretary-General make available their good offices so as to extend to the right to non-refoulement to “hunger refugees” in such situations.

While there is still a general tendency to undervalue economic and social rights in refugee adjudication, some courts and tribunals are increasingly referring to the International Covenant on Economic, Social and Cultural Rights and have started to develop an interpretation of persecution based on the deprivation of economic and social rights.

For example, several courts and tribunals have come to recognize that some violations of the right to work are so severe as to have a serious impact on a person’s economic survival, thus amounting to persecution. Such an approach

is consistent with that of the Committee on Economic, Social and Cultural Rights which has stated in its General Comment No. 18 that “the right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity”.

The right to health and in particular the right to equal access to medical treatment is another important area of human rights with implications for the refugee definition. For example, when upholding the claim of a child with cerebral palsy who faced severe discrimination in relation to access to medical care and education in Russia in *Tchoukhrova v. Gonzales* (2005), the US Court of Appeal for the Ninth Circuit considered that denial of medical care or education which seriously jeopardizes the health or welfare of the affected individuals constitutes persecution for the purposes of the Refugee definition. The Court did not refer to international human rights law. Nonetheless, its approach in this case is consistent with international human rights instruments and the pronouncements of the treaty bodies established under them.

For instance, with regard to the right to the highest attainable standard of health as protected by Article 12 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 14 in 2000. This General Comment provides useful guidance as to what the right to health entails. In particular, it identifies the “core obligations” arising from Article 12 of the Covenant, which include the obligation to ensure the right of access to health facilities, goods and services on a non-

discriminatory basis, especially for vulnerable or marginalized groups.

Similarly, the Committee on the Rights of the Child has adopted in 2006 a very detailed General Comment on the rights of children with disabilities. Of course, reference can now also be made to Article 7 of the new Convention on the Rights of Persons with Disabilities, which deals with children with disabilities. When dealing with asylum cases involving disabled children facing severe discrimination in relation to access to medical care, all these documents can usefully be referred to in order to establish persecution where appropriate.

Endorsement of the human rights framework of interpretation by the EU

It is worth noting here that the human rights framework of interpretation of the refugee definition has been explicitly endorsed not only by many national courts and tribunals, but also by intergovernmental organisations. In 2004, the Council of the European Union adopted a Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted. This important Directive provides that acts of persecution within the meaning of the Refugee Convention must involve “a severe violation of basic human rights”. This must surely constitute an explicit endorsement of the human rights approach to refugee law, at least at the EU level.

Dissemination of treaty bodies' output

While the International Association of Refugee Law Judges has been at the forefront of international efforts to promote a human rights approach to the interpretation of the Refugee Convention, my Office is pursuing its own efforts aimed at making the jurisprudence of treaty bodies more widely available and more visible to refugee law judges and to the public at large.

All the documents produced by the treaty bodies are of course available on the website of my Office. In addition, OHCHR has recently launched a searchable information tool called the Universal Human Rights Index which is available on the internet and contains all the concluding observations issued by the treaty bodies from the year 2000, as well as conclusions and recommendations of the Human Rights Council's special procedures concerning specific countries adopted since 2006.

The Universal Human Rights Index will also soon provide access to recommendations made in the framework of the Human Rights Council's Universal Periodic Review mechanism. Most usefully, the website currently allows visitors to search more than 1,000 documents produced by treaty bodies and special procedures. I very much hope that this database will assist refugee law judges in gaining better access to human rights documents.

Conclusion

To conclude, I would submit that refugee law and human rights law share a common objective in the protection of the

rights of individuals. This commonality of purpose between the two bodies of law has been strengthened over the years, inexorably so in my view. When the Refugee Convention was adopted more than fifty years ago, the international law of human rights was in its infancy. Since then, the scope of human rights law and the means to ensure accountability for violations have expanded exponentially. These developments have appropriately filtered into the realm of refugee law, and I have referred to but a few examples here today. These recent jurisprudential developments have shown that the Refugee Convention is a living instrument, capable of evolving so as to accommodate developments in human rights law.

Likewise, the significant work of judges such as yourselves in expounding the scope of refugee law has assisted in the elaboration of the international human rights norms and framework of the past 60 years. An example is the consideration of the principle of non-refoulement⁵ which, while well established early on in refugee law, has only relatively recently been more fully explored in the context of the Convention Against Torture,⁶ and even more recently in the jurisprudence under the International Covenant on Civil and Political Rights.⁷ The synergies between the two bodies of laws based on the respect for human dignity of all individuals must be reinforced. In using international human rights law as a source of interpretation for the Refugee Convention, refugee law judges are upholding the central objective of the Refugee

⁵ Prohibition of expulsion or return (Article 33 of the Refugee Convention).

⁶ Article 3 of the Convention of Torture prohibits return to torture.

⁷ Article 7 of the ICCPR prohibits torture and cruel, inhuman and degrading treatment. It has been interpreted by the Human Rights Committee as applying to situations of expulsion, return and extradition.

Convention, which is to provide human rights protection to refugees.

SESSION 2

Chaired by Ahmed Arbee
Chair, Africa Chapter, IARLJ

Conference address

"Charting the future course of international protection"

Erika Feller
Assistant High Commissioner – Protection
United Nations High Commission for Refugees

* * * * *

Erika Feller holds the post of Assistant High Commissioner for Protection, one of the four top management positions with the United Nations High Commissioner for Refugees. It carries the level of Assistant Secretary General. She is an honours law graduate, with an additional degree in the humanities, specialised in psychology.

Her professional career, now spanning some 35 years, has had a predominantly international law focus. It has included 14 years and three international postings with the Australian Diplomatic Service, including having headed the Australian Foreign Ministry's Human Rights Section. This was followed by 21 years of progressively more senior appointments with the UN, working predominantly with the theory and the practice of international human rights and refugee law. Ms Feller has served for UNHCR in

Geneva, but also as the Representative in Malaysia, Singapore and Brunei. Concurrently with this position, she was appointed Regional Coordinator for Status Determination under the Comprehensive Plan of Action to resolve the Indo-Chinese Refugee problem.

Ms Feller has travelled extensively, throughout Africa, Asia, Europe, the Middle East and North America, for the purposes of advice and negotiations with Governments on their asylum policies and practices. She was the initiator and manager of the 2001-2 Global Consultations on International Protection, which generated the Agenda for Protection, the internationally endorsed global "road map" on protection policy for the years ahead. Her job has had her running refugee camps and undertaking protection oversight missions to the large majority of the major refugee emergencies of recent years, for example in West Africa, Darfur and Chad, the Caucasus, the Balkans, Colombia, Timor and the countries which are the focus of UNHCR's Iraq Operation. She has, on a number of occasions, been UNHCR'S chief negotiator of protection agreements with Governments, as well as multilateral arrangements with agency partners. Internally she has served on key management boards and been responsible for initiatives which have brought significant changes to how the organisation fulfils its protection responsibilities.

In her current position, Ms Feller's responsibilities include oversight of age, gender and diversity mainstreaming and accountability in UNHCR programs. She is an academically acknowledged authority on refugee law, has published widely in Journals, is co-editor of a book on Refugee Protection in International Law and has

contributed to other book publications, including the Max Planck Encyclopedia of Public International Law.

Ms Feller is married, with two children.

Charting the future course of international protection

Erika Feller

I have followed the progress of the International Association of Refugee Law Judges for almost a decade. It has been a privilege for me to count as colleagues, and in some instances close friends as well, many eminent and inspiring members of this body. As important, perhaps, I have witnessed the birth and growth of the Association and now, if I may say so, its "coming of age". With precious little funding, a generous spirit of "volunteerism", and the drive and imagination of successive Presidents, in particular your current President Justice Tony North, the Association has developed from a loosely connected group of judges with differing expectations and purposes, to an international body of members joined by common goals and making a noted and professional contribution to improving asylum systems and decision-making in a number of parts of the world. The growth in Chapters of the Association is a welcome development, the continuation of which we would encourage in the years to come. I am particularly pleased to see that UNHCR is now turning to the Association with greater regularity for a practitioner's viewpoint and for practical assistance. This can only improve the authority of our guidelines, the performance of status determination systems, including our own and, ultimately, respect for and proper application of the 1951 Convention system. In the traditional spirit of using the occasion of such biennial conferences to provoke thinking on issues very much on UNHCR's agenda, I want to take the opportunity of this address to report on some

current concerns for the Office and to put some questions to you, which the deliberations to come perhaps will help find answers to.

Two years ago in Mexico City I had the pleasure of addressing the 7th World Conference of the Association. Prior to coming here, I reviewed what I then said – and was appalled to see that today I could have made a very similar speech about the challenges facing refugee protection and the actions necessary to meet them. I am not sure how I should assess this insufficient progress when it comes to our concerns at the time - widening asylum space, promoting stronger political will to take on refugee protection issues and capacity building of more responsive and effective asylum systems. I am tempted to cast blame all around: on the refugee producers who continue their ways in blatant disregard of human rights obligations and the safety of their populations; on governments more generally for being blinkered about their national interests and restrictive when it comes to international responsibilities; and on the international community, writ large and including UNHCR, for programs and responses which are more reactive than pro-active, and often just insufficient, measured against the needs.

The needs will continue to outstrip the response, absent new approaches and new partnerships which is of course what this Conference, with its focus on Charting the Future Course of International Protection, promises to be about. It is also the subject of my following presentation.

Setting the scene

FACT 1, the scale and scope of forced displacement remains significant. Overall, persons of concern to UNHCR number some 32 million people, of whom over 11 million are refugees under UNHCR's mandate. UNHCR also has specific responsibilities for close to 14 million persons displaced inside their own countries and an estimated 12 million stateless persons worldwide. Big as they are, these figures are not representative of the totality of global displacement. They do not include, for example, the more than 4 million Palestinian refugees supported by a separate UN agency, UNRWA. As for internally displaced persons, the estimated overall total stands at around 26 million persons.

FACT 2, the refugee plight cannot be approached as one or other country's domestic problem only. I recently addressed a European Conference on the theme: "Refugees as Global Citizens". This set me down an intriguing path of quasi-legal, quasi-political analysis which went something like this: In fact and at law, refugees are a global problem and a global responsibility. The defining feature of refugees is that they have been forced to flee their home countries, having temporarily lost their capacity to exercise the rights and duties of national citizenship. Flight and external displacement have effectively "de-citizenised" them. In response, international law, international institutions and third countries are all engaged in the effort to protect them through an alternative protection and assistance structure, to enable basic rights to be protected until a national system reclaims that responsibility. International protection is a temporary substitute for the

protection of national citizenship, meaning that global citizenry is indeed a relevant concept. However, it has some way to go.

As to how far, and this is FACT 3, much credit is of course due! Many States do honour and deliver upon their responsibilities. Millions of refugees have been able to enter third states, stay at least temporarily and even durably, or otherwise ultimately find the appropriate solution. Last year more than 700,000 were able to return home, while close to 100,000 persons benefited from resettlement opportunities made available by an ever growing and diversifying group of resettlement providers. New laws were enacted in a number of countries which put in place good regulations on key protection issues such as providing for refugee status in the context of sexual and gender-based violence. The right to a nationality was given stronger legal underpinning through long advocated legislation requiring the documenting of births, deaths and marriages, or expediting the process by which refugee populations might acquire the host country nationality.

As always, though, there is another side of this picture. FACT 4 is the still disturbing number of refugees who do not enjoy the rights which international refugee law and its national equivalents formally guarantee them. Developments over recent years have placed quite a strain on protection systems. Providing asylum can be costly, in monetary and other terms. Population displacement is a humanitarian, but also a serious political and security challenge for some states. Movements of refugees do have the capacity to dislocate and change economic and social systems within a short period. In the current climate,

where national security is high on the agendas of governments, concerns about international crime and terrorism have made states particularly wary about unauthorized arrivals, with asylum viewed through a security prism in many parts of the world. This has made borders a particularly shadowy place, with interception, turn-arounds and *refoulement* taking place outside the frame of any proper scrutiny. Detention, including arbitrary detention of children, is quite prevalent, and the possibilities to challenge this through, for example, habeas corpus or judicial review, is not always provided. Asylum seekers are left in legal limbo in such circumstances.

In my 2006 speech, I reported on the problems, at that time, of preserving access to, and the quality of, asylum. Against this background I suggested there was a need for more concerted judicial supervision of executive action, for more creative use of judicial intervention to wind back the gradual curtailment of refugee rights, and in this context for more flexibility when it comes to interpreting Convention definitions and responsibilities. I advocated a more “purposive”, rather than a strict “constructionist”, approach to interpreting international law, so as to keep the focus on the victim and the palliative purpose of protection.

Would you say – and this is my first question to you- that this is how refugee status issues are approached in your respective court rooms? Has this reasoning, this plea, made any difference to the way asylum cases are adjudicated? We would be most interested to have views on this.

Regional protection focuses

To update you a little on where our own efforts regionally have been focused, in Africa, UNHCR programmes have traditionally centred on large-scale movements and camp-based activities, with refugees protected and assisted on the basis of *prima facie* group determinations. Urban refugee claimants are now also growing, calling not only for adjustment in our programmes, but also the asylum arrangements in host states. A particular concern is the lack of integration of asylum laws and structures into the mainstream of the national legal system, with refugee laws operating in isolation from the immigration, administrative and constitutional law frameworks. There are also many examples of laws without implementing regulations to support them. UNHCR's revised guidelines on urban refugees will be issued for discussion during the High Commissioner's December Dialogue on Protection Challenges.

In other parts of the world it is not the adequacy of the framework but the absence of one which has been the bigger problem. In the region covered by the MENA Bureau, there is a marked reluctance on the part of most states formally to commit to the international legal framework for refugee protection, with accession to the 1951 Convention and its 1967 Protocol limited to seven states. Of parallel concern is the fact that states which have acceded have taken only limited steps to develop their domestic asylum systems. The strong and deeply rooted tradition of hospitality in these countries unfortunately goes hand in hand with a reluctance to establish more formal legal frameworks. This has meant, in a number of

countries at least, an over-reliance on UNHCR as the protection provider.

There are comparable problems elsewhere, including in parts of Asia, where a number of governments refuse to distinguish between refugee arrivals and other irregular entrants. The fear is that establishing formal asylum procedures could create a pull factor, would be too expensive to run, and will anyway provoke problems with neighbouring countries. In this regard, there has been a notable overall deterioration of the protection environment in Central Asia. Although RSD mechanisms and procedures exist in all countries – except Uzbekistan – political sensitivities are a barrier to access for asylum seekers from neighbouring countries. In other parts of Asia, including in many countries in SE Asia, refugees have no official status other than that of illegal immigrants, with most governments still preferring to rely primarily on UNHCR to determine refugee status, assist refugees and identify solutions for them.

The IARLJ has been supporting UNHCR's capacity-building activities. My question here would be what scope is there for this to grow? Perhaps it would be useful to meet with your executive to discuss possibilities and priorities particularly in this area?

Global challenges

An enduring one is that of disentangling refugees from migrants. This is a problem which presents itself equally at sea, land and air borders, even if sinking boats and drowning people are more likely to attract media attention. Safeguards in place together with controls at land borders

and airports are less prevalent when it comes to sea borders, and most often absent in the context of the increasing number of “virtual” or “offshore” border controls, which include visa-requirements, interception practices, carrier sanctions and outposted immigration officials. Foreign search and rescue zones seem to be becoming a new point of reference when it comes to deciding where disembarkation of “boat people” and first asylum should happen. This is starting to compete with the more traditional criteria of flag state and coastal state responsibilities and has been hailed by some⁸ as a new form of extra-territorialisation of migration control, or as “jurisdiction shopping” in order to alter the locus of international protection obligations. Often the very purpose of extra-territorial controls is to keep regulatory mechanisms outside the ambit of regular judicial review.

The current situation in the waters off Thailand, where we have recently seen particularly aggressive examples of interception and “turn-back” policies, illustrates the necessity of this. The “new” boat people in the region, Rohingyas, originally from Myanmar, have been encountering a very tough response from Thailand, whose authorities have refused them entry and towed boats back out to sea with little or no food or water. Hundreds have reportedly perished after being set adrift. Others who have been intercepted are currently being held in detention on remote islands off the Thai coast.

Have you had to adjudicate extra-territorial protection responsibilities and what positions have you taken? What can be done here about the limits to the jurisdictional reach of national

⁸ See DIIS Working Paper 2008/6.

legal systems so that as control mechanisms move beyond territorial borders, asylum principles and safeguards migrate with them?

The spectre of xenophobia continues to loom large in many regions of the world. Racism and anti-foreigner sentiment are on the rise, including in countries with a solid reputation of support for asylum and refugees. Intolerance has many faces. While it is obviously not solely linked to refugee arrivals, it is part of the asylum equation, in subtle and not so subtle forms. It impacts border control measures, refugee status decisions, resettlement and integration programmes, and the sustainability of refugee and asylum policies in many countries. Unprovoked and lethal attacks against foreign communities of the sort witnessed from South Africa to the Ukraine, is one example. More subtly, intolerance takes the form of laws which criminalise asylum-seekers who have arrived irregularly, stripping from them basic due process of law protections, such as their right to complete their asylum process and exhaust all local remedies before deportation. In some countries appeals are allowed but have ceased to have a suspensive effect on deportation.

Is deportation allowed before exhaustion of local remedies in your respective jurisdictions – for example does the lodging of an asylum appeal have a suspensive effect – and if not, what role does the judiciary play to reverse this failure of due process?

Intolerance has gone hand in hand, in a number of countries, with a widespread re-characterisation of asylum-seekers and refugees. Globalisation – of migration, of crime, of terrorism – has spawned a marked proliferation of

new terms which subtly challenge conventional interpretations of who and why are refugees. These have been thoughtfully analysed in a recent article in the *Refugee Studies Journal* which provocatively challenges us to reflect on why governments use so repetitively such notions as illegal asylum-seeker, bogus asylum-seeker, economic asylum-seeker, failed asylum-seeker, not to mention overstayers, and the pervasive illegal migrant. The vocabulary is various but chosen to match national priorities and mood, and intended to reinforce the image of a marginal, dishonest and therefore unwelcome person. The refugee concept is deconstructed and reinvented in order to marginalise and discredit the process of seeking asylum, and thereby to underpin and legitimise state strategies to regulate migration. One irony is that this has compounded the problem, not assisted governments to manage their borders. The author argues that the refugee label has become a highly privileged prize which few are held to deserve, many are driven to claim illegally, and which has become an expensive commodity to be bought. This can only contribute to criminalise the process, not clarify it. The proliferation of labels is described as a “messy political response to a confusing problem” for receiving states, which is serving to badly distort the refugee concept.⁹

This leads me to ask to what extent would you agree that the courts have a particular responsibility, and if so how to ensure the accuracy of labels, even if it entails extra-curial commentary so as to preserve and protect the essence of the refugee concept?

⁹ *More labels, fewer refugees*, Zetter, *Journal of Refugee Studies*, Vol 20, no. 2 2007

Failure to do so has implicitly underpinned the legitimacy of harsh detention policies. Detention remains a concern in a number of situations, from Egypt, across Europe to the US. Both the practice of detention in itself, absent serious reasons to justify it, and the conditions of detention, which can be deplorable, are of concern. Penal conditions, including handcuffs, shackles and plexiglass interviews, are not uncommon, parole possibilities are limited, and in some cases impossible conditions for release condemn people to arbitrary prison stay beyond the expiry of their terms, without the possibility of legal challenge. I do not know if there are any judges here from Egypt, but it is of particular concern there that asylum seekers from one clearly refugee-producing country end up with a 12 month prison sentence for their unauthorised entry, coupled with a \$1000 fine, which clearly they cannot pay, thereby leading to months more in prison and most usually deportation thereafter without access to any adjudication of their claims. On Lampedusa in Italy, there are currently nearly 2000 boat arrivals, including many from Somalia and Eritrea, crammed into a reception facility with space for 850, so that hundreds are now sleeping outdoors under plastic sheeting, and unable any longer to access the mainland asylum process. Instead, they have the option of a fast track process where they do not have the possibility of legal assistance and the launching of an appeal before a judge is seriously curtailed.

Detention of children, as a deterrent and a response to irregular entry, is still quite prevalent in a number of countries. There are many places of detention used, from waiting zones in airports, to immigration detention centres, police cells or prisons. In some instances, children may not

even have had a chance to apply for asylum due to immediate detention upon arrival. At other times, children may suffer long delays before asylum claims are determined, leading to prolonged detention. In other instances status is recognized but detention is nevertheless the rule. Witness for example the Nong Khai detention centre in Thailand which holds 158 Lao Hmong refugees, including some 90 children, crammed into two dark, dank rooms. Resettlement countries have offered them a new home, but the refugees remain confined after many months, as a legacy of a period of history that ended long before any of them were born.

These are but three examples of a multitude of different permutations of reception and detention regimes, confronting asylum seekers and refugees. It would be particularly interesting to hear your views on the compatibility of harsh or arbitrary detention not only with internationally-endorsed detention standards but also with the Article 31 requirement of non-penalisation for illegal entry?

The process of deconstructing the refugee label has also probably been a major contributor to the perennial problem of diverging interpretations of the refugee definition. Widely divergent recognition rates between states for the same or comparable caseloads can make asylum something of a lottery. Our research shows, for example, that persons from Iraq, Sri Lanka or Somalia have very different prospects of finding protection depending upon in which country their claim is lodged. Sometimes it is not an issue of which country but, in a country, which city receives the claim. The situation in one European country, where the claims of unaccompanied minors are processed in three

main towns, is illustrative here. Statistics show that 73% of all claims by UNAMs in one city were accepted, in another some 52% and in the third only 34%. And this is not a feature of the origin of the claimants. To take claims only from Iraqi children, the range was from 92% in one city to 2% in another. Particularly worrying are interpretations of the 1951 Convention which serve to prevent its application to an entire group on the basis of nationality, paying no heed to the non-discrimination approach of the Convention.

Aside from consistency in approach, applying the definition throws up quite a number of interpretation challenges we continue to look to the judiciary to help resolve in forward-looking ways. One is the question of diplomatic assurances, the question being when are assurances of safety given by governments sufficiently reliable to enable return of asylum seekers without breaching the Article 33 *refoulement* bar. In the area of exclusion from refugee status, we are currently wrestling with several difficult cases in the context of long-standing UNHCR doctrine requiring an exclusion decision to balance the imperative of exclusion against its consequences. Most recently the Office has been asked to decide whether someone clearly guilty of major financial fraud, with serious human consequences, but who happens also to belong to a discriminated minority, should be excluded because of his crimes. Exclusion will likely mean he could be returned to a legal system which is known to resort to torture, which may well result in his case, because of his political affiliations.

How practically can we cooperate to promote greater convergence around the definition's application and would you wish to be more integrally associated with efforts to clarify the international law position on matters such as diplomatic assurances or exclusion and proportionality?

Finally, the challenge of “modernising” the system

Against this broad-brush background, I want to go more deeply into two particularly topical questions, which I would frame as follows:

Can the challenges of displacement today really be tackled in an effective manner with the current legal and normative framework? As we commemorate the 60th anniversary of the Convention on Human Rights, what can be done to safeguard Article 14 of that document which states that “everyone has the right to seek and enjoy in other countries asylum from persecution” and where does asylum fit in when it comes to modern day forms of displacement?

[A] THE ADEQUACY OF THE 1951 CONVENTION FRAMEWORK

The most obvious limitation of the system is that there is still no universal sign-on to it. To date there are 147 States parties to the 1951 Convention and/or its 1967 Protocol. And even in countries which have acceded to the Convention framework, there can be quite an implementation deficit. This is partly a political will issue, as I explained earlier, but not exclusively so. The letter of the Convention has gaps.

The scope of the definition can be a limiting factor. Many will argue that the 1951 Convention definition, if flexibly applied, covers most of the forced external displacement situations of today. Inherent in many conflict situations are gross human rights violations clearly within the persecution threshold. That there is a mix of push factors cannot negate this fact. That people use the services of people smugglers, or arrive at State borders side by side with migrants who are not refugees, does not strip them of their own refugee character. Similarly so, their claim does not fall because they pass through several countries en route, benefiting from the many possibilities for inter-continental travel that globalisation has opened up. The emphasis, though, is on flexible interpretation, the absence of targeted persecution, or of one or other of the specific grounds mentioned in the Convention, can be a serious liability for a claim.

It was in recognition of the diversity of reasons why people flee and the limits of the 1951 refugee definition that the refugee concept was formally extended in Africa and Latin America to encompass victims of violence [i.e. conflict and public order disturbances] as well as victims of persecution. This so-called broader definition is the one with which UNHCR works. Many national legal systems remain, however, doggedly pegged to the traditional definition. While UNHCR makes all best efforts to promote flexibility – and lawyers can make a lot of money litigating this – the fact remains that the current global architecture for refugee protection heavily rests on a definition which allows governments so inclined to restrict the scope of their refugee responsibilities. This is a weakness in the protection architecture.

Greater solidarity with refugees is most likely to be forthcoming when it is underpinned by solidarity among states. Burdens and responsibilities are unfairly spread, with a majority of refugees in countries without the resources to meet their needs. The 1951 Convention is predicated on international solidarity, or the notion that states should address refugee problems collectively, sharing responsibilities to balance the burdens. There have been a number of tentative, but ultimately shelved attempts to articulate general benchmarks for burden or responsibility sharing, with the result that the system survives tenuously on undependable funding and promises of cooperation. Burden-sharing is a unifying principle for the refugee protection system, but the absence of clear parameters for burden-sharing is another important omission from the protection architecture of today.

There are other weaknesses as well. The Convention does not impose a legal duty on States to admit refugees on any permanent basis. The non-*refoulement* principle prevents – or should prevent – return to persecution, but non-return can be achieved in a number of ways short of approving entry.

It is important, here, to distinguish practice from law strictly defined. The finality of asylum is not formally prescribed in the Convention. It is a practice which has evolved, not an article being enforced. State practice consistently steers clear of endorsing that individuals have a right to be granted asylum in any particular country. As refugee law academics remind us, refugee law does not require states to admit refugees as permanent immigrants;

it only establishes the right of seriously at-risk persons to cross international borders to seek safety until the threat in their home country is eradicated. Insofar as a State's refusal to offer at least initial asylum may expose an individual to risk of violation of basic human rights, its responsibility to make this asylum available is duty driven. While individuals may not be able to claim a right to asylum, states have a duty under international law not to obstruct the individual's right to seek asylum. This is a key element of the 51 Convention framework. It also derives directly from the right to seek and enjoy asylum affirmed in Article 14 of the Universal Declaration of Human Rights. Nevertheless, the degree of protection is that required commensurate with the occasion. Here discretion becomes the decision maker. The content of the grant of protection – "whether it embraces permanent or temporary residence, freedom of movement and integration or confinement in camps, freedom to work and attain self-sufficiency or dependence on national or international charity – is less easy to determine".¹⁰ This discretion as regards admission is perhaps the Achilles heel of the international system.

[B] ASYLUM AND NEW FORMS OF DISPLACEMENT

Then there is another singularly important consideration when it comes to assessing the adequacy of the protection architecture - that is the new drivers of displacement and how comfortably they sit with traditional definitions and responses.

Patterns of forced displacement have been far from static over the 50 plus years since the 1951 Refugee Convention

¹⁰ p. 357, Goodwin-Gill

was put in place. The Convention's beneficiaries were categorised in a way that matched the profile of those displaced in Europe by the Second World War and its Cold War aftermath of ideological conflict. This approach came under considerable strain when the focus of refugee problems started to shift to the developing world, experiencing major displacements due to decolonization, resurgent nationalism and wars of national liberation. In tandem, impoverishment of large parts of the globe proved a further factor of instability. One only needs to think back to Albania in the 1990s where disastrous economic conditions, high unemployment and food shortages led to widespread social discontent, rioting, and finally large-scale exodus of tens of thousands by boat to Italy.

Displacement scenarios continue to evolve. There is a high probability that patterns of displacement will be increasingly impacted by environmental factors such as population growth, declining resources and inequality of access to them, ecological damage and climate change. Conflict, extreme deprivation and climate change are tending to act more and more in combination. Some 25 countries – the majority in Africa – have been identified as falling in the highest risk category for civil conflict in the next two decades. All have low cropland availability per person, half have fresh water availability problems and all are ranked amongst the poorest nations in the world. Darfur is usually quoted as illustrative. Tribal conflict in Darfur is actually centuries old and has long been a response to traditional ways of life made ever more untenable by factors like drought, heightened competition

for land or water, accelerated desertification and the breakdown of local mediation structures.¹¹

And the international financial crisis and widespread recession in host and refugee producing countries alike has to be factored into this accumulation of adverse factors. Any predictions that extreme poverty is on the decrease were recently thrown into disarray by the bad news from the World Bank this year that the number of people globally below the poverty line is actually increasing.

Clearly these various drivers will impact different groups and regions in varying ways. Not all those displaced as a result will fall within the mandate of an organisation like UNHCR or will need or merit protection through asylum. But there will be serious issues to consider before people can be deemed not to merit this. One need only look at Zimbabwe today to see how compelling this mix of push factors can be. On average there are 400 new arrivals a day at the Musina reception centre at the main Zimbabwe/South Africa border crossing point. The daily presence of Zimbabwean nationals in the screening area is some 2000. Since Musina was established in July 2008, 32,404 Zimbabwean nationals have been issued with asylum seeker permits, but of those processed only 50 persons have to date been recognised as refugees. This extremely low acceptance rate translated into only 5 cases recognised in the last four months, with the overwhelming majority of asylum seekers then facing rapid deportation on receipt of their rejection letters. Some 400 plus persons are deported daily at this crossing point. They are being

¹¹ Reference article in *Forced Migration Review* – Clark, « Social and Political Contexts of Conflict »

deported back to a major, man-made humanitarian crisis resting on a chaotic mix of persecution, violence and crime, serious shortages of basic necessities like food and drinking water, lack of any means of self-sustenance, in an environment of hyperinflation, a moribund economy, collapsing public services, even a cholera outbreak.

How would you assess the status of persons in circumstances such as in Zimbabwe? Do they have the right to be admitted? Are they protected against refoulement? Should those moving voluntarily and those forcibly displaced be treated differently as regards admission and non refoulement. Should a distinction be made between compulsion to flee because of cumulative adverse circumstances and compulsion to flee because of government policies? If so, against what criteria should such distinctions be made and where do entitlements differ? Can the broader human rights framework provide part of the solution?

There would be other questions to look at as well, were time to allow. For example, in the case of disappearing states – the climate-induced “sinking islands” scenario – questions are already being raised about status of persons who lose their state. Will they be stateless, for example, and would they have a right to be relocated and permanently admitted elsewhere?

The legal implications of displacement driven by forces other than persecution, human rights violations and war have yet to be seriously thought through. Whatever might be the responses deemed necessary to displacement generated by climate change or other forms of catastrophe, such as financial disasters, asylum will have to find its appropriate place. Asylum is not in itself a solution, but an

indispensable protection on the road to solutions. It is the key first response which can ensure protection and create the necessary humanitarian space to pursue the best solution. Within the international law framework of the 1951 Convention, asylum has closely accompanied the grant of refugee status to the point where the content of asylum has tended to be quite closely tied to the circumstances and needs of refugees. However, asylum is part of a range of responses increasingly proving suitable to situations which do not neatly fit the refugee paradigm. Various forms of subsidiary or temporary protection have been resorted to so as to help close a noticeable gap between the protection granted to refugees under the Convention and the protection required by the much larger group of persons forced to flee but not for reasons that can be reasonably brought within the 1951 Convention regime. To take one miscellaneous example, in the Netherlands, approximately 25% of persons that enter the asylum procedure are accepted for stay, but a mere 4% achieve this through the grant of refugee status.

It will be fundamentally important over the coming period to ensure that the international protection regime is not only strengthened in areas where it is still weak, but also that it is made flexible enough to accommodate the new challenges of displacement. In this regard, close to 33 years ago the UN General Assembly was formally invited to reconsider, when the time would be ripe, the re-convening of a conference on asylum. With the magnitude, frequency and variety of displacement crises today, perhaps the time for this is rapidly approaching.

Postscript

I cannot conclude without a word of heartfelt appreciation to your outgoing President, Tony North. As all good judges should be, I suppose, he has been a superb listener - to UNHCR among others - and has acted decisively where he has felt concerns expressed or suggestions offered merited attention. His vision for the Association has contributed significantly to its professionalisation and, certainly from our perspective, has very much helped to mould it into an entity we are privileged to turn to as a valued asylum partner. I can only say, Tony, please do stay engaged with the Association and our issues. Otherwise would constitute a real loss on both counts!

SESSION 3

Chaired by Judge Sebastiaan de Groot
Administrative Court, Haarlem, The Netherlands
Treasurer, IARLJ

Climate change, migration patterns and the law

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First speaker

“The science and ethics of global warming”

Professor George Philander

Knox Taylor Professor of Geosciences at Princeton
University (USA)

Research Director of ACCESS, the African Centre for
Climate and Earth System Science in Cape Town, South
Africa.

Unfortunately, only an abstract of Professor Philander's
paper is available.

Second speaker

“Climate change, migration patterns and the law”

Walter Kälin

Special Representative of the Secretary-General of the
United Nations

for Internally Displaced Peoples.

Abstract: "The Science and Ethics of Global Warming"

George Philander

How do we find a balance between our obligations towards future generations, and our responsibilities towards those suffering today, the poor for example? Our response to this ethical dilemma – it is but one of several wrenching global warming dilemmas -- depends on the scientific results concerning future climate changes. Uncertainties in those results, in estimates of how soon and severe the climate changes will be, complicate matters enormously and put scientists in a very difficult position. To reduce the uncertainties science demands of its practitioners a firm commitment to skepticism. Politicians who have to devise policies to deal with global warming demand unanimity from scientists. This talk will address these issues.

Climate change, migration patterns and the law

Walter Kälin

To speak about climate change, migration patterns *and the law* is not an easy task. First, lawyers are not really in a position to say anything authoritative on the complex causalities of global warming and its negative effects upon human beings. The law does not provide an answer as to whether, in fact, the climate is changing, or whether the causes are indeed human made. And while it tells us – in the form of the Kyoto Protocol – what to do, it cannot determine that these measures will have the desired effects. These questions are best left to scientists who have studied the complexities of weather and climate. However, issues of climate change will become relevant for you as refugee law judges as soon as you are confronted by an asylum seeker claiming he or she cannot be returned to the country of origin because it has been devastated by a hurricane or that living conditions have deteriorated to such extent due to drought and desertification that return would mean certain death. You may be quick to decide that the notion of refugee as defined in the 1951 Convention on the Status of Refugees (CSR51) does not cover such cases, but be at a loss if you nevertheless must decide whether a deportation order is legally valid or whether the person concerned should be granted subsidiary protection.

Speaking about these issues is also difficult because lawyers are ill at ease discussing that which they cannot define. At this time, we even do not know how to designate those who move – or have to move – because of the effects of climate change. Are they “climate refugees”,

“environmental migrants” or something else entirely? There is a temptation to start with definitions that would be derivative of existing concepts. Certainly there is no shortage of proposals. However, for a lawyer, notions such as “refugee” or “migrant” are not innocent. Rather, they carry implicit meanings with significant legal consequences. “Refugees” – a notion that is defined in precise legal terms - are those forced to leave their country for specific reasons; as a consequence, they are entitled to “international protection” as a substitute for the protection ordinarily afforded by the country of origin. While social scientists use the term “migrant” to cover both forced and voluntary migration, present international law makes a clear distinction. The only legal definition at the universal level is that of “migrant workers”, *i.e.*, persons engaged in a remunerated activity in a State of which they are not a national (Art. 2 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990) indicating that they were not forced to migrate but had some, albeit often small, option to remain at home.

To avoid a terminology potentially loaded with unintended implications, let me begin with three uncontroversial observations:

- (1) Climate change *per se* does not trigger movement of persons, but some of its effects do, including sudden and slow on-set disasters;
- (2) Such movement may be voluntary, or it may be forced; and
- (3) It may take place inside a country or across international borders.

Based on these observations, I would like to address the following issues:

- (1) How do climate change and movement of persons relate to each other? What are the various climate change scenarios that trigger population movements?
- (2) What is the nature of these movements, who are the affected persons, to what extent are they protected by present legal frameworks, and what are the gaps?
- (3) How can these normative gaps been filled, and what criteria should we use to define the categories of affected persons?

I. The Climate Change – Displacement Nexus

Findings relevant for the issue of displacement by the Intergovernmental Panel on Climate Change (IPCC) ¹ include:

- (1) Climate change is likely to reduce water availability, particularly in parts of the tropics, the Mediterranean and Middle Eastern regions and the Southern tips of Africa and Latin America. In contrast, water availability may increase in parts of Eastern Africa, the Indian sub-continent, China, and the Northern Latitudes. Hundreds of millions of people will experience water stress, whether due to too little or too much water.

¹ See Intergovernmental Panel on Climate Change, Fourth Assessment Report, Synthesis, Geneva 2007, pp. 48 – 53.

- (2) A decrease in crop yields is projected, increasing the likelihood that additional tens of millions of people will be at risk of hunger. The most affected region is likely to be Africa.
- (3) Due to rising sea-levels, the densely populated “mega-deltas,” especially in Asia and Africa and small islands, are at greatest risk from floods, storms and coastal flooding and eventual submerging, again with a potential impact on tens of millions of people.
- (4) The overall impact on health will be negative, especially for the poor, elderly, young and other marginalized sectors of society.
- (5) Overall, the areas that will be most affected by climate change are Africa, Asian mega-deltas and small islands.

Already in the 1990s, the IPCC mentioned migration as one of the major effects of climate change. The Stern Review estimates that 150-200 million may become permanently displaced due to the effects of climate change by the year 2050.² Already today, 20 – 30 million people are displaced each year at least temporarily by natural disasters, and the figures are rising due to the effects of climate change. Although “global warming” as such does not displace people, climate change produces environmental effects which may make it difficult or even impossible for people to survive where they are. Most causes of displacement triggered by climate change, such as flooding, hurricanes,

² Stern, N., *The Economics of Climate Change – The Stern Review*, Cambridge, Cambridge University Press 2006, p.77.

desertification or even the “sinking” of stretches of land³, are not new. However, their frequency and magnitude are likely to increase.

In this context, the following (tentative and hypothetical) typology may be helpful⁴:

- (i) The increase of *hydro-meteorological disasters*, such as flooding, hurricanes/typhoons/cyclones or mudslides, will occur in most regions, but the African and Asian mega deltas are likely to be most affected. Such disasters can cause large-scale displacement and incur huge economic costs. However, depending on recovery efforts, the ensuing displacement need not be long-term, and return remains possible as durable solution, at least in principle. Certainly many hydro-meteorological disasters would occur regardless of climate change, and some disasters such as volcanoes or earthquakes presumably have no linkage to such change. Nevertheless, they too cause movement of persons, and such persons should not be treated differently from those affected by the effects of climate change.
- (ii) *Environmental degradation and slow onset disasters* (e.g., reduced water availability, desertification, long-term effects of recurrent flooding, sinking costal zones, increased salination of ground-water and soil). With the dramatic decrease of water availability in some regions and recurrent flooding in others, economic opportunities and conditions of life will deteriorate in affected areas. Such deterioration may not

³ See e.g. the submerged ancient Roman cities in the Mediterranean Sea.

⁴ These scenarios are a typology. In reality, they may coincide and overlap.

necessarily cause forced displacement in the strict sense of the word but, among other reasons, will incite people to move to regions with better income opportunities and living conditions. However, if the areas become uninhabitable because of complete desertification or sinking coastal zones, then population movements amount to forced displacement and become permanent.

- (iii) The case of “*sinking*” *Small Island States* caused by rising sea levels constitutes a particular challenge. As a consequence, such areas become uninhabitable and in extreme cases the remaining territory of affected states can no longer accommodate the whole population or such states disappear as a whole. When this happens, the population becomes permanently displaced to other countries.
- (iv) Disasters will increase the need for governments to *designate areas as high-risk zones* too dangerous for human habitation. This means that people may have to be (forcibly) evacuated and displaced from their lands, prohibited from returning, and relocated to safe areas. This could occur, for example, because of increased risk of flooding or mudslides due to the thaw of the permafrost in mountain regions, but also along rivers and coastal plains prone to flooding. The difference between this situation and the previous typology of disaster-induced displacement is that return may not be possible, thus becoming a permanent form of displacement until other durable solutions are found.
- (v) A decrease in essential resources due to climate change (*e.g.*, water, arable land) may trigger *unrest*

seriously disturbing public order, violence and armed conflict: This is most likely to affect regions that have reduced water availability and that cannot easily adapt (e.g. by switching to economic activities requiring less water) due to poverty. Such conflict could endure as long as resource scarcity continues. This in turn would impede the chance of reaching peace agreements which provide for the equitable sharing of the limited resources.

II. The Nature of Movements, Affected Persons and Protection Frameworks

These five scenarios can help (1) to identify the character of the movement, *i.e.*, whether it is forced or voluntary, (2) to qualify those who move (are they migrants,⁵ internally displaced persons (IDPs),⁶ refugees,⁷ stateless persons⁸,

⁵ For the purpose of this paper, the term 'migrant' refers to the definition of migrant worker in Art. 2 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *i.e.*, "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."

⁶ The term 'internally displaced persons' refers to persons covered by the Guiding Principles on Internal Displacement: "internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."

⁷ The term 'refugee' refers to the legal definition of the 1951 Convention on the Status of Refugees, the 1969 African Convention governing the specific aspects of Refugee problems in Africa as well as the 1984 Cartagena Declaration on Refugees. Art. 1A(2) of the 1951 Refugee Convention defines "refugee" as 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." The African Convention expands this notion to include "every person who, owing to external aggression, occupation, foreign domination or events seriously

other something else altogether?), and (3) to assess whether and to what extent present international law is equipped and provides adequate normative frameworks to address the protection and assistance needs of such persons.

(i) *Hydro-meteorological disasters* can trigger forced displacement. Two situations should be distinguished:

- Cases in which most of the displaced remain inside their country and, as internally displaced persons, receive protection and assistance under human rights law and in accordance with the UN 1998 Guiding Principles on Internal Displacement and regional instruments. For these internally displaced persons, the existing normative framework is sufficient.
- Cases in which some of the displaced cross an internationally recognized state border, *e.g.*, because the only escape route leads there, because the protection and assistance capacities of their country are exhausted, or because they hope for better protection and assistance. They have no particular protected (legal) status – they neither qualify as refugees nor are they economic migrants. In some cases in the past, host governments have, for humanitarian reasons, allowed such persons to stay until they could

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.” The Cartagena Declaration on Refugees adds the criterion of “massive violation of human rights”.

⁸ Article 1 of the Convention relating to the Status of Stateless Persons of 6 June 1960 defines “stateless person” as “a person who is not considered as a national by any State under the operation of its law.”

return to their countries in safety and dignity⁹, but practice has not been uniform. The status of these persons remains unclear and despite the applicability of human rights law, including in particular provisions applicable to migrant workers, there is a risk that these persons end up in a legal and operational limbo.

(ii) *Situations of environmental degradation and slow onset disasters trigger several types of movements of persons:*

- General deterioration of conditions of life and economic opportunities as a consequence of climate change may prompt persons to look for better opportunities and living conditions in other parts of the country or abroad before the areas they live in become uninhabitable. These persons are protected by human rights law, including, if they move to a foreign country, guarantees specifically protecting migrant workers.
- If areas start to become uninhabitable, because of complete desertification, salination of soil and ground-water or sinking of coastal zones, movements may amount to forced displacement and become permanent as inhabitants of such regions no

⁹ This has been the practice for persons affected by flooding in different parts of the SADC region and for victims of Hurricane Mitch in the USA who were granted „temporary protection status“ in accordance with US migration law that provides for temporary protection not only for persons fleeing armed conflict and situations of generalized violence but also for those who cannot return to their country of origin in the aftermath of a natural disaster. This particular notion of “temporary protection” has to be distinguished from the concept of temporary protection as used particularly in Europe to handle a situation of mass influx of people fleeing armed conflict or generalized violence (see European Community, 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).

longer have a choice except to leave – or if they left earlier on a voluntary basis, stay away – permanently. If in this latter case the people remain within their country, they are *internally displaced persons* and fall within the ambit of the Guiding Principles on Internal Displacement. If they go abroad, they have no protection other than that afforded by international human rights law including provisions on economic migrants; in particular, they have no right under international law to enter and remain in another country, and thus are dependant upon the generosity of host countries. This scenario poses two particular challenges: (1) There is a lack of criteria to determine where to draw the line between voluntary movement and forced displacement; and (2) Those forcibly displaced to other countries remain without specific protection as they do not qualify as either refugees or economic migrants.

(iii) The “*sinking*” of *Small Islands States will be gradual*:

- In the initial phases, this slow-onset disaster will incite persons to migrate to other islands belonging to the same country or abroad in search of better opportunities. If they migrate to another country, these persons are protected by human rights law including guarantees specifically protecting economic migrants.
- Later, such movements take the character of forced displacement if areas of origin become uninhabitable or disappear entirely, or the remaining territory is inadequate to

accommodate the whole population. These scenarios would render return impossible and the population becomes permanently displaced to other countries. In this case, there are normative gaps for those who move abroad, leaving them in a legal limbo as they are neither migrants nor refugees. It is also unclear as to whether provisions on statelessness would apply.¹⁰

(iv) *The designation of high risk zones too dangerous for human habitation* may trigger (forced) evacuations and displacement:

- Affected persons are internally displaced persons. In terms of durable solutions they cannot return but must be relocated to safe areas or locally integrated in the evacuation area. Sustainability of the solution chosen is important to avoid permanent and protracted displacement situations or even return to high risk zones exposing the lives of returnees to a risk incompatible with human rights standards. International human rights law, the Guiding Principles on Internal Displacement and analogous norms and guidelines on relocation in the context of development projects provide a sufficient normative framework for addressing these situations¹¹.

¹⁰ The government of such countries may try to maintain a symbolic presence (e.g. on a built up small island or platform) and their laws which, according to Article 1 of the Convention on the Status of Stateless Persons, are determining who their citizens are may continue to be applied, e.g., to newly born children whose parents register them abroad at consulates of the country of origin.

¹¹ See for example, World Bank Operational Policy 4.12 of 2001.

- Should people decide to leave their country because they reject relocation sites offered to them or because they are not offered sustainable solutions in accordance with relevant human rights standards by their own government, protection is limited to that offered by general human rights law, including provisions applicable to migrant workers, but their status remains unclear and they may not have a right to enter and remain in the country of refuge.
- (v) *“Climate change-induced” unrest, violence and armed conflict* trigger forced displacement. Those remaining inside their own country are internally displaced persons. Those fleeing abroad may qualify as refugees protected by the 1951 Convention on the Status of Refugees or regional instruments or are persons in need of subsidiary forms of protection or temporary protection available for persons fleeing armed conflict. The available normative frameworks are the Guiding Principles on internal displacement, international humanitarian law, human rights law and refugee law. They provide a sufficient normative framework for addressing these situations since affected persons are fleeing a break down of public order, violence or armed conflict, rather than the changes brought about by climate change.

This analysis allows the following conclusions:

First: Existing human rights norms and the Guiding Principles on Internal Displacement¹² been provide sufficient protection for those *forcibly displaced inside their own country by sudden-onset disasters* (scenario i) or because their *place of origin has become uninhabitable* as a consequence of a *slow-onset disaster* (scenario ii), or been declared too dangerous for human habitation (scenario iv).

Second: Existing international law (international humanitarian law, human rights norms, Guiding Principles on Internal Displacement, refugee law) is sufficient to protect *persons displaced by a breakdown of law and order, violence or armed conflict triggered by the effects of climate change*, regardless of whether they cross an internationally recognized state border (scenario v).

Third: The main challenge is to clarify or even develop the normative framework applicable to persons crossing internationally recognized state borders in the wake of sudden-onset disasters (scenario i), as a consequence of slow-onset disasters (scenario ii), in the aftermath of the “sinking” of Small Island States (scenario iii), or in the wake of designation of their place of origin as high risk zone too dangerous for human habitation (scenario iv). In these cases, questions to be addressed include three sets of issues:

1. Should those moving voluntarily and those being forcibly displaced across borders be treated differently not only as regards assistance and protection while away from their homes but also as

¹² The Guiding Principles were recognized by the heads of state and government at the 2005 World Summit as “an important international framework for the protection of internally displaced persons.” World Summit Outcome, GA Res. A/Res/60/1, para. 132; See also GA Res. A/60/168, para. 8; A/Res/62/153, para. 10 and Human Rights Council Resolution A/HRC/6/L.46, para. 6 (c).

regards their possibility to be admitted to other countries and remain there temporarily? The answer seems obvious: Present international law, while recognizing that all human beings are entitled to the full enjoyment of human rights, does in fact differentiate between persons who move voluntarily and those forcibly displaced for whom special normative regimes (refugee law; Guiding Principles on Internal Displacement) have been developed at least in some cases.

2. Therefore, what criteria should distinguish between who voluntarily leave their homes or places of habitual residence because of the effects of climate change and those who are forced to leave by the effects of climate change or – even if they left voluntarily in the first place - can no longer return because of such effects and therefore should be entitled to receive protection abroad?
3. What would be the respective entitlements to assistance and protection of those leaving voluntarily and those forcibly displaced?

The remainder of this paper will focus on the second question, namely how to identify those who should be entitled to receive protection abroad because of the forced nature of their movement.

III. Filling the Gaps: Criteria for Defining Those to be Admitted and Not Returned

There are different ways to develop criteria to determine when a movement is no longer voluntary, but happens

under compulsion. One could use a vulnerability analysis to assess when vulnerabilities have reached such a degree that a person is forced to leave his or her home. However, it is obviously extremely complex to develop generic criteria on this basis and to apply them individually, in particular in situations of slow onset disasters.

This paper suggests a different approach, one that is inspired by the three elements of refugee definition as contained in Art. 2(A) CSR51: (i) being outside the country of origin, (ii) because of persecution on account of specific reasons, and (iii) being unable or unwilling to avail oneself from the protection of this country. The category of persons discussed here obviously fulfills the first criteria of having crossed a border. It is also obvious that, except in the case of scenario (v), such persons are not refugees because they are not persecuted, *i.e.*, do not fulfill the second of these criteria. However, the third criteria may help to conceptualize solutions for these people. Exactly as we do for refugees, we should ask ourselves: Under what circumstances should persons displaced across borders by the effects of climate change not be expected to go back to their country of origin and therefore remain in need of some form of surrogate international protection, whether temporary or permanent.

The point of departure should not be the subjective motives of individuals or communities for their decision to move, but rather *whether, in light of the prevailing circumstances and the particular vulnerabilities of the persons concerned, it would be inappropriate to require them to return to their original homes.*

This should be analyzed on the basis of three elements: permissibility, feasibility (*i.e.*, factual possibility), and reasonableness of return.

Permissibility: There are certain cases where human rights law, by analogy to the refugee law principle of non-refoulement, has indicated that return is impermissible. The first example is the prohibition against returning someone to a situation which poses an *imminent* risk to life and limb.¹³ The second example is the prohibition of collective expulsion, *i.e.* the collective return of affected persons absent an individual assessment.¹⁴

Feasibility: Return may be impossible temporarily due to technical or administrative impediments, such as when roads are cut off by floods. Return is also impossible if the country of origin refuses readmission for technical or legal reasons (*e.g.* during an emergency a country may lack the capacity to absorb large return flows, or it may prevent readmission of persons whose proof of citizenship was destroyed, lost or simply left behind when they left. Citizens of “sinking” Small Island States may experience a very special factual situation that makes return impossible, if the island as such has become inhabitable or even disappeared or remaining resources are inadequate for survival.

¹³ This principle was derived by the European Court of Human Rights and the UN Human Rights Committee from the prohibition of torture, cruel and inhuman treatment (Art. 3 European Convention on Human Rights (ECHR); Art. 7 International Covenant on Civil and Political Rights (ICCPR)). The principle of non-refoulement is also a cornerstone principle of international refugee law (Art. 33 CSR51) that has gained the quality of international customary law and arguably even peremptory international law (*ius cogens*).

¹⁴ This prohibition is implicit in Article 13 ICCPR and explicit in Article 12(5) American Convention on Human Rights, Article 26(2) Arab Charter on Human Rights, and Article 4 Protocol 4 to the European Convention on Human Rights.

Reasonableness: Return cannot be reasonably required from the persons concerned for example if the country of origin does not provide any assistance or protection or if what it does provide falls far below international standards. The same is true where it does not provide any kind of durable solutions according to international standards, in particular when zones have become or were declared uninhabitable and return to their homes therefore is no longer an option for the displaced.

If the answer to one of the following questions -- Is return *permissible*? Is return *feasible*? Can return *reasonably be required*? -- is "no", then individuals concerned should be regarded as victims of forced displacement in need of specific protection and assistance either within their own country (internal displacement) or in another State (external displacement). In the latter case, they should be granted at least a temporary stay in the country where they have found refuge until the conditions for their return are fulfilled. For citizens of sinking island states permanent solutions on the territory of other states must be found.

A next step would consist of identifying for each of the four categories of persons outlined above more detailed criteria to determine under what circumstances return to the country of origin (or in the case of internally displaced persons to their place of former habitual residence) would be *impossible* or could *not be reasonably expected* and to develop proposals for temporary protection regimes applicable to those who were forced to cross an international border due to the effects of climate change.

Their entitlements to assistance and protection, as well as their obligations, should also be elaborated.

How can this be done?

- First, we may look to existing provisions in domestic law addressing subsidiary protection that provide for or may be interpreted in a way to provide for such protection in the case of persons displaced by the effects of climate change and other environmental factors. For example, the US Immigration and Nationality Act provides for the possibility to grant Temporary Protection Status (TPS) for nationals of a foreign state if (i) there has been an environmental disaster in the foreign state resulting in a substantial, but temporary, disruption of living conditions; (ii) the foreign state is unable, temporarily, to handle adequately the return of its own nationals; and (iii) and the foreign state officially has requested such designation. TPS was granted in the case of Hurricane Mitch affected large parts of Central America 10 years ago but denied in the case of last year's devastating floods in Haiti. Similarly, a recent expert meeting concluded that Swiss law on temporary admission as a form of subsidiary protection may be interpreted to cover relevant cases even though the law does not expressly mention disasters.
- Second, as these approaches may be haphazard, discretionary and vary from one country to another, there is a clear need to go beyond domestic solutions to harmonize approaches. Most probably this will start at the regional level. Examples already exist in

the area of internal displacement. The Protocol on the Protection and Assistance to Internally Displaced Persons to the Declaration on Peace, Security, Democracy and Development in the Great Lakes Region of 14 and 15 December 2006 covers those displaced by disasters, too. Article 3 obliges States “to the extent possible, [to] mitigate the consequences of displacement caused by natural disasters and natural causes” and to “establish and designate organs of Government responsible for disaster emergency preparedness, coordinating protection and assistance to internally displaced persons”. Furthermore, States must “enact national legislation to domesticate the Guiding Principles fully and to provide a legal framework for their implementation within national legal systems” (Article 6, para. 3) and, in this context, to ensure that such legislation specifies the governmental organs responsible not only “for providing protection and assistance to internally displaced persons” but also for “disaster preparedness” (Article 6, paragraph 4(c)). The draft African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa to be considered and hopefully adopted by the Heads of State and Government in Kampala, Uganda, at the African Union Special Summit on Refugees, Returnees and Internally Displaced Persons in Africa in April 2009, is likely to contain similar provisions.

- Third, in the long term – and building up on domestic and regional experiences – an international convention may become possible.

This leaves the case of “sinking” Small Island States that cease to exist: It is often argued that their populations will become stateless and should be treated as such under the Convention relating to the Status of Stateless Persons of 6 June 1960. However, it remains to be seen whether those affected really become stateless persons under international law. According to Article 1 of the Convention “the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.” These persons do not become stateless as long as there is some remaining part of the territory of their State, and even where the whole territory of a country disappears it is not certain that its laws “sink” with it. Statelessness means being without nationality, not without state. It cannot be excluded that such Small Island States will continue to exist as a legal entity at least for some time even if their territory has disappeared as nobody will be ready to formally terminate their statehood. In addition, even if these persons end up without a nationality, international law on statelessness does not provide adequate protection, particularly it does not address the issue of admission and stay. Obviously, such persons will be in need of some form of international protection. Their rights must be identified, and it remains to be determined whether these people require a specific legal status. The question of the responsibility of the international community, in particular regarding relocation, must be clarified as well. In other words, new law will be required if we are to avoid these populations becoming marginalized and disenfranchised inhabitants of their countries of refuge.

Let me conclude with a word of caution: despite its relevance for all those affected by climate change, this

analysis does not ask whether climate change has triggered the movement. Why? At least now and in the near future, it is impossible to determine whether a *particular* disaster would or would not have happened without climate change. Moreover, an exclusive focus on climate change may incite us to neglect other causes of natural disasters and environmental changes such as volcano eruptions, tsunamis or earthquakes and thus amount to discrimination against persons having equally urgent protection needs. Just as we do not ask for the root causes behind the persecution of refugees (nationalism? ideologies? dissatisfaction within the army leading to a coup?), we should not ask what has caused relevant disasters. In determining to provide temporary or permanent international protection, it is enough instead to consider the environmental factors combined with the temporary or permanent unwillingness or inability of the country of origin to protect affected persons. We should therefore stop talking about “climate” refugees or migrants. If we need to coin a term, referring to *persons forcibly displaced internally or across international borders by environmental factors* would be more appropriate.

SESSION 4

Chaired by Justice Carolyn Laydon-Stevenson
Federal Court of Canada

“Escaping the dangers of a culturally constructed identity – Will the Refugees Convention provide an adequate basis for future protection from persecution on the grounds of gender?”

* * * * *

First speaker

“Escaping the dangers of a culturally constructed identity”

The Honourable Catherine Branson QC
President, Human Rights Commission of Australia
(formerly a judge of the Federal Court of Australia)

Second speaker

A response to the above paper:

The Honourable Mr Justice Blake
The High Court of England and Wales

Escaping the dangers of a culturally constructed identity – Will the Refugees Convention provide an adequate basis for future protection from persecution on the grounds of gender?

Catherine Branson

Introduction

This paper provides an analysis of how courts in the common law jurisdictions¹ have responded to the challenge of recognising gender-related persecution within the framework of the Refugee Convention. The paper outlines what constitutes gender-related persecution, assesses the significance of UNHCR's guidelines on gender-related persecution and the implementation of these guidelines on a national basis, and provides an overview of some of the jurisprudence concerning gender-related persecution in the common law jurisdictions. The paper identifies some of the areas where challenges remain for decision-makers in affording protection from gender-related persecution under the Refugee Convention and assesses the ability of the Refugee Convention, as interpreted and applied by national courts, to continue to respond to these challenges.

What is gender-related persecution?

Gender-related persecution is not a defined expression. Rather, it is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status. Although gender is not

¹ The jurisdictions covered in this paper are the United Kingdom, the United States, Canada and Australia.

specifically referenced in the definition of a refugee in the Refugee Convention, it is widely accepted that gender can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment.² For example, a woman may be persecuted *in a gender specific manner* (eg raped) for *reasons unrelated to gender* (eg activity in a political party); she may be persecuted *in a gender specific manner and for reasons of gender* (eg female genital mutilation); or she may be persecuted *in a manner which is not sex or gender specific* (eg beaten), but still *for reason of gender* (eg being a lesbian).³

In order to understand the nature of gender-based persecution, it is necessary to define and distinguish between the terms 'sex' and 'gender'. 'Sex' refers to an individual's biological determination. According to UNHCR,

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of persecution they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in

² UNHCR, *Guidelines on International Protection: 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*, UN Doc. HCR/GIP/02/01, 7 May 2002 ('UNHCR Guidelines'), at [6].

³ H Crawley, *Refugees and Gender: law and process* (2001), at p 8.

significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex.⁴

The UNHCR Guidelines on Gender-Related Persecution

The first formal acknowledgement of the challenges of encompassing gender-related persecution within the Refugee Convention came in 1985 with the adoption of a UNHCR Executive Committee Conclusion, which affirmed that states were free to consider women persecuted for transgressing social mores as members of a 'particular social group'.⁵

In 1991, UNHCR published its 'Guidelines on the Protection of Refugee Women'.⁶ These guidelines primarily address issues pertaining to women in refugee camps. However, the guidelines also address gender-related persecution and recommend procedures to make the refugee adjudication process more accessible to women.

In 1993, the UNHCR Executive Committee adopted Conclusion No. 73 on 'Refugee Protection and Sexual Violence'.⁷ This Conclusion recognises that asylum seekers who have suffered sexual violence should be treated with particular sensitivity, and recommends the establishment of training programs designed to ensure that those

⁴ UNHCR Guidelines on Gender Persecution, above n 2 at [3].

⁵ UNHCR, 'Executive Committee Conclusion No. 39 Refugee Women and International Protection' *Report of the 36th Session* UN Doc. A/AC.96/673 (22 October 1985).

⁶ UNHCR, *Guidelines for the Protection of Refugee Women*, UN doc. EC/SCP/67 (22 July 1991).

⁷ United Nations High Commissioner for Refugees, 'Executive Committee Conclusion No. 73 Refugee Protection and Sexual Violence', *Report of the 44th Session*, 1993 UN. Doc. A/AC.96/821 (12 October 1993).

involved in the refugee status determination process are adequately sensitised to issues of gender and culture.

The most recent version of UNHCR's guidelines, developed in 2002, is the 'Guidelines on International Protection: 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'.⁸ The UNHCR Guidelines outline what constitutes gender-related persecution, the circumstances in which gender-related persecution can constitute a well-founded fear of persecution, the causal link between persecution and the five Convention grounds in the context of gender-related persecution, and procedural issues which arise in relation to gender-related persecution.

In May 2003, UNHCR published a resource paper entitled 'Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines For Prevention and Response'. This paper, perhaps best characterised as an operational guide, provides greater detail on what constitutes sexual and gender-based violence and offers practical advice on how to design strategies and carry out activities aimed at preventing and responding to sexual and gender-based violence.

Although beyond the scope of this paper, it is of course important for decision makers to bear in mind, as the UNCHR publications have stressed, that procedures for refugee status determination must be sensitive to the reluctance of many women to disclose their experiences of persecution – especially if those experiences are of violence,

⁸ UNHCR Guidelines on Gender Persecution, above, n 2.

and especially sexual violence. Unless women are able to describe fully their experiences of persecution they may be refused the protection to which they are in truth entitled. The UNCHR Guidelines recommend a number of measures to improve access to the refugee status determination process for applicants, particularly women making gender-related claims.⁹

Implementation of the UNHCR Guidelines

The UNHCR Guidelines are intended to provide legal and interpretative guidance for decision makers carrying out refugee status determination and adopt a clear position in respect of the scope and meaning of gender-related persecution. The Guidelines urge states to ensure a gender-sensitive application of refugee law and procedures and outlines two general approaches taken by states to ensure gender-sensitive approaches by way of example:

- (i) some States have incorporated legal interpretative guidance and/or procedural safeguards within legislation itself;

- (ii) other States have developed policy and legal guidelines on the same for decision-makers.¹⁰

In implementing the guidelines nationally, Canada, the United States, the United Kingdom and Australia have adopted UNHCR's standards in their refugee status determination processes. The following timeline summarises the implementation of the UNHCR Guidelines:

⁹ Ibid, at [36].

¹⁰ Ibid, at [38].

- Canada: 'Women Refugee Claimants Fearing Gender-Related Persecution' (1993). A further, expanded version of the guidelines was published on 25 November 1996;
- United States: 'Considerations for Asylum Officers Adjudicating Asylum Claims From Women' (1995);
- Australia: 'Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers' (1996); and
- United Kingdom: 'Asylum Gender Guidelines' (2000) and in 2004 the Home Office issued policy guidelines for its caseworkers entitled 'Gender Issues in the Asylum Claim'.

Gender-related persecution and the Refugee Convention

Article 1A(2) of the Refugee Convention states that the term 'refugee' shall apply to any person who '...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. Although the Convention is founded on the principle of non-discrimination, the refugee definition has historically been interpreted through the lens of male experience. This has resulted in an emphasis on persecution stemming from violations of civil and political rights and on the state as the agent of persecution. The absence of comprehensive

statistics on gender-based claims under the Refugee Convention makes it difficult to assess the extent of the disadvantage that women may face in seeking asylum.

By contrast, women are frequently subjected to persecution in the private realm and decision makers have traditionally failed to recognise the political nature of these seemingly private acts. In the past decade, the understanding of sex and gender in the refugee context has advanced significantly, demonstrating the ability of the Convention to encompass gender-related claims. This Part outlines some of the key issues in interpreting the refugee definition in Article 1A(2) from a gender perspective that remain recurrent themes in the jurisprudence discussed in Part 6.

A gendered understanding of persecution

Harm by non-state actors is a particularly significant issue in respect of gender-related persecution, as abuse against women is generally perceived as domestic, individual or private and not attributable to the state.¹¹ In respect of domestic violence in particular, many societies have espoused the view that unless it is 'excessive', it is not a proper matter for state involvement or state penalties.¹²

UNHCR Guidelines

The UNHCR Guidelines recognise that male and female asylum seekers may face forms of persecution specific to their sex. Even seemingly private acts that inflict severe pain and suffering, such as dowry related violence,

¹¹ G Goodwin-Gill & J McAdam, *The Refugee in International Law*, (3rd ed, 2007), p 81.

¹² *Ibid.*

domestic violence and rape can be used as forms of persecution, whether by the state or private actors.¹³

The Guidelines also expressly affirm that offensive acts committed by the local populous, or by individuals, can be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.¹⁴ Thus, even if a state has prohibited a persecutory practice, it should not be assumed that it has stopped it effectively.¹⁵

A protection-based construction of persecution

A particular development in common law jurisprudence in respect of non-state actors is the protection-based construction of the refugee definition, which equates the concepts of persecution and protection. The High Court of Australia pursued a protection-based construction of the refugee definition in *Minister for Immigration & Multicultural Affairs v Khawar*,¹⁶ and held that the relevant equation is persecution = serious harm + failure of the state to protect.¹⁷ Where the state of nationality has failed to provide protection from harm, this itself satisfies the definition of persecution and obliges state parties to the Refugee Convention to offer surrogate protection. Surrogate protection, the obligation on contracting states to provide protection where national protection cannot be secured, is a fundamental principle of refugee law.¹⁸

¹³ UNHCR Guidelines on Gender Persecution, above n 2, at [10].

¹⁴ *Ibid*, at [19].

¹⁵ *Ibid*, at [11].

¹⁶ (2002) 210 CLR 1 ('Khawar').

¹⁷ U Jayasinghe, 'Women as 'members of a particular social group': Some flexible judicial developments', 2006 31(2) *Alternative Law Journal* 79, 81.

¹⁸ See for example, *Canada (Attorney-General) v Ward* [1990] 2 FC 667, 67 DLR (4th) 1.

A gendered understanding of ‘for reasons of’

Although gender is not specifically recognised in the Convention as a category on which a well founded fear of persecution may be based, it will be a significant factor in determining whether persecution is ‘for reason of’ any one of the five Convention grounds. The Canadian gender guidelines, for example, note that gender specific claims involving fear of persecution for transgressing religious or social norms may be determined on grounds of religion or political opinion.¹⁹ Nevertheless, gender-related claims for refugee status are often analysed within the parameters of the particular social group category, making an understanding of this term crucial.

UNHCR Guidelines

The UNHCR Guidelines define ‘particular social group’ as follows:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.²⁰

UNHCR expressly affirms that ‘sex’ can properly be considered to be within the ambit of the particular social group category, ‘with women as being a clear example of a

¹⁹ Above n 3, p 63

²⁰ UNHCR Guidelines, above n 2, at [29].

social subset defined by innate and immutable characteristics’, who are frequently treated differently than men.²¹ UNHCR further recognises social constructions of ‘gender’ as falling within the ambit of a ‘particular social group’, stating that equally, this definition would encompass homosexuals, transsexuals, or transvestites.²²

The ‘protected characteristics’ approach and the ‘social perception’ approach

The ‘protected characteristics’ and ‘social perception’ approaches are the two dominant theoretical approaches which have been developed in common law jurisdictions in respect of membership of a particular social group. UNHCR provides the following summary of each approach:

The first, the ‘protected characteristics’ approach (sometimes referred to as an ‘immutability’ approach) examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed to be so fundamental to human dignity that one ought not to be compelled to forego them. A decision maker adopting this approach would examine whether the asserted

²¹ UNHCR Guidelines, above n 2, at [30].

²² UNHCR Guidelines, above n 2, at [30].

group is defined: (1) by an innate characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human rights that that group members should not be compelled to forsake it....

The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the 'social perception' approach.²³

The leading cases on membership of a particular social group in the United States,²⁴ Canada,²⁵ the United Kingdom²⁶ and New Zealand²⁷ apply the protected characteristic approach, based on the anti-discrimination norms which emanate from the objects and purpose of the Refugee Convention. In contrast, the High Court of Australia's approach in *Applicant A v Minister for Immigration and Ethnic Affairs*²⁸ has been characterised as adopting the social perception approach.

In UNHCR's view, given the varying approaches, and the protection gaps that can result, these two approaches ought to be reconciled.²⁹ UNHCR considers that the protected characteristics approach may be understood to identify a

²³ UNHCR, Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 7 May 2002, at [6] – [7].

²⁴ *Matter of Acosta*, 19 I & N Dec. 211 (Board of Immigration Appeals, 1985).

²⁵ *Canada (Attorney-General) v Ward* [1993] 2 SCR 689.

²⁶ *Islam v Secretary of State for the Home Department, Ex parte Shah* [1999] 2 AC 629 ('Islam and Shah').

²⁷ *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387.

²⁸ (1997) 190 CLR 225.

²⁹ Above, n 23, at [10].

set of groups that constitute the core of the social perception analysis. A single standard which incorporates both dominant approaches is as follows:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.³⁰

Overview of jurisprudence on gender-related persecution

Sexual violence

Sexual violence, including rape, is one of the least controversial examples of harm amounting to persecution. Yet the political dimensions of this seemingly personal violence are still being explored. Women may suffer from gender-related persecution, for example, as a means of demoralising or punishing members of her family or community. It is well-established in the jurisprudence of the United Kingdom³¹ and Australian³² that membership of a family can constitute membership of a particular social group for the purposes of the Refugee Convention.

One example of such a case *Secretary of State for the Home Department v K*; *Secretary of State for the Home Department v*

³⁰ Above, n 23, at [11].

³¹ *Secretary of State for the Home Department v K*; *Secretary of State for the Home Department v Fornah* [2006] UKHL 46.

³² *Sarrazola v Minister for Immigration & Multicultural Affairs (No 3)* [2000] FCA 919.

Fornah.³³ Mrs K's husband was arrested and detained by the Iranian authorities in April 2001. Some weeks later, the Revolutionary Guards, an agent of the Iranian state, searched the house she shared with her husband and took away books and papers. Approximately a week after that, the Revolutionary Guards again searched the family home, insulted Mrs K and raped her. Mrs K then went into hiding. She was not molested when she went to visit her husband in prison, and none of her other family members were put under pressure by the authorities. In September 2001, however, the Revolutionary Guards openly approached her son's school in a manner which they must have known was likely to cause her great fear. Soon after this occurred, Mrs K left Iran with her son, fearing the possibility of greater harm to her son and herself. Lord Rodger noted that the actions against her and her son were consistent with the way that the Iranian authorities acted so as to menace the families of prisoners. The gendered aspect of the harm which arose in Mrs K's case, and could occur in similar cases, was expressly noted by Baroness Hale:

The family group was of interest to the authorities precisely because it was a family group. The cohesion and solidarity of a family means that any individual can be got at through the medium of other individuals in the group. Because of the crucial role within the family assigned to women in many societies, the wife and mother may be a particular target for this type of persecution.³⁴

³³ Above, n 31.

³⁴ *Ibid*, at [106].

The House of Lords clarified that it was not relevant whether the imprisonment of Mrs K's husband was for a Convention reason or not. The only relevant consideration was whether Mrs K held a well-founded fear of persecution on the basis of being a member of the family. The House of Lords held that she did.

Female Genital Mutilation ('FGM')

FGM cases contain some of the earliest statements by courts in common law jurisdictions that gender-related persecution comes within the ambit of the Refugee Convention. The gravity of the harm involved and the clearly gendered nature of the harm lead the courts to recognize these cases as examples of gender-based persecution.

While the first recognition of FGM as grounding a claim for asylum was a Canadian case in 1994,³⁵ the US case of *In re Fauziya Kasinga*³⁶ is particularly noteworthy as it was the first successful gender-related persecution case in the US and continues to be the main context in which gender-related persecution is recognised in that jurisdiction. *Kasinga* concerned a young woman from Togo who claimed asylum to escape a forced marriage against her will, a condition of which was that she undergoes one of the most severe forms of FGM. More recently, US courts have also

³⁵ *In the matter of Khadra Hassan Farah et al.*, T93-12198, T93-12199, T93-12197 (Immigration and Refugee Board (Refugee Division) 10 May 1994). Other cases include *Annan v Canada (M.C.I)* [1995] 3 FC 25 (TD); *Sanno v Canada (M.C.I)* [1996] FCJ. No. 566 (TD) (QL); *X.J.V, Re* [1996] CRDD No. 15 (QL); *MA1-00356 et al* (18 Dec. 2001) (CRDD); T99-09887 (17 May 2000) (CRDD).

³⁶ 21 I & N Dec. 357 (BIA 1996) ('Kasinga'). Other US cases on FGM include: *Abankwah v Immigration and Naturalization Service* 185 F.3d 18 (2nd Cir. 1999); and *Mohammed v Gonzales* 400 F.3d 785 (9th Cir. 2005).

demonstrated an awareness of the seriousness of the harm that FGM involves and the impact that it has on families in recognising the asylum claim of a mother in her own right, based on her fear of her nine year old daughter being subjected to FGM and being forced to witness the pain and suffering of her daughter in this process.³⁷

FGM has also been recognised as grounds for asylum in Australia³⁸ and the United Kingdom.³⁹ However, there has been considerable debate in this context about whether women generally, or a particular sub-set of women, in a particular society can constitute a particular social group. This issue was considered in the 2006 UK case of *Fornah v Secretary of State for the Home Department*.⁴⁰

In *Fornah*, the Court of Appeal had rejected Ms Fornah's claim for asylum based on a fear of FGM. It was unwilling to conclude that she had a well founded fear of persecution on the ground of her membership of a particular social group. In the Court of Appeal's opinion a group comprised of 'all women in Sierra Leone' or 'all young, single women in Sierra Leone' was unduly wide and would include those who had already been circumcised and those who had carried out this practice on others. In addition, the Court of Appeal held that FGM did not qualify as discriminatory persecution because it is carried out by the majority of the population in Sierra Leone and the practice lead to the

³⁷ *Abay v Ashcroft* 368 F.3d 634 (6th Cir. 2004).

³⁸ *VWFG v MIMIA* [2005] FCA 611; *NARU v MIMIA* [2004] FCA 864; *NART v MIMIA* [2004] FCA 865; *SVFB v MIMIA* [2004] FCA 822.

³⁹ *VM (FGM - Risks - Mungiki - Kikuyu/Gikuyu) Kenya v Secretary of State for the Home Department* CG [2008] UKAIT 00049; *CM (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 568; *FK (Kenya) v. Secretary of State for the Home Department* [2008] EWCA Civ 119; *SK v Secretary of State for the Home Department* [2007] UKAIT 00001.

⁴⁰ Above, n 31

acceptance of women in society as opposed to their discrimination. The Court of Appeal also held that it was not possible to define the particular social group as 'uncircumcised women and girls' as this would define the group by reference to the discrimination they suffered, which would violate the principle established in *Applicant A v Minister for Immigration & Ethnic Affairs*⁴¹ that a 'particular social group' must exist independently of the persecution suffered.

On appeal, the House of Lords unanimously concluded that the appellant qualified for refugee status. In his leading speech, Lord Bingham described FGM as an extreme expression of discrimination which reinforces women's inferiority in society.⁴² While the individual Law Lords expressed varying views on how to define the particular social group, they made clear that it is not necessary to define the class so that it only includes those who are likely to be persecuted; as long as the group has an existence beyond the persecution suffered it does not matter how widely or narrowly the definition is drawn.⁴³

Domestic Violence

Similarly, courts have come to recognise that domestic violence can be severe enough to come within the meaning of persecution and that, where the state fails to provide protection from violence to women, although it would protect men from comparable violence, the relevant nexus

⁴¹ Above, n 28.

⁴² Above n 31, at [7], [31].

⁴³ M Chaudhry, 'Case Comment: Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department', 2006 20(4) *Journal of International Asylum and Nationality Law* 300.

to a convention ground may be established. In Canada, spousal abuse has been an accepted basis for asylum since 1995.⁴⁴ Developments in other common law jurisdictions have been more recent.

In *Islam and Shah*,⁴⁵ the House of Lords accepted that married women who had fled Pakistan after suffering domestic violence and being turned out of their marital homes could maintain claims to asylum. The main point on appeal was whether the claimed fear was of persecution on account of membership of a particular social group. The House of Lords, with Lord Millett dissenting, concluded that it was. The majority speeches accepted that women suffered serious discrimination in Pakistan on the grounds of their sex and that the State either sanctioned that discrimination or did nothing to prevent it. As stated by Lord Hoffman, there were two reasons for the persecution that each woman claimed to fear – the threat of violence by her husband (which was a personal affair, directed against her as an individual); and the inability or unwillingness of the state to do anything to protect her. Lord Hoffman affirmed:

There is nothing personal about this [the state's inability or unwillingness to protect them]. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be

⁴⁴ Examples of spousal abuse cases include *Narvaez v Canada (Minister for Citizenship & Immigration)* [1995] 2 FC 55; *Diluna v Canada* (MEI) [1995] FCJ. No. 399 (TD) (QL); *P. (H.I) (Re)* [1995] CRDD No. 24 (QL); *Q.Y.O (Re)*, [1998] CRDD No. 81 (QL); MA0-03034 (18 October 2000) (CRDD); MA1-03752 *et al* (4 Jan. 2002) (CRDD); TA0-06676 *et al* (4 Mar. 2002) (CRDD).

⁴⁵ Above, n 26.

combined to constitute persecution within the meaning of the Convention.⁴⁶

In the case of 71429/99,⁴⁷ the New Zealand Refugee Status Appeals Authority ('NZRSAA') granted asylum to an Iranian woman who had fled her abusive ex-husband who continued to pursue her and their child. In the NZRSAA's view, '...the state of Iran condones, if not actively encourages, non-state actors such as husbands or former husbands to cause serious harm to women'.⁴⁸ Accordingly, the NZRSAA held that while it did not consider that the serious harm faced by the applicant at the hands of her ex-husband was for a Convention reason, the failure by the state to protect her from that harm was for the Convention reasons of membership of a particular social group, religion and political opinion.⁴⁹

The Federal Court of Australia made a similar ruling in *SBBK v Minister for Immigration & Multicultural Affairs*.⁵⁰ The Court held that women or divorced women in Iran constituted a particular social group. The case involved a woman claimant and her son, who sought asylum on the basis of her husband's violence against them and the Iranian State's failure to provide them with adequate protection.

In *Khawar*,⁵¹ the High Court of Australia recognised that a woman who had fled Pakistan after suffering sustained

⁴⁶ Ibid, at 653.

⁴⁷ *Refugee Status Appeals Authority Reference 71429/99* (New Zealand Refugee Status Appeals Authority, R Haines QC & L Tremewan, 16 August 2000).

⁴⁸ Ibid, at [118].

⁴⁹ Ibid, at [120].

⁵⁰ (2002) FCR 412.

⁵¹ Above, n 16.

domestic violence from her husband and his family could qualify for asylum. The applicant had repeatedly sought assistance from the police in Pakistan, but the police refused to take her complaints seriously or document her claims. In one incident, her husband and brother-in-law doused her in petrol and threatened to set her alight. At first instance, the Refugee Review Tribunal ('RRT') determined that because the violence she feared was motivated by private, family considerations, any further consideration of the state's failure to protect her as a member of a particular social group was irrelevant. The decision of the RRT was reviewed by a single judge of the Federal Court of Australia and then by the Full Court of the Federal Court. On appeal from the Full Court of the Federal Court, the High Court affirmed that the failure of the state to protect a citizen can constitute persecution where that omission is motivated by a Convention reason. In the High Court's view, the failure of the state to protect the applicant from violence was by reason of her membership in a particular social group, namely women in Pakistan.

By contrast, the US courts have not recognised domestic violence as providing the basis for a claim for asylum and the issue continues to be contentious in the US. The main case is *In re R-A*,⁵² which concerned a Guatemalan woman who claimed asylum in the US after ten years of brutal domestic violence. The applicant, Mrs Rodi Alvarado, fled Guatemala believing that if she remained, her husband would eventually take her life. The applicant's husband was a member of the Guatemalan army and the police refused to provide her with assistance or recognition of her claims on a number of occasions. The applicant was

⁵² 21 I & N Dec. 906, 908-10 (BIA 1999).

granted asylum at first instance, but on appeal, the Board of Immigration Appeals ('BIA') overruled the grant of asylum, disagreeing that the applicant was persecuted on account of her membership in a particular social group or on account of her political opinion. In the BIA's view, the domestic violence was perpetrated because her husband could, and that it was a personal matter.⁵³

Approximately eighteen months after the BIA's refusal, the US Department of Justice issued proposed regulations to address claims of gender persecution, specifically in respect of domestic violence.⁵⁴ The preamble to the proposed regulations states that their purpose was to remove 'certain barriers that the *In re R-A* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group'. The proposed regulations recognise gender as an immutable trait.

The then Attorney General Janet Reno vacated the denial of asylum to Mrs Alvarado, sending the case back to the BIA, instructing it to reconsider the case when the proposed regulations were issued as final. In February 2004, the Department of Homeland Security (formerly the INS) changed its position and filed a brief in which it argued that Mrs Alvarado was eligible for recognition as a refugee. The matter, and the regulations, however, still remain pending after eight years.

⁵³ *Ibid*, at 942.

⁵⁴ Department of Justice, Immigration and Naturalization Service, Asylum and Withholding Definitions 65 Fed. Reg. 76, 588-98 (Dec. 7, 2000).

As a result, the issue of whether domestic violence, where there is a failure of the state to provide protection on the ground of gender, can ground a claim for asylum remains an issue in limbo in the US. Given that the UK, Canada, New Zealand and Australia have all recognised such a claim, it seems likely that the issue will be resolved in the positive in the US in due course.

Sexual minorities

Asylum claims based on sexual orientation contain a gender element. As noted earlier, UNHCR has emphasised the distinction between 'gender' as a *social and cultural construct* and 'sex' as a *biological determination*. It has been suggested, however, that this distinction is not being fully reflected at the national level, to the detriment of sexual minorities. In particular, one commentator, Nicole LaViolette, argues that aspects of gender-related persecution are not being identified where they arise and applicants' claims for asylum are being adversely affected as a result.⁵⁵

LaViolette outlines the following example as illustrating her point. Two Israeli lesbians applied for asylum in Canada. The two women often met in a park where, from time to time, they engaged in sexual activity, as they were unable to meet in private. On one occasion, a police officer questioned them and one of the women was taken to the police station and held for ten hours, beaten about the face and verbally abused. Another time, again in a park, they were watched, insulted and harassed by three young

⁵⁵ N LaViolette, 'Gender-Related Refugee Claim: Expanding the Scope of the Canadian Guidelines' (2007) 19 *International Journal of Refugee Law* 169.

people. One of the women alleged she was raped during this incident. When the women tried to file a complaint with the police, they were identified as lesbians and refused assistance. The Canadian Immigration and Refugee Board (the 'Board') concluded that the feared violence did not constitute a serious violation of a basic human right. The Board determined that the rape did not constitute persecution, but rather a serious crime. The Board did not examine the possibility that these two lesbians, who were unable to find a place to live together, were thus rendered more vulnerable to attacks, such as those which occurred. The Board also did not consider the possibility that rape constitutes a type of persecution against lesbians. Their claim for asylum was rejected.

In LaViolette's view, the persecution of these two lesbians was an intersect of persecution on account of their gender and their sexual orientation. The totality of this intersection is significant in asylum claims:

Gender alone, however, is no more able to account for the specific persecution lesbians confront than is sexual orientation alone. Gender and sexual orientation rarely function as independent bases of persecution. More typically, they intersect in ways that expose lesbians to unique vulnerabilities to persecution *as a distinct group of women* whose very existence is widely perceived to violate socially imposed gender norms.⁵⁶

⁵⁶ Ibid, p 202 citing S Minter, 'Lesbians and Asylum: Overcoming Barriers to Access' in S Levy (ed.), *Asylum Based on Sexual Orientation: A Resource Guide* (1996), p 6.

LaViolette argues that this is equally the case for gay men and transgendered people. She notes that, to a great extent, in cases concerning gay men the persecutors perceive a direct connection between male homosexuality and femininity. This fear of male femininity, either in part or in whole, motivates the violence, sexual abuse, and harassment to which gay men are subjected.⁵⁷ In other words, gay men are subjected to abuse on the basis of their failure to conform to socially constructed roles, rather than in respect of their sexual orientation in particular. LaViolette states that '[i]n spite of the many accounts given by gay men that show the connection between sexual orientation and gender, the Board considered these claims to have been based exclusively on sexual orientation'.⁵⁸ Examples of the connections between sexual orientation and gender include the type of sexual abuse that gay men are subjected to, the psychological effect of that abuse, such as rape trauma syndrome, which is generally associated with women victims of rape, and the type of harm which gay men are subjected to by their family, including violence or being forced into marriages. These are the types of harm which guidelines on gender-related persecution are meant to identify, but are not being applied in sexual minority cases.

In respect of transgendered people, LaViolette notes that at least seven claimants have raised sexual identity as an issue before the Board since 1992, but that the Board only took the gender guidelines into account in one case.⁵⁹ In LaViolette's view, transgendered people are indisputable

⁵⁷ Ibid, at pp 195-6.

⁵⁸ Ibid, at p 199.

⁵⁹ Ibid, at p 200.

perceived as a threat to gender and social norms. Sexual identity, as distinct from sexual orientation, raises very specific gender issues, as transgendered people take on the appearance and behaviours that run completely counter to social expectations. LaViolette expresses concern that the Board has failed, on at least one occasion, to make the distinction between sexual orientation and identity, treating a female-to-male transsexual who was in the process of gender reassignment, as a sexual orientation case.

The shortcomings of viewing the persecution of sexual minorities solely as a question of sexual orientation is illustrated by the issue of whether persecution can be avoided by 'living discreetly'. In *Appellant S395/2002 v MIMA; Appellant S396/2002*⁶⁰ the High Court of Australia considered an appeal from two gay Bangladeshi men. In that case, the Refugee Review Tribunal (RRT) had found that as the applicants had lived discreetly without experiencing any more than minor problems outside their own families, they would not suffer serious harm and therefore did not have a well-founded fear of persecution. By majority, the Court held that the RRT had erred in not considering whether the need to behave discreetly to avoid the threat of serious harm constituted persecution. Justices McHugh and Kirby explain that:

[40]... Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it

⁶⁰ (2003) 216 CLR 473

will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.

[43] ... In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct.

Courts in the UK have also recognised that a need to modify conduct may be sufficiently harmful to amount to persecution.⁶¹ In 2006, the Court of Appeal in *J v Secretary of State for the Home Department*⁶² remitted the asylum claim

⁶¹ *Z v SSHD* [2005] Imm AR 75

⁶² [2006] EWCA Civ 1238

of a gay Iranian man to the Asylum and Immigration Tribunal, stating that the Tribunal 'will have to ask itself whether "discretion" is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activities but in relation to "matters following from, and relevant to sexual identity" in the wider sense'.⁶³ In April 2008, the Tribunal held that on the evidence, the appellant could reasonably be expected to tolerate acting discreetly on return.⁶⁴

While recognising the significant progress the judgment in S395 makes for homosexual asylum seekers, commentators such as Christopher Kendall argue that it does not adopt a sufficiently in depth understanding of what homophobic bias means socially. This gap in the High Court's approach becomes more visible in the UK cases, where the inquiry into what an applicant is 'reasonably' expected to tolerate appears to retain a heterosexist lens. Kendall argues that homophobia should be seen as a reaction to the actual or perceived violation of gender norms and roles, which aims to suppress, silence and make invisible lesbians and gay men to the extent that their relationships and sexuality challenge those norms.⁶⁵

Victims of trafficking

Asylum claims by victims and potential victims of human trafficking are an emerging area where gender will be relevant to the nature of the harm suffered and the reasons

⁶³ Ibid, at [16].

⁶⁴ *HJ (homosexuality: reasonably tolerating living discreetly) Iran* [2008] UKAIT 00044

⁶⁵ C Kendall, 'Lesbian and Gay Refugees in Australia: now that 'acting discreetly' is no longer an option, will equality be forthcoming?' (2003) 15 *International Journal of Refugee Law*, p 715

for that harm, although to date there is not extensive case law on the issue. In 2006, UNHCR published guidelines on the implications of trafficking within the refugee context,⁶⁶ emphasising that the Refugee Convention, properly interpreted, can cover claims brought by victims and potential victims of trafficking.

As outlined in the UNHCR Trafficking Guidelines, trafficking involves severe exploitation including abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, and starvation. These are serious human rights violations and generally amount to persecution.⁶⁷ Of course, both men and women can be victims of trafficking. However, the UNHCR Trafficking Guidelines⁶⁸ highlight the prevalence of women and girls amongst the victims of trafficking. The forcible or deceptive⁶⁹ recruitment of women and children for forced prostitution or sexual exploitation is a recognised form of *gender-related* violence, which may constitute persecution.

In addition, women may fear ostracism, discrimination or punishment by family, local community or state authorities if returned, which may, in severe cases, amount to persecution. Even if such treatment does not amount to

⁶⁶ UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, UN Doc. HCR/GIP/06/07 (7 April 2006) ('UNHCR Trafficking Guidelines').

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ The inclusion of 'or deceptive recruitment' is significant in the refugee context, as some trafficked women may leave their country of origin willingly without realising that they are entering into a harmful arrangement. In such circumstances, where a fear of persecution arises after leaving their country of origin, a trafficked woman may be considered a refugee *sur place*.

persecution, rejection by, and isolation from, social support networks may heighten the risk of re-trafficking or retaliation (eg if the victim cooperated with authorities in the country of asylum or the country of origin), which could give rise to a well-founded fear of persecution.⁷⁰ In UNHCR's view, even where trafficking is determined to be a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognise the individual concerned as a refugee if there are compelling reasons arising out of previous persecution. For example, where the trafficking experience was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable.⁷¹

In the trafficking context, the harm suffered is generally at the hands of non-state actors. Establishing that the reasons for the harm are a Convention ground will require showing either (i) the non-state actor acted for reasons related to one of the Convention grounds; or (ii) the inability or unwillingness of the state to offer protection was for reasons of a Convention ground.⁷² While membership of a particular social group may frequently be the most appropriate Convention ground, many trafficking claims involve 'a number of interlinked, cumulative grounds'.⁷³

In assessing whether a non-state actor acted for reasons related to one of the Convention grounds, an overriding economic motive for engaging in trafficking does not exclude the possibility of Convention-related grounds in

⁷⁰ UNHCR Trafficking Guidelines, above n 66, at [18].

⁷¹ *Ibid*, at [16].

⁷² *Ibid*, at [30].

⁷³ *Ibid*, at [33].

the targeting and selection of victims of trafficking. As stated in the UNHCR Trafficking Guidelines:

[t]rafficking in persons is a commercial enterprise, the prime motivation of which is likely to be profit...[t]his overriding economic motive does not...exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking.⁷⁴

In Australian jurisprudence, for example, the ‘mixed motive’ doctrine recognises that a person may be motivated by commercial advantage as well as a Convention reason. The targeting of particular individuals as victims of the crime may well be for a Convention reason. For example, in *Rajaratnam v Minister for Immigration & Multicultural Affairs*, a case involving the crime of extortion, one of the main issues was whether the crime had been committed for a Convention reason. As noted by Finn and Dowsett JJ:

The extorted party may...have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion.⁷⁵

It is therefore necessary to consider *why* a victim was considered a suitable target of *that* criminal activity; that is, to accord recognition to motives in addition to the general

⁷⁴ Ibid, at [31].

⁷⁵ [2000] FCA 1111 (Unreported, Moore, Finn and Dowsett JJ, 10 August 2000), [46]. See also *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517, 521-2; and *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205 (Unreported, Branson J, 10 March 1999), [20].

motive of commercial advantage.⁷⁶ This accords with the UNHCR Trafficking Guidelines which note that some subsets of women and children may be especially vulnerable to being trafficked and may constitute a particular social group within the terms of the Refugee Convention. Some examples, depending on the context, single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children.⁷⁷ Former victims of trafficking may be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked.⁷⁸

However, to date, there has been little recognition of women as a social group in the trafficking context. In the US, the Centre for Gender & Refugee Studies has summarised 93 trafficking cases.⁷⁹ In 52 of the cases a decision was made in respect of an asylum application. There were 7 grants and 4 denials at the Asylum Office; 13 grants and 26 denials in immigration court; and 3 grants and 9 denials issued by the Board of Immigration Appeals. In the federal courts, there have been no positive decisions and 3 denials. The Centre states that the overwhelming basis for rejection of trafficking claims is that these women were not considered members of any particular social group and/or that there was no 'nexus' to a Convention

⁷⁶ A Dorevitch & M Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims Under Australia's Migration and Refugee Law' 2008 9(1) *Melbourne Journal of International Law* 1, 39.

⁷⁷ UNHCR Trafficking Guidelines, above n 66 at [38].

⁷⁸ *Ibid*, at [39].

⁷⁹ S Knight, 'Asylum from Trafficking: A Failure of Protection', *Immigration Briefings*, July 2007. Available from Centre for Gender & Refugee Studies: <http://cgrs.uchastings.edu/law/articles.php>.

ground.⁸⁰ It may be that the approach to trafficking cases in the US is in the shadow of the pending BIA decision of *In re R-A*, which concerns the issue of whether women constitute a particular social group in the context of domestic violence.

Another key issue in trafficking cases is whether the state is reasonably able and willing to protect past and potential trafficking victims. In assessing whether the state of origin is able to protect victims or potential victims of trafficking, it will be necessary to look at whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking as well as to protect and assist the victims, and whether these mechanisms are effectively implemented.⁸¹ In Australia (and at least also the United Kingdom) courts have used US Department of State Trafficking Reports to assess the level of protection.⁸²

The US Department of State annually ranks countries into four tiers according to their level of compliance with the minimum standards for the elimination of trafficking prescribed by the *Victims of Trafficking and Violence Protection Act of 2000* ('US Trafficking Act').⁸³ This Act accords, in part, with the requirement in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ('UN Trafficking Protocol') to implement legislative mechanisms to prevent and combat trafficking. What the US Trafficking Act does not

⁸⁰ Ibid, at p 6.

⁸¹ UNHCR Trafficking Guidelines, above n 66, at [22] (referring to Part II of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children).

⁸² Above n 76.

⁸³ 22 USC § 7108 2000 ('US Trafficking Act').

assess, however, is the existence or otherwise of specific measures for the protection and rehabilitation of victims who are nationals of that country, which is a requirement of Part II of the UN Trafficking Protocol. Accordingly, as a tool of measurement of effectiveness of state protection, the US Department of State Trafficking Reports are insufficient, as they only give an indication of measures taken by a country to prevent and combat trafficking, it does not assess how victims will be treated upon return.⁸⁴

Furthermore, it appears that Australian courts have been prepared to accept that countries which do not fully comply with the US Trafficking Act's minimum standards (classified in the US Department of State Trafficking Reports as 'Tier 2' countries) are able and willing to protect the individual concerned, because they are making significant efforts to bring themselves into compliance.⁸⁵ For example, in *Case No. V02/13868*,⁸⁶ the RRT found that the Albanian government was willing and able to protect young women from being kidnapped and trafficked based on developments that included the creation of an Anti-Trafficking Unit with increased staff as well as several government and NGO programs to assist trafficked women. This approach can be contrasted with a 2003 decision of the UK Immigration and Asylum Tribunal ('UKIAT') which found that 'while there may be some improvement' in Albania's action against trafficking, including its promotion from a Tier 3 to a Tier 2 country in the 2002 US Department of State Trafficking Report, it 'does not yet fully comply with the minimum standards for the

⁸⁴ Above n 82, p 23.

⁸⁵ Above n 82, footnote 144.

⁸⁶ [2002] RRTA 799 (6 September 2002).

elimination of ‘trafficking’ and thus does not provide a ‘sufficiency of protection’ for the purposes of refugee law’.⁸⁷ The fact that in 2007, five years after this case, the government of Albania was still not complying with the minimum standards of the US Trafficking Act illuminates the danger in relying on Tier 2 placements as evidence that adequate protection will be forthcoming.⁸⁸

Accordingly, it appears that, at least from this small sample, the jurisprudence in respect of trafficking cases is uneven, with differing standards being applied and ad hoc assessments being made in respect of a State’s ability to provide protection to victims of trafficking upon return. This may, in part, be due to a failure to conduct a comprehensive assessment of an individual’s risk of gender-related persecution, including assessing the likelihood of reprisals or social ostracism upon return, as required by the UNHCR Trafficking Guidelines. This may also be part of a broader challenge in respect of gender-related persecution, where such persecution is viewed as a singular act – generally a past act – rather than as a continuum of harm where vulnerable individuals will continue to be subjected to a broad range of gender-related abuse and/or violence. This issue is discussed in more detail below.

A well founded fear of persecution: gender-related harm – a singular act or continuum?

The Refugee Convention requires that an asylum applicant demonstrate a ‘well-founded’ fear of being persecuted on

⁸⁷ *SK Albania* [2003] UKIAT 00023 (12 June 2003). See n 82, p 24.

⁸⁸ Above, n 82, p 24.

return to their country of origin. This is necessarily a ‘forward-looking’ assessment of the risk of harm.⁸⁹ In circumstances where the gendered harm suffered is viewed as a past – and thus implicitly a “one off” experience (eg FGM, forced sterilisation, trafficking) – it may be difficult for women claiming asylum to satisfy this requirement.

In assessing whether an applicant has a well-founded fear of persecution in respect of a gender-related claim, it may be appropriate to give particular weight to the prevalence of persecution by non-state actors in such claims and the unalterable nature of membership in a particular social group. In cases where it is suggested a failure of state protection for a Convention reason (namely women as members of a social group), it may be that this stems from broader societal discrimination against women. If the applicant has experienced a failure of state protection in the instant case, is it not likely that this discrimination will occur again in another context if the applicant is returned? Commentators have argued that a society which imposes harmful traditional practices against women has demonstrated institutional discrimination, and that a woman should not be returned to these conditions. As stated by Beety, ‘the woman is mutilated because her culture treats women in a certain way’.⁹⁰ In her view, if the basis of genital mutilation is recognised as gender within a specific culture, then FGM can be understood by courts as one act of gender-related violence within a spectrum of harms against women in that culture.⁹¹

⁸⁹ R Haines, ‘Gender-related persecution’, in *Refugee Protection in International Law* (2003), p 338

⁹⁰ V.E Beety, ‘Reframing Asylum Standards for Mutilated Women’ (2007-2008) 11 *Journal of Gender, Race and Justice* 239, 241

⁹¹ *Ibid*, at 263.

Furthermore, it may be that the significant enduring effect of past persecution in gender cases is likely to make an applicant more vulnerable to future persecution. For example, as noted above in respect of trafficking cases, the UNHCR Trafficking Guidelines emphasise that even if the trafficking experience of the applicant is determined to be a one-off past experience which is not likely to be repeated, it still may be appropriate to recognise the individual as a refugee if there are compelling reasons arising out of the previous persecution. This would include situations where the persecution suffered was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. As stated by UNHCR, 'in other words, the impact on the individual of the previous persecution continues'.⁹²

Conclusion

The implementation of guidelines and procedures to identify possible gender dimensions in asylum claims has made the asylum process significantly more accessible for women and sexual minorities in the past 15 years. A gender-sensitive interpretation of the Refugee Convention is increasingly reflected in national jurisprudence. With the exception of the United States, landmark decisions have been made across common law jurisdictions that recognise that the Convention can encompass gender-related claims in terms of both the *kind of* persecution suffered and the *reasons* for it. There continues to be challenges for fairly and comprehensively recognising the nature of gender-related

⁹² Above n 66, at [16].

harm. There is still a need to move away from equating gender with sex, to a more clearly defined, social constructionist interpretation of gender as the experiences of sexual minorities and victims of trafficking show. But the common law jurisprudence is promising, with strong foundations in national gender guidelines and courts taking account of developments in comparative jurisdictions. The Refugee Convention has proven to be a flexible and appropriate vehicle for identifying gender-related persecution and recognising vulnerable individuals at the margins of refugee protection.

Response

Justice Blake

Introduction

The history of how gender related persecution came to be recognised as an aspect of the Refugee Convention should give inspiration to those who seek to develop a principled response to the development of the Convention to recognise contemporary needs of protection.

Apart from the intrinsic importance of the issues discussed and developed in Catherine Branson's paper, the account of how senior courts in four distinct jurisdictions came to reach similar conclusions is an object lesson in purposive construction, the principled engagement of human rights norms and the search for an updating living instrument construction of the Convention. The answer to the question posed in Catherine's paper is therefore the Convention can provide protection to gender related claims but whether it will depends on the approach of individual asylum judges responding to the case law and principles set out in the paper.

Gender as a Convention Reason

If persecution can be considered to be the discriminatory denial of core human rights, as most common law jurisdictions following Professor Hathaway *The Law of Refugee Status* now appear to recognise, it does seem remarkable that the drafters of the Refugee Convention did

not include a reference to sex as one of the grounds of Convention persecution a well founded fear of which can make a person a refugee. After all sex was one of the grounds for unequal treatment identified in the UN Declaration on Human Rights Art 2 that has proved to be the inspiration and the programme of the more detailed provisions set out in the Refugee Convention and the ICCPR.

This omission, the initial focus of the Convention on the kind of historic persecution encountered in Europe before 1951 and cultural expectations of the sort of situations in which refugees were created served for a long time to deflect attention from recognition of gender related persecution, that Catherine Branson's paper so fully documents as an important trend in the jurisprudence of the past 15 years.

Perhaps this omission has proven in the end to be an unforeseen benefit. As the paper shows following scholars, the UN Guidelines and some national case law the preferred description of this class of claim is gender related persecution rather than persecution on the grounds of sex. A too easy recourse to sex as a ground might have led to an over-rigorous "biologism". Such an approach coupled with an inappropriately restrictive concept of causal nexus between the acts of the persecutors and the reasons for the well founded fear might have served to give the impression that sex was not the reason why persecution is feared. After all, outside the proscriptive rules of extreme religious communities, men and women exist and have always existed alongside each other in societies, and have tended

to need or at least value one another's company and association.

I am reminded of the struggle that took place in the United Kingdom to find the correct meaning of the Equal Treatment Directives of EU law, transposed into the law of the UK by the Sex Discrimination Act, when applied to dismissal of women who were pregnant. As long as an employer could say that he or she would sack a man who took extensive leave on grounds of illness it was originally said that there was no discrimination on the ground of sex. It was only when the ECJ pointed out that it is *women* who get pregnant, and that dismissal for pregnancy is dismissal based on a significant characteristic of sex that the true scope of that Directive was recognised and its purpose enforced: see Case 394/95 *Brown v Rentokil* [1998] ICR 790.

It is perhaps useful to work from a canvas which if it is not entirely blank at least has not already set out on a course that may give rise to error. Gender is social rather than biological identity and is the social appearance of sexual identity. Again a very useful judicial discussion of gender is to be found in another decision of the European Court of Justice dealing with the questions whether what was then seen as trans-sexuals (now trans-gendered people) could come within the Equal Treatment Directive: see Case 13/94 *P v S* [1996] ICR 795 and the Opinion of Advocate General Tesouro. By focusing on the social aspects of sexual identity, gender-enables discrimination relating to such identity to be more readily accepted as Convention persecution a class of the term "particular social group".

It has been the elaboration of the meaning of this an open ended term inserted in to the Refugee Convention late in the day at the instigation of the Swedish delegate that has proved one of the most challenging and stimulating aspects of Convention jurisprudence. The term apparently reflects the “or other status” limb of Article 2 of the UN Declaration. It was the insight of the US BIA in the *Matter of Acosta* and the reflection on that case given by the Canadian Supreme Court in *Ward* and elsewhere in the 1990s that led to the conclusion that a particular social group should share some similar characteristics as other head of Convention persecution and should either be a shared characteristic that one cannot change or applying the fundamental principles of human rights law should not be required to change.

This insight has tended to survive in the common law world and has successfully seen off the false doctrine of social cohesion or homogeneity as the essence of the meaning of a particular social group with which the Convention is concerned. It has also focused on the need for some common socially significant characteristic apart from the hostility aroused that may be the persecution, for it is equally common ground that a common experience of persecution cannot alone make a social group.

Although women can be persecuted for reasons of race, religion, nationality or political opinion, the reviewed conducted in the paper makes plain that it is the social group head of persecution that has witnessed the most significant developments making the Convention relevant to women asylum seekers. This process has witnessed a remarkable judicial conversation between the higher courts

of Canada, the UK, Australia and New Zealand, where comparative jurisprudence is cited and analysed as a matter of routine on these issues. Secondly the process has demonstrated how gender guidelines promoted by the UNCHR or panels of experts in particular countries play a role in the clarification of law and how the soft law of learned debate becomes the hard law determination and binding precedent in local jurisdictions.

Catherine's paper points out that the exception has tended to be the US that has proceeded on its own course, focusing on its national rules rather than international consensus in the meaning of an international instrument. It is not immune from clear consensus reached elsewhere however, and it was a significant event when the majority of the Supreme Court in *Lawrence v Texas* cited ECHR jurisprudence in belatedly striking down an anti-sodomy statute. Perhaps recent events will mean that the US will happily rejoin the rest of the world in the resolution of common problems in the asylum and human rights field generally, and provide inspirational and principled approaches to common problems.

Examples of the case law from the UK

As noted in Catherine's paper the breakthrough case in England was the decision of the House of Lords overturning the Court of Appeal in the case of *Shah and Islam* in the House of Lords. The evidence was of social discrimination against women and absence of protection of women assaulted by husbands and/or accused of adultery. The case established how to interpret the refugee Convention, how to decide what a social group was;

whether woman could be a social group and if so when. There was the paradox that women in Pakistan were held to be capable of being a social group, partly because the judges concerned readily accepted that homosexuals were such a group. Up to that point there had been an active debate in the lower courts and tribunals as to whether that was the case, with the Home Office often making strenuous efforts to prevent a precedent being established in the higher courts.

It is of interest to note how this decision reflected an articulation of concepts going on at the same time. The ECJ decisions in 1996 and 1998 have already been noted. Refugee Women's Legal Group published their influential Gender Guidelines in July 1998. The UNHCR was developing its guidelines and intervened with notable effect in the case with several volumes of soft law materials.

The judgment in *Shah and Islam* clarifies another related topic that might have been used to restrict the application of the particular social group head of claim to women. The judges pointed out that it was not necessary for the claimant to show that all women in Pakistan were persecuted in order to show either that they were a member of a particular social group or that the persecution feared was for reasons of membership of that group because they were women. Lord Hoffman was critical of counsel for the claimant's attempts to identify sub groups of women: abandoned women, women who were or perceived to be immoral, as unnecessarily complicated. For him the critical issue was the state's response to these women's need for protection because they were women. Those observations undoubtedly reflected the evidence as to practice in

Pakistan at the time, but some of his further observations may create new problems in the development of this jurisprudence. He contrasted the situation of women who are sexually assaulted and left deliberately unprotected by the state because they are women and therefore deemed in some way to be undeserving of protection, with women who are sexually assaulted and (or perhaps because) there is no state able to protect them at all.

The role of the state in defining or preventing persecution, the concept of non state persecution and the topic of sufficiency of protection, are the subject of continuing debate in the jurisprudence in the UK and elsewhere, that may cut down the potential benefits to women asylum seekers of a broader approach based on membership of a social group. In common with Canada and Australia, the courts in the UK readily accepted that persecution did not have to be restricted to state agents to be within the Convention. This was an important distinction between the UK and some of its European Union partners in the assessment of cases from Somalia, for example where it was long recognised that there was no state or governmental authority worth the name. But being the victim of generalised anarchy no more qualified a claimant for refugee status than being the victim of a high level of street crime. This was considered to be the case even if the anarchy came about as a result of ethnically based civil war that had resulted in the destruction of the old order.

On the one hand it can be said that if there is no state then there cannot be any sufficiency of protection that might otherwise prevent a claim to refugee status being well founded. On the other, if there is no state, it cannot be the

state's response to the claim for protection that is central to the question whether the ill treatment feared is persecution for a Convention reason. Equally, if there is a state but it has insufficient resources or competence to act as an effective deterrent to persecutory conduct, but otherwise no particular animus against the victim, does this prevent the persecution feared coming within the Convention?

These are difficult issues. They mean that an undisputed well-founded fear of rape may or may not found a claim to protection as a refugee depending on somewhat nebulous assessment of the circumstances. On one side there would be rape of women whom the state through its agents was unwilling to protect because of their status as a rejected or abandoned spouse who had apparently contravened social norms. This is the *Shah and Islam* case and most common law countries recognise that this as gender based social group persecution. There would also be case where rape was the deliberate use of a demeaning policy targeted against members of a distinct community: whether the distinction was based on religious, national, ethnic or political lines. This would be persecution against which there was no effective state protection, but it may be more open to debate as to whether gender was a relevant constituent of the social group or whether this was persecution directed at racial or religious etc identity.

On the other side may be rapes committed because the perpetrator believes that the state is non-existent or too weak to repress the activity. How does the tribunal assess the state's reasons in failing to protect? Does the outcome then depend on what the motives of the perpetrator were in committing the rape, sexual appetite or a misogynistic

hatred of women generally reflected in deliberate use of demeaning practices violates human dignity? How does a tribunal distinguish between different motives when persecutions hardly condescend to explain their inherently irrational actions? Does the claim fail if the claimant cannot identify what the rapists motives are or may be? How do such distinctions provide for an adequate basis for future protection from gender related persecution? Albeit that men can be raped and or suffer other violent treatment that violates their human dignity, can rape ever be disconnected from gender as a form of ill treatment to which women are peculiarly vulnerable?

The second major case on gender related persecution in the House of Lords was the combined cases of *K and Fornah*. Both reversed restrictive decisions in the Court of Appeal. In *K* it was held that women who feared persecution as a member of a family of a man who was being sought for non-Convention reasons could be a refugee on social group grounds. In *Fornah* it was held that women who were fleeing the threat of enforced FGM could also be refugees. Again nearly a decade on from *Shah and Islam*, asylum law and taken route. It is encouraging to note that *Fornah* was concerned with the issues noted by Deborah Anker in her paper at the 6th World Conference of the IARLJ Stockholm 2005 ("*Refugee Law, Gender and the Human Rights Paradigm*", published in *Asylum Process and The Rule of Law*" (2006) at 216. It may further be of significance that the slow broadening of the diversity of the British judiciary had developed to the point that dissenting in the adverse decision in the Court of Appeal was Lady Justice Arden, and a material voice in the unanimous decision in the

House of Lords was the recently appointed first female member of the Judicial Committee Baroness Hale.

The recognition of the family as a potential social group is of practical value to many gender claims may both be vulnerable to and targeted for persecution as family members. It is easy for commentators to say and all to agree that in theory family can be a social group but how does it work in practice? Marie Antoinette it has pointed out was not executed during the French Revolution because she was a woman, but because she was the consort of the king, or foreign, or a traitor, or a focal point for opposition. But Louis himself may be said to have been persecuted for political reasons. What about women who are targeted by gangsters in countries where there is no state protection because of some misdemeanour of their spouse or other family member. Are they merely the victims of crime or are they being discriminated against because they form a social group of family members? In *K* the persecutors were the quasi state agents the revolutionary guards, but the HL approved Australian and US 9th Circuit precedents and seemed to recognise that persecution by non-state agents of women because they were related to some target of hostility was social group persecution. That seems to me to be a potentially far reaching conclusion and gives one answer to the rape scenario: violation of women because they are mothers, wives, daughters or sisters can come within the Refugee Convention.

Fornah is equally significant in recognising that a gender specific form of gross ill treatment such as FGM can be Convention persecution without elaborate discussion of

causation and the need for singularity. Previous concerns about over-broad construction led to rejections of claims based on FGM to because the ill-treatment feared was not for reason of being a woman, but an un-willingness to accept local social custom and practice. The FGM case law, cited in the paper, is a welcome corrective to inappropriate reasoning that would exclude from protection those who most palpably need it. What the cases have to say about human rights and persecution, nexus to a Convention reason and the ways of characterising a particular social group is all important. It is now clear that it is irrelevant that in many traditional societies women are complicit in perpetuating the practice of FGM. It is irrelevant that those who undergo FGM are regarded with higher esteem as a complete woman or otherwise fit for marriage. It is irrelevant that local states may pass laws against such practices if they are unable or unwilling to enforce them and eradicate the practice. Once FGM is regarded by the international community and any national tribunal seeking to apply the Refugee Convention as serious harm sufficient to constitute persecution, the fact that it is harm directed at women is sufficient to make it social group persecution, whether the group is broadly defined as women or more narrowly as women who have not undergone the practice. The case law is a powerful indication of what a gender sensitive construction of the Refugee Convention can achieve by incremental development of the principles that probably travel far from the circumstances envisaged by the drafters.

Control mechanisms

However the experience of asylum law is that developments that open up the concept of refugee status to new groups previously not considered to be within its scope, is frequently met by development of counter factors restricting the impact of the new opening. The UK was certainly not flooded with Asian gender related persecution claims after *Shah and Islam*. One such mechanism is the sufficiency of protection approach already noted.

As the paper notes, in the field of sexual orientation claims, another limiting factor is the extent to which the gay or lesbian person can be expected to be discreet in their relationships and accordingly avoid the more draconian penal responses that might be visited on them. In the UK there has been somewhat of a roundabout exploration of this last issue, particularly with respect to gay men from Iran.

First, although the mere maintenance of anti-sodomy laws in Europe (even if there is never a prosecution) is considered by ECHR to be a violation of Art 8 private life (*Modinos v Cyprus*). Second, such a wide conclusion does not apply to an expulsion to another country not party to the ECHR. At the least expulsion to a country that maintains anti-sodomy laws and enforces them is not for that reason alone a validation of a well founded fear of persecution in that country by an active gay man. Thirdly, if there is a risk of persecutory repression: substantial periods of detention; ill treatment; grossly excessive punishments and the like, there is nothing in the Refugee Convention that requires victims to organise their lives to

live with it and give up conduct that may invite repression. That approach would be appear to me to be akin to collaboration with the persecutor rather than a vindication of the discriminatory deprivation of the human rights of the victim. There seems to be consensus that this is not the case.

However we can see that the case law then switches from where discretion to avoid persecution should be required as a matter of law, to whether an apparent historic willingness to exercise discretion is sufficiently intolerable to amount to persecution as a matter of fact. So fresh problems arise. Is it intolerable for the victim to act with discretion; how much should the victim desist in; does the fact that the victim has had furtive sexual relations at the edge of social norms without being state persecuted mean that the tribunal dealing with refugee status can conclude that it is not intolerable to return to the same lifestyle. How far should consciousness of the perils of risk drive primary fact finding so that a judge concludes it is unlikely that a claimant would have engaged in conduct that does give risk to a real risk of public persecution?

I am intrigued by the suggestion that these cases have been wrongly perceived exclusively as sexual orientation forms of social groups and could more advantageously been seen as gender related persecution. I recognise that if there is lingering doubt about whether sexual orientation is merely a personal preference that can be switched on and off as appropriate, then gender can bring a new element to the debate. I would have thought that, going back to *Acosta*, it would be accepted that sexual orientation is now established as a characteristic that one cannot or should not

be required to change. The problem has been shifted onto whether suppressing aspects of your identity is persecution and what is the conceptual space between exporting the right to respect to private life to countries that do not subscribe to human rights norms and the international protection of refugees on the basis of serious denial of core human rights.

The EU Qualification Directive

The EU established the Directive 2004/83/EC The Qualification Directive as a minimum standard whereby Member States must recognise claimants as refugees if the criteria are met. Whilst there is a danger of it being interpreted to replace the Refuge Convention and replace judicial consideration of the Convention outside the terms of the Directive, this would in my opinion be an error as the Directive makes plain that the Convention is the source of the obligation and the Directive is an aid to consistent interpretation as to minimum criteria.

In a number of jurisdictions the Directive required revision to its national case law, and in particular the need to recognise certain non state agents as both protectors and persecutors (Article 7). It provides a cautious definition of persecution as a sever violation of basic human rights particularly non- derogable ones, or an accumulation of various measures to affect an individual in a similar manner (Art 9). Art 9(2) recognises sexual violence and gender specific acts as being forms of persecution if they meet the required level of severity.

Article 10 (1)(d) is relevant to the present discussion and states that a social group shall be considered where the members share innate characteristics that cannot be changed or they shouldn't be required to change and the group is perceived of as a distinct identity. The HL have clarified that it is sufficient to be recognised if one of these routes lead to that result and both is not always necessary. Sexual orientation persecution can't be understood to include acts that are criminal in member states (and member states are required to formulate their laws in accordance with ECHR norms). And the section concludes "Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article". One can make of that what one will.

Conclusions

I would suggest that the challenge of the next few years for judges engaged in this sector is the broadening and strengthening of the threads of the jurisprudence noted rather than necessarily radical advances into undiscovered territory.

It would be helpful and encouraging if the core principles about gender and sexual identity were universally recognised as human rights that must be respected and protected, failing which the claim to surrogate protection arises. Many of us are fortunate in sharing a common law tradition of reasoned judgments in the English language and the network of connections that join Commonwealth jurisprudence together. It would be welcome if the inspiring jurisprudence of the South African constitutional

court were to engage with the Refugee Convention and influence constitutional decisions elsewhere in Africa. The shameful disaster of Zimbabwe shows how much it is needed, but beyond that addressing the homophobic and gender biased assumptions of a great many jurisdictions both sides of the Atlantic would be a significant achievement.

The international and regional human rights bodies have laid down clear markers as to what responsible governments must do to respect human rights. Failure to adhere to these norms can give rise to refugee creating situations. With these materials and the guidance given in the comparative case law refugee law judges are now in position to ensure that those who need protection can receive it.

SESSION 5

Chaired by Tjerk Damstra
Refugee Appeals Board, South Africa

Asylum seekers in Israel and the judicial review of asylum-seeker status decisions

* * * * *

First speaker

"Refugee law challenges in Israel in 2008"

Judge Uzi Vogelmann
Tel Aviv District Court, Israel

Second speaker

A commentary on the above paper:

Michael Kagan
Senior Fellow in Human Rights Law, American University
in Cairo
Former faculty member with Tel Aviv University Refugee
Rights Clinic

Refugee law challenges in Israel in 2008

Uzi Vogelman

Background information

According to the 1951 Convention Relating to the Status of Refugees (henceforth, "Refugee Convention"), the State of Israel is obliged to give refugee status to anyone considered a refugee until the danger in his home country subsides, or until he is resettled in Israel or in a safe third state. Israel signed and ratified the 1951 Convention and acceded to the 1967 Protocol. Those who claim they are entitled to refugee status in Israel are dealt with according to internal regulations of government authorities which were formulated by the deputy attorney general, in coordination with the Israeli delegation of the UNHCR and the High Commissioner for Refugees in Geneva. According to the regulations, the request to be classified as a refugee involves three stages. The first stage consists of an examination undertaken by the Israeli representative of the UNHCR, which runs the initial test, examining the facts submitted by the applicant and then formulating a recommendation. After the initial examination in which, amongst other things, the representative determines whether there is any basis for the argument within the confines of the Refugee Convention, the UNHCR representative submits the initial stance on the case to the Israeli authorities. In general, an applicant who has passed the initial screening receives a temporary visa, including a work permit, from the Israeli Ministry of Interior, which allows his stay in Israel until a final determination of his status is made.

It should be noted that the UNHCR's involvement in dealing with requests for political asylum permits the UN to have constant supervision of the implementation of the Refugee Convention in Israel. As clarified by the Ministry of Interior, one of the reasons that Israel established set procedures for the direct application to the Israeli delegation of the UNHCR was to allow applicants the option to turn to a neutral body—whose main purpose was helping and aiding refugees—due to their fear that Israel would return them to their State of origin. The UNHCR has access to a wealth of information from the UN delegations present in the different applicants' states of origin as well as access to additional sources of information. Therefore, an examination run by the UNHCR could be thorough and exhaustive in discovering the factual basis required for the applicant's request for refugee status.

After the completion of a full examination and incorporation of the recommendation by the UNHCR, the request is turned over for examination to the Inter-Ministerial Committee, consisting of representatives of various government Ministries, which advises the Minister of Interior. The Inter-Ministerial Committees' recommendation is then presented to the Minister of Interior for a final decision. An individual, whose request for refugee status is accepted, receives a residence permit ("A5") which, amongst other things, permits the refugee to work and provides for social security benefits and free education for his children. Recently, a structural change has begun in this process with the formation of a specific unit within the Ministry of Interior to deal with the

examination of asylum seekers' requests and to conduct thorough interviews. This will be discussed in greater detail later on.

Further protection is given to foreign citizens who escape from countries known as "Crisis Countries": countries in which civil war or a crisis has occurred, or where current conditions do not allow for safe return. The classification of a "crisis country" is made by the UNHCR. The citizens of these countries are given temporary protection until the crisis, which endangers their lives, ends - provided they then return to their country of origin.

Exercising Authority and Judicial Review

The "Entry into Israel" law, 5712-1952, provides the statutory basis for exercising authority within the boundaries of Israel. Despite the fact that the Refugee Convention was not formally incorporated into domestic Israeli law, it should be noted that the Minister of Interior exercises his authority in strict accordance with the Convention.

The "Entry into Israel" law provides the central statutory basis for the executive powers in this sphere. The law states that the entry into Israel of non-Israeli citizens requires a visa and a residence permit. The Minister of the Interior has broad discretion to issue residence permits and to set conditions for their issuance to non-Israeli citizens and to people who do not have the status of *Olim* (Jews and family members immigrating to Israel), according to the meaning of this term in the Law of Return.

The traditional view in Israeli case law, was that when the Minister of the Interior uses his powers according to the "Entry into Israel" law – as a representative of the executive branch and of the State – he has absolute discretion regarding everything connected to the entry of foreign citizens into Israel. This approach was based on the view that, unlike a citizen or resident, a foreigner has no vested right to enter the State¹. Thus, the State may deny foreigners from residing in Israel. In the same spirit it was held that the Minister of the Interior is not required to explain his refusal to permit a foreign citizen to enter Israel².

Gradually, the case law in this field changed significantly. First, it was held that despite the fact that the Minister of the Interior is not required to provide reasons for his decisions, when he does indeed choose to explain them "he himself opens the door . . . to subject them to the review of this court, for all of those grounds that render government acts improper according to administrative law"³, including unreasonableness. In the same spirit, it was held that the discretion of the Minister of the Interior on the issue of entry into Israel is not absolute. However, he has broad discretion in using his powers according to the "Entry into Israel" law⁴, which is based on the principle of state

¹ HCJ 482/71 *Clark v. Minister of the Interior*, P.D. 27(1) 113, 117 (hereafter: *the Clark case*).

² See Sec. 9(2) of Amendment of Administrative Procedure Law (Decisions and Explanations), 5719-1958; HCJ 740/87 *Bentley v. Minister of the Interior*, P.D. 42(1) 443, 444; HCJ 759/88 *Kendel v. Minister of the Interior*, P.D. 46(4) 505, 520 (hereafter: *the Kendel Case*).

³ *The Kendel case* cited above.

⁴ *The Kendel case* cited above, p. 520; HCJ 4156/01 *Dimitriov v. Minister of the Interior*, P.D. 56(6) 289, 293; APA 4614/05 *State of Israel v. Oren* (unpublished) (hereafter: *The Oren case*); HCJ 4542/02 "*Worker's Line*" *Non-Profit Association v. The Minister of the Interior* (unpublished) (hereafter: *the worker's line case*); HCJ 7052/03 *Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. Minister of the Interior* (unpublished) para. 29 of Vice-President (Ret.) Cheshin (hereafter: *The Adalah case*).

sovereignty over its territory⁵. It was further held that, the Minister of the Interior's discretion is subject to judicial review⁶, as with other branches of government. This review covers all of the known grounds for review in administrative law⁷.

In sum, then, the Minister of Interior utilizes his authority in accordance with Israel's international obligations under the Refugee Convention, and his decisions are subject to Judicial Review accordingly.

A key element in judicial review is the non-refoulement principle, which is not limited only to asylum seekers' claims. The Israeli Supreme Court has held that in any situation where the authorities use their powers, including in instances of deportation, the individual's life and liberty must be taken into account. Whoever enters Israel illegally is not entitled to remain in Israel, but is entitled to not have his life placed at risk - neither in Israel nor in the country to which he will be deported. Thus one should not be deported from Israel to a country where one's life or liberty will be threatened. Every use of authority—including that of deportation according to the 'Entry into Israel' law—should be used with recognition of 'human dignity and liberty' (Article 1 to the Basic Law: Human Dignity and Liberty). This is the main principle of non-refoulment, according to which a man will not be deported to a place where his life or liberty will be put at risk. This principle is

⁵ *The Tushbeim case* cited above.

⁶ HCJ 4370/01 *Lepka v. Minister of the Interior*, P.D. 57(4) 920, 930-931; *the Worker's Line case*, cited above, para. 3 of Vice-President Cheshin's judgment.

⁷HCJ 3648/97 *Stamka v. The Minister of the Interior*, P.D. 53(2) 728, 770 (hereafter: *The Stamka case*); HCJ 282/88 *Oud v. The Prime Minister*, P.D. 42(2) 424; HCJ 100/85 *Ben Israel v. The State of Israel*, P.D. 39(2) 45, 47.

stated in Article 33 of the Refugee Convention and constitutes a part of the internal legislation of many countries that have implemented the Convention or have addressed the issue in other contexts. In Israel, it relates to all uses of authority relating to deportation from this country.

Often the deported person is not put at risk in the country to which he is deported (henceforth, "Destination Country"). Even so, there is a concern that the destination country will deport the refugee to his country of origin, in which his life *is* at risk. For example: a citizen who escaped from State A faces a risk to his life if returned to that state. He illegally enters Israel. The Israeli authorities seek to deport him to State B, in which he faces no risk, but there is a concern that State B will deport him to State A. Under these circumstances, is the deportation to State B considered legal? The answer is no. What cannot be accomplished directly (deportation to State A) cannot be accomplished indirectly (deportation to State B, which will in turn deport to State A). Indeed, Israel must assure that the life and liberty of the deportee will not be put at risk. The authorities are not fulfilling their duties if they deport an individual to a state in which his life or liberty are not at risk, without receiving a promise that that state will not deport him to a state in which his life or liberty will be put at risk⁸.

As to the forum responsible for judicial review, it should be noted that in Israel no special tribunal for dealing with refugees exists and judicial review is done by a District Court sitting as an Administrative Court. There is also a

⁸ HCJ 5190/04, *Al Tai v. Minister of Interior*, 49(3) P.D. 843

right of appeal from the District Court's decision to the Supreme Court. In petitions against the decisions of the government, the Supreme Court, sitting as the High Court of Justice, is vested with authority to review the matter.

Unlawful Entrance from Egypt

At this stage I would like to address a phenomenon that has developed in recent years—the flood of migrants illegally crossing the border from Egypt, through Sinai, and into Israel, on a daily basis. Israel has a relatively long border with the African continent, which in most parts to date, is not secured by any physical boundary or fence. As such, it draws many Africans wanting to improve their quality of life. The government claims that the flood of illegal migrants into Israel in the past years clearly indicates that although some of them are asylum-seekers, the phenomenon is not mainly related to asylum, but is rather an outcome of the migrants' will to improve their quality of life. This conclusion is based on categorizing of the migrants according to their states of origin and their duration of stay in Egypt prior to entering Israel. If this is the case, many of the migrants into Israel will not be entitled to asylum, due to an absence of grounds mentioned in the Convention; i.e. well founded fear of persecution based on race, religion, nationality, political opinion or social group, and so on. According to the data presented by the government to the Courts, less than a third of the migrants originate from Darfur. Amongst those who do, many carry a certificate of refugee status given to them in Egypt or have begun the process of recognition as refugees in Egypt. This group of migrants is therefore protected in Egypt from return to Sudan. According to

Decision 58 of the Executive Committee of the UNHCR Egypt is a country in which they are expected to be given asylum and, in any case, in the interim after their initial request to the UNHCR in Cairo, they receive “temporary asylum” from the UN as asylum seekers who haven’t yet received a final determination of their status. Nevertheless, many of them choose to try to enter Israel. According to the Ministry of Interior, in 2007 there was a sharp rise in the number of cases of illegal migrants from Egypt. The following year saw a similar rise. (According to the data presented to the Court by the authorities, the number of illegal migrants in 2007 was 5208, while in 2008—until November 18—that number was 6900).

Due to the above stated circumstances, the Israeli government viewed the consistent rise in infiltration—which is a criminal offense—as infringing on its sovereignty and as interfering with its control over those who enter its territory. Furthermore, infiltration is often linked to additional criminal activities, such as arms trafficking and human trafficking, which have the potential to harm national security. Therefore, the Administrative authorities were required to prepare for, and deal with this phenomenon. This was true for the Prime Minister, the Attorney General, and the Foreign and Interior Ministries, as well as other relevant government bodies. All this was done in consultation with the UNHCR.

Ultimately Israel decided to form a special unit in the Foreigners Division, within the Ministry of Interior. The unit's task is to interview asylum-seekers in Israel in order to determine whether they meet the requirements needed to receive refugee status in Israel. This new unit has started

recruiting workers who speak foreign languages, with an emphasis on Arabic and other African languages, in addition to English. The training of the new employees includes a course given by the American Immigration Administration in the USA and additional training in Israel; the content was coordinated with the Israeli representative of the UNHCR.

One section of this new unit is in charge of initial identification and interviewing; a separate section handles the interviews, in an IDF installation, of those who entered Israel after being detained by the IDF (henceforth "southern division"). The in-depth interviews take place separately (Refugee Status Determination – RSD). The UNHCR and the Asylum Officers of the US Department of Homeland Security monitored the training process, including personal reviews, joint work and observations, for a period of two months.

According to the data presented by the Ministry of Interior, as many as 8,500 migrants claiming to be citizens of Sudan and Eritrea were interviewed by the unit as part of initial identification and questioning. It should be noted that the "Entry into Israel" law states that an illegal immigrant will be held in custody until leaving Israel or being deported from it, unless he is released under restricting conditions or bail. It is important to stress, however, that custody is not an automatic default of illegal entrance but rather each case is examined according to its individual circumstances. Every decision to keep a person in custody is subject to judicial review by a special tribunal, formed according to this law, known as the Custody Review Tribunal. One can appeal the tribunal's decision to the District Court, which

sits as an Administrative Court. If an Asylum seeker demonstrates during the preliminary questioning session that his asylum request meets the prima facie criteria, he will be released from custody and will receive a temporary visa until the process is complete. Today, there are about 7,000 asylum-seekers awaiting in-depth interviews (RSD).

Coordinated Return

Israel has also decided upon a further step to deal with the phenomenon of large groups crossing into Israel via Egypt. This step is known as Coordinated Return. It should be noted that disagreements exist over the legitimacy of this approach, which is utilized only in a limited manner - in 2008; only 91 people out of 6,900 were returned to Egypt under that category.

The Coordinated Return is the result of a June 2007 agreement between the Israeli Prime Minister and the President of Egypt. The starting point of the discussion was the Administrative Authority's position that, according to International Law, Egypt is the first "safe country" for asylum seekers who arrive there from other African countries. In Decision 58 (1989), the Executive Committee of the UNHCR decided that refugees and asylum-seekers who found protection in a specific country (the first country of asylum) could not move from that country "in an irregular manner in order to find [a] durable solution elsewhere." The decision also states that if a refugee or asylum seeker moves from the first country of asylum to another country, he can be returned to the first country of asylum under two conditions: (1) the refugee or asylum seeker is ensured that he will not be returned to his country

of origin, and (2) the refugee or asylum-seeker will be treated in a humane manner until a durable solution is found for him. The Administrative authorities in Israel state that the agreement between the Israeli Prime Minister and the President of Egypt is based on the aforementioned guidelines. Thus, the Coordinated Return can be used to return refugees to Egypt whilst assuring their safety and guaranteeing that they will not be returned to the Sudan.

The Coordinated Return is performed after the asylum-seeker is questioned by a specially-trained military interviewer. If the asylum-seeker argues that his life will be at risk if he is returned to Egypt, the military legal advisor will be consulted about the legality of a Coordinated Return. The official vested with the authority will not perform a Coordinated Return if, given all of the above, there exists a real risk to the refugee or asylum-seeker's life. In this regard, it is not enough that the asylum-seeker demonstrates that he will undergo a trial or will be charged and imprisoned because of the infiltration or for any other criminal offense.

Coordinated Returns take place through pre-determined border crossings and according to procedures decided upon with the Egyptian authorities.

Petition to the Supreme Court

In actuality, during 2007 and 2008, very few Coordinated Returns to Egypt took place and the legality of this procedure is currently pending a decision by the Supreme Court by the Supreme Court, due to a petition filed by Human Rights organizations. As part of this petition, the

organizations request that the Israeli authorities not expel people who enter Israel illegally and that Israel allows such people to meet with representatives of the UNHCR and file requests for asylum in Israel, according to the procedures described above. The petitioners argue that Israeli law does not allow deportation from Israel in the framework of Coordinated Returns. They point to the fact that the State's viewpoint that a coordinated return is a measure to prevent entrance to Israel, rather than a means of deportation, is artificial and cannot deprive asylum seekers access to the asylum process. Petitioners also argue that the limited questioning session held prior to a Coordinated Return does not fulfill the obligation to give the refugee or asylum seeker an opportunity to be heard. In addition, they assert that deportation without individual examination violates the principle of non-refoulement, according to which the state of Israel is obligated to provide each asylum-seeker with an individual examination even if he is at the border and has not yet entered the State, and even if he has entered illegally. According to petitioners, individuals cannot be deported from Israel based on unwritten understandings between the Prime Minister of Israel and the President of Egypt without a written agreement, without internal review in Egypt, and without the involvement of international bodies. They stress that no information is available about the fate of 48 asylum seekers who were returned to Egypt under Coordinated Return in August 2007. They further argue that the stance of the Israeli government is not in line with the stance of the UNHCR. Furthermore, they claim that it is not acceptable to prevent the entrance of asylum-seekers into Israel using the shortened procedure—they must be given access to the Israeli asylum procedures. Finally, petitioners argue that

return to Egypt can only be performed according to a formal, detailed agreement, and it must be determined whether the asylum-seeker received effective protection in Egypt. In light of the above, there is a concern that the non-refoulement principle is being violated.

The authorities in Israel believe that the procedure of Coordinated Return is in line with the internal Laws of Israel as well as with Israel's international obligations. They argue that Israel is a sovereign state with the right to defend its sovereignty, and is therefore entitled to decide who will enter its borders and to protect those borders from the entrance of foreign citizens en masse, at illegal border crossings. This is even more so the case when the asylum-seekers are citizens of states hostile to Israel - states that do not have diplomatic relations with Israel. Coordinated Return is the fulfilment of Israel's right to undertake any steps necessary to prevent illegal entrance into Israel, and must be considered a mechanism for preventing entrance into Israel. As long as one of the aspects of Coordinated Return is protecting the life and safety of the asylum seekers, according to an agreement with Egypt (like other coordinated return agreements in other places such as the U.S./Canada and Spain/Morocco), no legal problem hinders the use of Coordinated Return. The parties have argued their positions at the Supreme Court and the case now awaits a decision.

Conclusion

In general, the State of Israel operates an organized system for the treatment of refugees and asylum seekers in coordination with the UNHCR and out of obligation to

fulfil Israel's internal laws and Israel's international obligations. The actions of the authorities are subject to effective judicial review. Indeed, the necessary steps have not always been appropriately and swiftly taken. The Office of the State Comptroller recommended that the Ministry of the Interior examine, in cooperation with the UNHCR, whether it can help accelerate the processing of petitions for asylum in Israel, so as to minimize harm to asylum-seekers entitled to refugee status; and concomitantly to avoid extended stays in Israel of asylum-seekers whose petitions are denied out of hand. It was also recommended that the Ministry of the Interior seek, along with other relevant authorities, a practicable means of allowing every asylum-seeker entitled to legal status in Israel to attain such status and all associated rights. As we have seen, the authorities are in the process of handling the unique phenomenon along the Israel-Egypt border and are directing resources to increase the manpower handling asylum-seekers' requests. Out of all the steps taken to handle asylum-seekers' requests, only the Coordinated Return is still under judicial scrutiny and awaits decision, and is used only on a limited basis.

Commentary

Michael Kagan

It is an honour to be asked to offer these comments on asylum law in Israel, in no small part because of the distinguished jurist with whom I am paired here. I had the opportunity to read a draft of Justice Vogelmann's speech before preparing my own. I hope it will be a catalyst for a good deal of discussion about the situation in Israel.

I am grateful for the attention this association is devoting to Israel because we are speaking at a time of considerable crisis in refugee policy in both Israel and Egypt. A surge in irregular migration of asylum-seekers from Eritrea and Sudan through Egypt to Israel has substantially raised the political stakes of refugee policy in both countries. In 2000, just 61 people sought asylum in Israel. Last year, it was 7,681. Most of that growth has been just in the last two years. In Egypt, the response has been brutal. At least 33 unarmed migrants have been shot and killed by Egyptian forces at the Israeli border. Last year in Egypt, more than 1200 Eritrean asylum-seekers were deported without access to UNHCR. On the Israeli side, the vast majority of asylum-seekers are simply blocked from having access to the refugee status determination procedure. The State of Israel insists that it may deport asylum-seekers to Egypt within hours of their arrival, after only a brief interview with a soldier at the border.

I worked in Israel in developing legal aid for asylum-seekers for three years, and the legal questions faced there were among the most challenging that I have encountered

anywhere. The issues have become even more complicated in the last few years, raising questions of refugee status, often ignored articles of the refugee convention, and ultimately the balance between law enforcement, security and human rights. But I am not going to go into detail about many of these issues. I believe that the Israeli judiciary is at the beginning of the refugee law road, and IARLJ may play a great role in helping prepare Israeli courts to deal with some of the complex issues of refugee law.

The main point I want to make is more modest and more simple. But it is pivotal and will determine whether Israel develops a genuine asylum system. The Chief Justice of South Africa reminded us today to think of law, not just refugee law. I believe that a judge need not be familiar with refugee law to understand the demand for due process, for a fair hearing, when the state exerts power over an individual. The Assistant High Commissioner for Refugees, Erika Feller, essentially summarized my concern when she spoke of borders becoming “shadowy places ... outside the frame of judicial scrutiny.” This is very much the core question in Israel. Will Israeli judges insist on real due process for asylum-seekers, with real judicial scrutiny, and will this scrutiny extend over all of Israeli territory, including the border?

Israel has a strong and sophisticated judiciary. As Justice Vogelmann explained, before asylum became a major issue, Israeli courts had already recognized the principle of *non-refoulement* in their jurisprudence, and had established a framework for reviewing migration related decisions in administrative law. The problem is not the principle. The

problem is the practice. In practice, most refugees in Israel are simply not allowed to claim asylum.

You have already heard a description of the current refugee status determination system in the Ministry of Interior. I want to make some comments in this regard.

The committee that determines refugee status is composed of representatives of various Ministries, one of whom is the attorney who defends state practices on migration issues before the High Court. Israeli officials actually seem to concede that the National Status Granting Body (NSGB) is biased against refugees, and as Justice Vogelman indicated this bias is actually promoted as an explanation for the continued legally anomalous dependence on UNHCR to receive applications and do much of the heavy lifting involved in RSD. The NSGB itself typically gives little explanation for its decisions, and does not allow applicants to contest evidence or to submit their own evidence. The NSGB also does not always interview applicants, and restricts their right to counsel in the process.

What about the new units of specially trained staff that the Ministry of Interior has established? Indeed, this seems to be an admirable step by the Israeli authorities to begin to develop the capacity to handle the influx of asylum claims. And it is a good sign that UNHCR was consulted about the training. But I would like to quote at some length from a letter issued last month by UNHCR regarding the actual scope of training received.

Although UNHCR has provided training to staff in the Ministry of the Interior, *this*

training has not been designed for the duties that these staff will apparently undertake at the Sinai Border. The training events in question were more general in nature, and no tests of competencies were included. No accreditation process has been agreed with the Ministry of the Interior. While these staff have made very good progress toward the assumption of responsibility for registration of individual applicants, it is UNHCR's assessment that the necessary skill sets for the more sophisticated procedures for determining protection needs and/or refugee status have not yet been transferred.¹

The rapid growth in asylum applications in Israel is straining the government's capacity. That the state lacks sufficient capacity today is no shame on Israel, and the Israeli government is capable of catching up. I hope that it is truly committed to doing so. My concern is that the state has sought to obscure for the courts what it is actually doing, and what it is actually capable of doing, and has badly misconstrued for the courts the role of UNHCR. The effect has been to deter the judiciary from focusing on the ultimate questions of state responsibility, and to allow the state to escape actual judicial scrutiny of its practices.

In a current case at the High Court, the State has asserted that around 800 people who said they were Eritrean were actually found to be Ethiopian. But how was this

¹ Steven Wolfson, Head of UNHCR Liaison Office (Tel Aviv), Letter to Adv. Anat Ben Dor, "In the matter of HCJ 7302/07 Hotline for Migrant Workers et al. v. Minister of Defence et al" (2 December 2008) (copied to Adv. Yochi Gnessin, Deputy State Attorney) (emphasis mine).

conclusion reached? The local UNHCR office sent a letter clarifying that such a finding could come only after an in-depth RSD procedure, which had not occurred.² Instead, Israel conducted brief registration interviews with asylum-seekers, then made assertions to court as if a thorough RSD process had been conducted.³

In 2007, Israel recognized as Convention refugees *just three people*, from all nationalities. Israel's overall RSD recognition rate in 2007 was 0.9 percent. When people argue that Israel has obligations toward some of the asylum-seekers crossing from Egypt, the state often offers the reply that only a minority are from Darfur, and thus the rest must be just illegal economic migrants. Israel has received significant numbers of asylum claims from Sudan, Eritrea, Cote d'Ivoire, Ethiopia, Colombia, Myanmar, and others – all countries with very well known human rights concerns. Is it sufficient to reject an asylum application from Eritrea by saying, "Well, you are not from Darfur?"

When these decisions are challenged, the common state response is to claim that it relies on UNHCR, and that UNHCR allegedly has access to specialized information from UN sources about asylum-seekers' countries of origin. But this is generally not the case, and not the message that UNHCR usually promotes. In September 2006, the Director of International Protection Services, Mr. George Okoth-Obbo, wrote to a group of NGOs: "UNHCR relies almost exclusively on publicly available country of origin

² Wolfson, *supra* note 1.

³ *Id.*

information when examining refugee claims or developing positions on eligibility.”⁴

In October last year, a Ministry of Justice attorney – the same one who sits on the NSGB and decides RSD cases – told the High Court that Israel could return asylum-seekers to Egypt until *UNHCR* said on the record that Egypt is unsafe. The state thus tried to discourage the court from examining the State of Israel’s policy of deportation to Egypt. When petitioners submitted human rights reports about conditions in Egypt, the state’s attorney derided them as “just internet links.” This is quite alarming, given that the best country of origin information in the world is gathered by UNHCR on Refworld.org, which is on the Internet. What comes through most clearly is a tendency of the state to suggest that UNHCR is responsible for Israeli decisions, and to thus discourage courts from looking closely at what the state has done.

I wish that my concerns were limited to the weakness of refugee status determination in Israel. But in fact relatively few asylum-seekers ever go through an individual RSD procedure at all in Israel. In 2007, 5,703 people sought asylum in Israel, but only 483 RSD cases were decided; Justice Vogelman notes that there are around 7000 cases pending. That’s a lot, but it doesn’t even include the two largest nationalities, Eritreans and Sudanese, who are not permitted to even access the RSD procedure. Given the capacity strains, I would not raise a concern about this – had these asylum-seekers actually received a genuine

⁴ George Okoth-Obbo, UNHCR Director of International Protection Services, Letter to NGOs re: Procedural Standards for Refugee Status Determination under UNHCR’s Mandate (26 September 2006).

status in the interim. But instead they are often not given work permits, and often face restrictions on their freedom of movement, so that they cannot come to the center of the country. If they try to escape from this limbo by applying to be recognized as refugees, their claims will not be considered.

Now, let me come to the most urgent issue at hand – the border. In 2004, a group of 11 Sudanese asylum-seekers entered Israel from Egypt. After months in detention, they were deported to Egypt after unwritten assurances that they would not be deported to Sudan. But then Egyptian authorities transported seven of them as far south as Aswan. There, UNHCR was able to intervene, literally at the last moment, to secure their release and avoid deportation to Sudan.

On 1 July 2007, Prime Minister Olmert announced that he and President Mubarak had reached an understanding to return asylum-seekers from Israel to Egypt. We still do not know what kind of understanding this was. It was never written down and the Egyptian Ministry of Foreign Affairs denied it existed.⁵ Nevertheless, on 18 August 2007, Israeli authorities returned to Egypt 48 African migrants, including 44 Sudanese and 18 children, within 48 hours of their having arrived in Israel. None were allowed to present asylum claims. Since they were handed to Egyptian authorities, these 48 people have disappeared. Media reports citing anonymous Egyptian sources indicate that between 5 and 20 may have been deported to Sudan. Then,

⁵ Egypt Ministry of Foreign Affairs, Egyptian efforts to combat trespassing across the international borders with Israel (11 August 2007) (“Unlike what has been circulated by the media, Egypt did not agree to re-admit the persons who have previously trespassed to Israel through the Egyptian borders.”)

one year later, in August 2008, Israel deported migrants and asylum-seekers to Egypt again – apparently the number this time was 91 people. They also have not been heard from since, and some have reportedly been deported to Eritrea.⁶ None of these deportees has had the chance to meet UNHCR or outside lawyers in Egypt.

Information about the fate of these deportees in Egypt has been submitted to the High Court, but the court has nevertheless declined to issue even a temporary injunction blocking further deportations to Egypt. The state has told the High Court that before any returns to Egypt asylum-seekers will be interviewed by soldiers from the Israel Defense Forces. The state's submissions to court describing the training curriculum for these soldiers contain no mention of refugee law. The questionnaire that they use contains nothing inquiring about how the person might be treated in Egypt. The decisions reached by soldiers in the field cannot be appealed.

Justice Vogelman has mentioned EXCOM Conclusion 58 and the general issue of safe third country. I believe that this norm has been badly misconstrued, and given the weakness of refugee protection in the Middle East I have doubts about whether the safe third country idea can have any application in this region. I do not believe that a reasonable person could conclude Egypt is safe when the clear track record shows that asylum-seekers returned from Israel will disappear into Egyptian detention and will quite likely be deported to their countries of origin. But this is not actually the point. The fundamental issue is procedural.

⁶ Amnesty International, *Eritrean asylum-seekers face deportation from Egypt* (19 December 2008).

Before a person is sent to a place where there is a chance of arbitrary detention, of torture, or of disappearance, should she be able to have a fair hearing, to have a lawyer, to have confidence that the decision-maker is impartial and competent, and should she have the chance to appeal?

The smuggling and migration issues in Israel occur near a zone of conflict. But the border is relatively unguarded, marked in most places by a thin wire fence. It is near armed conflict, but it is also near an area where tourists relax at the beach. It is a complex zone, full of contradictions, but the migration and asylum challenges are not unique. Just a few days ago, UNHCR published a story about 13,252 migrants caught trying to enter Greece from Turkey, double the previous year.⁷ The general principles that apply to other countries – and that Israeli courts have endorsed – can be applied in Israel. The security and migration control concerns raised by the Israeli government are the same ones offered by governments all over the world. They are legitimate state interests, but they must be balanced against refugee rights. The fundamental, well-established means of making this balance is to treat each person as an individual, to hear and fairly assess her claims. This is what the Israeli government has been most reluctant to do, and this is what the courts have not yet insisted upon.

As in other countries, not everyone who enters Israel is a genuine refugee, but many are and they must be protected. It is not for the judiciary to decide exactly how to do so. But it is the role of the judiciary to remind the state that every

⁷ UNHCR News Stories, Greece's infrastructure struggles to cope with mixed migration flow (19 January 2009).

person has potential rights, and is entitled to a fair hearing. It is the role of the judiciary to remind the state that it must be precise and accurate in its assertions. It is the role of the judiciary to remind the state that consultation with UNHCR cannot substitute for actual compliance with international refugee law. It is the role of the judiciary to remind the state that it is sovereign, which means that it is responsible. And it is the role of the judiciary to remind the state that *non-refoulement* is not just a principle. It must be a practice.

These are not policy details. They are boundary lines of law within which policy may be set. We are at a critical moment today in Israel and I believe the Israeli judiciary can lay down these boundaries, and I hope it will. Then the training and advice of UNHCR and other governments will be valuable. Then a foundation for building a genuine asylum system in Israel will be in place.

SESSION 6

Chaired by Justice Andrew Nyirenda
High Court, Malawi

*The role of the judge – Should judges engage in
extra-curial commentary on human rights issues?*

* * * * *

First speaker

“The Extra-curial Role of the Judge in Refugee Protection”

George Okoth-Obbo
Director for International Protection Services, UNHCR

Second speaker

“The role of the judge”

The Honourable Mr Justice Isaac Lenaola,
Judge, High Court of Kenya
Chair, Kenya Magistrates and Judges Association

Third speaker

“Extra-Curial Pronouncements of Judges: To Speak or not to Speak...?”

The Hon Justice James Ogoola
Principal Judge, High Court of Uganda
Lord Justice, COMESA Court of Justice
Justice of Appeal, East African Court of Justice

Fourth speaker

"Judicial Freedom of Speech in Canada"

The Hon. James O'Reilly
Judge, Federal Court of Canada

The Extra-curial Role of the Judge in Refugee Protection

George Okoth-Obbo

I. Introduction

The contention in this paper is that the imperatives of our times inscribe for judges, over and above their direct functional roles as adjudicators, a role to play in collateralizing international protection in the public domain. It is a role which evokes a form of socially-responsible advocacy. Seen in terms of the orthodoxy of the separation of powers that underpins conventional judicature, the notion of so-called judicialization¹ of public life is controversial enough. Theorized in its even more personal terms, the assertion that a judge has or should have a publicly and socially - affecting role played outside of a formal adjudicatory setting is liable to be even more contentious. So as to answer these objections, the paper explains, first, that the way in which refugee protection plays itself out in national legal and political contexts in fact calls on the part of courts and judges an active and creative form of judicialism even in the exercise of a normal, official adjudicatory role. Other imperatives

¹ The literature is vast and growing, in the last decade drawing significantly from the experience in South Africa. See for instance Lourens M du Plessis, "An assessment of South African Courts' Approach to the interpretation of the bill of rights", Vol 20 (2) Politicon, 46 (December 1993). For other readings, see Carlo Guarieri and Patrizia Pederzoli, (edited by C A Thomas), The Power of Judges: A Comparative Study of Courts and Democracy, OUP, 2002; C Neal Tate and Torbjon Vallinder, The Global Expansion of Judicial Power, New York University Press, New York, 1995; Hakeem Yusuf, "Democratic transition, judicial accountability and judicialization of politics in Africa: The Nigerian experience", Vol 50 (5), International Journal of Law and Management, 336 (2008); and Heid Ly Beirich, "The judicialization of politics: Contemporary trends in research in European and other courts", Vol 22(3) West European Politics, 250 (July 1999).

principally of a social and political nature are what speak in favour of a discursive, yet authoritative role for the judge beyond the functional walls of a court room. The proper scope and contours of that role are theorized.

II. The Functional Role of Courts and Judges in Refugee Protection

The system of international refugee protection is established in its essential form in international refugee law underpinned by human rights. As set out in the 1951 Convention relating to the status of refugees, that system contains a definition of the criteria perforce which a person will be considered as a refugee or not; the basic rights and standards of protection by which, as refugees, such persons will be treated; the obligations visited upon States in ensuring that those rights are extended to persons falling under the terms of the Convention; when refugee status comes to an end; and various administrative and support dispositions.

The role of courts in the effectuation of this system of rights and obligations is both presumptive and explicit, as will be provided for in relevant international, regional or national legal instruments. As to the particular manner in which courts and judges should, as far as this paper is concerned, exercise this role, a number of factors should be noted.

First of all, the system, as such, is not value-neutral. On one hand, it features the interests of States which are projected either explicitly or implicitly within the legal scheme of the framework. On the other hand, the overriding purpose of international refugee protection is clearly that persons

falling within the ambit of this regime should indeed be able to receive protection. Access to protection is thus both the quintessential purpose of the system and threshold parameter by which due diligence in every measure of its implementation should be judged.

Secondly, while, as said earlier, essential elements of the system – the definition of a refugee; the primordial standards of treatment; and the criteria for inclusion and exclusion from the status of a refugees are well established, the system otherwise features major deficits both organically and in relation to new developments and requirements. Therefore, so as to have a legal architecture for refugee protection that is adequate in real time, the system needs to move forward both through affirmation of established legal and doctrinal dispositions and, as well, new and progressive development through both legislation and judicial law making.

These developments will however take place in an environment in which different interests and imperatives will often be competing fiercely with each other, one tending to preserve and expand both those protections themselves and the ability to gain access to them, the other seeking to diminish both. Particularly in an atmosphere dominated by concerns over national security and strict migratory regulation, the perception that many an asylum-seeker is a source of threat and risk to such security or even that many of them are in any case not genuine, there is a strong interest to achieve both “economies of process” and,

even more critically, of substance² in the legal and operational ordering of the protection regime.

In light of these factors, it is contended that courts as such and the individual judges who exercise decision-making responsibilities as officers of those establishments have, first, a responsibility to decide cases arising before them in the refugee domain in a way which advances the objective of those who merit protection under refugee law obligations in fact being able to receive it. This is not to say that courts and judges should not take into account other factors and imperatives which are indeed integral elements of refugee law, namely national interests. The overriding purpose of refugee law is, however, not to lionize and elevate state objectives over those of the primary subjects of the regime, i.e. individual refugee claimants. Therefore, the preponderance in the exercise of a decision-making authority in an asylum or refugee protection case, it is

² UNHCR's Director of International Protection at the time, Ms Erika Feller, has spoken to these questions in a number of her speeches at the respective previous World Conferences of the IARLJ. See for instance "Presentation by Ms Erika Feller, Director, Department of International Protection, UNHCR, at the IARLJ Conference "Judicial or Administrative Protection – Legal Systems within the Asylum System", [http://www.unhcr.org/cgi-](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42a404cf2&skip=0&query=role%20of%20courts&querysi=iarlj&searchin=title&display=10&sort=relevance)

[bin/texis/vtx/refworld/rwmain?page=search&docid=42a404cf2&skip=0&query=role%20of%20courts&querysi=iarlj&searchin=title&display=10&sort=relevance](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42a404cf2&skip=0&query=role%20of%20courts&querysi=iarlj&searchin=title&display=10&sort=relevance) in which she says: "The sheer number of people trying to enter national asylum procedures is sometimes a temptation to look for economies of due process", and "Address by Ms Erika Feller, Director of the Department of International Protection to the First Meeting of the Australia New Zealand Chapter of the Australia New Zealand Chapter of the International Association of Refugee Law Judges (IARLJ), Auckland, 10 March 2000),

[http://www.unhcr.org/cgi-](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42a407d72&skip=0&query=role%20of%20courts&querysi=iarlj&searchin=title&display=10&sort=relevance)

[bin/texis/vtx/refworld/rwmain?page=search&docid=42a407d72&skip=0&query=role%20of%20courts&querysi=iarlj&searchin=title&display=10&sort=relevance](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42a407d72&skip=0&query=role%20of%20courts&querysi=iarlj&searchin=title&display=10&sort=relevance) (accessed 25 January 2009) in which she talks of "Unduly restrictive interpretations of the refugee definition including very limiting notions of what amounts to persecution, who are the relevant agents of persecution and what constitutes effective state protection".

proposed, should always come out in favour of the said refugee protection context. Courts and judges, it is asserted here, have a duty and role to be particularly sensitive to the purpose and objectives of protection.

The judge adjudicating in a refugee context will often face not only competing priorities, but an absence of clearly or formally established law. In many a jurisdiction, the greater part of the law that today caters to questions such as secondary or irregular asylum-seekers; what comprises internal flight alternatives; standards for legally adequate refugee procedures; whether persecution can result from gender-based aspersions such as female genital cutting or from situations in which the agency of persecution is not the state; and many others has evolved not through conventional legislative enactment, but, rather the law-making role of judicial establishments. The personal role of a judge in advancing good and bad jurisprudence in this context as viewed from the primordial purposes of refugee law can thus be seen to be quite critical.

The positivist view in this situation would be that the judge should neither seek to imagine what the intentions of a proper legislating authority might be, nor substitute his or her own. The view in this paper is however that the requirements of a purposive-based form of judicature in the asylum and refugee context in turn requires that the court and judge must be ready to be both proactive and creative in their interpretative responsibilities and to venture into normative development. Litigation in these situations is not simply about legal or material accretions or entitlements. The very life of a human being is at stake. A bad decision, or a non-decision, can have critical and

interpreters of the law. They should neither involve themselves in issues located directly within the policy making function of the executive government, nor, in so doing, risk inviting controversy upon themselves and impugning the independence and respect upon which the integrity of judicature depends. Even when they arbitrate over highly contentious political and social matters, the objection goes, they should serve and dispense only the law, paying attention and being guided only by prior judicial precedent, not dictates of politics, policy or personal preference. Judges who pander to the latter incentives are rogue actors, the warning continues, pose a danger to the moral integrity of legality, constitutionalism and rule of law.

The view in this paper is doctrinally mindful of these riders. It is however not our stand point that, in reality, judicature is configured on a rigid counterposition between on one hand, dogmatic orthodoxy and, on the other, radical or socially revolutionizing iconoclasm⁶. To greater or lesser extents depending on the matter or situation at hand, the system of formal justice through the courts can be both compliant with the letter of the law while at the same time being sensitive to and taking properly account of social imperatives of the day and times. The difference, as seen by

⁶ The philosophical orientation of the paper as a whole has been very strongly influenced by the writings and outlook of Justice Antony Mason as elicited, particularly, in the following works read in preparing the paper: Antony Mason, *Judicial Independence and the Separation of Powers – Some Problems Old and New*, 13 (2) University of New South Wales Law Journal, 173 at 181 (1990); Geoffrey Lindell, The Mason Papers, Federation Press, 2007. Judge Sopinka, Supreme Court of Canada who, placing the matter in the context of freedom of speech, says: “Surely a judge should be able to comment on matters relating to the administration of justice and any reforms to that system. As key players in the justice system, their views should not be absent in fear of somehow entering the political fray”. See, “Freedom of speech under attack”, 5(1), Judicial Officers Bulletin, 1 (1993).

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this writer, is not between one outlook to adjudication which takes account of social factors as opposed to another that does not do so. Both forms of judicial functionality either consciously or unconsciously do reflect those choices. The difference is rather in the type or genre of the factors which are allowed to thus influence the judgements concerned. The persuasion of this paper is that those which serve refugee protection should be given eminence.

III. The Question of an Extra-Curial Role

Today, some of the greatest pressures and stresses on the asylum and refugee protection system are rooted in matters that are not easily justiciable, if not impossible directly to bring under a judicial decision-making authority. One example is the reluctance, dereliction or even refusal by State authorities to embrace or discharge the broad set of responsibilities that would ensure the protection of refugees or to do so in terms that are fundamentally driven by protection priorities. In official or national discourse, refugees rather get characterized not as persons to whom protection responsibilities are owed, but, instead, as the threat and source of risk which it is the duty of a responsible government to protect its people from. This is a toxification of the national psyche against refugees which, whether done deliberately or only fortuitously, feeds into, or compounds the racism, xenophobia or other forms of hatred and intolerance which are a regrettable fact of life in many a country today.

Some of these situations can be reduced to a discrete legal transgression or failure of formal responsibility or accountability that, if pursued as a measure of judicial

enforcement, for instance as a criminal prosecution, would thus implicate the official role of a court or judge. But this may be very difficult to do in these circumstances, and, in any case, such actions would be too late by then for purposes of protection due diligence from the point of view of the refugee or asylum-seeker. Even more to the point, the battleground in these cases is less about judicial contention in the court rooms and much more about the minds, hearts and souls of the nation, both official and popular. It is about creating more positive and responsible refugee catalogues in those minds, changing hearts and creating positive patronage.

It is precisely in these settings that I situate the critical extra-curial role of judges in the refugee protection domain. In most societies, judges typically are among the most hallowed, respected and authoritative quarters of society. Even in their personal disquisitions of a public nature, they are perceived as acting to a higher, impersonal value than if the same matter was being fronted by a political personality of comparable public renown. It is thus important that they are able to give voice in situations where the life, safety and the fundamental rights of refugees are at stake as a matter of a critical national state of affairs for which formal judicial regulation will be inadequate, if not impossible. Conversely, it compounds matters, and does not add to restraining or countervailing momentum which must be built up nationally in these cases if there is silence, aloofness and disengagement from those whose duty it is to watch over and oversee the proper national ethic or due diligence as massive transgressions are taking place.

Here too, the objections which are likely to greet these propositions in view of the mantras of separation of powers, judicial restraint, can be anticipated. That view already expects of judges acting formally as judicial decision-makers to exercise restraint in extending the envelope of adjudication in the interests of a claimed public good. By this orthodoxy, the vision of these same judges going even further than this so as to voice, in their extra-curial capacity, a stance on matters in public contention is viewed as nothing short of a calamitous disruption to the balance, orderliness and predictability of democratic societies based on the rule of law⁷. As one writer warns, they would thereby be oblivious of the line that should separate their duties in court from their other activities, wrongly take on the role of the executive and jeopardize the independence of the judiciary⁸.

The view of this paper is that judges can be functionally diligent in both their official roles while also allowing themselves a proper and necessary concern with matters outside the court room. We consider that Kirby provides the correct guidance in assuring that:

“The discussion by judges and tribunal members of issues relevant to their vocations is less shocking today... Now, properly performed, it may contribute to a more informed understanding of matters of legitimate community concern, a better

⁷ Helen Cunningham, “The Role of the Judiciary in a Modern Democracy”, Judicial Conference of Australia Symposium, 8 – 9 November 1997, <http://www.jca.asn.au/attachments/cunningham.html> (accessed 25 January 2009)

⁸ James Young, “The constitutional limits of judicial activism: judicial conduct of international relations and child abduction”, Vol 66 (6) **Modern Law Review**, 823.

appreciation of professional and other issues relevant to the administration of justice and greater transparency of government generally”⁹

Particularly in matters underpinned fundamentally by human rights as is international refugee protection, the social voice of judges, over and beyond their functional perorations, is imperative for sustaining due diligence in these changing times. In the words of Lord Falconer of Thoroton, UK Constitutional Affairs Secretary and Lord Chancellor, speaking in that context on the issue of terrorism and human rights: “the role of the judiciary, especially in relation to politics, is changing. ...We both need and are seeing the establishment of a new form of the relationship between the executive, the legislature and the judiciary. ...We have seen with greater clarity in recent years the need for judges to protect individual rights in a much more transparent way than in the past. That we are asking judges to take decisions which have formerly been left either to the executive without restraint or to parliament. That this changes role means judges are doing things which bring them much more into controversial areas than in the past”¹⁰.

⁹ In *Re Minister for Immigration and Cultural Affairs, Ex parte Epeaka* [2001] HCA 23 at 83, as quoted in Robin Creyke, “Sir Gerard Brennan’s Extra Curial Writings” in Aenne Watson, Robin Creyke and Patrick Keyzer, (eds) *The Brennan Legacy: Blowing the Winds of Orthodoxy*, The Federation Press, 2002, 141 at p 143.

¹⁰ Lord Falconer of Thoroton, UK Constitutional Affairs Secretary and Lord Chancellor, focusing on both terrorism and human rights, says: “the role of the judiciary, especially in relation to politics, is changing. ...We both need and are seeing the establishment of a new form of the relationship between the executive, the legislature and the judiciary. ...We have seen with greater clarity in recent years the need for judges to protect individual rights in a much more transparent way than in the past. That we are asking judges to take decisions which have formerly been left either to the executive without restraint or to parliament. That this changes role means judges are doing things which bring them much more into controversial areas than in the past”. See, “The Role of Judges in a Modern

IV. The Proper Province of Extra-Curial

What then is the proper province and form of extra-curial comment? Obviously, there are no globally established international standards or guidelines on this question. The personality, standing and integrity of the judge, the nature of the subject or issue at stake and the occasion to comment will all combine in particular ways to give form to the manner in which the judge in question will give voice properly.

It is however possible to sketch out broadly circumstances which would tend to a proper exercise of the role being proposed here. First of all, recalling the arguments that have been made as to the proper role of both courts and judges in their official contexts, the most commanding role of a judge in favour of refugee protection will normally be exercised in that context. In this setting, properly constructed judgements, making imaginative and creative use of the facility of obiter dictum, are some of the most veritable vehicles through which the role of the judge theorized in this paper can be played.

Beyond this, in his or her extra-curial context, the judge has to seize every opportunity which becomes available to give voice publicly on themes and issues in favour of the rights of those whose life are at stake. Academic writings and

Democracy”, Magna Carta Lecture, Sydney, Australia, 13 September 2006 www.dca.gov.au/speeches/2006/sp060913.htm (accessed 19 December 2008). Aharon Barak, **The Judge in a Democracy**, Princeton University Press, 2008, discusses the role of judges beyond deciding on disputes put before them under the law and argues that, beyond dispute resolution, their ultimate accountability is to the “internal morality” of democracy.

public speeches in conferences, seminars, functions in which judges are invited to deliver keynote speeches are thus some of the most facilitative and predictable vehicles for purveying the extra-curial role of the judge argued and urged in this paper.

Thirdly, the judge has what I will refer to as a demonstrative role. This refers to the imperative that, especially at moments when refugee rights and protection needs are being put critically at stake, judges should demonstrate their concern accordingly. As an example, they should consider visiting detention facilities at which refugees or foreigners as such are abusively detained. In those cases where there has been a public eruption of sentiment or even violent action against refugees, asylum-seekers or migrants generally, such as in xenophobic attacks, a well-timed visit by a judge and appropriate voicing of empathy and concern would speak volumes both then and afterwards. As persons mass at borders seeking entry into a country for their safety in flight from risk at home, it would be good for a judge to be widely reported as having been present there and expressed empathy for them and their plight.

Beyond this, it is admittedly much more contentious to theorize the extent to which judges can properly project themselves in overtly political contexts before the concern would be triggered that the line which divides properly judicial from political roles would have been crossed. An account of how Francis Nyalali, Chief Justice of Tanzania from 1967 to 2000, curved out a role for courts in the politics of his country that acted in favour of the rule of law offers some interesting examples and lessons. At a time

when the actions of the executive had impugned and corrupted the very integrity of the courts themselves, facing the Chief Justice with the dilemma whether he should not even resign, he had chosen rather to directly fight by taking his case directly into the political process, engaging and advocating with the ruling party and the political leadership of the country at the very highest level. The Chief Justice's actions are shown to have produced the results that would have been desired, leading to positive legislative actions to protect and foster the rule of law. Yet, the fact that he would become more and more politically embroiled and even came to be called upon himself to become a candidate for political office highlights the dilemmas imbedded in the problematic¹¹.

V. Conclusion

It is important that the role and vision of judges as impartial, independent and fair dispensers of justice should be scrupulously preserved. Yet, judges have thus far had, and will continue to influence eminently political and social issues, either directly or in more obscure and indirect manner. Even the most independent and non-partisan rulings can have far-reaching consequences for the politics of citizens. Modern judiciaries are thus at one and the same time both legal and political institutions. While they most evidently play a crucial role in underpinning the image of both courts and judges as independent sources of fairness and justice, the shibboleths of judicial restraint should not

¹¹ Jennifer A Widner, **Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa**, W.W. Norton and Company, New York, 454. See comparative review by Mary L Dudziak, "Who cares about courts? Creating a constituency for judicial independence in Africa", University of Southern California Law School Public Policy Research Paper No, 03-3.

immobilize judges from rising to important roles in supporting a human rights cause in a manner for which only an extra-curial role will be sufficient. Not only can such a role be carried out properly, it is argued that, in the field of refugee protection, such a role is often imperative.

The role of the judge

Isaac Lenaola

Introduction

“An independent, impartial, honest and competent judiciary is integral to the upholding of the rule of law, engendering public confidence and dispensing justice”.

Commonwealth (Latimer House) Principles, IV

- Independence and impartiality are central to the functions of any judiciary and is both institutional and personal to every judge.
- Judges should not be bound by what other people think including by the Executive and Legislative Arms of government but only by their personal, moral and political reference and subject only to the Constitution and the Law.
- Security of Tenure is given to insulate judges from the whims of the Executive but is it also given to gag them and to stop them from having viewpoints other than those contained in their judgments?
- What is the traditional role of a judge? To dispense justice without fear or favour but not to have any public view about anything? Is judicial reticence a good thing and why?

- In Kenya, the Judicial Service Conduct of Conduct provides at Rule 14 as follows:

“A judicial officer and any officer in the Judicial Service shall not make public statements on matters affecting Government programmes or policies of the Judicial Service without the specific authority of the Chief Justice. A public statement includes communicating with the press.

A judicial officer shall not, without the express permission of the Chief Justice-

- a) Act as the editor of any newspaper or take part directly or indirectly in the management thereof; or
- b) Publish in any manner anything which may be reasonably regarded as of a political or administrative nature, whether under his own name, under a pseudonym or anonymously.

A judicial officer, and any officer in the Judicial Service whether on duty or on leave of absence, should not allow himself to be interviewed on questions of public policy affecting Kenya or any other country without the permission of the Chief Justice.

Whilst it is not desire to interfere with a judicial officer’s liberty of the free speech, any lack of discretion on his part likely to embarrass the Government of the Judicial Service may result in

appropriate consequences for the officer responsible.”

- What of the constitutional freedoms including that of assembly and speech? Does it not apply to judges?

Emerging Trends

Judges the world over have kept their silence on matters extra-curial and generally have studiously avoided the temptation to react publicly to any situation around them even in the areas of human rights abuses. Is this a good thing and why?

However with the internet taking centre stage in the world of communication technology, there are new and controversial happenings.

Example: The blog www.becker-posner-blog.com.

The blog was created and is managed by two close intellectuals one of whom is Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit.

Judge Posner was at one time, the Chief Judge of that court. He is also a Senior Lecturer at the University of Chicago Law School and an accomplished author including authoring the following books: *Cardozo: A study in Reputation*, *Sex and Reason*, and *Aging and Old Age*.

Some of the subjects tackled in his debates with Gray Becker, Nobel Price Laureate include: *The future of Free*

Market Conservatism; Bail out the Detroit-Auto Manufacturers; and Catastrophic Risks, Resource Allocation and Homeland Security.

There is disquiet amongst some of judge Posner's colleagues about the blog but as of today it has attracted a large number of bloggers and is immensely popular and is widely quoted by other bloggers.

What is wrong with the judge expressing his views outside the bench? Is there any ethical code he has breached and if so why does he remain on the bench and no action has been taken against him?

Other issues

Should Judges comment on attacks on their independence only or even on human rights violations around them but not brought to their courts?

Examples:

- In Uganda when an elite Military force called the "Black Mambas" stormed the High Court building in Kampala on 16.9.2005 and held judges, advocates and litigants at siege, the judiciary took the unprecedented step of laying down their tools, spoke forcefully about the collapse of the rule of law in the country. None was more forceful than the Hon. Mr. Justice James Ogoola who penned a masterpiece in the nature of a poem titled "The Rape of the Temple". The Government later accepted that it had gone overboard.

- In Pakistan, when the government sought to punish judges for exhibiting independence when the country was undergoing political turmoil, the Chief Justice led a huge demonstration that culminated in serious changes in the country.
- Are these extra-curial activities in any way a breach of the code of silence among judges?
- In any event, who defends the judiciary today and without a defender, what should judges do?

In Kenya, there is the risk of the Constitution being amended to remove the security of tenure for Judges and have them reapply for their jobs? Should they sit and watch the events around them because the issue has not been placed before them in the nature of a constitutional reference?

Human Rights Questions

- The genocide in Rwanda – where were judges? Could they have made a difference had they stood up?
- All other human rights abuses around us – what is our role? Should we be passive observers?
- Can we make a difference and how?

Conclusion

“The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with International Human Rights Conventions and International Law, to the extent permitted by the domestic law of each commonwealth country”.

Latimer House Principles - IV

Is that all we should do? In a changing world, can pronouncements outside the bench have impact?

Should we relax the gag code and create parameters and limits to extra-curial commentaries?

Extra-Curial Pronouncements of Judges: To Speak or not to Speak...?

James Ogoola

Prologue

“The perverse mouth, I hate.” (Proverbs 8:13)

Introduction

I am deeply delighted to have been invited by the United Nations High Commission for Refugees to participate in this crucial Eighth World Conference. The timing of the Conference is just right; the theme of the Conference, is thought-provoking; and the site of the Conference, simply superb!

I bring you fraternal greetings and hearty felicitations from the people and nation of Uganda – a land which, for nearly the whole of its short history of approximately fifty years, has been wracked by the ugly scourge of incessant wars and their attendant waves of refugee challenges. Paradoxically, this is also the same land which gives birth to the sacred River Nile, flowing north from the Equator, through the sud of Sudan and the perched desert of Egypt, to the fertile Delta of Cairo and then, ultimately, empties into the mighty Mediterranean. It was to this River that everybody, who is anybody in Holy Scriptures, ran for refuge: from Abraham to Joseph; from Jacob and his tribe of Twelve to Moses, Aaron and Joshua; and indeed, right up to the Infant God Himself (baby Jesus, escaping the

bloody baby massacre perpetrated the wicked Herod, the megalomaniac vassal king of the Jews).

Coming from such a Country whose own history and associated history are deeply steeped in the international refugee syndrome - coming from such a land, to your own land here in South Africa, I cannot but help to make one or two fond remarks. From the dark murky shadows of the abhorrent and pernicious apartheid, South Africa has emerged, with its wounds bandaged, to blaze a trail on this Continent of Africa in many spheres of life. One: the vibrancy and radiance of your commerce on a still dark continent, is stellar. Two: your Constitutional Court and its sterling job, courageously shouldered by judicial titans of our time, is a marvel to behold. The fundamental and overarching nature and quality of the precedents of the Constitutional Court of South Africa, are legendary household words in the judicial households of all sister jurisdictions across the length and breadth of the African judicial landscape. Three: the immeasurable success of the racial and cultural mend and mix in this mythical land, has been truly miraculous – particularly so coming as it has done so swiftly and so solidly on the heels of the demise of the horrible nightmare of apartheid.

All these spectacular phenomena have materialized in no small measure as a result of the audacity of two or three of God's anointed saints: Nelson Madiba Mandela (the Liberating Moses of the Cape); Desmond Tutu (the priestly Aaron of the South); and Oliver Tambo (the very embodiment of the Joshua of the *Umkhonto we Sizwe*). To all these valiant Patriarchs and to the entire Elect Nation of

the land at the Cape of Good Hope, we bring our unstinted, heart-warmed salutations!

The Topic

I have been asked to speak about “The Role of the Judge: Extra-Curial Commentary on Social Issues” – the statements that Judges in our system of justice may or may not freely make off the bench. Now, the judicial systems represented here are many and quite diverse. We have, represented at this Conference, the whole gamut of Roman-Dutch law, the Common law, Civil law, African law, Islamic law and assorted varieties spanning these five systems in their diverse manifestations. I am no expert in all five; nor, indeed, do I claim any fundamental familiarity with any one of them. Nonetheless, the topic we are discussing today does, in many ways, cut right across the frontiers of all these legal systems – having spawned a large swathe of international traditions, practices and applications. Essentially, the topic for our discussion is rooted in issues of the propriety and the permissibility (including the content and scope) of what a Judge may or may not pronounce, both verbally and in writing, when not sitting on the bench. To what extent does the judicial robe gag its wearer from speaking out openly, loudly and publicly concerning topical issues in the community, locality or the nation; or concerning issues dear to the heart, conscience, morality, feelings and values of the Judge?

All these, raise basic and complex questions enshrined in the Code of Judicial Conduct – a subject on which Judges of all jurisdictions have been actively working in the very recent past; and have produced a veritable number of

documents and instruments of an international character, whose application straddles all the legal systems of the World.

The Applicable Law and Practice

It is quite evident that the topic of our discussion is governed largely, if not exhaustively, by the body of rules concerning Judicial Conduct. Normally, such rules are predominantly a function of each national jurisdiction; and are rarely statutorily enforceable rules. They tend to be only *Guidelines* adopted by the respective national organizations of the Judges themselves. Accordingly, they tend to be *Codes of Conduct*, not rules of statute.

Nonetheless, over the last one decade or so, there have been intensive efforts to recognize regionalize and internationalize the basic tenets of these national Codes of Conduct into comprehensive instruments and documents that are accepted and embraced worldwide. Among the best known efforts in this regard, have been the following:

- The *Siracusa Principles* (1981), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers.
- The *United Nations Basic Principles on the Independence of the Judiciary*, endorsed by the United Nations General Assembly (1985).
- The *Singhvi Declaration* (1989), prepared by Dr. L.V. Singhvi, United Nations Special Rapporteur on the study on the Independence of the Judiciary.

- The *Beijing Statement of Principles of the Independence of the Judiciary* (1997), adopted in Lwasia Region by the Conference of Chief Justices.
- The *Latimer House Guidelines for the Commonwealth of Nations* (August 1998) on good practice governing relations between the Executive, Parliament, and the Judiciary to promote good governance, the rule of law and human rights.
- The *European Charter on the Statute for Judges* (July 1998), by the Council of Europe.

In February 2001, the Judicial Integrity Group, comprising a diverse number of Chief Justices and Senior Judges from around the World, met in Bangalore, India, to adopt a Draft Code of Judicial Conduct. The Bangalore Meeting was sponsored by, among others, the United Kingdom Department for International Development, the Government of India, and the UN High Commission for Human Rights. Over the following 20 months, the Bangalore Draft was widely disseminated and discussed by Judges in both the common law and civil law jurisdictions – totaling in all some 75 countries: at meetings and conferences of Chief Justices: including the Strasbourg Meeting of June 2000 (intensive review of the Bangalore Draft by the civil law system); and The Hague Round-Table Meeting (in November, 2002), at which the Bangalore Draft was revised to take stock of, among others, the Australian Code of Judicial Conduct, the Baltic States Model Rules of Conduct, the Chinese Code of Judicial Ethics, and the Macedonian Code of Judicial Ethics. Eventually, the Bangalore Draft was adopted as the *Bangalore Principles of Judicial Conduct* at the 59th Session of the United Nations

Commission on Human Rights in its Resolution No. 2003/43 of 29th April 2004.

In his Preface to the *Commentary on the Bangalore Principles of Judicial Conduct*, (Sept. 2007. hereinafter referred to as the “*Bangalore Commentary*”) the Chairperson of the Judicial Integrity Group, C G Weeramantry, gives a succinct summary of the scope, impact and reach of the Bangalore Principles – thus:

The Bangalore Principles have increasingly been accepted by the different sectors of the global judiciary and by international agencies interested in the judicial process. In the result, the Bangalore Principles are seen more and more as a document which all judiciaries and legal systems can accept unreservedly.

In short, these principles give expression to the highest traditions relating to the judicial function as visualized in all cultures and legal systems.

(see Bangalore Commentary, p.5).

The Right of Expression

Clause 4.6 of the Bangalore Principles provides as follows:

A judge, like any other citizen is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

The above rule is a reflection of the Constitutional protection of the right of every citizen to freedom of speech, freedom of thought, conscience and belief, and freedom to assemble and demonstrate together with others, as well as freedom of association (including freedom to form and join associations, unions, and political or civic organizations). While all other citizens may enjoy the above freedoms to the full, it is not exactly so with Judges. By their very vocation, Judges must, in their enjoyment of these rights, exercise a discretion and responsibility commensurate with their high office in society – an office that calls for the highest form of impartiality and independence. And so, while the Judge does not surrender his or her Constitutional right to the freedom of expression, he or she must exercise restraint in order to maintain the public's confidence in the impartiality and independence of the Judiciary. The test for the Judge's involvement in public debate is two-fold: one, whether such involvement could reasonably undermine confidence in his or her impartiality; two, whether such involvement may unnecessarily expose the Judge to political attacks or be inconsistent with the dignity of judicial office.

Public Controversy

Judges should be above public controversy – in both their utterances or deeds. This is so because the very essence of being a Judge is the ability to view the parties to disputes in an objective and judicial manner; to be seen by the public as:

...exhibiting that detached, unbiased, unprejudiced, impartial, open-minded, and even-handed approach which

is the hall-mark of a judge. If a judge enters the political arena and participates in public debates – either by expressing opinion on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government – he or she will not be seen to be acting judicially when presiding as a judge in court. The judge will also not be seen as impartial when deciding disputes that touch on the subjects about which the judge has expressed public opinions; nor, perhaps more importantly, will he or she be seen as impartial when public figures or government departments that the judge has previously criticized publicly appear as parties, litigants or even witnesses in cases that he or she must adjudicate. (See Bangalore Commentary, para. 95).

Derogatory Comments

In those instances in which a Judge is free to express himself publicly, he or she must refrain from making derogatory comments, expressions, gestures or behavior that may be reasonably interpreted as showing insensitivity or disrespect – particularly so derogatory comments based on racial, cultural, sexual or other stereotypes; or disparaging comments about ethnic origins. The Judge should ensure that his/her remarks do not have racist overtones, and do not even unintentionally offend minority groups (see para. 187 of the *Bangalore Commentary*, at p.124).

To speak or not to speak...?

Where members of the Public, the Legislature and the Executive comment publicly (as they are entitled to do) on what they perceive to be limitations, faults or errors of a

Judge and his/her judgments, the Judge concerned (according to the convention of political silence), should not ordinarily respond in kind. Indeed, rarely do Judges nowadays even invoke the rules relating to contempt of Court to suppress or punish criticism of the Judiciary or of a particular Judge.

The better and wiser course is to ignore any scandalous attack, rather than to exacerbate its publicity by initiating contempt proceedings. As has been observed:

justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even outspoken, comments of ordinary men.

(see Lord Atkin in *Ambard v Attorney General for Trinidad & Tobago* [1936]AC at 335, quoted in the *Bangalore Commentary*, para. 137).

On the other hand, a Judge may speak publicly, quite properly, in two particular situations:

(i) on matters that directly affect the Judiciary's operations, its independence, fundamental aspects of the administration of justice, or the personal integrity of a Judge. However, even here, the Judge must act with restraint and circumspection – without appearing to lobby or, indeed, to be seen as indicating how he or she would rule in particular disputes before the Court.

(ii) participation in a discussion of the law for educational purposes or to point out weaknesses in

the law – including giving helpful comments on draft legislation: but without giving or offering formal interpretations or controversial opinions on the law. The Judge should normally restrict his/her comments to the practical implications of the law or its drafting deficiencies; and avoid political controversy, Ideally, such comments should be given by the institutionalized Judiciary, rather than by individual Judges.

There is a third category of occasions on which a Judge may properly speak and act – but with the greatest circumspection – namely, where the Judge out of conscience, morals, feelings and values considers it a moral duty to speak out (for example, to join a vigil, hold a sign or sign a petition to express opposition to war). However, such a Judge would have to recuse himself/herself in the event of any such issue coming to the Judge's court, in order to avoid any perception of impartiality or doubtful judicial integrity.

Lecturing (Legal Education)

Judges may deliver lectures, participate in conferences and seminars, judge student training hearings, act as examiners; and even contribute to legal literature as authors or editors. These are professional activities (legal and professional education) that are in the public interest, and are highly encouraged. Nonetheless, the Judge should clarify the point that such contributions are not intended as advisory opinions or a commitment to a particular legal position in a court proceeding – for:

...until evidence is presented, argument heard and, when necessary, research completed, a judge cannot weigh the competing evidence and arguments impartially, nor can he or she form a definitive judicial opinion. (See the Bangalore Commentary, para. 157).

Notwithstanding the above, a Judge who writes or contributes to a publication (whether related to law or not) must not permit the publisher or anybody associated with the publication to exploit the Judge's office – such as through inappropriate advertising.

Confidential Information

Clause 4-10 of the Bangalore Principles provides that:

Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

A Judge who acquires any such confidential information whether of commercial value or not, must not reveal or use it for personal gain or for any purpose unrelated to judicial duties. This prohibition seeks to preserve the proper use of undisclosed evidence (such as evidence subject to a confidentiality order in a large-scale commercial litigation – see *Bangalore Commentary*, paras. 154 and 155).

Commercial Television

A Judge should eschew appearing on a commercial television network, to avoid the perception of his or her

advancing the financial interests of that organization or of its sponsors. Participation could be restricted to programmes connected with the law. Factors to take into account here include: the frequency of the Judge's appearances; the television audience; the subject matter; and whether the programme is commercial or not.

Participation in Extra-Judicial Activities

To avoid their isolation from the community, Judges may engage in appropriate extra-judicial activities – including writing, lecturing, teaching and speaking on non-legal subjects, if such activities do not detract from the dignity of the Judge's office; or do not interfere with the Judge's judicial duties.

A Judge may become a member of an organization dedicated to the preservation of religious, ethnic or legitimate cultural values – but should be conscious about becoming involved in, or lending his or her name to, any fund-raising activities, or soliciting membership for the organisation, if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

Electoral and Other Governmental Activities

While exercising functions as a Judge, the Judge should not be involved, at the same time, in executive or legislative activities. In Uganda, the matter has come to a head in at least two instances:

- (i) Inspector General of Government ("IGG") – The law (Act No. 5 of 2002) establishing that Office

requires the Inspector of Government (essentially an Ombudsperson) to be a Judge or a person of equivalent qualifications. In view of this, is it feasible for a sitting Judge to be appointed Inspector General of Government? The statutory powers of the IGG include *investigations* and *prosecution* and *disciplining* of errant Government officials – powers which on their face go well beyond the judicial function of a sitting Judge. To avoid any untoward conflicts of interest, a Judge who accepts appointment as IGG must first relinquish his or her judicial office.

(ii) Chairperson of the Amnesty Commission – Similarly, the statute (Cap. 294) establishing the Amnesty Commission requires the Chairperson to be a Judge or a person qualified to be a Judge. The Commission's duties are to assess and to grant amnesty (i.e pardon) to persons waging war against the State who genuinely renounce their rebellion and return to the community. Here again, a Judge who accepts appointment as Chairperson of the Amnesty Commission must first relinquish his or her judicial office.

Elsewhere, especially in the Southern African region, the law requires/permits Senior Judges of the Bench to chair the Electoral Commission. Given the tremendous risks for political controversy associated with Electoral processes (if not outright civil strife, as in Zimbabwe's recent elections; or even ethnic/political warfare, such as in Kenya's elections of 2008), the question arises whether, how and to what extent sitting Judges should be involved in the

electoral process – especially when it is the Judiciary which is the ultimate arbiter of the people’s election petitions?

Conclusion

To speak or not to speak? ... that is the question! Whether it is nobler to keep a judicious silence, or whether to take up verbal arms against a sea of judicial troubles ... that is the eternal judgment to be made by every Judge every time he or she opens the mouth to speak beyond the hallowed bench.

It is a question that pits the Judge’s own fundamental right of speech and expression and speech, against the Judge’s over-arching duty and responsibility owed to society at large to render justice to all:

- independently, impartially – without fear or favour,
- without affection or ill-will; and, even more importantly,
- without the *appearance* of any of these shortcomings!

As Shakespeare would say: *Therein lies the rub!*

Epilogue

You have been snared by the utterance of your lips caught by the words of your mouth ... Free yourself as a gazelle from the snare; or as a bird from the hand of the fowler.

(Leviticus 6:2-5)

Judicial freedom of speech in Canada

James O'Reilly

Judges occupy a unique position in society. What judges say matters to many – litigants, lawyers, other judges, students and the public as a whole. But most judicial speech is obligatory: we are required to give clear and logical reasons for our decisions. Only a small portion of judicial speech is optional – speeches, interviews, scholarly articles, panel presentations, and so on. In these areas, judicial speech is sometimes subjected to even greater scrutiny because it can reveal how it is we go about our main task of hearing and deciding cases. Accordingly, judges must take great care in what they say outside of court. Does this mean that they should be silent? Not at all. In fact, judges have a responsibility to inform the public about the judicial role and legal issues more generally. However, there are ethical parameters that define the proper scope of judges' freedom of speech. These parameters will operate differently in different jurisdictions, but I believe they are broad enough to be applicable to most judicial officers around the world.

The Scope of Judicial Speech

The Canadian Judicial Council publishes a document called *Ethical Principles for Judges*¹ that sets out a broad range of guidelines for judicial behaviour. It is not a “code” of conduct. It is meant to be advisory, not a set of prohibited

¹ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) [Principles].

behaviour. In turn, an Advisory Committee on Judicial Ethics receives inquiries from judges and provides confidential advice on ethical issues. (I am a member of this Committee.) A large number of these inquiries relate to matters of judicial speech. A common question is, “should I speak to this or that group?” or, “should I attend this or that function?”

Naturally, the Committee’s advice is based on the contents of the *Ethical Principles*. There are a number of them that apply.

Judges should ensure that their speech does “not raise reasonable concerns about their independence.”² They should also avoid comments that “reasonably may be interpreted as showing insensitivity to or disrespect for anyone.”³ The most important duty, however, is to avoid any conduct that would display a lack of impartiality. So, judges should not attend political gatherings or take part in controversial political discussions. They should “avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality.”⁴ The risk is that a judge may inadvertently create the impression that he or she does not have an open mind about a legal issue that could come before the court. Further, these kinds of comments are “likely to lead to public confusion about the nature of the relationship between the judicial on the one hand and the executive and legislative branches on the other.”⁵ Even if the judge says nothing, his or her mere attendance at a particular

² Judicial Independence, Commentary 2, *Principles* at 8.

³ Equality, Commentary 4, *Principles* at 25.

⁴ Impartiality, Commentary A.5, *Principles* at 32.

⁵ Impartiality, Commentary D.2, *Principles* at 39.

gathering could create a perception of political involvement or put his or her impartiality in doubt.⁶

These guidelines obviously do not describe the subject matter to which judges may or may not address themselves. Judges have to consider, therefore, whether their speech relates to a subject that could be considered politically controversial or that could come before the court. Certainly, there are many topics under the heading “human rights” that would be uncontroversial or unlikely to come before the court. Issues on which there is a broad consensus under international law (*e.g.*, the prohibition on torture or the rights of children) or which are well-established under domestic law (*e.g.*, constitutionally-entrenched rights) are obvious examples.

On the other hand, jumping into a debate on constitutional reform may be unwise. In Canada, in 1981, a judge (Justice Thomas Berger) was censured by the Canadian Judicial Council for speaking out in favour of including rights for aboriginal peoples in the Constitution and criticizing the political figures who had failed to do so. The Council concluded that the judge’s remarks were an “indiscretion” because they were addressed to “matters of a political nature, when such matters were in controversy.”⁷ The Council did not recommend the removal of the judge but, in any case, he decided to resign. In due course, aboriginal rights were included in the constitutional reform package

⁶ Impartiality, Commentary D.3, *Principles* at 40.

⁷ William A. Esson, “The Judiciary and Freedom of Expression”, (1985) 23 U.W.O. L. Rev. 159 at 163.

that was enacted in 1982, the year after the judge spoke out.⁸

Interestingly, the Council suggests in the *Ethical Principles* that it might now take a more lenient view in situations similar to the Berger case. It states, after specifically referring to Berger, that “having regard to judges’ special knowledge and experience in matters relating to the administration of justice and their obligation to preserve judicial independence, the proper ambit for their out of court interventions may be somewhat wider in appropriate cases.”⁹

The Duty to Speak

Indeed, the *Ethical Principles* suggest that judges may actually have a duty to speak on certain subjects and in particular circumstances. For example, judges should “take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence.”¹⁰ Judges can also “contribute to the administration of justice by...taking part in continuing legal education programs ... and in activities to make the law and the legal process more understandable and accessible to the public.”¹¹ Even in controversial areas, judges can speak out if the subject matter “directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the

⁸ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35; Martin Felsky, “The Berger Affair and the Independence of the Judiciary” (1984), 42 U. Toronto Fac. L. Rev. 118.

⁹ Impartiality, Commentary D.6, *Principles* at 42.

¹⁰ Judicial Independence, Commentary 7, *Principles* at 11.

¹¹ Diligence, Commentary 13, *Principles* at 22.

personal integrity of the judge.”¹² Similarly, judges can get involved in law reform or other non-partisan scholarly pursuits “directed to the improvement of the law and the administration of justice”, so long as their conduct does not amount to lobbying or indicate how they would rule in future cases.¹³ Finally, as mentioned, the Council tells judges that they have a duty to help the public understand the role of the judiciary, the functioning of the legal system and the administration of justice.¹⁴ This duty includes “setting the record straight” when the media publish false or misleading information about the judiciary or a judicial decision.

All of this leaves judges in the following situation: they can, or even should, speak out of court on matters relating to the administration of justice, judicial independence, the operation of the courts, a judge’s personal integrity, law reform, legal scholarship, or the correction of errors by the media. While they should generally avoid controversial subjects, judges can address sensitive topics if they are uniquely placed by virtue of their knowledge and experience to do so. However, they should always communicate in a non-partisan way, make clear that they are independent from the other branches of government, remain impartial about issues that could come before the court, and ensure that their conduct does not discredit the judiciary.

¹² Impartiality, Commentary D.6, *Principles* at 41.

¹³ Impartiality, Commentary D.7, *Principles* at 42-43.

¹⁴ Canadian Judicial Council, *The Judicial Role in Public Information* (Ottawa: Canadian Judicial Council, 1999).

Conclusion

In my view, judges enjoy a considerable range of freedom of speech. True, there are numerous parameters that judges must recognize and respect. Many judges will assess these factors and, out of caution, choose silence. This is the traditional judicial attitude toward public speaking. Still, as the Canadian Judicial Council recognizes, judges can, and should, contribute a good deal to public discourse on important social issues, so long as they accept the limitations their judicial role places on them. In my view, this leaves considerable room for judges to speak on vital topics of public interest, including human rights.

SESSION 7

Chaired by Judge President Bernard Ngoepe
High Court, South Africa

The test applied by the courts on judicial review of refugee law decisions and recent developments

* * * * *

First speaker

“Judicial involvement in refugee decisions in Canada”

Justice Marshall Rothstein
Supreme Court of Canada

Second speaker

“The test applied by the courts on judicial review”

Justice Professor Harald Dörig
Supreme Administrative Court of Germany

Third speaker

“Administrative law and refugee decisions”

Professor Hugh Corder
Dean of the Faculty of Law
University of Cape Town

Fourth speaker

"Administrative and Judicial Review of Asylum Decision in the United States of America" presented jointly by:

Lori Scialabba, Associate Director
Refugee, Asylum and International Operations,
Department of Homeland Security, USCIS

and

Juan P. Osuna, Chairman,
Board of Immigration Appeals
Executive Office of Immigration Review
Department of Justice

Judicial Involvement in Refugee Decisions in Canada¹

Introduction

In Canada, judges only become involved in the refugee process, if they ever do at all, once claims have already made their way past executive decision makers. It is not the judge's role to make the decision as to whether a particular person should benefit from refugee protection in Canada. Rather, the judge's role in the refugee process is limited to ensuring that the executive is abiding by the Constitution and, more importantly for this paper, abiding by the statutory framework that the Parliament of Canada has enacted to govern refugee claims in Canada. Deference is generally the byword of the judiciary's role in the Canadian refugee process. The statutory framework for refugee claims provides for an important, but limited role for the judiciary. This is partly a policy choice by Parliament. Practically, however, it is a recognition that the volume of refugee claims in Canada far surpasses the ability of the Canadian judiciary to respond. In 2007, the last year for which complete statistics are available, the vast majority of cases commenced in the Federal Court - the Canadian Court tasked with deciding immigration and refugee cases - were immigration related.² This paper presents an

¹I am indebted to my law clerk Michael Fenrick, a 2008 graduate of Dalhousie Law School in Halifax, Nova Scotia, for much of the work involved in the preparation of this paper.

²Federal Court of Canada, *Statistics: Activity Summary - January 1, 2007 to December 31, 2007*, online:

<http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics_dec07>

overview of the Canadian refugee process and the judiciary's role in that process.

The Canadian Refugee System: An Overview

In Canada, refugee protection is conferred on a person who is either determined to be a refugee as defined by the United Nations *Convention Relating to the Status of Refugees* ("Refugee Convention") or is a person in need of protection.³ Canada's refugee protection system has two main components. The first is the Refugee and Humanitarian Resettlement Program ("Resettlement Program"). This program is for people making protection claims from outside of Canada. The second component of our refugee system concerns claims for protection made from within Canada itself (for the purposes of this paper, "asylum seekers").⁴

While this paper largely concerns asylum seekers, a more complete picture of Canada's refugee processes requires a description of the Resettlement Program initiative. Briefly, the Resettlement Program involves Citizenship and Immigration Canada (the "CIC") working with the United Nations High Commissioner for Refugees, as well as other referral groups and private sponsors, to select refugees from abroad for resettlement in Canada.⁵ Sponsors must meet certain eligibility requirements, for example they must not have been convicted of a serious crime.⁶

³*Immigration and Refugee Protection Act*, SC 2001, c. 27, s. 95 [IRPA].

⁴Citizenship and Immigration Canada, *The Canadian Refugee System* (3 November 2005), online: <<http://www.cic.gc.ca/english/refugees/index.asp>>.

⁵For more information, see *Resettling Refugees in Canada*, online: <http://www.cic.gc.ca/english/refugees/outside/index.asp>.

⁶See *Immigration and Refugee Protection Regulations* (SOR/2002-227), ss. 138, 156 [Regulations].

Claimants who hope to be resettled must demonstrate their inability to return to their country of nationality or to remain in the country where they are receiving temporary protection. Refugees eligible for resettlement must also undergo medical, security and criminality screening, as well as demonstrate that they will be able to establish themselves in Canada.⁷ In urgent circumstances, claimants may be excepted from the latter requirement.⁸ Persons who meet the criteria for the Resettlement Program may apply for a permanent resident visa at a Canadian immigration office abroad.⁹ In 2005, approximately 10,000 persons were selected from abroad through the Resettlement Program. This represents about one-third of all protected persons landed in Canada in that year.¹⁰

Claiming Refugee Protection from within Canada: The Process

This paper's focus is on the judicial processes that commence, if at all, only after persons who have made their way to Canada of their own initiative apply for protection from within Canada and are denied. Before examining this issue, it is useful to have a general sense of the Canadian process for granting protection to asylum seekers.¹¹ Guiding the refugee protection process in Canada is the definition of refugee contained in Article 1 of the Refugee

⁷*Ibid.*, s. 139.

⁸*Ibid.*, s. 139(2).

⁹*Ibid.*, s. 150.

¹⁰Citizenship and Immigration Canada, *Facts and Figures: Immigration Overview: Permanent and Temporary Residents* (2005), online: <<http://dsp-psd.pwgsc.gc.ca/Collection/Ci1-8-2005E.pdf>>.

¹¹See generally *Process for Making a Claim for Refugee Protection*, online: <http://www.irb-cisr.gc.ca/en/references/procedures/processes/rpd/rpd_e.htm>.

Convention,¹² incorporated into Canadian law by the Immigration and Refugee Protection Act (the “IRPA”).¹³ The language adopted in the IRPA provides that:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.¹⁴

This definition has been supplemented in the *IRPA* to include persons who do not strictly meet the definition of a Convention refugee, but who, if removed to their country of origin, would be subjected either:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

¹²*Convention Relating to the Status of Refugees*, 189 UNTS 2545, art. 1 [Refugee Convention].

¹³*IRPA*, *supra* note 3, s. 96.

¹⁴*Ibid.*

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment.¹⁵

As can be seen by Canada's incorporation of both the Refugee Convention and the Convention Against Torture into the statutory language of the *IRPA*, the domestic Canadian refugee context is influenced by international law, as well as by domestic legal norms.

Domestic Canadian law also adopts the exclusions contained in the Refugee Convention for persons who would otherwise meet the definition of refugee, but who are deemed not to be in need of protection or are considered to be undeserving of that protection.¹⁶ These are included in a schedule to the *IRPA*. This schedule provides that a claimant will not be considered for protection where:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹⁷

These exclusions are drawn from the Refugee Convention.

¹⁵*Ibid.*

¹⁶*Refugee Convention, supra* note 12, arts. 1E and 1F.

¹⁷*Ibid.*, Schedule, F.

Within Canada, persons seeking refugee protection are filtered through two levels of decision makers prior to any possible judicial involvement. To claim refugee protection from within Canada or at its border, a person must first notify a CIC officer (an “immigration officer”) of her intention. This can be done at any port of entry to Canada, such as a border crossing, an airport or a seaport, at a Canadian Immigration Centre or a Canada Border Services Agency office. Once a claim has been made, the claimant will then be interviewed by an immigration officer. This immigration officer makes the initial decision as to whether a person is eligible to claim refugee protection in Canada.¹⁸ If the officer decides that the claim is eligible, she will forward the person’s application to the Refugee Protection Division of the Immigration and Refugee Protection Board (“IRB”) of Canada. In the event that the immigration officer does not make a decision within three days, the claim will automatically be sent to the IRB for consideration.¹⁹

The claimant must demonstrate to the immigration officer that he or she is eligible for protection in Canada.²⁰ A claim is ineligible in certain defined circumstances that include:

- the claimant has already been granted refugee protection in another country;
- the claimant has previously been refused refugee protection in Canada;

¹⁸*IRPA*, *supra* note 3, s. 100.

¹⁹*Ibid.*, s. 100(3).

²⁰*Ibid.*, s. 100(4)

- the claimant came to Canada from or through a designated safe third country where she could have claimed refugee protection;
- the claimant is a security risk, has violated human or international rights, has committed a serious crime or has been involved in organized crime.²¹

If the immigration officer decides that the claimant is eligible, then she will refer the claim to the IRB for determination. If the immigration officer decides that the claim is ineligible, the claimant may apply for leave to a judge of the Federal Court of Canada to judicially review the immigration officer's decision.²² The immigration officer's decision on eligibility cannot be appealed to any other administrative tribunal or court.

If the matter is referred, the IRB will determine the fairest and most efficient way for the claim to be heard. The IRB will consider a number of factors, including the country against which the claim has been made and the nature of the claim itself before deciding what route the claim will follow. There are three possible routes:

- a fast-track expedited process;
- a fast-track hearing;
- a full hearing.²³

The fast-track expedited process is used for claims that are manifestly well-founded. In the expedited process, the

²¹*Ibid.*, s. 101.

²²*Ibid.*, s. 72.

²³*Supra* note 11.

claimant meets with an IRB employee called a refugee protection officer (“RPO”). The RPO interviews the claimant and then makes a recommendation to an IRB decision maker. That decision maker then decides whether the claim should be accepted without a hearing. A fast track hearing is held where a claim appears to concern only one or two issues that are not complex. An RPO does not normally attend a fast track hearing.²⁴ If the claimant is not granted protection through the expedited process or a fast track hearing, then a full hearing is ordered.²⁵ This hearing is quasi-judicial in nature and follows specified rules and procedures.²⁶ Decision makers in these hearings are independent and appointed by the government of Canada.²⁷ An RPO will often assist the decision maker to ensure that all evidence is presented. In some cases, counsel will represent CIC to argue against a specific claim. The claimant must establish on a balance of probabilities that they meet the criteria for refugee status in Canada. All three processes are considered to be non-adversarial. The decision maker assumes an inquisitorial role to ensure that all of the evidence upon which the claim is based is heard. Refugee hearings are normally private, and not open to the media or the public generally.²⁸ They are open to members of the United Nations High Commissioner for Refugees.

²⁴See generally *Fast Track Policy: Hearings Process* (14 March 2005), online: <http://www.irb-cisr.gc.ca/en/references/policy/policies/hearings_e.htm>.

²⁵See generally *Tribunal Process*, online: <http://www.irb-cisr.gc.ca/en/references/procedures/index_e.htm>.

²⁶See generally *Refugee Protection Division Rules* (SOR/2002-228).

²⁷Citizenship and Immigration Canada, *Reform of the Immigration and Refugee Board's Governor in Council Appointments: Background*, online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2004/2004-03-16.asp>>.

²⁸*IRPA*, *supra* note 3, s. 166(c).

The IRB decision maker determines whether refugee protection should be conferred on the claimant. If protection is conferred, then the claimant can apply to CIC to become a permanent resident of Canada. If the decision maker determines that the claimant is not entitled to protection, the claimant may seek leave of the Federal Court for judicial review of the decision. Counsel for CIC may also apply to the Federal Court for leave to review any decision made by the decision maker.²⁹ Although provisions exist within the *IRPA* that provide a statutory framework for an internal appeal tribunal (the Refugee Appeal Division), this legislation has not yet been implemented.³⁰

If the refugee claim is rejected, and leave to the Federal Court is refused or not sought, then the claimant will be removed from Canada under a departure order. The precise timing of removal depends on the nature of the decision.³¹ If the claimant refuses to leave, the departure order becomes a deportation order. This means that the claimant cannot return to Canada without the Minister of Citizenship and Immigration Canada's (the "Minister of Immigration's") permission.³²

Other Avenues for Persons Seeking to Stay in Canada

In the interest of providing a complete picture of the Canadian process, it is important to canvass briefly two

²⁹*Ibid.*, s. 72.

³⁰*Ibid.*, ss 110-11. See also Citizenship and Immigration Canada, *The Refugee Appeal Division: Backgrounder*, online: <<http://www.cic.gc.ca/english/refugees/rad-backgrounder.html>>.

³¹*IRPA*, *supra* note 3 at s. 49.

³²*Regulations*, *supra* note 6 at s. 226.

additional issues that may arise in the claims process. First, the extra-judicial avenues that may be available to a claimant seeking to stay in Canada. And second, the processes involved when a refugee claim gives rise to security concerns.

There are two processes that may entitle a person to stay in Canada who otherwise must be removed because they do not merit refugee protection. The first of these is a discretionary power. At any point in the claim process, claimants can apply to the Minister of Immigration to stay in Canada on humanitarian and compassionate grounds, even when the claimant does not meet the criteria for refugee status in Canada.³³ There is no limit on the number of times that a claimant can apply for this relief. This method is often a last resort for those claimants who will face particular hardship if they are returned to their country of origin. The Minister of Immigration's decision is highly discretionary and there is no right to appeal. However, although infrequent, decisions of the Minister of Immigration based on humanitarian and compassionate grounds have been successfully judicially reviewed in Canadian courts.³⁴

The second process is the pre-removal risk assessment ("PRRA").³⁵ Most people subject to a removal order may apply for this assessment. When assessing whether a claimant qualifies for this relief, an immigration officer is tasked with assessing the risk of persecution if the claimant is returned to his or her country of nationality, including

³³*Ibid.*, s. 25.

³⁴See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

³⁵*IRPA*, *supra* note 3, ss. 112-16.

the risk of torture or cruel, inhuman and degrading treatment.³⁶ This is assessed with regard to the criteria established in the Refugee Convention as well as the Convention Against Torture. The immigration officer makes the decision in light of the information from the IRB hearing. New evidence can only be considered where it was previously unavailable or not “reasonably available” at the date of the hearing.³⁷ If the immigration officer accepts the risk alleged, then normally refugee protection will be conferred on the claimant who can then apply for permanent residency. However, in cases that involve serious criminality or national security concerns, there will normally only be a stay of the removal order. If the result of the PRRA is that there is no risk to the claimant if returned, then the removal order is reactivated if previously stayed. A PRRA decision can be reviewed by the Federal Court where leave is granted by a judge of that court.³⁸

National Security, Serious or Organized Criminality

In some cases, the asylum seeker will be considered inadmissible to Canada because his or her past raises concerns related to security. As noted above, a person can be denied refugee protection because he or she has been found guilty of a serious crime, has been involved with organized crime, or because has violated international law or human rights. He or she may also be declared inadmissible because of government concerns that the claimant is a risk to national security. In these cases, the Minister of Immigration and the Minister of Public Safety

³⁶Citizenship and Immigration Canada, *Pre-Removal Risk Assessment* (9 March 2005), online: <<http://www.cic.gc.ca/english/irpa/fs%2Drisk.html>>.

³⁷*IRPA*, *supra* note 3, s. 113(a).

³⁸*Ibid.*, s. 72.

and Emergency Preparedness (together the “Ministers”) may sign a security certificate stating that the claimant is inadmissible to Canada.³⁹ This certificate is then referred to a judge of the Federal Court. At the time that the certificate is referred, the Ministers must file with the court the information and evidence upon which the certificate is based, as well as a summary of that evidence. This summary will not include any information that in the Ministers’ opinion would endanger national security or jeopardize any person’s safety if made public, although the judge will have access to that evidence when deciding the matter.⁴⁰ This summary is provided to allow the person named in the certificate to have at least some basis from which he or she can reasonably challenge the government’s case.

The judge must then make a determination of the certificate’s reasonableness.⁴¹ This amounts to a kind of judicial review of the Ministers’ decision to issue the security certificate. However, special procedures provided in the *IRPA* govern this sort of judicial review. The *IRPA* provides that the judge tasked with reviewing the certificate must proceed with determining the reasonableness of the certificate as informally and expeditiously as the circumstances and the rules of natural justice allow. The judge may hear evidence both *in camera* and in the absence of the person named in the certificate. This may be done on the judge’s own motion and shall be done where the Minister of Public Safety and Emergency Preparedness so requests, either because the information or

³⁹*Ibid.*, s. 77(1).

⁴⁰*Ibid.*, s. 77(2).

⁴¹*Ibid.*, s. 78.

evidence could be injurious to national security or because it could endanger a person's safety. However, even where evidence is heard *in camera*, the judge must continue to ensure that the person named is provided with a summary that reasonably allows him or her to know the case that he or she must meet. If the judge determines that the certificate is reasonable, that decision is conclusive proof that the person is inadmissible to Canada and he or she will be removed.⁴² This decision cannot be appealed or judicially reviewed.⁴³

The certificate process has changed considerably as a result of the Supreme Court of Canada's decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration Canada)* and Parliament's legislative response to that decision. In order to strike a balance between security and the right of the named person to know the case against her, a special advocate may be appointed to represent the interests of the person named in the certificate.⁴⁴ A special advocate is a person, vetted by the Minister of Public Safety and Emergency Preparedness for security clearance, who is responsible for protecting the named person's interests in cases where evidence is heard in his or her absence.⁴⁵ All of the evidence relied on by the Ministers to support the certificate is provided to the special advocate. However, after that evidence is provided, the special advocate may only communicate with the named person with the judge's permission.⁴⁶ The special advocate is entitled to make submissions, cross-examine witnesses and exercise any

⁴²*Ibid.*, s. 80.

⁴³*Ibid.*, s. 80.

⁴⁴*Ibid.*, s. 83(1)(b).

⁴⁵*Ibid.*, s. 85.1(1).

⁴⁶*Ibid.*, s.85.4

other powers that the judge thinks necessary to protect the named person's interests. The special advocate may, for instance, challenge the Ministers' assertion that the evidence upon which the certificate is based must remain confidential. The special advocate assumes a difficult role. He or she is the advocate for the person named in the certificate and yet is also tasked with preserving the confidentiality of sensitive information that could be of use to the named person in making his or her case.

The determination of the reasonableness of the Ministers' security certificate is not the only place where judicial intervention is mandated by the *IRPA* in cases where security concerns are raised by a refugee claim. The Ministers also have the power to issue a warrant for the arrest and detention of the person named in a certificate.⁴⁷ This may result in a lengthy detention of the named person while the certificate proceeds through the courts and afterwards. Society has an interest in protecting itself from foreign nationals who present a risk to Canadian security. In some cases, the person named in the certificate cannot be returned to her country of origin because he or she faces a risk of torture if he or she is returned. However, at the same time the person presents a security risk. The *IRPA* strikes the balance between Canadian security concerns and those of the foreign national by providing for periodic reviews of the person's detention by a judge of the Federal Court.⁴⁸ The *IRPA* mandates that the judge is to order the named person's continued detention if he or she poses, or continues to pose, a risk to national security or a person's safety, and if this risk cannot be addressed simply by

⁴⁷*Ibid.*, s. 82(2).

⁴⁸*Ibid.*, s. 83.

imposing conditions on the release of the named person.⁴⁹ If imposing conditions is sufficient to protect society's interests, then the named person will be released on conditions, either until the certificate is declared unreasonable or the person is ordered removed.

Procedure for the Judicial Review of Refugee Decisions⁵⁰

Judges of the Federal Court are tasked with hearing judicial reviews of decisions related to the refugee claims process. The Federal Court is a statutorily created court that handles many matters that, under Canada's federal system, are within the national government's jurisdiction, including immigration and refugee matters. The review process begins when either the asylum seeker⁵¹ or the Minister of Immigration⁵² seeks leave to have a decision reviewed by the court. The process is intended to be expeditious. The application for leave must be filed and served within fifteen days of notification of the IRB's decision, for applications from persons within Canada, and within sixty days, for applications from persons outside of Canada.⁵³ The application for leave is decided without the personal appearance of the parties, unless the judge orders otherwise.⁵⁴ The parties instead submit affidavit evidence and written submissions.⁵⁵ The application for leave must be deposed of by the judge without delay and in a

⁴⁹*Ibid.*, s. 82(5).

⁵⁰See generally Acting Chief Administrator, *Immigration and Refugee Proceedings in the Federal Court and Federal Court of Appeal* (May 2006), online:

<http://cas-nrc-nter03.cas-satj.gc.ca/fct-cf/pdf/Immigration_practice_guide_e.pdf>.

⁵¹*IRPA*, *supra* note 3, s. 72.

⁵²*Ibid.*, s. 73.

⁵³*Ibid.*, s. 72(2)(b).

⁵⁴*Ibid.*, s. 72(2)(d).

⁵⁵See *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, r. 10-13 [Rules].

summary way.⁵⁶ There is no right to appeal a decision of the judge on an application for leave.⁵⁷ If the leave application is granted, then a judge of the Federal Court will set out a time and place for the hearing of the review.⁵⁸ This hearing must be heard no sooner than thirty days and no later than ninety days after leave was granted, unless the parties agree to an earlier date.⁵⁹ There is no appeal from a decision on judicial review unless the judge of the Federal Court who hears the matter certifies that the case gives rise to a serious question of general importance.⁶⁰ Once submissions from the parties have been heard, the judge will give the parties the opportunity to specify the question to be considered for certification.⁶¹ But it is the judge who ultimately decides if a question will be certified and, if so, what that question will be. If a question is certified for appeal, then it will be heard by the Federal Court of appeal. Once a question is certified, then all issues raised by the appellant will be considered on the appeal, not simply the certified question.⁶² Ultimately, the decision of the Federal Court of Appeal can be appealed to the Supreme Court of Canada with leave on the grounds that the matter being appealed raises a question of national importance.

In 2007, the last year for which complete statistics are available, 3259 applications for leave seeking judicial review of decisions made in the refugee process were

⁵⁶*IRPA*, *supra* note 3, s. 72(2)(d).

⁵⁷*Ibid.*, s. 72(2)(e).

⁵⁸*Ibid.*, s. 74(a).

⁵⁹*Ibid.*, s. 74(b).

⁶⁰*Ibid.*, s. 74(d).

⁶¹*Rules*, *supra* note 55, r. 18.

⁶²*Baker*, *supra* note 34 at para. 12.

commenced. Of these applications, only 661 applications for leave were granted. This means that in 2007 more than 80% of applications for judicial review of refugee decisions were dismissed at the leave stage. I am told by the administrator of the Federal Court of Appeal that in those cases granted leave and heard as judicial reviews in the Federal Court in 2007, judges of the Federal Court certified questions for appeal in only 16. In my experience, only one or maybe two of these cases will be granted leave to appeal to the Supreme Court of Canada every year. Because of the limited role of the judiciary in refugee decisions, these statistics make it obvious that the hearing before the IRB is critically important because, except in a small minority of cases, that decision will be final.

The Judicial Review of Refugee Decisions

As noted above, a claimant who receives a negative decision from an immigration official or decision maker from the IRB does not have an entitlement to have that decision reviewed. Nor does the Minister of Immigration if he or she disagrees with a decision of the IRB. Section 72(1) of the *IRPA* provides that:

Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

This requirement provides some relief for judicial caseloads that would otherwise be overwhelmed by the volume of judicial reviews of refugee decisions that are sought in

Canada. As indicated above, judicial review of decisions under the *IRPA* will often not be available to refugee claimants seeking review of questions of fact or the exercise of discretion by the IRB or other immigration officials. This is because the executive decision makers tasked with the mandate for hearing refugee protection claims are considered to be in a better position than the courts to evaluate a witness's credibility and make findings of fact. This is what Parliament intended these decision makers to do and because they actually hear witnesses, evaluate evidence firsthand and have specialized expertise, they are in the best position to reach these kinds of conclusions. Canadian courts will therefore normally defer to their conclusions on these types of issues.

The more complicated question is to what degree courts can interfere when these decision makers are required to decide questions of law or are asked to determine the scope of their own jurisdiction. The court is better placed than these executive decision makers to make these types of decisions since they deal directly with Canada's broader legal framework. Much as reaching factual conclusions is the everyday task of decision makers operating under the *IRPA*, deciding questions of law and jurisdiction is the task normally assigned to judges in Canada's legal system. For this reason, courts are more likely to interfere with decisions made under the *IRPA* that can be classified as questions of law or jurisdiction. However, the scope of the courts' authority to intervene in these issues is a matter of some debate.

In what follows, I will address two issues that remain uncertain in Canadian law that bear particular relevance to

the judicial review of refugee decisions. The first issue is whether the scope for judicial review of refugee decisions is prescribed exhaustively by statute or whether there is any space for the common law of judicial review to define the scope of permissible judicial intervention. The second issue is whether it is proper on judicial review to segment cases raising several discrete issues so as to subject each of the issues to differing degrees of deference depending on the nature of the issue being reviewed or whether it is better to review the decision as a whole. A case addressing the first of these issues is presently before the Supreme Court of Canada.⁶³ For this reason, I have had to limit my comments simply to raising the concerns on both sides of these debates, since it would be improper for me to comment on cases currently before my Court. In other words, I will only raise the questions, but not purport to answer them.

A) Statutory or Common Law Judicial Review?

The Federal Court of Canada is a statutorily created court. This means that where leave is granted, the bases for judicial intervention and the relief that the Federal Court can grant are prescribed by statute. The issue of whether judicial review under the Federal Courts Act is also informed by the common law of judicial review and to what extent remains an open question in Canadian law.

On an application for judicial review, a judge of the Federal Court may provide the following relief to the applicant:

⁶³*Canada (Minister of Citizenship and Immigration) v. Khosa*, (31952) - Hearing Date March 20, 2008.

(a) order [the IRB or other immigration official] to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of [the IRB or other immigration official].⁶⁴

It should be noted that this section does not permit a judge on judicial review merely to substitute his or her own decision for that of the immigration official or IRB decision maker. Judicial intervention in the refugee process is limited to what in common law parlance would be the prerogative writs: prohibition, *certiorari*, injunction, etc. The ultimate decision must still be made by the tribunal and the judge must remit the matter to the tribunal to remake the decision even where the judge orders that the decision is to be made in accordance with specific directions.

The statutory bases for judicial intervention are also prescribed by the *Federal Courts Act*. Section 18.1(4) of the *Federal Courts Act* outlines these bases. It provides that:

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the [IRB or other immigration official]

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

⁶⁴*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3) [*Federal Courts Act*].

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.⁶⁵

This would appear to provide a code for the judicial analysis of decisions under the *IRPA*, providing the reviewing court with both the basis for intervention and the standard according to which a decision is to be reviewed. For example, the reviewing judge is entitled to intervene where there was a decision made under the *IRPA* that constitutes “an erroneous finding of fact”. The provision further requires that deference must be shown unless the finding of fact was “made in a perverse or capricious manner”. The first part of this formulation provides the ground for review (in this case, “an erroneous finding of fact”), while the second part provides the standard that

⁶⁵*Ibid.*, s. 18.1(4).

must be met for the judge to interfere (in this case, that the finding was “made in a perverse or capricious manner”).

There is conflicting authority in Canada on whether refugee decisions should only be reviewed in accordance with the express terms of s. 18.1(4) or whether the common law of judicial review should also apply to judicial reviews under the *Federal Courts Act*. As I noted above, a case on this issue is currently before the Supreme Court of Canada. For now, it is perhaps interesting to note the origins of this debate.

The history of the judicial review of administrative decisions in Canada is a confusing one. For some time, the issue was relatively clear and the courts had few problems applying the traditional rules of judicial review. Parliament created administrative tribunals that, in some cases, did work that courts would have done. This was necessary in an increasingly regulated environment like Canada’s. In the refugee context, for example, there are a very large number of people seeking refugee protection in Canada. It would be an overwhelming prospect for our courts to have to consider all of these claims as part of their mandate. Parliament has therefore chosen to create an administrative process for hearing these claims. This is not only true of refugee decisions, but is equally true of a wide array of important decisions made in Canada.

Some courts have interfered with the decisions of these tribunals notwithstanding Parliament’s indication through the enactment of a statutory provision that deference is owed to them. Courts have presumed, sometimes

mistakenly, that they are in the best position to decide certain issues.

Parliament has developed four statutory means of addressing this unwanted interference by courts. The first was the inclusion in these tribunals' governing statutes of rights of appeal or opportunities for judicial review that are limited to certain types of questions, for instance to questions of law. The second was to provide for limited avenues for appeal or judicial review, for instance, as under the *IRPA*, limiting judicial review only to cases where leave is granted. Third, Parliament may provide for review through a detailed scheme outlining the kinds of decisions that a tribunal might make and the standards for judicial deference in each of these kinds of decisions. Finally, and most conceptually challenging, is Parliament's decision in some instances to oust the courts' jurisdiction altogether by enacting a privative clause providing that a tribunal's decision may not be appealed or judicially reviewed. By purporting to exclude all judicial oversight over some tribunals, Parliament could in theory create an unaccountable executive. This is unacceptable constitutionally in Canada because it would undermine the rule of law. If given their full effect, strong privative clauses would empower these tribunals to make decisions that were not within their jurisdiction or that were legally wrong with no recourse to an independent judiciary. In light of this constitutional issue, the question is what to do with Parliament's clear message to our courts that they are not to interfere with the decisions of some tribunals.

Our courts have responded to these strong privative clauses by recognizing that they have a constitutional duty

to ensure that tribunals do not exceed their jurisdiction. This is similar to the courts' constitutional responsibility to ensure that each of our two senior levels of government in Canada's federal system (the federal Parliament, on the one hand, and the provincial legislatures, on the other) do not exceed their constitutionally prescribed areas of exclusive jurisdictions. The modern approach to this issue in Canada has focused on an analysis of whether the matter being reviewed was within the jurisdiction of the tribunal and whether that decision is owed deference by the court. The Supreme Court of Canada considered these issues in *C.U.P.E. v. N.B. Liquor Corporation*⁶⁶ and *U.E.S., Local 298 v. Bibeault*.⁶⁷ In both of these cases, the Court was asked to decide what level of deference should be shown to the decisions of an administrative tribunal that was protected by Parliament from review by a strongly worded privative clause that expressly excluded judicial interference. The modern Canadian approach focused our courts' analyses onto the tension between Canadian courts' constitutional role and the clearly expressed decision by Parliament to exclude judicial interference from areas falling within these tribunals' mandates. The balance was struck in favour of deference.

In *C.U.P.E.*, Justice Dickson (later Chief Justice of Canada), writing for the Court, held that to avoid interfering unjustifiably in the decision of a tribunal tasked with a specific mandate by Parliament and insulated from review by a strong privative clause, courts in Canada should err on the side of deference. He held that:

⁶⁶[1979] 2 S.C.R. 227 [*C.U.P.E.*].

⁶⁷[1988] 2 S.C.R. 1048 [*Bibeault*].

The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.⁶⁸

This passage represented a change in the balance struck in Canada between the courts and the regulatory state. Courts in Canada should now normally defer to executive decision makers who are protected by a privative clause. However, Justice Dickson did not provide any principled basis from which future courts could decide what degree of deference was necessary when reviewing a specific decision. In *Bibeault*, Justice Beetz, writing for the Court nearly ten years later, advanced the decision in *C.U.P.E.* by holding that in cases where a tribunal is protected by a strongly worded privative clause, the courts should apply a pragmatic and functional analysis to decide the level of deference that will be owed to the decisions made by a protected tribunal. The court tasked with reviewing the decision must decide whether the question answered by the tribunal was intended by Parliament to be within the tribunal's jurisdiction.⁶⁹ To do this, the reviewing court must examine not only the wording of the statute that conferred jurisdiction on the tribunal, but also the purpose of the tribunal, the reason for its existence, the expertise of its members and the nature of the problem before the tribunal.⁷⁰

This can be seen from Justice Beetz's reasons in *Bibeault*, the reason for conducting this analysis is to balance the court's

⁶⁸*C.U.P.E.*, *supra* note 67 at 233.

⁶⁹*Bibeault*, *supra* note 68 at para. 119.

⁷⁰*Ibid.*, at para. 122.

responsibility as a superintending authority with Parliament's intention that the courts should not interfere unnecessarily with a particular tribunal's decisions.⁷¹ Parliament's intention is demonstrated through the enactment of a privative clause intended to protect a tribunal's decisions from appeal or judicial review. The effect of the pragmatic and functional approach of *Bibeault* was for the court to grant greater deference to the decision of the tribunal than otherwise would have been the case. The precise analysis for judicial review in Canada has been further refined, most recently by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*.⁷² It has come some way since *Bibeault*.

However, the unanswered question is to what extent this approach that began in *Bibeault* is limited to the judicial review of decisions made by tribunals that are protected by a strong privative clause. There is conflicting authority on this point. In *Canada (Director of Investigation and Research) v. Southam Inc.*,⁷³ *Pezim v. British Columbia (Superintendent of Brokers)*,⁷⁴ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*⁷⁵ and *Baker*⁷⁶, the Supreme Court of Canada applied this *Bibeault*-type analysis to cases where the decision maker in question was not protected by a privative clause. In *Pushpanathan and Baker*, in fact, the *Bibeault* pragmatic and functional analysis was applied where the decision maker was an immigration official exercising his authority in a refugee case under the predecessor

⁷¹*Ibid.*, at paras. 123-26.

⁷²2008 SCC 9

⁷³[1997] 1 S.C.R. 748.

⁷⁴[1994] 2 S.C.R. 557.

⁷⁵[1998] 1 S.C.R. 1222

⁷⁶*Supra* note 34.

legislation to the *IRPA*. More recently, however, the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*⁷⁷ held that the statutory scheme created by Parliament under the *Federal Courts Act* was sufficient to analyze the scope of judicial review under the *IRPA*. The Court held that:

Applications for judicial review of administrative decisions rendered pursuant to the Immigration Act are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (c) and (d) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.

On questions of fact, the reviewing court can intervene only if it considers that the IAD [Immigration Appeal Division] “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it” (*Federal Court Act*, s. 18.1(4)(d)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the Immigration Act. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4.⁷⁸

⁷⁷[2005] 2 S.C.R. 100.

⁷⁸*Ibid.*, at paras. 37-38.

This passage suggests that the scheme in the *Federal Courts Act* is sufficient for analyzing the level of deference that should be shown to a decision made under the *IRPA* and that a court need not rely on the common law of judicial review when reaching its conclusion on this issue. If the *Pushpanathan* and *Baker* pragmatic and functional approach governs, the most significant effect is that on questions of law considered to be within the expertise of the IRB or other immigration official, the Court will be deferential and allow the administrative decision to stand if it is not unreasonable. That means that even if the Court itself might have come to a different conclusion on the legal question, the Court will defer to the tribunal if it can be shown that there was at least some rational basis for the decision. If the *Mugesera* approach governs, on questions of law the Court will show no deference to the Tribunal and will review the legal question on a correctness standard. In other words, the Court conducts its own analysis of the legal question to see if it agrees with the Tribunal. If it does not it will overturn the Tribunal's decision.

Under the *IRPA*, the decisions of immigration officials or members of the IRB are not protected by a privative clause from judicial review. Rather, Parliament has chosen other means for limiting the judicial review of refugee decisions, through both the requirement to seek leave as well as through the prescribed scheme in the *Federal Courts Act*. At this point in the development of the law of judicial review in Canada, should it be presumed that Parliament is aware that by not including a privative clause in a statute that it is sending a clear message to the courts? In cases where Parliament has clearly attempted to oust the jurisdiction of

the courts, then balancing Parliament's intention with the courts' constitutional role will sometimes require deference. But in cases where no privative clause is provided for in the statute, as in the case of the *IRPA*, and where Parliament has enacted a statutory scheme governing judicial review, do the same concerns arise? The issue is still an undecided one in Canada.

B) *Segmentation?*

Another unanswered question in Canada concerns segmentation. That is, whether the IRB or other refugee decision is to be reviewed as a whole with the same level of deference or whether a separate standard should apply to each aspect of a decision. No one suggests that in every case it is easy to segment an administrative decision into its constituent parts. However, in many cases it will be clear that part of a tribunal's finding is factual and part of it is legal. There is little consensus on this issue in Canadian jurisprudence, but it is an important one because it may have a profound impact on the results of a judicial review. For example, where separate standards are applied, a court may be willing to intervene in the legal element of a decision, but not in the factual ones. Applying the same level of deference to the decision as a whole, however, may well produce different results. The court may intervene wholesale in the tribunal's decision or not interfere with any of it at all. Settling this issue will lead to more predictability for litigants, but as yet there is no consensus.

In *C.U.P.E. v. Ontario (Minister of Labour)*, Justice Binnie writing for a majority of the Supreme Court of Canada held that the "court's task on judicial review is not to isolate [...]"

issues and subject each of them to different standards of review.”⁷⁹

However, four years later in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, Justice Bastarache, also writing for a majority of the Supreme Court of Canada, endorsed differentiated standards of review. The majority held that:

Of course it may not always be easy or necessary to separate individual questions from the decision taken as a whole. The possibility of multiple standards should not be taken as a licence to parse an administrative decision into myriad parts in order to subject it to heightened scrutiny. However, reviewing courts must be careful not to subsume distinct questions into one broad standard of review. Multiple standards of review should be adopted when there are clearly defined questions that engage different concerns under the pragmatic and functional approach.⁸⁰

Despite the endorsement of segmentation in *Lévis (City)*, in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, a decision delivered the day after *Lévis (City)*, the majority reasons written by Justice Abella, with many of the same judges who had endorsed *Lévis (City)* concurring, does not apply segmentation to the decision under review in that case.⁸¹

⁷⁹[2003] 1 S.C.R. 539 at para. 97 [*Lévis (City)*].

⁸⁰2007 SCC 14 at para. 19.

⁸¹2007 SCC 15.

While not addressing the issue directly, the Supreme Court of Canada has segmented issues in the judicial review of a decision made under the predecessor legislation to the IRPA. In *Suresh v. Canada (Minister of Citizenship and Immigration)*,⁸² the Court was asked to review the Minister's decision to deport a person who was alleged to have been a member and fundraiser for a terrorist organization. He alleged that if deported he would face torture in his country of nationality. The decision that was reviewed raised both a constitutional issue as well as several factual issues. In that judgment, the Court reviewed the constitutional issue on a standard of correctness, that is on the basis that the court conducted its own constitutional analysis to determine if the Minister's decision was correct. Since courts are best placed to decide constitutional issues that have an impact on Canada's legal framework as a whole, this position makes sense. The Court held unanimously that deportation to torture may deprive a refugee of his constitutionally protected right to liberty, security of the person and even life.⁸³

However, the review also raised at least two important factual questions. First, whether the refugee was a threat to national security.⁸⁴ And, second, whether the refugee actually faced a substantial risk of torture if he were removed.⁸⁵ The Court unanimously subjected these factual questions to maximum deference since these types of decisions are clearly in the bailiwick of the Minister of Immigration who has reviewed the evidence and reached a conclusion based on the facts. If the Minister of

⁸²[2002] 1 S.C.R. 3.

⁸³Implicit in *ibid.* at para. 44.

⁸⁴*Ibid.* at para. 29

⁸⁵*Ibid.* at para. 39.

Immigration's decision were not segmented, it is unclear what level of deference the Court would have applied to the decision as a whole. However, it is clear that applying one standard to the entire decision would have resulted in either more or less deference being shown to some part of the decision. This may have led to a very different result.

As of yet, the Supreme Court of Canada has not achieved a consistent consensus on this important issue. As can be seen by the example of *Suresh* above, the level of deference applied to an administrative decision may lead to very different conclusions in cases where the decision is considered as a whole as opposed to scenarios where the issues raised are analyzed distinctly. How the Court will develop its analysis of this issue in the future remains for now an open question.

Conclusion

As I hope I have demonstrated, it is not the judiciary's role to decide on whom Canada will or will not grant refugee protection. Those important decisions are left to decision makers whose authority is prescribed by statute, conferred upon them by Parliament. The Canadian judiciary's role is secondary. Whether the basis for judicial intervention is prescribed by statute exclusively or whether it is informed in every case by the common law of judicial review is an undecided question. Moreover, how the reviewing judge approaches the decision - either as a whole or segmented into its constituent parts - is also not settled. Regardless of the answers to these questions, as I noted above: the byword of the Canadian judiciary in refugee matters continues to be deference to the decisions of the

administrative state in issues of fact, credibility and the exercise of discretion by the IRB and immigration officials. These are by far the dominant issues in refugee cases. Cases raising jurisdictional or legal questions, which give rise to the problematic issue of the level of deference the Court will grant to the decisions of members of the IRB or other immigration officials, are fewer. It is in that area that Canada is still struggling to fashion a coherent approach to judicial review.

The Test Applied by the Courts on Judicial Review

Harald Dörig

Recourse to the Courts

Access to the courts is guaranteed under constitutional law to nationals and aliens alike. The Constitution guarantees, in particular, that recourse to the courts shall be open to any person whose rights may be violated by public authorities (Art. 19 para. 4 GG). Thus, also asylum-seekers may challenge any violation of their rights by public authorities in court.

Competence of Administrative Courts

The courts in Germany are organized by subject matter. Law-suits of a public law nature are to be dealt with by the administrative courts. They are independent courts like the ordinary courts. Since asylum cases are considered to be of a public law nature, appeals against negative asylum decisions must be lodged with the administrative courts (Art. 40 para. 1 Code on Administrative Court Procedure). There are three levels of administrative courts: the local Administrative Courts ("Verwaltungsgericht"), the regional Higher Administrative Courts "Oberverwaltungsgericht") and, finally, the Federal Supreme Administrative Court ("Bundesverwaltungsgericht").

Appeal to Administrative Court of first instance

In Germany asylum claims are decided exclusively by the Federal Refugee Office (BAMF), a federal government agency under the supervision of the Federal Ministry of Interior ("Home Office"). The decision-makers at the agency are federal civil servants who are bound not only by law but also by the rules and policy of the agency. So the office is no tribunal or court, it is part of the administration. It is their decision which can be appealed by the asylum-seeker in case he doesn't agree with the decision. The Federal Office can grant asylum under the German Constitution (1), refugee status under the Geneva Convention (2), subsidiary protection according to the EU Qualification Directive (3) or protection against deportation under national law (4). There exists a hierarchy under these four forms of protection: 1 and 2 grant the highest protection status and have to be decided first, followed by 3 and 4, if the higher protection has been denied. Therefore 73.5 percent of the Iraqi applicants in the first half of 2008 have been granted refugee status, only for the rest a decision on subsidiary protection was necessary.

In many countries an applicant needs to obtain leave of the court in order to obtain judicial review. This is not the case in Germany. If the asylum-seeker meets the formal requirements (time limit etc) he can appeal against any decision of the Refugee Office. So the Administrative Court of first instance is open to all aliens applying for refugee status or for subsidiary protection. They even don't need a lawyer and don't have to pay court fees. Every year about 40 000 appeals on asylum have been decided by the 52 German Administrative Courts of first instance. The

administrative courts of first instance decide simple asylum cases through a single judge, more difficult cases through a panel of three judges. The judge at the administrative court does not only decide on asylum, but also on building permits, protection of environment etc.

1. Time Limit

In asylum cases the appeal to the administrative court has to be submitted within two weeks after the negative decision of the Federal Office has been delivered (Art. 74 para. 1 AsylVfG). Shorter time limits apply in asylum cases in which the Federal Office has rejected the asylum claim as manifestly unfounded or irrelevant and under the airport procedure.

2. Suspensive Effect

In cases in which the Federal Office has denied the asylum application without further qualification as unfounded the asylum-seeker's appeal against the negative asylum decision and the removal order has suspensive effect (Art. 75, Art. 38 para. 1 AsylVfG). Thus, the removal order may not be executed as long as the administrative court has not taken a decision on the appeal. An appeal has no suspensive effect, however, in cases in which the Federal Office has rejected the asylum claim as manifestly unfounded or irrelevant, or if the alien entered German territory from a "safe third country".

3. General Scope of Review

The review of the administrative court goes both to the facts and to the law.

In reviewing the facts of a case the court, above all, will have to review the situation in the alien's country of origin. Relevant are the facts and the law as they stand at the time of the court's decision (Art. 77 para. 1 AsylVfG). Hence, the court *ex officio* has to take into account *inter alia* changes in the asylum-seeker's country of origin which took place after the decision of the Federal Office. It also has to consider new facts and evidence brought forward by the asylum-seeker (Art. 74 para. 2 AsylVfG).

The competence of the court to review all the facts of the case is limited only in cases in which the applicant has come either from a country which by law has been classified a safe country of origin or from a country which the legislator has classified a safe third country.

4. Ascertainment of Facts ex officio

Administrative courts, as a rule, must ascertain the facts of a case *ex officio* (Art. 86 VwGO). Hence, in asylum cases the court may go beyond the material submitted by the Parties, and conduct its own investigation of the case. It has the authority to request input from the Ministry of Foreign Affairs or other government departments, from UNHCR, amnesty international and others. It often relies on opinions sought from private experts. In addition asylum judges regularly study the press. Opinions received by one court are shared with the other courts. Thus, each court has acquired over the years a huge amount of resource

materials on conditions in countries of origin and other asylum related questions. The material used in each case has to be disclosed to the applicant.

5. Obligations of Asylum-Seeker

The responsibility for establishing the facts of a case, however, is shared between the court and the asylum-seeker. Thus, there are a number of provisions which call upon the asylum-seeker to cooperate and which lead to an accelerated procedure if he fails to do so. One of his main obligations is to submit to the court all the facts and evidence on which his appeal is based within one month after the decision of the Federal Office was served upon him (Art. 74 para. 2 AsylVfG). In addition, the court may order the asylum-seeker to specify certain statements or to produce evidence for certain assertions within a specified time limit. If the asylum-seeker fails to submit the information in time the court may decide not to consider statements and evidence advanced later on and decide without further investigation. This the court may do so, however, only if otherwise the disposal of the case would be delayed, the asylum-seeker cannot excuse sufficiently his delay, and he has been informed of the consequences in advance (Art. 87 b VwGO). Moreover, if the asylum-seeker fails to pursue his appeal for more than one month after notice by the court it may be considered as withdrawn (Art. 81 AsylVfG). Finally, if the asylum-seeker does not cooperate the court may reject his appeal under certain circumstances as manifestly unfounded thereby excluding any further appeal.

6. *Oral Hearing*

The administrative court shall take its decisions on the basis of an oral hearing (Art. 101 para. 1 VwGO). It may decide on the papers alone, however, if the parties agree.

7. *Scope of Decision*

In case the appeal is not limited to certain issues the court will have to deal in its decision with all the issues the Federal Office has decided upon, i.e. asylum under the German Constitution, refugee status under the Geneva Convention, subsidiary protection according to the EU Qualification Directive and national protection against deportation according to Art. 60 para 5 and 7 German Residence Act. If the court overturns a decision of the Federal Office granting asylum under the German Constitution or refugee status according to the Geneva Convention then it has to decide on whether or not the applicant at least is entitled to subsidiary protection or suspension of deportation.

8. *Dismissal of Appeal as manifestly unfounded*

The court may dismiss the appeal as "unfounded" or as "manifestly unfounded". According to the Federal Constitutional Court administrative courts may qualify an appeal as manifestly unfounded, however, only if at the time of their decision there are no reasonable doubts as to the facts of the case and if on the basis of these facts according to generally accepted legal principles and practice the denial of the appeal downright suggests itself. The consequence of a dismissal as manifestly unfounded is

that the applicant cannot go on to the Higher Administrative Court or the Federal Administrative Court. Instead, the decision of the administrative court of first instance is final (Art. 78 para. 1 AsylVfG). The alien is free, however, to lodge a constitutional complaint against this decision with the Federal Constitutional Court.

Appeal to Higher Administrative Court

If the administrative court of first instance rejects the appeal as unfounded the Higher Administrative Court may grant leave for a further appeal to it on the facts and the law (Art. 78 para. 2 AsylVfG). About ten percent of the 40 000 asylum proceedings move on to the court of second instance by granting leave.

1. Leave Proceedings

The application for leave must be lodged within one month after the decision of the administrative court of first instance has been served (Art. 78 para. 4 AsylVfG). It must be granted by the Higher Administrative Court (Art. 78 para. 5 AsylVfG) if

- (a) the case raises issues of a legal or factual nature which are of fundamental importance;
- (b) the decision of the administrative court goes against higher precedent, or
- (c) the administrative court has violated principles of procedural fairness.

If the Higher Administrative Court refuses to grant leave the decision of the local administrative court becomes final.

Against the decision of the Higher Administrative Court not to grant leave there lies no appeal to the Federal Administrative Court (Art. 80 AsylVfG). The asylum-seeker may lodge, however, a constitutional complaint against this decision with the Federal Constitutional Court.

2. Review Proceedings

If the Higher Administrative Court has granted leave to appeal it will review the case according to the same rules and principles applying to the proceedings before the administrative court of first instance (Art. 125 para. 1 VwGO). There are two differences which should be noted, however. First, decisions of the Higher Administrative Court, as a rule, are taken by panels of three professional judges. However, if the participants agree - which is quite often the case - the case also may be heard and decided upon by a single judge (§ 87 a paras. 2 and 3 VwGO). Second, the Higher Administrative Court may decide without an oral hearing - which is not often the case - if it unanimously is of the opinion that the appeal is either founded or unfounded (Art. 130 a VwGO). Thus, if in such a case the parties have not insisted on an oral hearing before the administrative court of first instance it may happen that their case at all levels is disposed of without an oral hearing.

Appeal to Supreme Administrative Court

If the appeal of the asylum-seeker is denied by the Higher Administrative Court there may be a further appeal on questions of law to the Federal Administrative Court if leave is granted either by the Higher Administrative Court

or by the Federal Administrative Court (Art. 132 para. 1 VwGO). In 2007 the Federal Administrative Court has decided on 50 such further appeals.

1. Leave Proceedings

If leave to appeal to the Federal Administrative Court is denied by the Higher Administrative Court, the asylum-seeker may ask the Federal Administrative Court for leave to appeal within one month after the decision of the Higher Administrative Court is served (Art. 133 para. 2 VwGO). The reasons why leave should be granted have to be stated within two months after the decision of the Higher Administrative Court has been served (Art. 133 para. 3 VwGO). Leave to appeal to the Federal Administrative Court must be granted (Art. 132 para. 2 VwGO) if

- (a) the case raises questions of fundamental legal - not factual - importance;
- (b) the decision of the Higher Administrative Court goes against higher precedent, or
- (c) the Higher Administrative Court has violated principles of procedural fairness..

2. Review Proceedings

If leave to appeal to the Federal Administrative Court is granted the further appeal is limited to questions of law alone. Thus, the Federal Administrative Court will decide on the basis of the facts established by the Higher Administrative Court. If the appeal is considered to be unfounded the Federal Administrative Court will reject it. Then the decision of the Higher Administrative Court

becomes final. The asylum-seeker may lodge, however, a constitutional complaint with the Federal Constitutional Court. If the appeal of the asylum-seeker is considered to be founded the Federal Administrative Court may decide the case itself or it may refer the matter back to the Higher Administrative Court if further questions of fact have to be addressed (Art. 144 para. 2 VwGO).

Complaint to Federal Constitutional Court

1. Exhaustion of Remedies

If the asylum-seeker has exhausted all the remedies which are available to him within the administrative court system he may lodge a constitutional complaint ("Verfassungsbeschwerde") with the Federal Constitutional Court (Art. 93 para. 1 No. 4a GG). This has to be done within one month after the decision of the court of last instance has been notified to him (Art. 93 para. 1 BVerfGG). The Federal Constitutional Court may decide, however, to accept a complaint for constitutional review even before other available remedies are exhausted if the individual case is of general importance or if otherwise the complainant would suffer serious and unavoidable disadvantages (Art. 90 para. 2 BVerfGG).

2. Acceptance Procedure

Because of the high number of constitutional complaints filed in the past a special procedure has been established under which a panel of three constitutional court judges decides on whether or not to accept a complaint ("Annahmeverfahren"). Today, a complaint is accepted for

review only if it is of general constitutional importance or if it is necessary for the enforcement of the complainant's basic rights (Art. 93 a para. 2 BVerfGG).

3. Temporary Injunction

The constitutional complaint has no suspensive effect. Thus, the administration may remove the asylum-seeker even though his complaint has not yet been decided upon by the Constitutional Court. The Court may issue, however, a temporary injunction if this is required to avert serious harm (Art. 32 para. 1 BVerfGG).

4. Scope of Review

With the constitutional complaint the asylum-seeker may assert only a violation of his constitutional basic rights. This he may do, for instance, by alleging that the interpretation and application of the term "political persecution" by the administrative court violated his constitutional right to asylum. Or, he may contend that the classification by the legislator of his country of origin as a "safe country of origin" was not justified under Art. 16 a para. 3 GG and consequently the negative decision of the administrative court based on that classification violated him in his constitutional right to asylum. He, furthermore, could claim that the administrative court violated his constitutional right to a fair hearing (Art. 103 para. 1 GG). In the past years constitutional complaints of asylum-seekers had more success in questions of procedural fairness than in violating their material right of asylum.

Administrative law and refugee decisions

Hugh Corder

Introduction

I appreciate the opportunity to address this distinguished gathering.

At the outset, I must explain background: I am a constitutional lawyer whose initial work was on judicial politics, but who has focussed his main teaching and research interest on administrative law from 1987 till now. I have just completed ten years as Dean of Law at the University of Cape Town (UCT), during which time I had precious little time for academic pursuits, did little teaching and less research. What work I did was in the developing fields of comparative administrative justice and global administrative law, so that I make no claim to special expertise in the area of refugee law. However, taking my cue from the Chief Justice yesterday (who spoke deliberately of “law” while acknowledging the special challenges and expertise present in the area of refugee matters), I thought that it would be of some interest to you to apply what I know of what could be termed “general administrative law” in this country to the specific characteristics of those decisions which have had an impact on refugees in South Africa. I would regard “refugee law” predominantly as a specialist form of administrative review, so do not feel too uncomfortable to be here today.

Two further contextual points must be made at the outset. First, this specialist area of the law is very new in South

Africa, so it all amounts to a “recent development”, for it goes without saying that this country was, until the early 1990s, rather a “refugee-producing”, than a refugee-receiving state, for obvious reasons. The Deputy President, if I heard her correctly, spoke yesterday of there being 40 000 refugees in this country as of now: I assume that this is the documented, official figure, but it omits the perhaps millions of those formally documented as asylum seekers, chiefly those displaced by the terror in Zimbabwe and elsewhere in sub-Saharan Africa. It seems that South Africa has over the past two years received the highest number of such asylum seekers of any country in the world, all of whom have extensive rights under the current law pertaining to refugees. Indeed, when I arrived at the entrance to this hotel yesterday morning and announced my business to the attendant, he told me that he was a refugee from the Democratic Republic of the Congo.

Secondly, I have benefited immensely in my preparation of these remarks from the expertise which exists in the Refugee Law Clinic in the UCT Faculty of Law: under the dedicated leadership of Ms Fatima Khan and supported by the UNHCR and philanthropic bodies, we have for the past two years or so been able to employ several legal professionals who see thousands of clients each year, not to mention responding magnificently when crises erupt (such as occurred on a devastating scale in May 2008). Refugee (and Immigration) Law is a popular option in the LLB degree, and is also offered at LLM level, so that students can elect to study and research in this area. One such student, Janice Bleazard, has assisted in research for my contribution, and I am grateful for her guiding expertise, as

well as that of Ms Khan. I am also very pleased that the Faculty has acted as one of the sponsors of this conference.

In the time left to me I wish to talk briefly about three aspects of the topic: the general structure of decision-making about refugees; the general law applicable to such processes; and the judicial approaches to review of such decisions.

The structure of determining refugee status in South Africa

Without going into great detail, the legal and administrative structure which exists for the determination of refugee status in South Africa is as follows. There was no separate statute governing refugees under apartheid: any refugees who presented themselves were treated under the provisions of the Aliens Control Act (96 of 1991), and its predecessors. The first democratically-elected Parliament after 1994 remedied this situation by adopting the Refugees Act (Act 13 of 1998), which came into force in April 2000. As was mentioned yesterday, in principle this Act represents good human-rights practice, in particular for the following reasons: it accepts the Organisation of African Unity (in its Convention Governing the Specific Aspects of Refugee Protection in Africa, 1969) definition of a "refugee", broader than the usual approach; it authorises a Refugee Reception Officer(RRO) after a cursory formal enquiry to assign the status of " asylum-seeker" to those who present for refugee status (section 22); it further authorises a Refugee Status Determination Officer (RSDO) to grant such status after further enquiry, which may include a hearing (section 23); and it provides for two

avenues of reconsideration of such decision, through review and appeal.

Review is undertaken by the Standing Committee on Refugee Affairs (which must oversee the whole administrative process: its members are appointed by the Minister, but must be independent and without bias), where the decision is that the application is “manifestly unfounded” (see generally section 11 of the Act for the powers of the Standing Committee). Any appeal (which must be lodged within 30 days) is to the Refugee Appeal Board, whose members are also appointed by the Minister, where the application is rejected as “unfounded”(see generally Chapter 4 of the Act for the provisions governing Reviews and Appeals). The Appeal Board may after a hearing “...confirm, set aside or substitute any decision of an RSDO” (as authorised by section 26 (2) of the Act).

This is not the occasion to assess the general effectiveness of this new regime under the Refugees Act. Those more intimately involved in such matters over the past eight years, both from the side of the State as well as those representing refugees, must guide us in this regard, and I refer you to a 2008 publication *Advancing Refugee Protection in South Africa*, edited by Handmaker, De la Hunt and Klaaren, especially at chapters 4 and 5. A one-sentence summary of the position would read as follows:

Starting from a relatively low base-line, there has been slow but encouraging improvement in official compliance with what are by all accounts comparatively ambitious standards of both procedural and substantive fairness as contained in the statutory regime.

I move now to consider briefly the changed face of administrative justice in South Africa, which provides the constitutional, statutory and common-law context in which the Act and the refugee system operate.

Administrative justice generally in South Africa

South African administrative law has undergone a remarkable process of rejuvenation and reform over the past fifteen years. Some details of the extraordinary journey undertaken by administrative lawyers and Parliament over the period from 1993 till 2000 in an endeavour to transform a repressive, backward and unresponsive administrative law regime into a progressive, transparent and effective means of ensuring administrative *justice* through the law. This was of course part of a much wider attempt (which continues to the present) to undo the wicked past and establish a reasonable measure of executive and administrative accountability and transparency. (A useful summary of these changes can be found in Hugh Corder “Reviewing Review: much achieved, much more to do”, chapter 1 in Corder and Van de Vijver (eds) *Realising Administrative Justice* Cape Town, Siber Ink, 2002.)

While the overall objective has been executive and administrative fidelity to law (or establishing the “rule of law”, if you like), the following eight statements mark the milestones along this journey:

- 1) This part of South African law (we are a “mixed legal system”) is thoroughly English in its origins and influences. Regrettably, the retreat into a colonial past of legislated

racial discrimination (in the form of both segregation and apartheid) caused any number of progressive reforms in the English common law of judicial review of administrative action to bypass this country. So we remained effectively steadfast adherents to a late nineteenth-century or Diceyan approach to parliamentary sovereignty, but without its accepted common-law partner which serves as an inhibitor of rampant legislative power, viz the rule of law. Having said that, it is not unimportant to note the longevity of a law-based system of government in this country, since the *Charter of Justice* was introduced by Britain in 1828.

2) Being a common-law phenomenon, much of the development of administrative law depended on judge-made law (through judicial review of administrative action), and in this regard the courts proved to be remarkably and increasingly “executive-minded” as the twentieth century wore on, as many studies have shown. (The best-known is John Dugard *Human Rights and the South African Legal Order* Princeton, University Press, 1978.)

3) Much of the administrative law in place when freedom/and formal democracy arrived in 1994 had been fashioned in the fraught interface between the State and the individual, particularly where “state security” and the social engineering process which was apartheid impacted devastatingly on the rights of South Africans. Indeed, the very “constitutive act” of a regime based on race, that of race-classification, was an administrative act, subject to review. This has had a further warping effect on the development of this area of the law.

4) Administrative law reform was part of the constitutional agenda from the time of the release of political prisoners and the freeing up of political activity in early 1990. Many foreign states sought to assist and perhaps influence the process, but in relation to administrative law, fellow members of the British Commonwealth, by the very nature of their common background, proved most influential. Above all, the government-driven and thorough-going process of administrative law reform which occurred in Australia from the 1970s provided immensely valuable guidance.

5) A right to administrative justice was constitutionalised as part of the chapter on fundamental rights in the transitional constitution (of 1993) which was the supreme law of South Africa from April 1994 till February 1997, and in fact this formulation of the right lived on in the final constitution till February 2000. Essentially, although the right was cast in very convoluted terms which reflected the political struggles of the negotiating process, the review-standards of lawfulness, procedural fairness and “justifiability in terms of the reasons given for” administrative action were guaranteed in section 24, together with a right to be given written reasons for such action. This was really an extraordinary leap of faith, given the practices of the past.

6) After some debate, the right to “just administrative action” was retained in the Constitution of the Republic of South Africa (the final constitution, Act 108 of 1996), but more simply stated as the right to administrative action which is “lawful, reasonable and procedurally fair”, as well

as the right to written reasons. Section 33, however, also required Parliament within three years to enact a statute to flesh out these disarmingly simply-stated rights, and so the Promotion of Administrative Justice Act (PAJA) came into being in February 2000. PAJA provides the minimum content of the several constitutional rights, as well as codifying the common-law grounds of review, setting various time-limits and stipulating a range of potential remedies on judicial review.

7) While the Act has many shortcomings, it has proved useful to both practitioners and judges, after a very slow start. For reasons which need not detain us here, a “turf battle” broke out between the newly-established Constitutional Court(CC) and its predecessor as the highest court in the country, the Appellate Division (or Supreme Court of Appeal (SCA) since 1997), over the relationship between the constitutional and common-law forms of administrative law. The dispute was resolved in a judgment of the CC in the *Pharmaceutical Manufacturers* case (reported in 2000(2) SA 674 (CC)), as follows:

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control (at para 44, per Chaskalson CJ).

Since then, a number of important decisions of the CC have explored, for example:

- the limits of executive decisions as opposed to administrative action;

- the meaning to be given to “reasonableness review”, while yet maintaining the divide between appeal and review;
- the scope of the meaning of “administrative action”, which is the key “jurisdictional gatekeeper” of review activity – does it include administrative lawmaking (subordinate legislation) or tender processes, for example?; and
- the varying requirements of procedural fairness given the extraordinarily wide range of administrative conduct. (The best text on this subject is Cora Hoexter *Administrative Law in South Africa* Cape Town, Juta, 2007.)

8) Three final points need be made in this regard:

- the Constitution substantially broadens the notion of “standing to sue” in regard to protected rights, including class actions and those in the public interest (see section 38);
- almost all rights in the Bill of Rights are available to “everyone” in the country, whether citizen, permanent resident or temporary visitor, having gained lawful or unlawful entry to the country (only “political” or franchise rights, as well as the right to choose one’s trade, profession or occupation freely are reserved for citizens--- see sections 19, 20 and 22 of the Constitution); and
- a similar “right-plus-statute” regime exists to advance transparency in public life, in the form of the right to have access to information (section 32 of the Constitution) and the Promotion of Access to

Information Act of 2000, effectively a companion to the PAJA.

Narrowing the focus further from this general sketch of administrative law, what is the jurisprudence of the superior courts in reviewing administrative action in the form of refugee-status determination?

Refugee law: lessons from the cases

About a dozen reported judgments of the High Court (the lowest level of superior court) and one from the SCA deal specifically with refugees, with a similar number being concerned with immigration matters. The judgments generally follow the typical judicial approach to review of administrative action, with some exceptional features, in my view. What is clear, however, is a strong concern for the rights of refugees in the face of administrative bungling, indifference or at worst harsh treatment. This concern is in turn strengthened by reference to the human rights protection accorded by the Bill of Rights and the Constitution more generally, as well as international law. (In regard to the last, it is significant to note that section 6 of the Refugees Act requires the interpreter of its provisions to have “due regard” to the Convention Relating to the Status of Refugees (UN,1951), the Protocol Relating to the Status of Refugees (UN,1967), the OAU Convention of 1969 referred to above, the Universal Declaration of Human Rights (UN,1948), and “any other relevant convention or international agreement to which the Republic is or becomes a party”.)

In general, the courts have not hesitated to apply the requirements of the Constitution and statute to foreigners unlawfully in the country, in a range of decisions in this field over the past ten years: this matter is no longer in any doubt as settled law. Taking the grounds of review in section 33 of the Constitution in turn provides a good picture of judicial performance.

So, in ensuring the *lawfulness* of determinations on refugee status, the court has held:

(a) that administrative inconvenience *cannot* be used as a defence by the Department of Home Affairs in the face of its constitutional obligations e g in *Kiliko v Minister of Home Affairs* (2006(4) SA 114 (C)) the Cape High Court found that the procedure adopted by the department, namely dealing with only twenty applications from asylum-seekers each day, was unlawful when weighed against the requirements of both the Act (ss 2 and 22) and the Constitution; so also in *Tafira v Minister of Home Affairs* 2006(5) BCLR 562(W):

(b) that administrators have acted *ultra vires* when issuing general prohibitions in respect of asylum seekers e g in *Minister of Home Affairs v Watchenuka* 2004(4) SA 326 (SCA), the SCA set aside a determination by the Standing Committee that prohibited generally the right of asylum seekers to work and study;

(c) that the test to be applied by RSDOs when assessing whether an applicant has a “well-founded fear of persecution” on return to her home country is not to be assessed by reference to a “real risk” but rather that a

“reasonable possibility” of such persecution exists(see *Tantoush v Refugee Appeal Board* 2008(1) SA 232 (T), and *Van Garderen NO v Refugee Board* 2007(T), case number 30720/2006);

(d) that the independence of the members of the Standing Committee must be ensured by the Minister, and that the presence on that body of a majority of employees of the Department of Home Affairs was thus *ultra vires* (*Ruyobeza v Minister of Home Affairs* 2003(5) SA 51 (C), interpreting section 9(3) of the Refugees Act); and

(e) that mistakes of both law and fact by the administrative authorities justified a setting aside of their actions.(See *Van Garderen* referred to in (c) above).

In the area of *procedural fairness*, the reviewing courts have insisted on relatively strict compliance with the formal requirement of the *audi alteram partem* rule (e g see *Kadima v Refugee Appeal Board* [2007] JOL 20410(T), *AOL v Minister of Home Affairs* 2006(2) SA 8 (D) and *Masamba v Chairperson, Western Cape regional Committee of the Immigrants Selection Board* [2001] JOL 8578 (C)), and have expressed clear disapproval of any signs of bias in the actions of an RSDO or the RAB (e g see *Tantoush v Refugee Appeal Board* 2008(1) SA 232 (T), and *Ruyobeza* in (d) above). The application of the doctrine of legitimate expectation in immigration cases and more generally in the field of administrative law indicates that its use in the refugee field can be expected.

The South African courts have taken some time to come to terms with their new-found authority to review administrative action for *reasonableness*. The PAJA (in

section 6(2)(h)) complicates matters by formulating the reasonableness requirement in the convoluted and circular language first adopted in the *Wednesbury* case in the UK in 1947, but effectively abandoned in that jurisdiction by the 1980s. Fortunately, in the leading case on this ground of review in the Constitutional Court (*Bato Star Fishing v Minister of Environmental Affairs* 2004(4) SA 490 (CC)), the judges unanimously interpreted “reasonableness” to mean a combination of rationality and proportionality, so that we have been spared from *Wednesbury* by judicial interpretation. Nevertheless, our judges are by nature and training cautious to intervene in the executive sphere, and the doctrine of the separation of powers reinforces such an approach. There has been only one case directly on point (*Kiliko* in (a) above), in which the Cape High Court held that the administrative action was indeed unreasonable, and that was where the Department of Home Affairs was as a matter of convenience considering only twenty asylum applications per day, no matter how many applications were being received..

Generally in administrative law, the courts are reluctant to find administrative action unreasonable, and having done so, they are much less likely to substitute their decision for that of the administrator, rather following the traditional route of declaring the action invalid and referring the matter back to the administrator for a fresh determination. This is usually ascribed to the enduring effect of the doctrine of the separation of powers. In contrast, this is perhaps the most striking aspect of refugee law, to my mind, for the courts have on a number of occasions substituted their own decisions for those of the administrator concerned, on the grounds typically that the

applicant has already suffered unacceptable delay and prejudice(see *Tantoush, Van Gaderen and Ruyobeza* above, and *Mayongo v Refugee Appeal Board* [2007] JOL 19645 (T)). Rather paradoxically, however, and mainly in immigration law matters, the judges also insist on compliance with section 7 of PAJA, which requires the exhaustion of domestic remedies before seeking assistance from the court (see, for example, *Houd v Minister of Home Affairs* 2006(C), case number 1344/2006, and *Koyabe v Minister of Home Affairs* 2008(T), case number 4754/2007, both unreported). On one occasion, a judge has rather unusually ordered the remedy of a structural interdict (as in setting a detailed and time-bound schedule for corrective action) where bureaucratic inefficiencies are found to be endemic (see *Kiliko* at (a) above).

Conclusion

The general picture sketched in broad outline here shows a system trying to come to terms with new realities in the law, both more widely and in the narrower ambit of refugee-status determination. There are clear signs that the values promoted by the Constitution in section 1 (such as the pursuit of dignity, equality and freedom, non-sexism and non-racism, the supremacy of the Constitution and the rule of law, and open, responsive and participative government) are beginning to infuse the field of refugee law, but there is also clearly a long road to travel. The shortcomings are evident in the accounts of those who are daily concerned with this area of the public administration, and they also came to the fore during the mob-violence crisis (styled as xenophobia) of May 2008. This is self-

evidently “work in progress”, but there is no reason to believe that such progress will not continue.

Administrative and Judicial Review of Asylum Decision in the United States of America

Lori Scialabba and Juan P Osuna

Introduction

The United States has two separate programs to provide protection to refugees. The overseas refugee program provides protection to individuals outside the United States. The asylum program provides protection to refugees within the U.S. or at a port of entry to the U.S.

To be admitted to the U.S. as a refugee, an applicant must meet the statutory definition of “refugee”. A refugee is defined as someone who experienced past persecution or has a well-founded fear of future persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.¹ Additionally, the applicant must be included in a refugee group of special humanitarian concern as designated by the President, and must be sponsored by a responsible person or organization.² Refugee determinations are generally made by officials of the Department of Homeland Security, and they are not subject to any formal administrative appellate review or motion procedure, or to judicial review. An applicant may, however, submit a request for review with the agency upon receipt of a denial.

An asylum applicant who is in the U.S. or at a point of entry must also meet the statutory definition of a “refugee”

¹ 8 U.S.C. § 1101(a)(42)(A).

² 8 U.S.C. § 1157; 8 C.F.R. § 207.2(d).

to be eligible for asylum in the United States.³ This is the same definition used for refugee determinations in the overseas program. Under U.S. law, asylum is considered a discretionary benefit.⁴ Therefore, even if the applicant meets the definition of refugee and is otherwise eligible for asylum, there are some circumstances in which the applicant may be denied asylum in the exercise of discretion.⁵ An example would be an applicant with a serious criminal history. Asylum determinations are subject to administrative appellate review and federal judicial review under United States law.

Because refugee determinations are not subject to formal administrative appellate or judicial review, this paper will focus on the process for administrative and judicial review of asylum decisions, and the standards of review used by the administrative and federal appellate courts in reviewing asylum cases.

Overview and description of appeals process for asylum claims

There are two ways to obtain asylum in the United States. The first is known as the “affirmative” asylum process, which involves the applicant coming forth to file an asylum application with the United States Citizenship and Immigration Services (USCIS), which is located within the Department of Homeland Security (DHS) (formerly the Immigration and Nationalization Service, or INS). In this scenario, the application is reviewed by an administrative

³ 8 U.S.C. § 1158(b)(1)(A).

⁴ Withholding of removal is not discretionary. However, it has a different burden of proof and will not be discussed further.

⁵ Id.

procedure that includes a non-adversarial interview with a specially trained Asylum Officer (AO) within the USCIS. The second procedure is sometimes referred to as the “defensive” asylum process. This is where an applicant, who has been charged as removable or deportable from the United States, pursues an asylum request during an administrative court proceeding before an Immigration Judge (IJ) within the Department of Justice’s Executive Office for Immigration Review (EOIR). Therefore, either the USCIS AO or the IJ may serve as the first instance decision maker, depending on whether the applicant initially requests asylum through an affirmative or defensive process.

A. Asylum Officers as the First Instance Adjudicator

At the core of the affirmative asylum adjudication process, an AO conducts a non-adversarial interview with the asylum applicant during which the officer takes detailed notes, reviews relevant country conditions research, and completes security checks to determine an individual’s eligibility for asylum status. The AO then issues a written assessment explaining the decision. Supervisory Asylum Officers (SAOs) review the AO adjudications and have the authority to ask an officer to change a decision if it is not legally sufficient. In some instances, the SAO may ask the AO to pose additional questions to the applicant or to conduct additional research on country conditions or on other issues.

If an AO finds the applicant ineligible for asylum status through the affirmative process, and the applicant is not in valid immigration status, the officer refers the applicant to

EOIR for placement in removal proceedings, where he or she may request asylum before an IJ. The resulting removal proceedings are not considered to be an appeal of the AO's decision not to grant asylum. Rather, the IJ is now considering the asylum seeker's application *de novo* in adversarial proceedings, and is not bound by any findings made by the AO. However, the IJ may have access to the AO's assessment laying out the rationale for the decision to refer the case and/or the officer's notes from the interview if the DHS trial attorney, representing the government's interests, introduces them as evidence.

B. Immigration Judges as the First Instance Quasi-Judicial Body

Immigration Judges are responsible for conducting formal administrative court proceedings and act independently in deciding the matters before them. There are over 200 IJs in more than 50 Immigration Courts located throughout the United States.⁶ As a general matter, IJs determine removability and adjudicate applications for relief from removal and deportation, which include, but are not limited to: asylum, withholding of removal ("restriction on removal"), protection under the Convention Against Torture, cancellation of removal, and adjustment of status.⁷ After the parties have presented their cases, the IJ renders a decision. The IJ generally renders an oral decision at the hearing's conclusion, but he or she may render an oral or written decision on a later date. If the decision is rendered orally, the parties are given a signed summary order from the court. The applicant and the DHS both have the right

⁶ Office of the Chief Immigration Judge, Immigration Court Practice Manual, available at http://www.usdoj.gov/eoir/vll/OCIIPracManual/ocij_page1.htm

⁷ 8 C.F.R. § 1240.1(a).

to appeal an IJ's decision to the Board of Immigration Appeals (Board), but they may also waive the right to appeal.

The IJ may independently ask the Board to review his or her decision, which is known as certifying a case to the Board.⁸ This is sometimes done in cases deemed to pose a novel legal question, or otherwise deemed to be of particular import. The Board has the discretion whether or not to accept the certified case for review. The certification of a case is separate from any appeal in the case. Therefore, a party wishing to appeal the IJ's decision should file an appeal despite any certification to the Board. Except when certified to the Board, the decision of the IJ becomes final upon the waiver of appeal or upon the expiration of the time to appeal if no appeal is taken (whichever occurs first).⁹

C. Board of Immigration Appeals

If the Department of Homeland Security or the asylum applicant disagrees with an IJ's decision regarding the applicant's asylum claim, either party may file an appeal with the Board of Immigration Appeals, which is also part of EOIR in the Department of Justice. The Board is the highest quasi-judicial administrative body for interpreting and applying immigration laws and has been given

⁸ 8 C.F.R. §§ 1003.1(c); 1003.7.

⁹ 8 C.F.R. § 1003.39. An applicant may file a motion to reopen in limited circumstances in order to offer new material evidence that was not available at the former hearing. *See* 8 C.F.R. § 1003.2(c). A motion to reopen must state the new facts to be proved and must be supported by affidavits or other evidentiary material. *Id.* In addition, a motion to reopen will not be granted unless the moving party establishes a prima facie case of eligibility for the underlying relief sought. *See INS v. Abudu*, 485 U.S. 94 (1988). The regulations also permit the filing of a motion to reconsider. *See* 8 C.F.R. § 1003.2(b). The appeals process for motions is outside the scope of this paper and will not be discussed further.

nationwide jurisdiction to review the orders of the IJs and to provide guidance through published decisions.¹⁰ Decisions of the Board are binding on all DHS officers and IJs unless modified or overruled by the Attorney General or a federal court.¹¹ While the Board's decisions are generally subject to judicial review in the federal courts, there are certain topical areas where review is limited by statute.

The Board consists of 15 Board Members, including a Chairman and up to two Vice-Chairmen. Under the direction of the Chairman, the Board uses a case management system to screen all cases and manage its caseload. Generally, the Board does not conduct courtroom proceedings - it decides appeals by conducting a review of the record of proceedings. On some occasions, however, the Board does hear oral arguments of appealed cases, predominately at its headquarters in Falls Church, Virginia.

The Board adjudicates cases in three different ways. A large number of cases at the Board are adjudicated by a single Board member as is mandated by the regulations.¹² However, a panel of three Board members will decide the case if there is the need to: (1) settle inconsistencies among the decisions of Immigration Judges; (2) establish a precedent construing the meaning of laws, regulations, or procedures; (3) review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents; (4) resolve a case or controversy of major national import; (5) review a clearly erroneous factual determination by an Immigration Judge; or (6) reverse the

¹⁰ See 8 C.F.R. § 1003.1(d).

¹¹ See 8 C.F.R. § 1003.1(g).

¹² 8 C.F.R. § 1003.1(e).

decision of an Immigration Judge.¹³ The panel renders decisions by majority vote, and dissenting or concurring opinions may be attached. The Board also may consider a case *en banc*.

1. Scope of Review and Jurisdiction

The Board generally has the authority to review appeals from IJ decisions pertaining to asylum, withholding of removal, and the Convention Against Torture. In 2002, the Attorney General issued a procedural reforms regulation, which, in part, related to the standard of review applied by the Board and the scope of its review of decisions.¹⁴ Under these regulations, the Board may not make specific findings of fact on appeal from a decision by an IJ, and is only authorized to make a decision based on the record developed by the IJ.¹⁵ Similarly, the Board only considers evidence submitted during the proceedings before the IJ, and does not consider new evidence on appeal. If new evidence is submitted, that submission may be considered a motion to remand proceedings to the IJ for evaluation of that evidence. Additionally, the Board has the right to take administrative notice of commonly known facts, such as current events or the contents of official documents.¹⁶ However, the Board will not take administrative notice where the facts are contested, and will not engage in fact-finding in the course of deciding appeals.¹⁷ The Board will

¹³ 8 C.F.R. § 1003.1(e)(6). The Department of Justice has recently published a proposed rule adding that a case may also be referred to a panel if it involves “the need to resolve a complex, novel or unusual issue of law or fact.” 73 Fed. Reg. 34,654, 34,663 (June 18, 2008).

¹⁴ See Board of Immigration Appeals, Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

¹⁵ 8 C.F.R. § 1003.1(d)(3)(iv); Abdulai v. Ashcroft, 239 F.3d 542, 549-50 (3d Cir. 2001).

¹⁶ 8 C.F.R. § 1003.1(d)(3)(iv).

¹⁷ Matter of Adamiak, 23 I&N Dec. 878, 880 (BIA 2006).

also only review matters that were raised or objected to before an IJ and if a matter was not objected to or raised before the IJ, it is generally deemed to be waived.¹⁸

2. *Standards of Review*

The Board reviews the factual findings made by an IJ under the clearly erroneous standard of review.¹⁹ This includes any credibility determinations made by the IJ. The Board may review questions of law, discretion, and judgment, and all other issues in appeals from decisions of IJs *de novo*.²⁰ The following discussion will address these categories more specifically.

Factual Issues

As stated earlier, the Board is generally prohibited from “engag[ing] in factfinding in the course of deciding appeals.”²¹ In the context of asylum claims, the IJ’s assessment of what happened to an asylum applicant is a factual determination that is reviewed under the highly deferential clearly erroneous standard.²² Similarly, other factual findings, such as the credibility of testimony, are reviewed only to determine whether the IJ made a clear error.²³ A finding is clearly erroneous when although there is evidence to support it, the court is left with the “definite and firm conviction” that a mistake has been committed.²⁴ Under this standard, a factual finding may not be

¹⁸ Matter of I-Y-C, 24 I&N Dec. 260, 261 n.1 (BIA 2007).

¹⁹ 8 C.F.R. § 1003.1(d)(3)(i).

²⁰ 8 C.F.R. § 1003.1(d)(3)(ii).

²¹ 8 C.F.R. § 1003.1(d)(3)(iv).

²² Matter of A-S-B, 24 I&N Dec. 493, 496-97 (BIA 2008).

²³ 8 C.F.R. § 1003.1(d)(3)(i).

²⁴ 67 Fed. Reg. 54,878 at 54,889 (Supplementary Information) (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder.²⁵

Legal Issues

Legal questions are reviewed by the Board *de novo*. In the asylum context, legal questions include whether the facts established by the applicant demonstrate harm that rises to the level of persecution and whether the harm was inflicted on account of a protected ground.²⁶ These issues are therefore not limited by the clearly erroneous standard of review.

Interplay of Fact and Law/Mixed Issues

The Board defers to the factual findings of an IJ unless they are clearly erroneous. However, it retains *de novo* judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to facts.²⁷ This analytical approach to deciding cases recognizes that the IJs are better positioned to discern credibility and assess the facts with witnesses before them, but that the Board is better positioned to resolve issues involving the application of legal standards and the exercise of discretion.²⁸

²⁵ 67 Fed. Reg. at 54,889.

²⁶ Matter of A-S-B, at 497.

²⁷ 67 Fed. Reg. at 54,888-89; *see also* Matter of A-S-B, *supra*; Matter of V-K, 24 I&N Dec. 500 (2008).

²⁸ 67 Fed. Reg. at 54,888-89.

Discretion

The IJ's discretionary judgment whether to grant asylum relief to an eligible asylum applicant is reviewed *de novo*.²⁹

United States Courts of Appeals

If an asylum applicant's claim is denied by the Board and the applicant is in removal proceedings, the applicant has the right to file a petition for review of the Board's decision with the appropriate United States Court of Appeals.³⁰ There are 13 federal circuit courts of appeals, each of which is authorized to hear appeals from decisions of federal administrative agencies such as the Board.³¹ Each court covers a specific geographic area in the United States and follows its own rules and procedures. In the circuit court, appeals generally are decided by panels of randomly drawn judges. Some cases are decided on the basis of written legal briefs filed on behalf of the parties, while others are selected for an oral argument before the judges. In rare instances a case will be reheard en banc by a particular court. In the federal circuit courts, the Board is defended by attorneys from the Office of Immigration Litigation (OIL), a division within the Department of

²⁹ 8 C.F.R. § 1003.1(d)(3)(ii); see also Noble v. Keisler, 505 F.3d 73 (2d Cir. 2007) (holding that the Board has the authority to reach a different result on discretion than that reached by the Immigration Judge).

³⁰ 8 U.S.C. § 1252(a)(1). However, the DHS, the other party to the case, may not appeal the decision. Because only an applicant may appeal an adverse Board decision, the federal courts never see cases in which applicants have been granted asylum. See US Dept of Justice, Fact Sheet: Asylum Variations in Immigration Court, 05 Nov 2007, available at <http://www.usdoj.gov/eoir/press/07/AsylumVariationsNov07.pdf>. The DHS, however, may request that the Attorney General, in the exercise of his or her discretion, review a Board decision. See 8 C.F.R. § 1003.1(h).

³¹ The U.S. Court of Appeals for the Federal Circuit and the DC Circuit Court do not hear asylum claims.

Justice which is completely separate from EOIR. Decisions by circuit courts are usually final, unless they are remanded to the Board for additional proceedings, or the case is accepted for review by the Supreme Court of the United States. Federal circuit court decisions are binding on all DHS officers, IJs, and the Board, unless the decision is modified or overruled by that court in a later or en banc decision, or by the Supreme Court.

1. Scope of Review and Jurisdiction

As set out in the Immigration and Nationality Act (INA), a court of appeals may review an immigration decision only if the petitioner has exhausted all administrative remedies of right.³² Further, circuit courts “shall decide the petition only on the administrative record on which the order of removal is based.”³³ Where the Board expressly adopts the IJ’s opinion or summarily affirms the opinion, the court will review the IJ’s opinion. However, where the Board issues its own decision, the circuit court’s review is limited to the Board’s decision, except to the extent that the IJ’s decision is expressly adopted. Where the Board has reviewed the IJ’s decision and incorporated portions of it as its own, the federal circuit courts treat the incorporated parts of the IJ’s decision as the Board’s.

The federal circuit courts generally do not have jurisdiction to review a discretionary action by the Board.³⁴ However, asylum determinations are exempt from that jurisdictional

³² 8 U.S.C. § 1252(d)(1); *see also* Massis v. Mukasey, --F.3d--, 2008 WL 5146962 (4th Cir. Dec. 9, 2008).

³³ 8 U.S.C. § 1252(b)(4)(A).

³⁴ 8 U.S.C. § 1252(a)(2)(B)(ii).

bar and thus may be reviewed.³⁵ The federal circuit courts are expressly given jurisdiction to consider both constitutional questions and questions of law raised in a petition for review, and this of course includes those issues when they arise in an asylum determination.³⁶ The judicial review clause does not explicitly address whether the circuit courts have jurisdiction over purely factual issues or mixed questions of law and fact.

Several aspects of the asylum law are not subject to judicial review by the federal courts. For example, there is no judicial review to challenge a decision to deny an applicant asylum because he or she: (1) can go to a safe third country; (2) did not file the asylum application within one year of entry; (3) was previously denied asylum; (4) did not demonstrate that there were changed circumstances warranting an exception to the one-year rule or the rule regarding previously denied asylum claims, or extraordinary circumstances relating to the delay in filing an asylum application; or (5) is deemed to be a terrorist.³⁷

2. Standards of Review

Judicial review is substantially narrowed at the federal circuit court level. There, asylum analysis basically involves a two-step inquiry: (1) whether the applicant qualifies as a 'refugee' as defined in 8 U.S.C. § 1101(a)(42)(A), and (2) whether the applicant merits a favorable exercise of discretion.³⁸ Therefore, the ultimate grant of asylum is discretionary. However, the factual

³⁵ *Id.*

³⁶ 8 U.S.C. § 1252(a)(2)(D).

³⁷ 8 U.S.C. §§ 1158(a)(3) and (b)(2)(D).

³⁸ See *Ouda v. INS*, 324 F.3d 445, 451 (6th Cir. 2003).

determination of whether an applicant has suffered from past persecution or has a well-founded fear of future persecution on account of his or her race, religion, nationality, particular social group, or political opinion, is not. In light of this distinction, the circuit courts have developed a bifurcated system of review.

Factual Issues

The standard of review used to review factual questions is one of substantial evidence. This standard is established in 8 U.S.C. § 1252(b)(4)(B), which specifies that “administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” Under the substantial evidence standard, the federal circuit court will not overturn the Board’s asylum decision unless the applicant demonstrates that the evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.³⁹ The substantial evidence standard is a highly deferential standard, and “is not petitioner-friendly.”⁴⁰ That the record *supports* a conclusion contrary to that reached by the Board is not enough to warrant upsetting the Board’s view of the matter; for that to occur, the record must *compel* the contrary conclusion.⁴¹

Generally, the IJ’s and Board’s asylum decisions are treated as factual questions reviewed under the deferential substantial evidence standard, and the courts must uphold the determination if it is supported by substantial evidence

³⁹ See INS v. Elias-Zacarias, 502 U.S. 478, 481(1992).

⁴⁰ Bocova v. Gonzales, 412 F.3d 257, 262 (1st Cir. 2005).

⁴¹ See Elias-Zacarias, 502 U.S. at 481, n.1.

in the record.⁴² For example, the question of whether the applicant established eligibility for asylum is a question of fact because it is a factual determination as to whether the applicant qualifies as a refugee.⁴³ Therefore, the IJ's or Board's conclusion that an applicant did not establish that he or she suffered past persecution is a factual determination reviewed under the substantial evidence standard.⁴⁴ Similarly, the IJ's or Board's determination that an applicant failed to establish a well-founded fear of persecution on account of any of the enumerated grounds is reviewed as a factual question under the substantial evidence rule.⁴⁵ Likewise, the question of whether an asylum applicant did or did not demonstrate a nexus between the harm he or she suffered and a protected ground is a factual question.⁴⁶ For example, the question of whether an applicant was persecuted on account of his or her membership in a particular social group is a factual determination that is reviewed under the substantial evidence standard.⁴⁷ Other factual determinations reviewed under the substantial evidence standard include the IJ's credibility determination in an asylum proceeding⁴⁸ and any finding of firm resettlement.⁴⁹

⁴² Gomez-Zuluaga v. Attorney General of the United States, 527 F.3d 330 (3d Cir. 2008).

⁴³ Patel v. Gonzales, 470 F.3d 216, 219 (6th Cir. 2006).

⁴⁴ See e.g., Journal v. Keisler, 507 F.3d 9, 12 (1st Cir. 2007), Celaj v. Att'y Gen. of the U.S., 471 F.3d 483 (3d Cir. 2006), Mohamed v. Keisler, 507 F.3d 369 (6th Cir. 2007), Ahmed v. Gonzales, 467 F.3d 669 (7th Cir. 2006), Kebede v. Gonzales, 481 F.3d 562 (8th Cir. 2007).

⁴⁵ See e.g., Wong v. United States Attorney General, 539 F.3d 225, 230 (3d Cir. 2008).

⁴⁶ See e.g., Silaya v. Mukasey, 524 F.3d 1066, 1070 (9th Cir. 2008).

⁴⁷ See e.g., Silva v. Ashcroft, 394 F.3d 1, 6 (1st Cir. 2005).

⁴⁸ See e.g., Segran v. Mukasey, 511 F.3d 1, 4-5 (1st Cir. 2007), Jian Hui Shao v. Board of Immigration Appeals, 465 F.3d 497, 502 (2d Cir. 2006).

⁴⁹ See e.g., Diallo v. Ashcroft, 381 F.3d 687 (7th Cir. 2004).

Legal Issues

The federal circuit courts review legal questions *de novo*. For example, the courts will review constitutional questions, such as whether an asylum applicant's due process rights were violated, *de novo*. The courts also will review claims of legal error and erroneous statutory interpretation *de novo*.⁵⁰

De novo review of the Board's statutory determinations, however, is "subject to established principles of deference" as set forth by the Supreme Court in *Chevron v. Natural Resources Defense Council*.⁵¹ The *Chevron* deference principles state that, in considering an interpretation adopted by an administrative agency, such as the Board, the circuit courts must ask "whether Congress has directly spoken to the precise issue."⁵² If Congress has directly spoken to the precise issue, then the circuit courts have primary authority under *Chevron* to determine whether the Board's interpretation is consistent with the unambiguously expressed intent of Congress.⁵³ That determination is a legal question subject to *de novo* review. If Congress has not directly spoken to the issue, the circuit courts may not "simply impose [their] own construction on

⁵⁰ See e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

⁵¹ 467 U.S. 837 (1984). The INA grants the Attorney General broad discretion with respect to the "administration and enforcement" of the immigration laws and states that his "determination[s] and ruling[s] with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1). The Attorney General, while retaining ultimate authority, has vested that interpretive authority in the Board in the course of considering and determining cases before it. 8 C.F.R. § 1003.1(d)(1). Based on this allocation of authority, the Board is accorded *Chevron* deference as it gives ambiguous statutory terms "concrete meaning through a process of case-by-case adjudication." *INS v. Aguirre Aguirre*, 526 U.S. 415, 423 (1999).

⁵² *Chevron*, *supra*, at 843.

⁵³ See *Cardoza-Fonseca*, *supra*, at 447-48.

the statute.”⁵⁴ Rather, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court[s] is whether the [Board’s] answer is based on a permissible construction of the statute.”⁵⁵ Therefore, the courts will review the Board’s interpretation of its statutory provisions *de novo* but will defer to its interpretation of a statute if it is reasonable and does not contradict the clear intent of Congress. However, the federal circuit courts will not defer to the Board’s interpretation of statutes that the Board does not administer, such as criminal law provisions.⁵⁶ Similarly, the circuit courts are not obligated to accept an interpretation clearly contrary to the plain and sensible meaning of the statute. The Supreme Court has recently clarified that if an administrative agency publishes precedent on an issue on which its governing statute is silent or ambiguous, that precedent is subject to Chevron deference, even in a federal circuit that has previously ruled to the contrary in a published decision.⁵⁷

Interplay of Fact and Law/Mixed Issues

There is disagreement among the federal circuit courts regarding whether the courts have jurisdiction to review mixed questions of law and fact. Specifically, the courts are divided on whether questions of law are limited to questions of statutory interpretation and constitutional questions or also include mixed questions of law and fact – those situations in which the historical facts and applicable

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Chevron, *supra*.

⁵⁷ National Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005). For an example of Brand X as applied in the immigration context, see Gonzales v. Dept. of Homeland Security, 508 F.3d 1227 (9th Cir. 2007).

legal standard are undisputed but the agency's application of those facts to the law are at issue.

Mixed questions of law and fact arise when an asylum applicant petitions the federal court to review issues that are subject to jurisdictional preclusion. For example, an asylum applicant who applied for asylum on or after April 1, 1998 (or April 16, 1998 for those filing affirmatively), must establish that he or she filed for asylum within one year from the date of last arrival or establish that he or she is eligible for an exception to the one year filing requirement.⁵⁸ If the applicant cannot establish that he or she filed within one year, the applicant is not eligible to apply for asylum unless he or she establishes that there are changed circumstances materially affecting the applicant's eligibility for asylum or extraordinary circumstances related to the delay in filing.⁵⁹ If one of these factors is established, the applicant must demonstrate that the application was filed within a reasonable amount of time given the circumstances.⁶⁰

One circuit court has found that whether an applicant established an exemption to the one-year filing requirement by demonstrating changed circumstances is a mixed question subject to judicial review because the definition of "questions of law" extends to questions involving the application of statutes or regulations to undisputed facts.⁶¹ That court held that it has jurisdiction to review mixed questions of law and fact because they are questions of law and reviewed the mixed question using the substantial

⁵⁸ 8 C.F.R. § 1208.4(a).

⁵⁹ 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a).

⁶⁰ *Id.*

⁶¹ *Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007).

evidence standard of review.⁶² Other circuits, however, have rejected this approach.⁶³

Discretion

The Board's discretionary judgment whether to grant asylum relief to an eligible asylum applicant is reviewed under the manifestly contrary to the law standard and abuse of discretion standard.⁶⁴ Federal circuit courts have found that the Board abuses its discretion when it acts “arbitrarily, irrationally, or contrary to the law.”⁶⁵

The United States Supreme Court

If an asylum applicant's claim is denied by the federal circuit court and the applicant is in removal proceedings, the applicant may petition the Supreme Court of the United States for review. The Supreme Court has the discretion to grant a writ of certiorari to hear the case.⁶⁶ The Supreme Court may decide to hear a case if it involves conflicting views on an issue by the federal circuit courts, or is deemed to be a case of national importance.

⁶² *Id.* at 657.

⁶³ See e.g., *Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007); cf. *Liu v. INS*, 508 F.3d 716 (2d Cir. 2007) (clarifying that the court will not review matters which are essentially quarrels about factfinding, but circumstances such as the application of the wrong legal standard to facts, or the unambiguous mischaracterization of facts, might present reviewable questions of law).

⁶⁴ 8 U.S.C. § 1252(b)(4)(D).

⁶⁵ *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000).

⁶⁶ 28 U.S.C. § 1254(1).

Two examples of cases currently pending before the Supreme Court this term which will impact asylum seekers are:

1. Nken v. Mukasey. The question presented is whether the decision of a court of appeals to stay a petitioner's removal pending consideration of the petitioner's petition for review is governed by the standard set forth in section 242(f)(2) of the INA, or instead by the traditional test for stays and preliminary injunctive relief.

2. Negusie v. Mukasey. The question presented is whether the "persecutor exception" in the INA prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.

SESSION 8

Chaired by Lois Figg
Immigration and Refugee Board, Canada
Deputy President, IARLJ

Regional Instruments – A comparative view of the operation of regional instruments in Europe, Africa and Central America.

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First speaker

"The European Protection System"

Judge Hugo Storey
Senior Immigration Judge
Asylum and Immigration Tribunal, UK

Second speaker

"Regional Instruments: Africa"

Justice Sophia Akuffo
Supreme Court of Ghana
Vice President, African Court on Human and Peoples' Rights

Third speaker

“Where to now: regional arrangements and refugee protection in Latin America and in the Americas”

José Fischel de Andrade LLM (São Paulo), MSt (Cambridge). PhD (Brasília).

Head of the UNHCR Field Office in Goz Beida, Chad.

(This paper is the basis of a presentation made at this session. The views expressed herein are those of the author and do not necessarily reflect the views of the UNHCR or the United Nations).

The European protection system

Hugo Storey

Introduction

Despite the hopes of some pan-Europeans that there would by now be a “United States of Europe”, Europe remains a collection of independent states. Nevertheless, most European states have undertaken obligations not only under the Refugee Convention but also under a range of international human rights treaties, most importantly under the (regional) European Convention on Human Rights (ECHR). And 27 of them, so far, have been prepared to cede some of their sovereignty to the institutions of the European Union (EU). Both the ECHR and EU legal systems have their own supranational court. As a result Europe has an advanced system of regional protection for persons seeking refugee from persecution or ill treatment. Its system is certainly not the most liberal: the past two decades have seen an era of restrictionist policies applied by almost all European states against asylum seekers. “Fortress Europe” is one of the terms coined to describe it. But increasingly the system does truly operate as a regional system and one which by and large is legally enforceable.

So, disregarding the Commonwealth of Independent States (the CIS), the European system of protection comprises two main legal orders. There is the system of protection based on the Council of Europe-enacted ECHR. The 47 European states (depending how one defines “European”) who have ratified this Convention are Member states of the Council of Europe, as follows:

Albania, Andorra, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom.

Then there is the system of protection afforded by the European Union (EU). The 27 European countries who are now Member States of the EU are:

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

The ECHR

The ECHR system of protection is over 50 years old and since 1960 a very considerable body of jurisprudence (known as “Strasbourg jurisprudence”) has developed affording an important level of protection to persons seeking asylum. Its case law represents the most extensive and established jurisprudence world-wide on human rights protection in the field of asylum or protection.

It is protection, curiously, which has been granted indirectly, because the ECHR itself contains no specific guarantees relating to asylum-seekers. But through its case law on key provisions, in particular Articles 3 and 8, the judicial organs of the Strasbourg system, have developed important guarantees. The two most important are articles 3 and 8. Article 3, which is a nonderogable right, prohibits ill-treatment. Article 8, which is a qualified right, guarantees the right to respect for private and family life. Article 3 protection against ill treatment has operated very much as an equivalent to Refugee Convention protection against persecution. The only difference has been that whereas under the Refugee Convention one has to show not just a real risk of persecution but also a Refugee Convention ground, under Article 3 you can succeed even if you cannot show a Refugee Convention ground.

The main way in which ECHR norms operate is at the grass roots, through the national law arrangements made by each Contracting State, almost all of whom in one way or another have incorporated the ECHR into their national law. But many cases are still taken to the European Court of Human Rights in Strasbourg (hereafter “the Court” or “Strasbourg”) by those who allege that the State concerned has failed to afford an effective human rights remedy. By and large States who are found by this supranational Court to have violated the ECHR comply with their obligation under the Convention to give effect to judgements of the Court, for example by undertaking not to expel an asylum-seeker applicant. In this way the Court’s judgements form a body of jurisprudence that is constantly being updated. Further, since 1998 when the Court began to operate a

Grand Chamber the case law of the Court is increasingly seen as forming a system of neo-precedent¹.

I shall mention just two examples of recent cases to give an illustration of the significance that the ECHR system of protection can have.

The *D v Turkey* case, app.no. 2425/03 judgment of June 22, 2006

D v Turkey illustrates first of all the fact that no longer are the Contracting States to the ECHR confined to Western Europe. As well as Turkey, Russia, Belarus and the Ukraine, among others, are parties to it. The case also illustrates something else of some importance. Most ECHR cases dealing with asylum applicants involve Contracting States who carry out their obligations under the Refugee Convention by setting up *national systems* for decision and appeal, involving executive officers at the first level and then judges in the case of any onward appeal against an adverse executive decision. That is the case, for example, in Germany, France, the UK, the Netherlands, to name but a few. But in some states that have ratified the UK refugee determination is not done this way, but by way of arrangements made between the national government and UNHCR. Indeed, world-wide UNHCR does primary refugee status determination in over 70 countries. *D v Turkey* involved one such country, Turkey. The significance of *D v Turkey* is that the applicants in that case were subject to a UNHCR determination, which went against them. The applicants were a couple from Iran and their child. The husband was a Sunni Muslim, the wife a Shi'a Muslim.

¹ See Jan Sikuta and Eva Hubalkova, European Court of Human Rights: Case Law of the Grand Chamber 1998-2006, TMC Asser, 2007, Foreword by Luzius Wildhaber.

They had married against the wishes of the wife's family, who had influence with the Iranian authorities. They were arrested and sentenced to 100 lashes for fornication. The punishment was carried out on the husband but postponed against the wife because she was pregnant, during which time they managed to flee to Turkey. The Court found that to remove them from Turkey back to Iran would violate their Article 3 right not to be exposed to torture or inhuman or degrading treatment or punishment. The Court concluded that even judicial corporal punishment, as carried out in Iran, amounted to "inhuman treatment" and found Turkey to be in breach of Article 3 for threatening to remove the couple.

So it can be seen that the ECHR can furnish protection even in European states that delegate their refugee determination to UNHCR. Also in this way, incidentally, it can be seen that a regional, supranational court, can operate as a type of appeal stage against a UNHCR decision, against which there would not otherwise have been an independent, effective remedy.

The *N.A. v UK* case

Significantly in the asylum field the Court has also begun to see the need for cases dealing with asylum-related applications that attempt to set down what one might call Strasbourg "country guidance". Thus in the case of *N.A. v. United Kingdom*, app.no.25904/07 (judgment of 24 June 2008) the Court made a number of extremely important observations about the *use and role of Country of Origin Information (COI)* in decisions on asylum-related cases and also about the *validity of courts and tribunals, including the*

Court itself, identifying certain lead cases as “country guidance” cases.

The *N.A. v UK* case concerned an applicant from Sri Lanka of Tamil ethnicity who had entered the UK clandestinely in 1999 and claimed asylum the next day. He feared ill-treatment by the Sri Lankan army and the Liberation Tigers of Tamil Eelam (the LTTE). He had been arrested and detained by the army on 6 occasions between 1990 and 1997 on suspicion of involvement with the LTTE. Following his last detention he had gone into hiding until his family managed to fund his journey to the UK. He claimed to be at risk on return both from the army and from the LTTE: he feared the latter on account of their adverse interest in his father who had done some work for the army. The applicant relied in particular on recent COI from various sources, including UNHCR, indicating that the situation in Sri Lanka had worsened and that the peace process had irretrievably broken down. The UK Government relied on lead UK cases, in particular several recent “Country Guidance” cases. In particular, LP (LTTE area-Tamils-Colombo-risk?) Sri Lanka CG [2007] UKAIT 00076, decided by the Asylum and Immigration Tribunal (AIT), which had held that although the situation in Sri Lanka had worsened it had not deteriorated so much that Tamils generally would be at risk; and that whether or not a person of Tamil ethnicity could show real risk of persecution or serious harm on return would depend on an examination of his or her case by reference to a number of “risk factors”.

In *N.A. v UK* the Court dealt first of all with the applicant’s claim that he was entitled to succeed under Article 3 because of the civil war going on in Sri Lanka, which put

everyone at serious risk of generalised violence. It stated that its jurisprudence:

“has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return” (*N.A. v. U.K.*, para. 115).

NA v UK is also interesting for what it shows about the Court’s approach to what is considered necessary by way of evidence if a person seeks to base his or her claim to be at real risk of ill treatment purely on being a member of a group whose members are generally at such risk. In *Salah Sheekh v Netherlands* the Court found that the Ashraf was a minority clan group in Somalia whose members were generally at risk. In *N.A. v U.K.* the Court emphasised the need in such cases for there to be evidence of a general practice or systematic pattern of ill treatment:

“116. Exceptionally, however, in cases where an applicant alleges that he or she is a *member of a group systematically exposed to a practice of ill-treatment*, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned

(see Saadi v. Italy, cited above, para 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, para 148)." (Emphasis added)

Having rejected the argument that all Sri Lankan Tamils were at risk, the Court then indicated that it considered the most appropriate way to assess risk to applicants who were Tamils was by reference to a list of "general risk factors".

In *N.A. v U.K* the Court was, of course, concerned with decisions made against N.A. by the U.K. authorities, both executive and judicial. And in the U.K. context, as already noted, the judicial decisions have a special feature. In its cases dealing with asylum applicants, the UK Asylum and Immigration Tribunal, with approval of the higher courts, has seen fit to attempt to identify risk of persecution or serious harm in any individual case by reference to a list of "risk factors" which the decision-maker needs to take into account. In *N.A. v U.K.* the Court approved of this type of approach. For the Court "it is in principle legitimate, when assessing the individual risk of returnees, to carry out that assessment on the basis of the list of risk factors, which the domestic authorities, with the benefit of direct access to objective information and expert evidence, have drawn up" (*N.A. v. the U.K.*, para. 129). The Court accepted the position of the U.K.'s Asylum and Immigration Tribunal

that these factors are not intended to be a “check list” or “exhaustive” (ibid. para. 129). The Court stressed that due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case (Hilal v. the U.K., para. 60) (*N.A. v. U.K.*, para. 130).

One of the other key principles applied by the Court in all its asylum cases is that of *current or ex nunc assessment of risk*. The past situation is only of interest insofar as it throws light on the issue of risk as at the date of hearing. This principle proved crucial in the case of N.A. because the domestic decision had been to refuse his attempt to make a fresh claim. Once the Strasbourg Court decided that that decision was wrong, it found itself having to consider N.A.’s position for itself, on the basis of the latest country evidence and the latest U.K. country guidance. The Court’s conclusion was that, applying the latest Tribunal country guidance to his current situation, N.A. did face a real risk of treatment contrary to Article 3.

EU Law

The EU - or the EEC as it used to be called - is also now over 50 years old, but its powers to introduce legislation in

the field of asylum are of relatively recent origin². As is well-known, the system of EU or Community law is highly developed and much of the legislation enacted by EU institutions has “direct effect” and takes precedence over the national law of EU Member States. If a provision of EU law applies, a Member State may be faced with having to “disapply” any national law provisions that are contrary to it.

Although it has long-established legislation regulating the free movement of persons (as well as of goods, capital and labour), it was not really until October 2006, with the implementation of the Refugee Qualification Directive³ (QD), that it had any law affecting refugee eligibility and eligibility for subsidiary protection.

What was the position like before October 2006? Prior to the introduction of the Directive, asylum or protection law in Europe was a Tower of Babel. Prior to 10 October 2006, that is to say, EU law impinged in only a limited way on substantive asylum-decision making at a national level. Each Member State was a party to the Refugee Convention, but the jurisprudence it applied was almost entirely based on its own national law and domestic jurisprudence⁴. Inevitably, over the years, there were very considerable divergences between European Member States in their

² Introduced by the 1995 Treaty of Amsterdam and given concrete shape by the Tampere summit in 1999: see further Hemme Battjes, European Asylum Law and International Law, Nijhoff, 2006, pp.26-46.

³ “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”.

⁴ Although it must be said that the efforts of the IARLJ, UNHCR and other bodies did much to encourage trends towards a global convergence of interpretation.

approach to the Refugee Convention. Divergences over, for example, what persecution meant, whether there could be non-state actors of persecution, over whether there was an internal flight alternative, whether a person could succeed in an asylum claim solely on the basis of sur place activities. Concern on the part of Member States about divergent interpretation of the Refugee Convention led to the adoption of the 1996 Joint Position, but it was not a legally binding instrument.

Further, all European states were increasingly becoming embarrassed at the differing criteria that they applied when deciding about *extra-Refugee Convention* or complementary or subsidiary protection. Some limited it to people who qualified under Article 3 ECHR, some did not. Some gave it to war refugees, some did not. Some gave it to people fleeing armed conflicts in certain countries, but not others. Some gave beneficiaries a set of rights and benefits as good as refugees, others did not. There were all kinds of different names for these complementary protection categories: category B status, exceptional leave to remain, humanitarian protection etc. An ECRE survey in early 2000 highlighted the disparities in approach and treatment in relation to complementary protection.

The Qualification Directive and the Common European Asylum System (CEAS)

But in October 1999 the EU governments drew up what were called the Tampere Conclusions, endorsing a programme for EU asylum legislation, which was soon reinforced by the Hague Programme, acting under the legal basis created by Article 63 of the Amsterdam Treaty to pass

laws on asylum. The EU legislators set about creating what is called a *Common European Asylum System (CEAS)*. We have just now completed the “first phase” of this System.

Of the array of legislative measures making up the first phase, the QD is its flagship. But it is clear from a glance at the others that the intention has been to construct a body of laws dealing with all aspects of the asylum process.

Those which formed part of the first phase of the CEAS, now completed, are:

- the Temporary Protection Directive (Council Directive 2001/55 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) (implemented 1 January 2005);
- the Dublin Regulation (2003/343/EC) establishing criteria and mechanisms for determining the Member State responsible for examining an application lodged in one of the Member States by a third country national;
- the Reception Conditions Directive 2003/9/EC of 27 January 2003; the Qualification Directive (implemented 10 October 2006);
- two EURODAC Regulations (Regulation 2725/2000, Regulation 407/2002; and

- the Procedures Directive (Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (implemented 1 December 2007)).

Almost all these measures are driven by a concern to overcome national divergences in law and practice. The importance attached to overcoming this variability in criteria can be seen from recitals 6 and 7 of the QD:

“(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.” (emphasis added)

A related aim was to prevent “asylum-shopping” and “secondary movements”. The QD expressly refers to this wider context at recital 4:

“The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the

recognition of refugees and the content of refugee status.”

Currently the EU Commission is busy drawing up measures that will form part of a “second phase” of the CEAS. Up until the setback to the Lisbon Treaty caused by its rejection in the Irish Referendum, it was intended to construct the second phase on the new legal basis of the 2007 Lisbon Treaty, but even if that remains stalled, measures in the second stage will still see an increase in the level and extent of harmonisation⁵.

The current text of Article 63 of the TEC/TEU, the EU treaty provision dealing with asylum, refers to “minimum standards”, which places some limit on the degree of harmonisation. The new Art 62(2) TFEU (under the Lisbon Treaty), however, makes no mention of “minimum standards” and provides for the adoption of measures relating to:

“(a) a uniform status of asylum for nationals of third countries, valid throughout the Union; and (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection”.

Until the EU can overcome the problem of defeat in the Irish Referendum, this legal basis must wait in the wings, but if it becomes part of EU law, it will have major effects on existing law and practice. The Commission’s *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*

⁵ See the EU Commission’s “*Policy Plan on Asylum: an integrated approach to Protection Across the EU*” Brussels, 17 June 2008 COM (2008) 360.

(Brussels 17 June 2008 COM (2008) 360 states that, since “common minimum standards have not created the desired level playing field”, wide-ranging amendments should be made, whether action is undertaken under existing Article 63 or the Lisbon Treaty, including possible widening of the material scope of subsidiary protection.

The role of the ECJ and the European legal order

All existing and future legislative measures on asylum are, of course, subject to interpretation by the European Court of Justice (ECJ). Judgments of the ECJ have binding legal effect in each of the Member States of the EU.

The potential implications for asylum law are huge. Whereas before different Member States could happily adopt different approaches to definition of key terms relating to persecution, protection, sur place claims and the like, now these are all subject to ECJ ruling. Of course, at the time of writing, the ability for a reference relating to the QD has only existed since October 2006 references and the reference procedure is not the normal Art 234 one, but an Article 68 one, which is limited to courts of final instance, so that to date there have only been three references. But already (i) the ECJ has shown that it can accelerate certain cases; (ii) the second and third of the three references, both from the German Supreme Federal Administrative Court, will necessitate the ECJ dealing with key matters of refugee law, relating to the cessation and exclusion clauses respectively.

The first reference, from the Dutch Council of State in a case called *Elgafaji*⁶, concerned not any of the provisions of the QD dealing with refugee eligibility, but rather eligibility for subsidiary protection. But it will require the ECJ to address the vital matter of whether the QD's subsidiary protection regime offers anything over and above Article 3 in respect of persons who base their claims on risk arising from being returned to situations of armed conflict. Judgment in that case, the *Elgafaji* case, is expected in the next month or so. It concerns a couple from Iraq who claimed, inter alia, that the level of generalised violence in Iraq was such that to return them to that country would cause them serious harm.

When the Court gives its judgment on the two references concerning cessation and exclusion under the Refugee Convention, it will mean that for the first time there will be jurisprudence directly related to the Refugee Convention from a supranational Court. And a supranational court with supervisory powers over 27 Member States. As I said, in a paper I gave to the last IARLJ World Conference in Mexico⁷, over time it may prove very difficult for courts and tribunals in other countries not to be strongly influenced by forthcoming refugee-related jurisprudence emanating from a supranational court speaking in the name of 27 countries.

In the longer term, the uniform interpretation achieved through ECJ jurisprudence, will make a big difference. Think for example of EU law on free movement of persons.

⁶ Case C-465/07 *Elgafaji*.

⁷ Hugo Storey, "International Law Instruments and Refugee Law: "The New Kid on the Block", in Forced Migration and the Advancement of International Protection, 7th World Conference, Nov 6-9 2006, IARLJ, Printed MultiCopy Harlem, 2008, pp.154-164.

Everyone agrees today that it is largely settled law (although the 2004 Citizens Directive has contained one or two surprises), but national decision-makers and judges are for the most part able to apply the law as established by ECJ jurisprudence. There is very little scope for national law. Consider the following roll-call of some of the leading cases dealing with EU free movement of persons which have created that body of settled law: *Van Duyn v Home Office* 1975; *Rutili*;1976; *Watson and Belmann* 1976; *R v Bouchereau* 1978; *R v Pieck* 1981; *Levin* 1982; *Luisi and Carbone* 1984; *Diatta v Land Berlin* 1985 ;*Netherlands v Reed* 1986; *Gul v Staatssecretaris van Justitie* 1986; *Rush Portuguesa* 1990; *Ex parte Antonissen* 1991; *Surinder Singh* 1992; *Van der Elst* 1994; *Ex parte Savas* 2000; *MRAX* 2002; *Chen* 2005; *Tum and Dari* 2007; *Metock*, July 2008.

It took several decades, but over time this body of jurisprudence has transformed the law on free movement of persons and, for the most part, national judges find application of it quite straightforward.

Refugee protection and the Qualification Directive

Guidance on the refugee definition

Let us look at what the QD says about refugee protection and at the important changes the QD has brought to the approach national decision-makers must take when deciding whether someone is eligible for refugee protection.

So far as concerns what the QD says about refugee protection, three main features are important.

First, the Directive has not adopted the same approach as one finds in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) or the Cartagena Declaration. Both of these contain a definition of refugee which is *deliberately wider* than that contained in the Refugee Convention. Whereas under the Refugee Convention one is only able to qualify as a refugee if one can show a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and be outside the country of nationality or habitual residence(if stateless), under the African Refugee Convention one is able to qualify simply by showing one “is compelled to leave his/her place of habitual residence...” “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his/her country of origin or nationality”. That is to say, the approach adopted under the Directive is to leave intact the Refugee Convention definition but to establish a supplementary or subsidiary protection system alongside it. The two together give rise to what is called “international protection”. The QD is the first supranational instrument to bring together in the one treaty provisions covering *both* types of protection.

Second, so far as concerns the Refugee Convention, it expressly aims to ensure a “full and inclusive application of the [Refugee] Convention” (recital 2) and to set down “minimum standards for the definition and content of refugee status ...to guide the competent national bodies of member States in the application of the Geneva Convention” (recital 16). It does not seek to supplant the

Refugee Convention or to create an alternative European Refugee Convention, rather it expressly reaffirms the primacy of the Refugee Convention. Thus recital 3 refers to the Refugee Convention providing the “cornerstone of the international legal regime for the protection of refugees”.

The parent EU legislation, Article 63 of the TEC, also describes the Refugee Convention as the primary treaty to which EU law must “accord”.

Third, as already mentioned more generally, it aims to provide further interpretive guidance. As I have written in my IJRL article⁸, the principal role of the Directive, as far as asylum law is concerned, is not to substitute a different definition of refugee but is rather to add more detail to it. The definition of refugee given in the 1951 Convention was deliberately kept brief and simple⁹. It is a minimalist definition, one which does not define many of the key terms contained within the Article 1 definition, for example persecution and protection. This lack of detail, of course, whilst ensuring certain flexibility, has led to much scope being left for each contracting State to add more definitional detail unilaterally, by means of national legislation or case law or a combination of both.

As a result there has been considerable variation in the approach taken to establishing who is a refugee by different countries. This is what the Directive, at least for

⁸ Hugo Storey, “EU Refugee Qualification Directive”: a Brave New World?” *Int.J.Refugee Law*, 2008.

⁹ “...owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...”

the 26 EU States who are now parties to it¹⁰, seeks to overcome.

To this end, the Directive furnishes interpretive guidance on the application of key elements of the refugee definition. Thus Art 9(1) defines persecution stating that “acts of persecution within the meaning of article 1A of the [Refuge] Convention *must*” Article 9, being in mandatory terms, requires Member States to ensure that in interpreting and applying the Refugee Convention, acts of persecution are defined as set out in Article 9(1) and (2).

Article 9(1) states:

“Acts of persecution within the meaning of article 1A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or

b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

.....”

Similarly, Art 6 defines actors of persecution, specifying that they can include non-state actors.

“Actors of persecution or serious harm include:

(a) the State;

¹⁰ Denmark has not opted in.

- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.”

Article 7 makes clear, among other things that protection against persecution or serious harm can be provided by de facto as well as de jure state entities.

- “1. Protection can be provided by:
 - (a) the State; or
 - (b) parties or organisations including international organisations, controlling the State or a substantial part of the territory of the State.
- 2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.
- 3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.”

Article 5 (in conjunction with Article 4(3)) deals with sur place claims.

Article 8 deals with internal relocation.

“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.”

Article 4(4) deals with the relevance of past persecution.

Taken together, these further definitional details cover elements of the refugee definition which arise, in one way or another, in almost every asylum claim. Since the above provisions cover most of the key elements of the refugee definition, the Directive *now governs almost everything to do with refugee eligibility.*

So far as changes the QD has wrought to the asylum-related law and practice of EU Member States are concerned, the most graphic change concerns the approach to *persecution by non-state actors*. Article 6 specifically provides that persecution can emanate not only from the state (Article 6(a)), but from either “parties or organisations controlling the State or a substantial part of the territory of the State” (6(b)) or “non-State actors...” (6(c)). Previously in some countries a concept of persecution was applied so that only state actors of persecution could be agents of persecution. So if for example you faced persecution at the hands of a guerrilla organisation or a criminal gang, you could not show you were “being persecuted”; you could qualify for some other form of protection, but not the one with the best rights and benefits. Germany was the clearest (but not the only) example. Indeed the different approaches to persecution as between the UK and Germany became to subject of a ECtHR judgment in *T.I v UK*¹¹ which concerned whether a Sri Lankan returned by the UK to Germany would face onwards refoulement to Sri Lanka which may be contrary to Article 3. He has contended that he would be persecuted by the LTTE, not the state authorities.

But there are other changes, and we (i.e. those of us who are judges in one of the 27 EU Member States) are all having gradually to grapple with those in our national case law, whilst awaiting ECJ guidance.

Harmonising of the method of approach to asylum-related claims

One of the reasons for taking time above to focus on refugee protection is because of what was said earlier about

¹¹ [2000] INLR, 211.

“subsidiary protection”, being explicitly defined as *secondary* protection. There is method in the Directive’s choice of language here. What the Directive is trying to avoid is that Member States should use complementary protection regimes as a *substitute* for according refugee status to those who are eligible.

It is in order to counteract that tendency that the TEC (now TEU) legislation (Article 63) and the Directive also impose on Member States a specific ordering or method of approach in deciding asylum-related cases. In particular, and that is clearest from use of the word “subsidiary”, the Directive envisages that the national decision-maker must first decide whether a person is a refugee. Only if the decision-makers finds a person is NOT a refugee, does one turn to consider whether he is eligible for “subsidiary” protection. Also implicit in this ordering is that any separate human rights eligibility under national constitutional law or the ECHR as incorporated would only be considered last.

Subsidiary protection and the Qualification Directive

Just as persecution in the concept that governs whether one is eligible for refugee protection, so serious harm is the concept that governs whether one is eligible for subsidiary protection.

Article 15 states:

“Serious harm consists of:

(a) death penalty or execution; or

- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

There have been some problems with transposition of this provision, several states, including Belgium, Lithuania, Austria, Finland, Portugal and Sweden, having omitted the word "individual", France having substituted "generalised violence" (*généralisée*) for "indiscriminate violence" (*indiscriminée*) to name just some examples. But, if EU law takes its normal course, these will be ironed out in time.

Complementary to Art 15(c), is recital 26 which states:

"Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm".

Article 2(e) of the Qualification Directive provides:

"[person eligible for subsidiary protection] means a third country national or a stateless person who does not qualify as a refugee ...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 of former habitual residence, *would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail*

himself or herself of the protection of that country.”
(emphasis added)

So we have the *burden of proof*, which is on the applicant (“substantial grounds *have been shown*”), the *standard of proof* (“substantial grounds... for believing [a person if returned] would face a real risk”) and what has to be proved namely (to break it down into the four main elements): serious and individual threat; to a civilian’s life or person; by reason of indiscriminate violence; and in situations of international or internal armed conflict.

Why is this such a key provision? Again we need to look at the wider context.

Importance of subsidiary protection as a status.

Prior to the date by which 26 Member States had to implement the Refugee Qualification Directive (10 October 2006) the two main non-refoulement obligations of Member States arose under the Refugee Convention and Article 3 of the European Convention of Human Rights. The big difference between the two types of protection was that if a person qualified as a refugee he was entitled to a *status*, recognised at the level of national and international law. Within Europe being granted refugee status meant that a person received a right of residence plus other rights and benefits. However, if a person was found *not* to be a refugee but to benefit from Article 3 ECHR protection, all that this resulted in was a protection against removal. It did not by right result in a status. Of course individual Member States made provision in their national law to grant certain rights of residence and other benefits to persons who could

show that their removal would violate Article 3, but national arrangements varied widely.

The difference between the situation on the ground *pre- and post- Qualification Directive* can be illustrated in this way.

Pre-Qualification Directive, if I based my non-refoulement claim on risk from mafia-type criminal gangs or if I was a woman who based my claim on a risk of domestic violence, I would very rarely be considered a refugee – because even though I could show I faced a risk of persecution/ill treatment, I could not show that the persecution/ill treatment was on account of a Refugee Convention ground. But I could show a real risk of Article 3 violation. So I could not be removed. But whether I received anything more by way of permission to reside or other benefits, varied from Member State to Member State and it was usually inferior to what refugees got.

Post-Qualification Directive, contrastingly, such persons qualify for subsidiary protection (under Article 15(b)) and are also entitled to a grant of subsidiary protection status (by Article 18), a status recognised at the level of national Member State and EU law. This status is a guaranteed status in EU law. It is true, the Directive does not accord as generous rights and benefits to persons eligible for subsidiary protection status, but the minimum standards they require are still a significant advance, and including, for example rights of family reunion and the right to work.

One obvious question is, “So is subsidiary protection just Article 3 protection plus a guaranteed status. Is it material scope exactly the same?”

It is convenient as a starting-point (but as a starting-point only) to conceptualise subsidiary protection as quasi-Article 3 ECHR protection or as “Art 3 + status”. Basing the concept of subsidiary protection on the ECHR is indeed suggested by recital 25.

“It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. *Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.*” (emphasis added)

And Article 15(a) and 15(b) are obviously based on the Sixth Protocol and Article 3 of the ECHR respectively.

The only thing new and unfamiliar in the Directive is, therefore, Art 15(c).

Main differences between subsidiary protection and Article 3 protection

But the notion of subsidiary protection as quasi-Article 3 protection, although useful as a start-point, is subject to some important qualifications.

Personal scope

One qualification is that subsidiary protection only applies to third-country nationals and stateless persons, whereas

Article 3 protection applies to everyone. Note again the title of the Directive:

“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”.

Material scope: exclusion clauses

But the most important and certain qualification is that, unlike Art 3, subsidiary protection is subject to exclusion clauses similar to those applied to refugee protection. Article 17 stipulates that:

“A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 - (b) he or she has committed a very serious crime;
 - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
 - (d)...
- 2....
3....”

The Directive copies the Refugee Convention in making refugee status subject to cessation and exclusion clauses: see Articles 11 and A12¹². But it also applies cessation and exclusion clauses to those eligible for subsidiary protection status: see Articles 16, A17. (Indeed the exclusion clauses applied to subsidiary protection are more widely drawn than those contained in either the Refugee Convention or in A12 (2)-(3)). Generally speaking the existence of cessation clauses will make no material difference, since Article 3 ECHR is concerned only with current risk, and where cessation clauses would apply to subsidiary protection, similar considerations will entail that there is no violation of Article 3 ECHR.

However, no such approximation applies in respect of the exclusion clauses. It is an axiom of Article 3 ECHR jurisprudence that Article 3 is an absolute right and cannot be subject to restrictions of any kind. A topical example of an exclusion case where Article 3 may still avail a person arise if he were an out-and-out terrorist. He would

¹² Article 12 (2) and (3) state:

2) "A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refugee prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3) Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

Note that this text is not wholly identical to Art 1F of the Refugee Convention.

normally fail not only to qualify under the Refugee Convention, but would also fail to qualify for subsidiary protection under the Directive, as under both legal regimes he would fall within the exclusion clauses. However, he would continue to be able to invoke Art 3 of the ECHR, on the basis that, albeit a terrorist, he cannot be refouled without threatening his Article 3 right, which is absolute. The same will apply to an out-and-out serious criminal who is a fugitive from justice in his country of origin yet would face on return a real risk of serious harm (because, for example he will face the death penalty or unlawful killing or because the justice system there would flagrantly deny him a fair trial). There has been some criticism of the EU legislators for applying exclusion provisions to subsidiary protection as well as to refugee protection. The argument the other way is that the status and benefits which attach to subsidiary protection are positive civic advantages which should not be afforded to a persons whom a state would want to remove, particularly those who have committed crimes against humanity or a who are a mass murderers. The question posed is, "Why their irremovability for Art 3 ECHR reasons should put them in the same position as persons who are not criminal wrongdoers?"

Other differences relate to health cases and armed conflict cases.

Health cases

The wording of A15 (b) copies the wording of Art 3 ECHR precisely, save for adding the (italicised) words "torture or

inhuman or degrading treatment or punishment *in the country of origin*".

This restriction appears to have been deliberately added in order to prevent persons relying on ill health grounds from being able to qualify for subsidiary protection. By contrast, it is well-settled that although there is a high threshold in order to succeed, Art 3 ECHR can afford protection in health cases. A clear-cut example, albeit likely to be rare, would be a person facing expulsion found to be at real risk of committing suicide in the UK. Another possible example (although an exceptional one) is *D v UK* (1997) 24 EHRR 423¹³, where the main or equally important basis of the claim that expulsion would breach Art 3 ECHR was not treatment in the country of origin (St Christopher and Nevis), but the impact on a claimant's physical and moral integrity in the UK of the decision to remove, given the life-threatening nature of his illness¹⁴. (However, it is at least arguable that the additional wording may not wholly prevent ill-health claims being brought under A15 (b) based on the lack of medical treatment in the country of origin, since ECHR norms generally accept that state inaction can still give rise to ill treatment and in unusual circumstances the lack of medical facilities could be seen as "treatment...in the country of origin").

Material scope and armed conflict cases

But the most controversial difference – or possible difference- concerns the provision made in the Directive for persons fleeing situations of armed conflict.

¹³ Specific reference was made in the drafting discussions to the case of *D v UK*,

¹⁴ See now *N v UK* (App.no.75157/01) judgment of 29 April 2008.

According to one interpretation, which has been adopted by several EU Member States, Article 15(c) simply codifies Article 3 ECHR-type protection in situations of armed conflict. If that is right it has no “added value” to Article 3 of the ECHR apart from conferring a status on the person who shows he meets the eligibility criteria. On this view Article 15(c) simply particularises how Article 3 is to be applied in specific types of situation (15(a) dealing with the death penalty and 15(b) dealing with situations of armed conflict). As I will come to in a moment, this matter is the subject of a pending reference from the Dutch Council of State to the ECJ. However, it is useful in the interim to note that several (albeit not all) national courts and tribunals, and now the Advocate General in his Opinion¹⁵ on the pending case, *Elgafaji*, have found that Article 15(c) does afford some additional scope to (b) and (a).

Before coming to that it is also important to note that in the countries which have so far decided lead cases dealing with Article 15(c), whilst not all agreed over the issue of “added value”, all of them so far have applied an international humanitarian law (or “IHL”) approach. For convenience, I shall refer in the main to the UK case which deals with Article 15(c) because it contains references to other countries’ lead cases up to that point. The case is *KH* (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023 (March 2008).

In *KH* it was held:

¹⁵ Opinion of Advocate General Poiares Maduro, 9 Sept 2008 in Case C-465/07 *Elgafaji*.

- (1) *Key terms found in Article 15(c) of the Qualification Directive are to be given an international humanitarian law (IHL) meaning. Subject to (3) below, the approach of the Tribunal in HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 to this provision is confirmed.*
- (2) *Article 15(c) does add to the scope of Article 15(a) and (b), but only in a limited way. It is limited so as to make eligible for subsidiary protection (humanitarian protection) only a subset of civilians: those who can show that as civilians they face on return a real risk of suffering certain types of serious violations of IHL caused by indiscriminate violence.*
- (3) *Article 15(c) is not intended to cover threats that are by reason of all kinds of violence. It does not cover purely criminal violence or indeed any other type of non-military violence. Nor does it cover violence used by combatants which targets adversaries in a legitimate way.*
- (4) *Where it is suggested that a person can qualify under Article 15(c) merely by virtue of being a civilian, the principal question that must be examined is whether the evidence as to the situation in his or her home area shows that indiscriminate violence there is of such severity as to pose a threat to life or person generally. If such evidence is lacking, then it will be necessary to identify personal characteristics or circumstances that give rise to a “serious and individual threat” to that individual’s “life or person”.*

- (5) *Given that the whole territory of Iraq is in a state of internal armed conflict for IHL purposes (that being conceded by the respondent in this case), a national of Iraq can satisfy the requirement within Article 15(c) that he or she faces return to a situation of armed conflict, but will still have to show that the other requirements of that provision are met.*
- (6) *Neither civilians in Iraq generally nor civilians even in provinces and cities worst-affected by the armed conflict can show they face a “serious and individual threat” to their “life or person” within the meaning of Article 15(c) merely by virtue of being civilians.*

In June 2008 the German Supreme Administrative Court specifically said that it endorsed the approach in *KH*. The case concerned is BVerwG 10 C 43.07 (June 2008). In an English summary of this case provided to the IARLJ¹⁶ it is stated:

“The German Supreme Administrative Court has given the 'individual threat' requirement a meaning which does not make the protection illusory. Risks which the population of a country or a section of the population are generally exposed are not excluded from subsidiary protection. An individual can be personally at risk in two ways: Either every member of the population in a country or in a certain region of the country is at risk (f.ex all Israelis in a war of the neighbouring Arab states against them) or – if that is not the case – the applicant qualifies to be at

¹⁶ Available via the IARLJ website and its Database.

higher risk than the population in general because he belongs to a risk group (journalists, politicians, doctors etc). A decisive element is the intensity of the danger, that means how many persons (of the population in general or of the specific group) have been victims of the armed conflict. Concerning the individual threat requirement the German judicature – generally spoken - uses the same criterions to grant subsidiary protection as they have already used to grant refugee status for years.

Subsidiary protection may not be used to avoid granting refugee status. The German Supreme Administrative Court has decided, that the government as well as the courts first have to decide on refugee status, and only if this status has to be denied they are asked to decide on subsidiary protection. Therefore 73.5 percent of the Iraqi applicants in the first half of 2008 have been granted refugee status, only for the rest a decision on subsidiary protection was necessary.”

Since these two cases were decided, there is now to hand, as noted earlier, the Opinion of Advocate General Poiares Maduro, 9 Sept 2008 in Case C-465/07 *Elgafaji*. It concerns a husband and wife from Iraq who claimed that even though they had been found not credible and had failed in their asylum claims they were entitled to succeed on the basis of Article 15(c) since as civilians they would face a serious and individual threat to their life or person by reason of indiscriminate violence in a situation of internal armed conflict.

The Court has been asked by the Dutch Council of State whether Article 15(c) added anything to Article 3 of the ECHR (which is replicated in Article 15(b)).

The questions asked are:

“(1) Whether Art 15(c) has to be considered applicable to the same situations as Art 3 ECHR as interpreted by the case law of the ECtHR, or if it offers a complementary or another form of protection.

(2) Should this be the case, then what are the criteria to assess whether a person who claims to qualify for subsidiary protection status runs a real risk of a serious and individual threat as a consequence of indiscriminate violence as stipulated in Art 15(c) of the Directive when read in combination with Art 2(e) of the same Directive”.

The Advocate General’s answer was yes. He made no mention of IHL (we shall return to that matter below) but based his analysis on an approach which sees the principal purpose of the Directive to prevent fundamental violations of a person’s basic human rights, as is evident from the following extract.

“35. From that point of view, the requirement of a threat which is ‘individual’ is fully justified. That requirement serves to make apparent the fact that indiscriminate violence must be such that it cannot fail to represent a likely and serious threat to the applicant for asylum. The distinction between a high

degree of individual risk and a risk which is based on individual features is of defining importance. Although a person is not covered by reason of features concerning him particularly, that person is no less individually affected when indiscriminate violence substantially increases the risk of serious harm to his life or person, in other words to his fundamental rights.

36. In order to answer the second question referred more specifically, and in particular from the point of view of the burden of proof to be borne by the applicant for asylum, it must be noted that the burden of proof in respect of the individual link required is certainly less for the individual targeted under Article 15(c) than under Article 15(a) and (b). However, the burden of proof will be greater in respect of demonstrating indiscriminate violence, which must be generalised (in the sense of non-discriminatory) and so serious that it raises a strong presumption that the person in question is the target of that violence. In reading recital 26 of the Directive, we are reminded that that violence exceeds the risks to which the population of a country or a section of the population is generally exposed.

37. Those two aspects may in actual fact be closely connected: the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it

himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.”

During the period whilst national courts and tribunals have been awaiting the ECJ judgment in *Elgafaji* there has been considerable debate about the Advocate General’s Opinion¹⁷. It has been seen to have many positives, in particular that by identifying a need to draw on ECHR norms, he promotes what one might call a human rights approach to interpretation¹⁸. That allows decision-makers to continue to rely on EHCR norms as a source of objective criteria.

But perhaps its major positive feature has been seen as its rejection of a restrictive interpretation of the concept of “individual threat” which would require a person to show he faces being singled out or uniquely or personally targeted or has, in the A-G’s words at para 28 “features particular to him”. The Advocate General rejects that. He endorses instead the notion that a class of persons who are collectively targeted may also be described as individually targeted. At para 34 he states that Art 15(c) is intended to cover “situations of indiscriminate violence which is [are] so serious that, as the case may be, *any individual with the ambit of that violence may be subject to a real risk of serious harm to his person or life*”. As he puts it at para 35, “[t]he

¹⁷ Article 15(c) was the subject of an IARLJ European Chapter workshop in Berlin in September 2008.

¹⁸ In the same way as refugee jurisprudence has increasingly come to give key terms under the Refugee Convention a human rights reading (in order to provide an objective basis for making decisions), seeing persecution in terms of a basic attack on fundamental human rights, so the A-G’s recommended approach to the concept of “serious harm” is to give it a human rights approach and so a more objective basis for decision-making.

distinction between a high degree of individual risk and a risk which is based on individual features of defining importance". That notion accords with common sense and our sense of history.

But his Opinion has also been seen as having some negative features.

Since this paper is written for a conference of judges, it is particularly important to mention concerns that have been expressed about the *process* used in relation to this case. Despite citing the November 2007 UNHCR study in a footnote, the Opinion shows no sign of being aware of national case law. From the fact that it does not refer to the very important recent ECtHR Article 3 ECHR case, *NA v UK*, July 17 2008 [2008] ECHR 616, App.No.25904/07, it would appear to have been largely drafted some months ago. That may partially explain its apparent lack of any awareness of existing national case law. No-one was expecting the A-G to refer to specific national cases, that is contrary to Luxembourg traditions; but national judges *were* (I think) expecting that he would show that he was conversant with the existing case law approaches, particularly as he cites the November 2007 UNHCR study which does refer to some cases.

As a corollary, the A-G appears to see himself as tackling Art 15(c) as a jurisprudential blank slate. There is a respectable body of opinion that affronts the notion of the "European legal order" being a *partnership* of ECJ and national judges. In that light the A-G Opinion might be said to gloss over the fact that the Directive is legislation giving effect to TEC/TEU articles intended to give primacy to the

Refugee Convention and other international obligations. In relation to these, national courts and tribunals have built up an extensive case law. Not even to locate the proposed answers to the reference questions in terms of the existing national case law discourse may not appear the best way to begin a new European-wide jurisprudence. (One has to say, the reference process does not encourage the ECJ judiciary to have regard to this dimension since it is only the Member State executives and European institutions, including the Commission, which have a right to make submissions. Unlike the position before the ECtHR in Strasbourg, neither UNHCR nor the IARLJ had an opportunity to make third-party interventions to the Luxembourg Court. According to a UNHCR note on the oral hearing in July, “[n]o reference to international humanitarian law was made and none of the Member States, with the exception of Sweden mentioned the role of State practice in defining the content of Article 15c QD”).

(The fact that the Opinion shows no obvious sign in its analysis of being aware of UNHCR’s views may also be thought odd given that one of the recitals of the Directive does refer to consultations with UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention” (recital 15)).

One of the main concerns in terms of substance, has been in the A-G’s approach to the concept of “indiscriminate violence”¹⁹. It has been suggested that he displays an

¹⁹ See e.g. the U.K. AIT decision, *AM & AM* (armed conflict: risk categories) Somalia CG[2008] UKAIT 00091.

apparent ignorance of the significance of the war or armed conflict context of Article 15(c).

The armed conflict context

It is acte clair that a person cannot come within the terms of Article 15(c) unless he can show he faces a situation of armed conflict. Yet the A-G's approach appears to proceed on the basis that the relevant norms to be applied –human rights norms- apply irrespective of whether the situation is one of war or peace. They do not. In peacetime, if I find myself shot at by a tank, that is a serious breach of my fundamental rights. But Art 15(c) is not about peacetime. It is about wartime. And (at international law), it is not a serious breach of my fundamental rights to be shot at by a tank if I am a soldier or insurgent. It is only so if I am a civilian and then only in certain circumstances, in essence, when the attack is a deliberate targeting of me as a civilian or was undertaken without taking care to differentiate between military and civilian targets or being disproportionate in its aims, means or methods.

But if it is only so if I am a civilian, then what becomes crucial is knowing what the laws of war allow in relation to civilians. Advocate-General Maduro has overlooked a basic principle of international law when one is dealing with armed conflict situations: When the subject area is armed conflict the International Court of Justice has held that IHL is the "*lex specialis*" (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 [1996] ICJ Rep 66). And, to the extent that the A-G thinks it is all about fundamental rights, the European Court of Human Rights itself has consistently seen the ECHR as forming body of a

wider body of international law, with which State parties must comply: see *Bosphorus Airways*, Application no. 45036/98 at para 150, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI.”

Apparent lack of consistency with binding international norms

Another way of putting the above is that the A-G’s adoption of a framework based on international norms is impermissibly selective. Simply to stop at international human rights norms as the "Grundnorm" overlooks that there are other preemptory international norms and that these are as binding on the Community legal order as are human rights norms. International obligations (including IHL treaties to which most Member States are a party) automatically form part of the laws of Member States and the EU: see Case-540/03 *Parliament v Council*. The rules of IHL (at least insofar as they constitute customary international law) are likewise binding upon the Community institutions and form part of the Community legal order: see C-162/96 *Racke* [1998] ECR 03655, paras 45-6.

Dubious interpretation of concept of “indiscriminate violence”

So far as concerns the key terms the A-G does seek to interpret, it may be a good thing that the A-G does not attempt any technical or exhaustive definition. But, in order to establish his own proposed interpretation, he does depend upon a particular approach to the meaning of the concept of “indiscriminate violence”. As his paras 34 and 36 makes clear, his approach depends on this term meaning

violence which does not have a discriminatory element. In para 36 he states:

“...However, the burden of proof will be greater in respect of demonstrating indiscriminate violence, which must be generalised (in the sense of non-discriminatory) and so serious that it raises a strong presumption that the person in question is the target of that violence.”

This approach might be considered of doubtful validity since what it entails is that when deciding whether the violations of fundamental rights are so serious that every individual within its ambit is placed at real risk, the decision-maker can only have regard to one type of violence: the violence which has no discriminatory element. He can only have regard to that because Art 15(c) imposes a causal requirement: “serious and individual threat” by reason of indiscriminate violence”. It does not say “by reason of all violence, including indiscriminate violence”. Put another way, he must disregard all the targeted violence. The difficulty here is that in most armed conflicts the overall level of violence will be made up of various types of violence, targeted as well as indiscriminate (in this sense). Take the sustained shelling of Sarejevo by the Serbs, which caused the destruction of schools, hospitals, apartments etc. That was plainly discriminate violence in the sense of violence which intended to target the entire population of that city. Yet under A-G Maduro’s definition, a person who had sought to claim under Article 15(c) at that time (if this provision had been in force) would have got nowhere. Take Iraq for example (at least for most of 2007/early 2008). Some of the actors are targeting each other

because of religion (Sunnis versus Shias, Muslims versus Christians), some because of race or nationality (Sunni extremists versus Kurds, Palestinians etc), some because of membership of a particular social group (e.g. patriarchal tribes against women seen to have committed crimes of honour). In the course of these types of targeted violence, there are civilians who get caught in the cross-fire and who in that way could be said to be victims of indiscriminate violence, but not otherwise. There are also insurgents who seek to spread terror without any real regard for who the victims are: they too could be said to be victims of indiscriminate violence. But overall, limiting oneself to indiscriminate violence in the A-G's sense means leaving out of the picture a huge amount of the violence going on in modern armed conflicts.

(Of course, under an alternative, IHL reading of "indiscriminate violence" there is also an inevitable limitation, but it does not prevent counting in various types of targeted violence where the means or methods deployed offend the IHL principles of distinction and proportionality. Applied to the Iraq situation, the IHL approach, I would submit, allows for a more realistic overview of levels of violence than the AG's.)

Conclusion

Whilst the European system of protection is highly developed and by and large legally enforceable, it should not be forgotten that in relation to the Qualification Directive and other EU legislative measures dealing with asylum, it is still early days. In the short period since October 2006 it can be seen that there are still quite a few

problems of lack of full or correct implementation. But there is no reason to think these will not be ironed out in time.

It might be said that by opting for a concept of “international protection” which keeps refugee and subsidiary protection distinct, the European model helps ensure that the Refugee Convention retains its primacy as the global instrument governing refugees. It avoids the possible difficulty of the African model that one can have two types of refugee: a refugee under the 1951 Convention and a refugee under the African Convention. But even if it were thought right or preferable to adopt the European approach to definition of the term “refugee”, it might also be said that the current content given within Europe to the concept of subsidiary protection is too narrow. Even though it consciously seeks to supplement the contents of Refugee Convention protection with “subsidiary protection”, the resultant system of “international protection” is still narrower, or so it would seem, than either the African or Cartagena Declaration definitions of who is a refugee.

Perhaps the most important lesson of the European model is that in order to ensure that the system of protection actually works in practice, and not just on paper, it is essential that states within a region ratify provisions in international treaties (such as the ICCPR and the Convention against Torture) and regional treaties that afford the *right of individual access to a supranational court*. Although what ultimately matters is protection afforded at the grass roots within each country within a region, it would appear that it is only by giving supervisory

responsibility to a supranational court, seized with power to receive applications from individuals, that the a protection system has a real and lasting engine with which to drive through change.

Regional Instruments: Africa

Sophia Akuffo

Introduction

Meaning of 'Refugee'

The United Nations Convention relating to the Status of Refugees (1951) (hereinafter referred to as "the UN Refugee Convention") defines the term "refugee" in its Article 1A(2) as,

"[A]ny 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 [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country"[Emphasis is mine].

At the regional level, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) (hereinafter referred to as "the African Refugee Convention") defines the term "refugee" in its Article 1(1) as,

"...every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

outside the country of his/her nationality and, owing to such fear, is unable or is unwilling to avail himself/herself 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”.

Under Article 1(2) of the African Refugee Convention, the term "refugee"

“...also applies 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/her country of origin or nationality, is compelled to leave his/her place of habitual residence in order to seek refuge in another place outside his/her country of origin or nationality”

The founding Statute of the United Nations High Commissioner for Refugees (UNHCR) also defines the term “refugees” as:-

“... those who are outside their countries and who cannot or do not want to return because of a well-founded fear of being persecuted for reasons of their race, religion, nationality, political opinion or membership in a particular social group” .

The term "refugee" may also include persons recognized under the UN Refugee Convention, its 1967 Protocol, the African Refugee Convention, those recognized in accordance with the UNHCR Statute, persons granted complementary forms of protection and persons granted temporary protection.

Even though the UN Refugee Convention, the African Refugee Convention and other relevant conventions or protocols provide statutory definitions for the term 'refugee', and despite the fact that most countries have acceded to these legal instruments, differences in interpretation remain between the UNHCR and various stakeholders such as Governments and Non Governmental Organizations (NGOs) regarding who is a refugee. The UNHCR sees a refugee in more formal terms, as defined by the UN Refugee Convention. National Governments in Africa see a refugee in terms of the African Refugee Convention. NGOs, on the other hand, tend to see a 'refugee' from a much broader viewpoint, which includes persons who do not necessarily come within the purview of the statutory definitions, but who nevertheless require similar assistance or protection. Hence, in my humble view, the term "refugee" is better explained than defined.

The above definitions require a person to be displaced from his/her country of nationality to qualify as a refugee, thereby describing refugees as "Externally Displaced Persons". In certain cases, such as the situation in the Darfur Region, and DR Congo, "Internally Displaced Persons" may suffer similar or even greater hardships in their own country, and probably need more help than their counterparts who have fled to neighbouring countries.

Thus, the requirement of an external displacement factor in the statutory definition of a refugee is most unfortunate. The emphasis should rather be on whom the system of refugee protection laws should apply to rather than on whether a person is internally or externally displaced. In my respectful view, the protection provided by the laws should apply to all “persons of concern” and the laws should not be interpreted to limit the protection to only “statutory refugees”.

Seven population categories have been identified by the United Nations (UN), collectively referred to as “total population of concern to UNHCR” or “persons of concern to UNHCR”. “Persons of concern” have been categorised as refugees, asylum-seekers, internally displaced persons (IDPs) protected/assisted by UNHCR, stateless persons, the so-called “Others of concern”, returned refugees and returned IDPs. The two last categories are commonly referred to as returnees. All these persons should come under the protection provided by the refugee protection laws.

Addressing the refugee problem

The UNHCR has been very instrumental in addressing the Global refugee problem. The UNHCR protects and promotes the rights of refugees and other “persons of concern” worldwide. Closely working with the UNHCR is the Executive Committee of the High Commissioner’s Programme (EXCOM).

Other bodies which are important in addressing the refugee problem include the United Nations Relief and

Works Agency (UNRWA), the African Union (AU) and similar organizations such as the European Union (EU), the international community, national governments, the courts and NGOs.

Legal protection of refugee rights

Globally, the system of laws established under the auspices of the United Nations (UN) for the protection of the rights of refugees include the UN Refugee Convention and its amending 1967 Protocol.

The UN Refugee Convention was framed within the post-World War II context and, as such, it focuses on individualized persecution in defining the refugee problem. It does not recognize situations of general violence, natural disasters and large-scale development projects as legitimate causes of flight. It can, therefore, be said of the UN Refugee Convention that it has geographic and time limitations. The 1967 Protocol was drafted to remove these limitations. However, apart from the amendments relating to limitations, the Protocol retains the same language as that used in the UN Refugee Convention.

It is noteworthy that neither the UN Refugee Convention nor the Protocol makes any direct reference to the concept of asylum, lawful admission and the conditions under which it is granted, which remains at the discretion of States. Instead, the UN Refugee Convention provides for the principle of *non-refoulement* in its Article 33, which provides that no Contracting Party shall expel or return ('refouler') a refugee in any manner whatsoever to territories where his/her life would be threatened.

Other laws that have a significant bearing on refugee rights protection at the international level include the Charter of the United Nations (hereinafter called “the UN Charter”) and the Universal Declaration of Human Rights (UDHR). Thus, Article 7 of the UDHR provides that all persons are equal before the law and are entitled to equal protection of the law, without any discrimination. Also, Article 8 of the same instrument provides that every person has the right to an effective remedy by competent national tribunals for acts violating his/her fundamental human rights existing under constitution or any other law.

These international instruments serve as additional sources of Refugee Rights Protection Laws for application by the courts at various levels of protection.

Protection at the Regional Level

Specifically, in Africa, the system of laws for the protection of refugee rights include the African Refugee Convention (1969), the African Charter on Human and Peoples’ Rights (1981) (hereinafter called “the African Charter”) and the Constitutive Act of the African Union (2000) (hereinafter called “the Constitutive Act”), which replaced the OAU Charter of 1963.

The African Refugee Convention provides, inter alia, for a humanitarian approach towards resolving the problems of refugees and the rights of refugees, affirming the principle in the UN Charter and the UDHR that human beings shall enjoy fundamental rights and freedoms without

discrimination. In particular, Article 4 of the said Convention is in the following terms:-

“Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions”.

The African Charter (effective from October, 1986) is grounded on the OAU Charter stipulation that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples. Key provisions of the African Charter include;

- Every individual shall be equal before the law and shall be entitled to equal protection of the law (Article 3).
- Everyone has right to respect and dignity inherent in a human being (Article 5)
- Every individual has a right to have his or her cause heard (right to due process of the law) (Article 7).
- Duty of the State to ensure elimination of all forms of discrimination (Article 8).

The African Commission on Human and Peoples’ Rights (hereinafter called “the African Commission”) exists to protect and promote the rights that have been enshrined in the African Charter. The African Commission, however, does not have the power to make enforceable decisions; it may only make recommendations to States Parties.

The Constitutive Act, by its Article 2, established the AU. In its Article 3(e) & (h), the Constitutive Act sets the objectives

for the AU as, inter alia, to encourage international cooperation, taking into account the UN Charter and the UDHR as well as to promote and protect human and peoples' rights in accordance with the African Charter. Furthermore, the guiding principles of the AU include respect for democratic principles, human rights, the rule of law and good governance in accordance with Article 4(m) of the Constitutive Act.

Without doubt, every matter concerning the welfare of refugees is fundamentally a human right issue. Consequently, human rights treaties and conventions are expected to serve as effective tools for the protection of refugees at all levels of the Refugee law and human rights system of laws. Hence, other regional instruments that, from a rights-based analysis, have a bearing on the protection of the rights of the refugee include:-

- i) the African Charter on the Rights and Welfare of the Child (1990),
- ii) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (1998) (hereinafter called "the Protocol on the Establishment of the African Court on Human and Peoples' Rights") (*effective July 2004*),
- iii) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003),
- iv) Protocol on the Court of Justice of the African Union (2003),
- v) the African Youth Charter (2006) and

- vi) the Protocol on the Statute of the African Court of Justice and Human Rights (2008).

Currently, the African Court on Human and Peoples' Rights (AfCHPR), is the only continent-wide court established for the protection of Human and Peoples' rights in Africa, in enforcement of the African Charter. This court is intended to complement the protective mandate of the African Commission and thus, under its establishment Protocol, has the power to make binding and enforceable decisions.

In addition to abovementioned regional instruments, a whole gamut of international instruments also becomes applicable as sources of law to the AfCHPR, by virtue of Article 18(3) of the African Charter, including the UDHR, the UN Refugee Convention, etc. Furthermore, under the Protocol on the Establishment of the African Court on Human and Peoples' Rights, other sources of law that may be applied by the AfCHPR include any Human Rights instruments ratified by the Respondent State(s).

For recourse to the AfCHPR, Article 5 of the Protocol on the Establishment of the African Court on Human and Peoples' Rights gives unfettered access to the African Commission, State parties and African Intergovernmental Organizations. Access by individuals and NGOs is however, effectively, circumscribed. Clause 3 of Article 5 of the AfCHPR Protocol provides as follows:

“The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission and

individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

The said Article 34(6), which is embedded in the provisions on ratification, provides that:-

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

Thus an individual cannot have access to the AfCHPR unless and until the State against which the individual desires to lodge a complaint a declaration accepting the competence of the Court to receive cases from individuals. Until then, the Court lacks jurisdiction. Where no such declaration has been made by a Member State of the AU, no individuals (or NGOs), including refugees and other persons of concern, may bring petitions to the Court against that State on issues of violations of their human rights regardless of whether or not the violation arises from the status of the individual as refugee. In effect, even though access to the Court by individuals has been provided by the said Protocol, this access is in fact taken back by the same Protocol. To date, only Mali and Burkina Faso have made this declaration.

Furthermore, not all Member States of the AU are signatory to, or if signatory, have ratified, the Refugee Rights Protection Laws. For instance, countries like Eritrea, Namibia, Sahrawi Arab Democratic Republic and Sao Tome & Principe have not ratified or acceded to the African Refugee Convention. Other countries such as Djibouti, Madagascar, Mauritius and Somalia have not as yet ratified the above Convention, even though they are signatories. The effect of failure to sign and/or ratify such Conventions is that these laws do not become part of the applicable laws in the countries concerned.

Furthermore, in July 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights which, by its provisions, establishes the African Court of Justice and Human Rights (ACJHR). This court is yet to come into existence, however, it will, when physically established, will merge with and replace the AfCHPR and the Court of Justice of the African Union.

In the July 2008 Protocol there is improved institutional access to the ACJHR, compared to that of AfCHPR. However, the claw-back clause in the establishment protocol of the AfCHPR has been repeated in the Protocol on the Statute of the ACJHR. On "Other entities entitled to submit cases to the Court", Article 30 of the said Statute provides as follows:

"The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter

on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned:

- a) State Parties to the present Protocol;
- b) the African Commission on Human and Peoples' Rights;
- c) the African Committee of Experts on the Rights and Welfare of the Child;
- d) African Intergovernmental Organizations accredited to the Union or its organs;
- e) African National Human Rights Institutions;
- f) Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol".

Clause 3 of the said Article 8 states that:

"Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f) involving a State which has not made such a declaration".

The establishment protocol of the AfCHPR is silent on the jurisdiction of the Court to deal with a dispute involving a Member State that has not ratified the protocol establishing the court. The AfCHPR thus has jurisdiction to deal with a dispute involving a Member State once that Member State submits to its jurisdiction notwithstanding the fact that that Member State has not ratified its establishment protocol. The situation is completely different with the ACJHR. By its establishment protocol, the ACJHR does not have jurisdiction to deal with a dispute involving a Member State that has not ratified the said protocol. Clause 2 of Article 29 of the said protocol provides as follows:

“The Court shall not be open to States, which are not members of the Union. The Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol”.

It is hoped that, by the time the ACJHR becomes operational, all Member States of the AU would have ratified the said protocol in order to ensure the court’s jurisdiction to deal with a dispute involving any Member State of the AU. As at now, no Member State of the AU has ratified the establishment protocol of the ACJHR.

Protection at the Sub-Regional Level

The sources of laws open to the courts for the protection of the rights of refugees at the sub-regional level include sub-regional instruments, regional instruments such as the African Charter, as well as international instruments such

as the UDHR. Just like the regional instruments for the protection of refugees, the regional instruments for the protection of refugees are essentially offshoots of the UDHR.

ECOWAS

Within the West African region, the system of laws that may be utilised for the legal protection of refugees include the Treaty of Lagos (1975) (hereinafter referred to as “the Lagos Treaty”) adopted by the Economic Community of West African States (ECOWAS). The Lagos Treaty is grounded in for fundamental principles which include the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter.

The ECOWAS Court of Justice (hereinafter called “the ECOWAS Court”) was established by the ECOWAS Treaty with a mandate to enforce human rights within the Community. By its revised 2005 Protocol, the jurisdiction of the ECOWAS Court has been expanded to receive cases from individuals alleging violation of their human rights by a Member State. In this wise, the ECOWAS Court (at the sub-regional level) has a more effective protective jurisdiction than the AfCHPR (at the regional level). ¹To

¹ In the case of *Mrs. Hadijatou Mani Koraou v. The Republic of Niger* [Judgment No. ECW/CCJ/JUD/06/08] dated 27 October 2008, the ECOWAS Court exercised jurisdiction in a case in which an individual had come before it with complaints of violation her human rights. In this case, the applicant, Mrs. Hadijatou Mani Koraou of Nigerian nationality and a citizen of the ECOWAS Community, claimed that the respondent, the Republic of Niger and a Member State of the ECOWAS Community, had violated her fundamental human rights. It was the applicant’s case that while she was only twelve (12) years old, she was sold as a slave under a customary practice in Niger as the result of which her human rights were violated. By her application, she asked the ECOWAS Court to acknowledge this violation and to condemn the defendant. The ECOWAS Court,

date, it can be said that the ECOWAS Court is the only regional court with explicit jurisdiction to hear cases from individuals for the violation of their human rights. There is no such specific mandate for other regional courts but it is arguable that they have such power implicitly. The sources of law open to the ECOWAS Court include the provisions of the Lagos Treaty, regional instruments such as the African Refugee Convention, as well as international instruments such as the UN Refugee Convention and the UDHR.

SADC

Within the Southern African Development Community (SADC), the Treaty of the Southern African Development Community (hereinafter referred to as “the SADC Treaty”) was adopted in 1992 and entered into force in 1993. The SADC Treaty has, as part of its core principles, the observance of human rights, democracy and rule of law (by the terms of its Article 4). It also provides for fundamental principles including the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter. By its Article 9(1)(g), the SADC Treaty establishes the Southern Africa Development Community Tribunal (hereinafter called “the SADC Tribunal”). Pursuant to Article 16(1) of the SADC Treaty the key role of the SADC Tribunal shall ensure adherence to, and the proper interpretation of, the provisions of the SADC Treaty and subsidiary instruments and to adjudicate on such issues as may be referred to it. The scope of jurisdiction of the SADC Tribunal extends to

assuming jurisdiction in the matter, came to the conclusion that defendant did not sufficiently protect the applicant’s rights against slavery and ruled that an amount of ten million CFA francs be paid by the respondent to the applicant as an all-inclusive compensation for the harm suffered.

disputes between Member States and natural or legal persons. The scope of jurisdiction has been applied to effectively include the enforcement of individual human rights, rather than commercial disputes only². The sources of law open to the SADC Tribunal include subsidiary instruments, the SADC Treaty, and, arguably, instruments such as the African Refugee Convention and the UN Refugee Convention and the UDHR.

COMESA

The Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) (hereinafter called “the COMESA Treaty”) (1993) established COMESA. The COMESA Treaty has also established the COMESA Court of Justice (hereinafter called “the COMESA Court”). The COMESA Court is the judicial organ of COMESA, having jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA Treaty. Specifically, it ensures the proper interpretation and application of the provisions of the COMESA Treaty; and it adjudicates any disputes that may arise among Member States regarding the interpretation and application of the provisions of the COMESA Treaty. The decisions of the Court are binding

² In the case of *Mike Campbell (Pvt) Ltd & Ors v. The Republic of Zimbabwe* [SADC (T) Case No. 2/2007], seventy nine (79) applicants made up of both individuals and companies filed an application with the SADC Tribunal against the respondent, a Member State of the SADC, on issues relating, inter alia, to the compulsory acquisition by the respondent of some agricultural land and discrimination on grounds of race. At the trial, the learned Agent for the respondent made submissions to the effect, inter alia, that the Tribunal had no jurisdiction to entertain the application under the Treaty. It was held that the Applicants had been discriminated against on the ground of race, and that a fair compensation was payable to the applicants for their lands compulsorily acquired by the respondent. On the issue of the Tribunal’s jurisdiction to entertain the action, it was unanimously held that Tribunal had jurisdiction to entertain the application brought by the applicants (who were made up of both natural and artificial persons), against a Member State of the SADC.

and final, and decisions of the Court on the interpretation of the provisions of the COMESA Treaty have precedence over decisions of national courts of Member States. The COMESA Court has an implicit jurisdiction to entertain actions brought before it by individuals³.

The East African Community

The Treaty for the Establishment of the East African Community (EAC) (hereinafter called “the EAC Treaty”) established the EAC. Article 3 of the EAC Treaty provides, as one of the guiding principles of the EAC, the adherence to universally acceptable principles of good governance, democracy, the rule of law and the observance of human rights and social justice. Further, Article 6(d) of the EAC Treaty provides that the fundamental principles of the EAC includes the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter. By its Article 9, the EAC Treaty establishes the East African Court of Justice (hereinafter called “the EAC Court”) as one of the organs of the EAC. The EAC Court has jurisdiction to hear and determine the following:

- Disputes on the interpretation and application of the EAC Treaty.

³ In *Kabeta Muleya (Dr) v. The Common Market for Eastern and Southern Africa and Erastus Mwencha* [2003] COMESACJ 1 (4 April 2003) an individual, Dr. Kabeta Muleya, filed a Reference against the respondents (COMESA and Mr. Erastus Mwencha) for violation of his rights as a result of alleged defamation on him supposedly committed by the respondents. In response to the Reference filed by the applicant, the respondents filed an Interlocutory Application seeking to dismiss the action on account of it being defective in material particulars and for an Order to strike out Mr. Mwencha as a Party to the Reference. Assuming jurisdiction in the matter, the COMESA Court of Justice granted the two prayers of the respondents with cost awarded against the applicant.

- Disputes between the EAC and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations.
- Disputes between the Partner States regarding the EAC Treaty if the dispute is submitted to it under a special agreement.
- Disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the EAC Court to which the EAC or any of its institutions is a party.
- Disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the EAC Court.
- The jurisdiction of the Court may be extended to appellate and human rights at a suitable date to be determined by the Council established by the EAC Treaty.

On Advisory Opinions, the EAC Court may, on request, give an advisory opinion regarding a question of law arising from the EAC Treaty and which affects the EAC.

Like the SADC Tribunal and the COMESA Court, the EAC Court also has implicit jurisdiction to entertain human rights actions brought before it by individuals for the violation of their rights⁴. The sources of law open to the

⁴ In the case of *James Katabazi & 21 Others V. Secretary General of the East African Community & The Attorney General of The Republic of Uganda* [Reference No. 1 of 2007]

EAC Court include the EAC Treaty, regional instruments such as the African Refugee Convention as well as international instruments such as the UN Refugee Convention and the UDHR.

Protection at the Domestic Level

At the domestic level, sources of law for the protection of refugees include Constitutional provisions protecting fundamental human rights of all persons (including refugees) resident in the State concerned. Most of these rights protecting constitutional provisions are offshoots of the UDHR. For instance, the 1992 Constitution of Ghana has, among others, the following provisions:

- Article 15(1) - the dignity of all persons shall be inviolable
- Article 15(2) - no person shall, whether or not he is arrested, restricted or retained, be subjected to torture or other cruel, inhuman or degrading treatment or punishment or any other condition that detracts or is likely to detract from his dignity and worth as a human being
- Article 16(1) - no person shall be held in slavery or servitude
- Article 16(2) - no person shall be required to perform forced labour

(dated 1st November 2007), the applicants (as individuals), filed a Reference against the respondents on violation of their Human Rights as a result of unlawful arrest and incarceration. The EAC Court, assuming jurisdiction in the matter, granted the Reference in part, with costs against the second respondent.

- Article 17(1) - all persons shall be equal before the law
- Article 17(2) - a person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status

Quite apart from these 'direct' rights protecting constitutional provisions, there are **constitutional provisions which serve as 'indirect' sources of rights protecting laws by creating the opportunity for the application** of other laws or standards 'considered to be inherent in a democracy and intended to secure the freedom and dignity of man'. For instance, Article 33(5) of the 1992 Constitution of Ghana, on the Protection of Rights by the Courts, provides as follows:

"The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man".

Similarly, the 1995 Constitution of Uganda has provisions which define the human rights laws applicable by domestic courts to include human rights laws which are not specifically mentioned in the Constitution. Article 45 of the said Constitution provides as follows:

"The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be

regarded as excluding others not specifically mentioned”.

Thus, the domestic courts of States that have such constitutional provisions may be able to apply other relevant international and regional human rights instruments such as the UDHR, the UN Refugee Convention, the African Refugee Convention etc, as the standards for the assurance of human rights not specifically mentioned in their constitutions.

Such constitutional provisions enable the courts to give effect to a wide selection of human rights standards and instruments, even where national legislation had not expressly ‘domesticated’ particular international or regional instruments.

Of course, national legislation, expressly ‘domesticating’ particular rights protecting instruments, is crucial for assuring effective protection where no such constitutional provisions are available to the domestic courts. Where States do not domesticate international, regional and regional instruments, even though they have signed or ratified them, it is often impossible, or at least difficult, without judicial activism, to implement these instruments in the domestic setting and the relevant instruments can often not be applied directly by the domestic courts of the State in question as a source of its domestic law (“the enforcement gap”).

Ghana, for instance, has in place the Ghana Refugee Act, 1992 (PNDCL 305D) which embodies or domesticates the provisions of the UN Refugee Convention and its 1967

Protocol as well as the African Refugee Convention. The Act has established the Ghana Refugee Board with the responsibility for the management of activities relating to refugees in the country. The UNHCR office in Ghana works closely with the Ghana Refugee Board with the Act as its guiding tool. The UNHCR had an observer role on the Board and some NGOs sit on the Board as well⁵.

Mali, has in place the Refugee Law of 1998. Also, Nigeria has a national refugee law (Refugee Law of 1989) which incorporates the UN Refugee Convention, using identical language.

Conclusion

There does exist in Africa, an extensive system of laws that when imaginatively and boldly applied strengthen the efficient protection of human rights in general and of refugees. These laws consist of instruments that either specifically protect refugees or by protecting and promoting human and peoples' rights serve as effective tools and standards for assuring refugee rights. This system

⁵ According to the *World Refugee Survey 2008- Ghana*, by the United States Committee for Refugees, Ghana has hosted over 40,000 refugees and asylum seekers over the past seven (7) years; Liberian refugees, numbering 28,000, being the largest group who sought refuge in Ghana during the Liberian civil war, together with some 12,000 from Togolese due to the political violence in Togo in 2005. There were also about 600 refugees from Sudan. Most of the refugees lived in the Central, Western and Volta regions. Ghana had two main refugee camps: Buduburam (population 26,000) and Krisan (population 1,400). Also, an estimated 6,000 refugees lived in the Volta region. Following the Liberian presidential election, the Office of the UNHCR began repatriating the Liberian refugees. Also, after finalizing a tripartite agreement with the Governments of Ghana and Togo, UNHCR has repatriated some of the estimated 12,000 Togolese refugees. Even though refugees legally have access to the Ghanaian courts, usually they take resort to alternative dispute resolution mechanisms.

of laws for the protection of the rights of refugees in place has chalked some remarkable successes although some have not as yet been specifically tested in the courts of law. It has served as the enabling tool for refugee-focused bodies in the protection of the rights of millions of refugees worldwide, to ensure that the basic human rights of vulnerable persons including refugees are not violated and that refugees are not forced to return to countries where they face persecution.

However, there are a number of drawbacks in the system of laws for the protection of refugees and in the effective application and enforcement of these laws. One may safely make the observation that, whilst many African States are reasonably quick to sign all the relevant instruments, international, regional or sub-regional, there is, all too often, the neglect or failure to ratify or domesticate crucial instruments, thereby neutralizing their efficacy. When the ACJHR comes into operational being, under its establishment protocol, the scope of its jurisdiction will cover only states that have ratified the protocol. Arguably, a state that has not formally ratified it cannot, nevertheless, opt to submit itself to the Court's jurisdiction.

Additionally, and with specific reference to the purposeful, functioning of the AfCHPR (and ACJHR, yet to come into operation established) individual access is crucial. In matters involving any aspect of human rights, the victim is more often than not an individual or a group of individuals. Many a time, also, where the individual does not pursue his/her own cause of action, it is oft times an NGO rather than a State will espouse such individual victim(s) cause. The existence of the claw-back clause in

these protocols, and the sad dearth of declarations of competence of the AfCHPR, places a big (and rather embarrassing) question mark on the commitment of the signatory states to the preservation of all aspects of human rights in Africa. I therefore take this opportunity to urge Member States of the AU to make the declaration of competence of the AfCHPR as immediately. More radically, an amendment is recommended to remove the clause from the protocols.

It is also urged upon Member States, which have not as yet domesticated the refugee rights instruments, to do so. This is the only sure way to make the refugee rights instruments direct sources of the domestic laws of Member States for application by the domestic courts.

Further, the term “refugee” must be given a more expansive definition to include all “persons requiring refugee assistance and protection” and the term should not be interpreted in any such manner as would effectively limit assistance or protection to only “statutory refugees”. This will be more responsive to the dictates of current realities.

Furthermore, the courts and the international community need to perceive the refugee problem as, fundamentally, a human rights issue, rather than in isolation as a specialised issue.

Quite apart from the system of Refugee Rights Protection Laws in place, measures ought to be instituted to address the root causes of the refugee problem before it arises. These would include:-

- (i) Measures to combat proliferation of small arms in Africa
- (ii) Measures to ensure true democracy and stability throughout the continent so as to avoid political strife or anarchy
- (iii) Measures to improve food security
- (iv) Measures to strengthen regional integration and co-operation (the need to be each other's keeper)
- (v) Measures to promote social cohesion and religious harmony

*Where to now: regional arrangements and refugee protection in Latin America and in the Americas**

José Fischel de Andrade

INITIAL REMARKS

There is a growing trend towards the harmonization of norms and procedures in a variety of legal fields, including refugee law. While the 1951 Convention and its 1967 Protocol can guide the systematization of current practice, flexibility will often depend on regional realities, values and experiences. Ideally, regional policy approaches to refugee protection should complement the UN regime, without neglecting the general principles endorsed by the international community.

The Americas in general and Latin America (a sub-region of the American continent) in particular have historically and consistently contributed to the development of refugee law, procedures and practices. This has always been done with respect to the letter of the 1951 Convention, the 1967 Protocol and other UN instruments, as a means to build upon on what has been agreed on the global level.

* This paper is the basis of a presentation made at the panel “Regional Instruments – A Comparative Review of the Operation of Regional Instruments in Europe, Africa and the Americas”, on 29 January 2009, during the 8th bi-annual World Conference of the International Association of Refugee Law Judges (IARLJ), entitled “Where to now: Charting the future course of international protection”, held in Cape Town, South Africa, from 27-30 January 2009.

In this short paper, I introduce and briefly examine (i) the rationale behind regional policy approaches and the need for harmonization; (ii) the sub-regional Latin American instruments and practice related to asylum issues; and (iii) the basic structure and jurisprudence of the Inter-American human rights regional system, with a focus on asylum and forced migration issues.

INTRODUCTION: REGIONAL POLICY APPROACHES AND THE NEED FOR HARMONIZATION

Regional policy approaches

Not too long ago it was asserted that refugee law should be developed at a global level, and that it would be regrettable if solutions to the refugee problem could not be found in the framework of the United Nations.¹ Today, it is understood that the time is not ripe for a new legal framework constructed by the adoption of new instruments based on universal criteria and needs.² Even if it were otherwise, there can be no universal set of practical measures or responses; efforts to ameliorate causes, protect those in need, and allocate responsibility for resolution of the problems must differ, depending on the character of the movement.³

¹ See A. Grahl Madsen, *Territorial Asylum*, London/Stockholm, Oceana Publ./Almqvist & Wiksell International, 1980, 66.

² See G. Coles, 'Approaching the Refugee Problem Today', in G. Loescher and L. Monahan (eds.), *Refugees and International Relations*, Oxford, Clarendon Press, 1990, 383; P.H. Kooijmans, 'Trends and Developments in Asylum and Admission of Refugees', *Yearbook of the International Institute of Humanitarian Law* 159 (1986-87); D.L. Garrido, *El Derecho de Asilo*, Madrid, Ed. Trotta, 1991, 29.

³ P.M. Moussali, 'International Protection: The Road Ahead', 3 *IJRL* 610 (1991).

Regional initiatives need to be carried out in a cautious manner given their potential impact and 'ripple effects' in other regions. The objective of a regional policy approach is to mitigate the flaws and deficiencies of the 1951 Convention relative to contemporary forced migration, and to adapt international refugee law to existing regional refugee problems. In this process regional instruments ought necessarily to incorporate and be compatible with universal principles, and ought in turn to be interpreted and implemented in accordance with these principles. Regional systems are not aimed at superseding the universal one, but rather at complementing and supplementing it whenever need be. As a consequence, regional phenomena should always be analyzed and tackled parallel to the universal.

Regional developments give rise to many advantages. By adapting the global system to the specific realities of a region or sub-region, various positive factors are taken into account, such as specific particularities, mutuality of interest, cultural compatibility and social traditions. Furthermore, regional organizations are generally in a better position to play an active role in peace-making and peace-keeping, because of their equitable geographical representation which facilitates the achievement of consensus. Solutions therefore may be 'custom-made' to the special circumstances that arise.⁴ Regional initiatives, by their pragmatic nature, facilitate removing the difficulties and limitations which often characterize actions taken at the universal level. Of course, there are also difficulties

⁴ See L. Druecke, *Preventive Action for Refugee Producing Situations*, 2nd ed., Frankfurt am Main, Verlag Peter Lang (European University Studies: Ser. 31, Political Science, vol. 150), 1993, 44.

originating from regional approaches, such as the lack of experience, structure, financial means and procedures of many regional organizations to respond effectively to conflicts and to humanitarian emergencies.⁵

Notwithstanding such drawbacks, regional policy approaches of refugee protection and mechanisms seem to be the best option to articulate and to consolidate various regional principles relevant to solutions of refugee problems.⁶ Caution is required, however, in that a regional policy approach should not involve a lowering of the standard which has, with so much effort, been established at the universal level.⁷

Many regions have already realized the benefits and convenience of regional initiatives, as this panel on regional instruments indicates.

Harmonization of refugee protection

When considering the necessity to regionalize the protection of refugees, the necessity of harmonizing relevant policies and norms should also be considered. Harmonization goes far beyond a mere regional policy approach, for the latter may confine itself to common trends.⁸ Harmonization, in turn, ought to be understood as

⁵ See G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, New York/Oxford, Oxford University Press, 1993, 190; Drucke, above, 175.

⁶ See P.M. Moussalli, 'Fundamental Principles in the International Protection of Refugees and Displaced Persons: The Role of the UNHCR', in *Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons* (Seminar of Manila, 14-18 Apr. 1980), San Remo, IHL/University of the Philippines, 1980, 12.

⁷ *Ibid.*

⁸ A good example are the several regional arrangements concluded in Latin America since last century regarding 'asylee status'. They reflect a regional practice and custom which is by no means harmonized. Not even the 1954 Convention of Territorial Asylum,

a comprehensive concerted effort, which encompasses the diplomatic, political and legal will of all states in a specific region. Regional harmonization must encompass, principally, the legislation that defines the term 'refugee', the interpretation of this concept, and the procedure for determining refugee status.

On the policy of regional harmonization, UNHCR's position is clear:

Harmonized regional approaches ... are perhaps the most promising option for strengthening protection. As progress is made towards removing intra-regional barriers on the movement of persons and coordinating regional policies on the admission – and non-admission – of foreigners, including asylum seekers it is inevitable that national policies concerning the admission of persons in need of international protection should also be harmonized...⁹

The harmonization of policies is necessary for pragmatic reasons: refugee influxes unfortunately will not disappear soon and they usually have a regional impact. Regional practices of coordination and harmonization will thus enable the formulation of concerted responses better suited to the proper handling, within a humanitarian context, of the problems that arise from refugee flows.

for instance, is a manifestation of a right unanimously accepted by all States that nowadays represent the Latin American community; see H. Gros Espiell, 'El Derecho Internacional Americano sobre Asilo Territorial y Extradición en sus Relaciones con la Convención de 1951 y el Protocolo de 1967 sobre el Estatuto de los Refugiados', in *Asilo y Protección Internacional de Refugiados en América Latina* (Colloquium of Mexico, 11-15 May 1981), Mexico, Universidad Nacional Autónoma de México, 1982, 72.

⁹ UNHCR, 'Note on International Protection', UN doc. A/AC.96/830, 7 Sept- 1994, para. 55.

See also Executive Committee Conclusion No. 80 (XVII), 'Comprehensive and Regional Approaches within a Protection Framework'.

Regional policy approaches

Latin America has collaborated in developing regional policy approaches towards better refugee protection. Apart from the regional instruments which, since the 19th century, have laid down the basis for 'asylee'¹⁰ status, some Latin American countries developed mechanisms and concepts that have tackled the contemporary refugee problems in a rather pragmatic manner.¹¹ As there was no political will to sustain renewed attempts for a regional refugee regime along the lines of the 1969 OAU Convention, the pragmatic solution found in the region was the Cartagena Declaration on Refugees, adopted in a colloquium in 1984 in Colombia.¹²

Conclusion No. 3 of the 1984 Cartagena Declaration stated that,

¹⁰ The term 'asylee' refers to the person who enjoys a legal status resulting from the application of either any of the regional Latin-American instruments or the pertinent domestic legislation therefrom derived and related to 'asylum' (*asilo*). 'Asylum' and 'refuge', and consequently 'asylee status' and 'refugee status', are different concepts in Latin America.

¹¹ The Central American solution model for the large-scale movement of refugees was created in the International Conference on Central American Refugees (CIREFCA), held in Guatemala City in May 1989. For the document that guided the discussions during CIREFCA, see H. Gros Espiell et al., 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America', 2 *IJRL* 83 (1990).

¹² Hereinafter '1984 Cartagena Declaration'. For its text, see *La Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios* (Colloquium of Cartagena de Indias, 19-22 Nov. 1984), Bogotá, ACNUR/Centro Regional de Estudios del Tercer Mundo/Universidad Nacional de Colombia, 1986, 332-9.

the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

The fact that the Executive Committee of the UNHCR Programme 'welcomed the use of regional approaches in resolving refugee problems of regional scope, as amply demonstrated by the [Cartagena] Colloquium' is evidence of the potential importance of these initiatives.¹³

Initially tailored to the problems of the late 1970s and early 1980s in Central America, the 1984 Cartagena Declaration has influenced Latin American countries. In the commemoration of its tenth anniversary, another colloquium, held in San José de Costa Rica, confirmed the regional vocation of the 1984 Cartagena Declaration. The eighteenth and twentieth conclusions of its 1994 San José Declaration on Refugee and Displaced Persons, respectively,

[Noted] with particular interest the efforts initiated by the Permanent Consultative Group on Internally Displaced in the Americas, as a regional inter-agency forum dedicated to the study and consideration of the acute problems faced by

¹³ UNHCR Executive Committee Conclusion No. 37 (XXXVI) on Central American Refugees and the Cartagena Declaration.

the displaced within their own countries for reasons similar to those that result in refugee flows, [and] [Called] upon States to urge existing regional fora dealing with matters such as economic issues, security and protection of the environment to include in their agenda consideration of themes connected with refugees, other forced displaced populations and migrants.¹⁴

Varying regional standards of refugee definition, procedures for determining refugee status and treatment of refugees may of course cause many problems, e.g. regarding interpretation and push factors, but they have the attractive advantage of regulating issues; unregulated matters are not in the interest of states, since they do not solve problems but rather create them. Thus, regional initiatives must be seen as a pragmatic alternative framework within which the needs of refugees might be addressed along humanitarian and human rights lines.¹⁵

Harmonization of refugee protection

As to Latin America in general, and Central America in particular, the first moves towards harmonization occurred in the mid- and late 1980s, on the occasion of the 1984 Cartagena Declaration and the 1989 CIREFCA. The recent 1994 San Jose Declaration on Refugees and Displaced Persons in its fifth conclusion,

¹⁴ For the conclusions and recommendations of the 1994 San Jose Declaration on Refugees and Internally Displaced Persons, see *Memoria del Colóquio Internacional: 10 Anos de la Declaración de Cartagena sobre Refugiados* (Colloquium of San Jose de Costa Rica, 5-7 Dec 1994), San Jose, ACNUR/IIDH, 1995, 415.

¹⁵ J.C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', 31(1) *Harv.I.L.J.* 175 (1990).

[Urges] governments to encourage, with the collaboration of UNHCR, a process of progressive harmonization of rules, criteria and procedure concerning refugees, based on the 1951 Convention and the 1967 Protocol relating to the status of refugees, the American Convention on Human Rights, and the Cartagena Declaration.¹⁶

Although desired, the harmonization of regional refugee approaches in Latin America is not an easy task, because of the distinct experiences and realities faced by Central and South American countries. These have resulted in differing policies, regulations and practices. What is called for now is the exchange of information on applicable norms in each Latin American country and to establish whether progress in some countries reflects the general will of the region and is likely to last, as well as to debate whether Latin American countries are in fact able to apply the expanded refugee definition of the 1984 Cartagena Declaration effectively, in the face of mass displacements of people from other regions.¹⁷ If so, the region could be proud of harmonizing its policy and norms at the highest existing standard.

Regional harmonization of the legislation applicable in Latin America concerning refugees is indeed necessary to

¹⁶ See *Memoria del Colóquio...*, above, 420.

¹⁷ A. D'Alotto and R. Garreton, 'Developments in Latin America: Some further thoughts', 3 *IJRL* 500 (1991). The inclusion of the 1984 Cartagena Declaration refugee definition in an effort of harmonization has already been suggested by OAS General Assembly Resolution N. 1336 (XXVO/95), adopted, at the ninth plenary session on 9 June 1995, which '2. [urged] member states to consider the possibility of promoting a process of legal harmonization on refugee matters, taking into account the principles embodied in such instruments as the 1951 Convention on the Status of Refugees, the 1967 Protocol thereto, the American Convention on Human Rights, the 1984 Cartagena Declaration, and the 1994 San Jose Declaration'.

avoid conflicts and contradictory solutions to similar problems.¹⁸ In the task of harmonizing domestic legislation within the context of existing international refugee law and regional peculiarities, both UNHCR and the supervisory organs established under the 1969 American Convention of Human Rights (the Inter-American Commission and Court, the latter in its advisory competence), could likely play a prominent role.¹⁹

The harmonization of domestic legislation should encompass both the refugee definition and the procedures for determining refugee status. As to the refugee definition, the first task is to secure that all States of the region have a harmonized definition, which is not yet the case in Latin America. Then comes the crucial problem of ensuring that States apply the criteria equally and that national interpretations are in line with established standards which have been regionally or globally endorsed. This problem is intrinsically linked to the necessity of establishing harmonized procedures for determining refugee status, for variations between national determination systems render futile any attempt at harmonizing the implementation of the refugee definition.²⁰ The harmonization of refugee determination procedures, which is desirable and feasible in Latin America,²¹ needs to be considered under both the

¹⁸ See OAS General Assembly Resolution N. 1504 (XXVII-O/97), adopted, at the seventh plenary session on 4 June 1997, which '5. [considered] the need for harmonizing the laws, criteria, and procedures regarding refugees insofar as possible, in order to provide appropriate treatment to persons in that position'.

¹⁹ See AA. Cancado Trindade, 'Discurso Inaugural', in *Memoria del Colóquio...*, above, 27.

²⁰ See E. Arboleda, 'The Convention Refugee Definition in the West A Legal Fiction?', 5 *IJRL* 68 (1993).

²¹ See, among others, K. Asomani, 'Análisis Histórico de la Situación de los Refugiados en América Latina que propició la Adopción de la Declaración de Cartagena de 1984 sobre los Refugiados', in *Memoria del Colóquio*, above, 192; ACNUR, 'Declaración de Cartagena, diez años después', in *Memoria del Colóquio*, above, 52, 59, 75.

guidelines endorsed by the international community²² and the experience of the region; special attention must be paid to certain domestic developments which may serve to indicate what can be done in the region.

THE AMERICAS: BASIC STRUCTURE AND JURISPRUDENCE OF THE HUMAN RIGHTS REGIONAL ARRANGEMENTS WITH A FOCUS ON ASYLUM ISSUES

Basic structure of the Inter-American Human Rights Protection System

The Inter-American system for the protection of human rights emerged with the adoption of the **American Declaration of the Rights and Duties of Man** in April 1948. That was the first international human rights instrument of a general nature, predating the December 1948 Universal Declaration of Human Rights.

The Washington-based Inter-American Commission of Human Rights (IACHR, or Commission) was created in 1959. It held its first meeting in 1960, and it conducted its first on-site visit to inspect the human rights situation in an Organization of American State (OAS) member state in 1961. A major step in the development of the system was taken in 1965, when the Commission was expressly authorized to examine specific cases of human rights violations. Since that date the IACHR has received thousands of petitions and has processed in excess of 12,000 individual cases.

²² See, for example, Executive Committee Conclusions No. 8 (XXVHI), No. 28 (XXXIII), and No. 30 (XXXIV).

The IACHR's ranking officers are its seven commissioners. The commissioners are elected by the OAS General Assembly, for four-year terms, with the possibility of reelection on one occasion, for a maximum period in office of eight years. They serve in a personal capacity and are not considered to represent their countries of origin but rather "all the member countries of the Organization" (Art. 43 of the American Convention on Human Rights). The Art. 42 of the same instrument says that they must "be persons of high moral character and recognized competence in the field of human rights". No two nationals of the same member state may be commissioners simultaneously (Art. 37), and commissioners are required to refrain from participating in the discussion of cases involving their home countries.

Nowadays, the main task of the IACHR is to promote the observance and defense of human rights in the Americas. In pursuit of this mandate it (i) receives, analyzes, and investigates individual petitions alleging violations of specific human rights protected by the American Convention on Human Rights; (ii) monitors the general human rights situation in the OAS's member states and, when necessary, prepares and publishes country-specific human rights reports; (iii) conducts on-site visits to examine members' general human rights situation or to investigate specific cases; (iv) encourages public awareness about human rights and related issues throughout the hemisphere; (v) holds conferences, seminars, and meetings with governments, NGOs, academic institutions, etc. to inform and raise awareness about issues relating to the inter-American human rights system; (vi) issues member states with recommendations that, if adopted, would

further the cause of human rights protection; (vii) requests that states adopt precautionary measures to prevent serious and irreparable harm to human rights in urgent cases; (viii) refers cases to the Inter-American Court of Human Rights, and litigates those same cases before the Court; and (ix) asks the Inter-American Court to provide advisory opinions on matters relating to the interpretation of the American Convention or other related instruments.

In 1969, the guiding principles behind the American Declaration were taken, reshaped, and restated in the **American Convention on Human Rights** (the American Convention, also known as “Pact of San José”²³). The American Convention defines the human rights that the states parties are required to respect and guarantee, and it also ordered the establishment of the **Inter-American Court of Human Rights** (IACrtHR, or Court). It is currently binding on 24 of the OAS's 35 member states.

The Court is an autonomous judicial institution and, unlike the IACHR, is based in the city of San José, Costa Rica. It was established in 1979 with the purpose of enforcing and interpreting the provisions of the American Convention on Human Rights. Its two main functions are thus adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it. Under the latter, it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states.

²³ OAS Treaty Series No. 36, 1144 UNTS 123, entered into force on July 18, 1978, reprinted in Basic Instruments Pertaining to Human Rights in the Inter-American System, OEA/Serv.L.V./II.82 doc.6 rev.1 at 25 (1992).

The adjudicatory function requires the Court to rule on cases brought before it in which a state party to the Convention that has accepted its contentious jurisdiction is accused of a human rights violation. In addition to ratifying the Convention, a state party must voluntarily submit to the Court's jurisdiction for it to be competent to hear a case involving that state. Acceptance of contentious jurisdiction can be given on a blanket basis or, alternatively, a state can agree to abide by the Court's jurisdiction in a specific, individual case.

Under the American Convention, cases can be referred to the Court by either the Inter-American Commission on Human Rights or a state party. In contrast to the European human rights system, individual citizens of the OAS member states are not allowed to take cases directly to the Court: individuals who believe that their rights have been violated must first lodge a complaint with the Commission and have that body rule on the admissibility of the claim. If the case is ruled admissible and the state deemed at fault, the Commission will generally serve the state with a list of recommendations to make amends for the violation. Only if the state fails to abide by these recommendations, or if the Commission decides that the case is of particular importance or legal interest, will the case be referred to the Court. The presentation of a case before the Court can therefore be considered a measure of last resort, taken only after the Commission has failed to resolve the matter in a noncontentious fashion.

Proceedings before the Court are divided into written and oral phases. In the written phase, the case application is filed, indicating the facts of the case, the victims, the

evidence and witnesses the applicant plans to present at trial, and the claims for redress and costs. If the application is ruled admissible by the Court's secretary, notice thereof is served on the judges, the state or the Commission (depending on who lodged the application), the victims or their next-of-kin, the other member states, and OAS headquarters. For 30 days following notification, any of the parties in the case may submit a brief containing preliminary objections to the application. If it deems necessary, the Court can convene a hearing to deal with the preliminary objections. Otherwise, in the interests of procedural economy, it can deal with the parties' preliminary objections and the merits of the case at the same hearing. Within 60 days following notification, the respondent must supply a written answer to the application, stating whether it accepts or disputes the facts and claims it contains. Once this answer has been submitted, any of the parties in the case may request the Court president's permission to lodge additional pleadings prior to the commencement of the oral phase.

The president sets the date for the start of oral proceedings, for which the Court is considered quorate with the presence of five judges. During the oral phase, the judges may ask any question they see fit of any of the persons appearing before them. Witnesses, expert witnesses, and other persons admitted to the proceedings may, at the president's discretion, be questioned by the representatives of the Commission or the state, or by the victims, their next-of-kin, or their agents, as applicable. The president is permitted to rule on the relevance of questions asked and to excuse the person asked the question from replying, unless overruled by the Court.

After hearing the witnesses and experts and analyzing the evidence presented, the Court issues its judgment. Its deliberations are conducted in private and, once the judgment has been adopted, it is notified to all the parties involved.

If the merits judgment does not cover the applicable reparations for the case, they must be determined at a separate hearing or through some other procedure as decided on by the Court. The reparations the Court orders can be both monetary and nonmonetary in nature. The most direct form of redress are cash compensation payments extended to the victims or their next-of-kin. However, the state can also be required to grant benefits in kind, to offer public recognition of its responsibility, to take steps to prevent similar violations occurring in the future, and other forms of nonmonetary compensation.

While the Court's decisions admit no appeal, parties can lodge requests for interpretation with the Court secretary within 90 days of judgment being issued. When possible, requests for interpretation are heard by the same panel of judges that ruled on the merits.

The Court's advisory function enables it to respond to consultations submitted by OAS agencies and member states regarding the interpretation of the Convention or other instruments governing human rights in the Americas; it also empowers it to give advice on domestic laws and proposed legislation, and to clarify whether or not they are compatible with the Convention's provisions. This advisory jurisdiction is available to all OAS member states, not only

those that have ratified the Convention and accepted the Court's adjudicatory function. The Court's replies to these consultations are published separately from its contentious judgments, as advisory opinions.

As stipulated by Chapter VIII of the American Convention, the Court consists of seven judges of the highest moral authority from the OAS's member states. They are elected to six-year terms by the OAS General Assembly and may be reelected for one additional six-year period.

No state may have two judges serving on the Court at any one time, although – unlike the commissioners of the Inter-American Commission – judges are not required to recuse themselves from hearing cases involving their home countries. In fact, a state party appearing as a defendant that does not have one of its nationals among the Court's judges is entitled, under Art. 55 of the American Convention, to appoint an *ad hoc* judge to serve on the bench hearing the case.

Jurisprudence of the Inter-American Human Rights Protection System with a focus on asylum and forced migration issues

The two provisions of the Pact of San José which are most relevant to asylum issues are paragraphs 7 and 8 of Art. 22 (Freedom of Movement and Residence):

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is

being pursued for political offences or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

So far there has not been any case submitted to the Court²⁴ which dealt with violations of these two provisions. There have been, however, few cases heard by the Court which are relevant to asylum and forced migration issues.

In the exercise of its adjudicatory function, the Court has declared that the duty to substantiate state decisions is captured in the American Convention's Art. 8, which refers to the right to a fair trial²⁵. The Court has also determined that all decisions which affect fundamental rights ought to be substantiated, otherwise they will be regarded as arbitrary²⁶. UNHCR has considered that this decision is applicable, by analogy, to refugee status determination procedures.

In a case where "fair trial" was again at stake, the Court has declared that the procedural minimum guarantees of the American Convention's Art. 8(2) should be observed in all

²⁴ Given editorial limits this paper will not deal with the jurisprudence of the Inter-American Commission of Human Rights.

²⁵ Art. 8.1 reads: "Every person has the right to a hearing, with due guarantees and within a reasonable time (...) for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".

²⁶ The Court has also declared that "At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*"; see I/A Court H.R., *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 184, and particularly paras. 147-164 and 181-229.

instances (be them of a procedural, judicial or administrative nature) whenever fundamental rights were involved²⁷. Again, according to UNHCR and in light of the Court's decision state procedures meant for the determination of refugee status should observe the procedural minimum guarantees embodied in Art. 8(2) of the American Convention.

In a rather interesting case the Court established that as the sister of the main victim

suffered painful psychological consequences as a result of her brother's disappearance and death, because he was her only brother and they lived under the same roof, and because she experienced, together with her parents, the uncertainty of the victim's whereabouts and was forced to move to Europe, where she has lived as a refugee in the Netherlands [she was entitled] for direct compensation for moral damages.²⁸

The court has also considered few cases pertaining to the broader issue of forced migration. These are relevant not only to Latin American states but also – as a comparative, inspirational source – to African states which may face similar situations.

²⁷ See I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 124-130.

²⁸ Cf. I/A Court H.R., *Case of Castillo-Páez v. Peru*. Reparations and Costs. Judgment of November 27, 1998. Series C No. 43, para. 89. This decision is similar to previous ones taken by the European Court of Human Rights; see *Tusa v. Italy*, February 1992. Series A No. 231-D, p. 42, para. 21; *Beldjoudi v. France*, 26 March 1992, Series A No. 234-A, p.30, para. 86; and *Kemmache v. France (Article 50)*, 2 November 1993, Series A No. 270-B, p. 16, para. 11.

In a recent case the Court found that the State was responsible for the violation of the rights embodied in Article 22 (Freedom of Movement and Residence) of the Pact of San José, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of the 702 persons who were forcibly displaced.²⁹ The Court went further to say that

When the former inhabitants, who have not already done so, decide to return to [their places of origin], the State must guarantee their security, which should include monitoring the prevailing situation in a way and for the length of time that will guarantee this security. If it is not possible to establish these conditions, the State must provide the necessary and sufficient resources to ensure that the victims of forced displacement may resettle in similar conditions to those they had before these events, in a place they freely and voluntarily choose.³⁰

In another, similar case, the Court stated that

In view of the complexity of the phenomenon of internal displacement and of the broad range of human rights affected or endangered by it, and bearing in mind said circumstances of special weakness, vulnerability, and defenselessness in which the displaced population generally finds itself, as subjects of human rights, their situation can be understood as an individual *de facto* situation of lack of protection with regard to the rest of those who are in similar situations. This condition of

²⁹ See I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 235.

³⁰ *Ibid.*, para. 404.

vulnerability has a social dimension, in the specific historical context of the domestic armed conflict in Colombia, and it leads to the establishment of differences in access of displaced persons to public resources managed by the State. Said condition is reproduced by cultural prejudices that hinder the integration of the displaced population in society and that can lead to impunity regarding the human rights violations against them.³¹

It went further to say that

Under the terms of the American Convention, the differentiated situation of displaced persons places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defenselessness, including those *vis-à-vis* actions and practices of private third parties.³²

In a very pragmatic manner, the Court looked into the State guarantees of safety of the displaced persons who decide to return by determining that

(...) the State must send official representatives to Mapiripán [the village of origin] every month during the first year, to verify order and conduct consultations with the residents in the town. If during these monthly meetings the townspeople express concern regarding their safety, the State must take such steps as may be necessary to ensure it,

³¹ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 177.

³² *Ibid.*, para. 179.

and these actions will be designed in consultation with the beneficiaries of the measures³³.

The Court made a remarkable move by involving the victims in the solution of their situation, what goes *pari passu* with the idea that victims are not objects but rather subjects of rights. This approach is innovative as it represents the best interests of the victims and an attempt to ensure that the decision is being implemented, i.e. that there is a positive, supervisory obligation imposed on the State – and not only a negative one, which limits the State conduct.

In some cases the Court has also used provisional measures to ensure that the immediate needs of forcibly displaced persons are met, as well as that no further displacement occurs and that displaced persons may return to their villages of origin. In several occasions the Court called upon States of Colombia, in accordance with the provisions of the American Convention on Human Rights, to grant special protection to the so-called “humanitarian refuge zones” established for particular communities comprising displaced persons and, to that effect, to adopt the necessary measures so that they may receive all the humanitarian aid sent to them. The Court also called upon States to ensure the necessary security conditions so that the members of these communities, who have been forcibly displaced to jungle zones or other regions, may return to their homes or to the “humanitarian refuge zones” established for these communities. In some cases the Court called upon States to establish a continuous monitoring and permanent

³³ *Ibid.*, para. 313.

communication mechanism in the so-called “humanitarian refuge zones”.³⁴

In the exercise of its advisory function the advisory opinion that is most relevant to asylum issues was the one on *Juridical Condition and Rights of the Undocumented Migrants*.

The Court established that the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process should encompass all matters and all persons, without any discrimination. Most importantly, the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights.³⁵ As mentioned above, this rationale has been used by UNHCR with regard to refugee status determination procedures.

Equally relevant – specially in times of “war against terrorism” –, the Court established that States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.³⁶ The potentially vulnerable position of migrants – and particularly forced migrants – may find protection in this decision of the Court.

³⁴ See *inter alia* I/A Court H.R., *Matter of The Communities of Jiguamiandó and Curbaradó regarding Colombia*; I/A Court H.R., *Matter of the Peace Community of San José de Apartadó regarding Colombia*; I/A Court H.R., *Matter of Pueblo indígena de Kankuamo regarding Colombia*; and I/A Court H.R., *Matter of Pueblo Indígena de Sarayaku regarding Ecuador*.

³⁵ I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, items 7 and 8 of para. 173.

³⁶ *Ibid.*, item 11 of para. 173.

Although it does not have the same weight of this advisory opinion, the concurring opinion of Judge A.A. Cançado Trindade elaborates on the construction of the individual subjective right to asylum. He claims that the institute of asylum is much wider than the meaning attributed to asylum in the ambit of Refugee Law (i.e. amounting to refuge), and that the institute of asylum (general kind to which belongs the type of territorial asylum, in particular) precedes historically for a long time the *corpus juris* itself of Refugee Law. Against this background the *aggiornamento* and a more integral comprehension of territorial asylum – which could be achieved as from Article 2 of the American Convention on Human Rights – could come in aid of the undocumented migrant workers, putting an end to their clandestine and vulnerable situation. To that end, the right to asylum would have to be recognized precisely as a subjective individual right, and not as a discretionary faculty of the State.³⁷

FINAL REMARKS

As the nature of refugee flows has changed from what those who drafted the 1951 Convention might have expected, States have been interpreting this and other international instruments and applying international refugee law in quite different ways. One major challenge seems to be rationalization and systematization of existing practice.

³⁷ *Ibid.*, Concurring Opinion of Judge A.A. Cançado Trindade, paras. 31-43, and especially para. 39.

The validity and relevance of the 1951 Convention should guide the rationalization and systematization of the current practice, which is also premised on the elasticity of the present structure. This elasticity will often depend on regional realities, values and experiences. Hence, regional policy approaches to refugee protection, without neglecting the general principles endorsed by the international community, should complement and guide actions to resolve, or at least alleviate, the refugee problem.

In Latin America there are various definitions of a 'refugee' and of people who are worthy of international protection which are derived from the diverse legally binding and non-binding regional and sub-regional instruments. So far, only a very limited number of countries in Latin America have enacted refugee legislation and established procedures for the formal recognition of refugees. Regional harmonization of legislation in Latin America – i.e. for those countries that have enacted refugee acts – is necessary to avoid conflicts and contradictory solutions to similar problems. It is in the interest of States to avoid unregulated policies.

Both UNHCR and the supervisory organs established under the 1969 American Convention of Human Rights could play a useful role in this area. The Inter-American Court of Human Rights, as shown in this paper, has already heard several cases in which it advanced the protection of asylum- and forced migration-related issues – especially asylum-seekers and internally displaced persons. It is hoped that in the coming years the number of cases will increase, what will favor the advancement of the

protection of victims of forced migration in general, and of refugees in particular.

IARLJ Working Parties

James Simeon

The Inter-Conference Working Parties Process engages a large segment of our membership in addressing some of the most difficult and perplexing legal issues confronting our professional field of international, regional and national asylum and refugee law. With perhaps over 100 of our members from around the world participating directly on our IARLJ Working Parties, it is undoubtedly one of the most dynamic and active elements of our Association and also, perhaps, one of its most valuable.

The contribution of the IARLJ Working Parties to a common application, understanding, and development of asylum and refugee law, irrespective of the level, whether global, regional or national, or jurisdiction, international, intergovernmental or State, is becoming ever more self-evident, if not yet fully appreciated.

At the 8th IARLJ World Conference in Cape Town, South Africa, the IARLJ Working Parties made a significant contribution. Seven active and engaged IARLJ Working Parties presented their substantive research papers and reports to the Cape Town World Conference delegates.

It is important to point out that two of the IARLJ Working Parties tabled draft guidelines for the consideration of IARLJ members. The Expert Evidence Working Party presented its *Guidelines on the Judicial Approach to the Evaluation of Expert Medical Evidence*. The Vulnerable Persons Working Party in fact presented nine separate

guidelines on procedures for dealing with vulnerable persons. The following categories of vulnerable persons were included: children, the elderly, trafficked persons; those who fear gender related harm, mental health issues, or physical disabilities, and so on. Both the Expert Evidence and the Vulnerable Persons Working Parties called on IARLJ members to provide their views, opinions, suggestions and advice on their respective draft guidelines pertaining to these two critically important areas of refugee status determination and practice.

In addition, the Human Rights Nexus Working Party chose to address the challenging issue of violations of socio-economic rights as a form of persecution and an element of internal flight, relocation or protection alternative. Further, the *1951 Convention* and Subsidiary Protection Working Party decided to explore the degree to which the European Union (EU) Qualification Directive has been implemented, thus far, by its 27 member states.

From the contributions to the Cape Town IARLJ World Conference alone, it is evident that the IARLJ Working Parties focus their research on some of the most pertinent and relevant refugee law issues of concern to practicing refugee law decision-makers members. Of course, a significant portion of the world's refugee law adjudicators, judges and justices are, in fact, members of our Association. It is also evident that our IARLJ Working Parties have not shied away from the more challenging, difficult, and some would say, controversial issues and concerns that are confronting the refugee law adjudicator, judge or justice today. Clearly, this underscores the value of the IARLJ Working Parties to our colleagues within our Association,

but also to the field of international refugee law and practice as a whole.

The contribution of each of the IARLJ Working Parties for the Cape Town IARLJ World Conference is as follows:

- **Human Rights Nexus Working Party:** Kate Jastram, Anne Mactavish, and Penelope Mathew, *Violations of Socio-economic Rights as a Form of Persecution and as an Element of Internal Protection*.
- **Membership in a Particular Social Group WP:** Patricia Milligan-Baldwin, Immigration Judge, Asylum and Immigration Tribunal, United Kingdom, with contributions from Joanne Sajtos, Immigration and Refugee Board of Canada, and David Kosar, Research and Documentation Service, Supreme Administrative Court, Czech Republic, *Membership in a Particular Social Group: The protection afforded to African refugees in Canada, Australia, Czech Republic and the UK*.
- **Expert Evidence WP:** 3rd Report of the Expert Evidence Working Party to the IARLJ Conference at Cape Town, South Africa, January 2009, *Upon the Judicial Approach to the Evaluation and Reception of Expert Medical Evidence*. [Geoffrey Care et al.]
- **1951 Convention and Subsidiary Protection WP:** *Implementation of the EU Qualification Directive: Some*

Features, IARLJ World Conference, Cape Town, South Africa, January 2009. [Jane McAdam, et al.]

- **Vulnerable Persons WP:** *Judicial Guidelines on Procedures With Respect to Vulnerable Persons.*
 - Guidance Note 1: Procedures for All Vulnerable Persons
 - Guidance Note 2: Mental Health
 - Guidance Note 3: Children
 - Guidance Note 4: Trafficked Persons
 - Guidance Note 5: Elderly Persons
 - Guidance Note 6: Survivors of Torture and Serious Harm
 - Guidance Note 7: Gender Related Harm
 - Guidance Note 8: Detained Persons
 - Guidance Note 9: Physical DisabilityConsultation Document, Draft Guidelines of Procedures With Respect to Vulnerable Persons (November 10, 2008)
- **Asylum Procedures WP:** Steve Karas, Senior Member of the Administrative Appeals Tribunal, Australia, *Report on Inter-Conference Activities 2007-2009 of the Working Party on Asylum Procedures of the International Association of Refugee Law Judges (IARLJ).*
- **Country of Origin Information and Country Guidance WP:** *Brief Report on the Activities and Plans of the Country of Origin Information and Country Guidance Working Party.*

For the full content of each of the IARLJ Working Parties research papers and reports for the Cape Town IARLJ World Conference, please see each of the IARLJ Working Party contributions posted on the IARLJ website.

The recent Working Party parties in Cape Town followed a truly a prodigious output of legal research and analysis on international refugee law which was produced for the IARLJ 7th World Conference in Mexico City in November 2006. At that time, the Inter-Conference Working Party Process delivered twelve substantive research papers and reports from seven highly active and engaged Working Parties, with some Working Parties contributing more than one substantive research paper or report.

The Country of Origin Information and Country Guidance Working Party produced two substantive research papers:

- *Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist*, by Senior Immigration Judge Dr. Hugo Storey, and
- *Results of a Survey of Country Guidance Models*, by Justice Professor Boštjan Zalar.

The *1951 Convention* and Subsidiary Protection Working Party produced four substantive research papers:

- *Convention Refugee Status and Subsidiary Protection Working Party, First Report* by Professor Jane McAdam;
- *The French Reading of Subsidiary Protection*, Vera Zederman, Senior Legal Counsel, Refugee Appeal Board, France;

- *The 1951 Geneva Convention and Subsidiary Protection: Uncertain Boundaries*, Laurent Dufour, Senior Legal Counsel, Refugee Appeal Board, France;
- *Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)*, by Justice Carolyn Layden-Stevenson and Jessica Reekie, Law Clerk, Federal Court of Canada.

The Vulnerable Persons Working Party presented two reports:

- *Report of the Vulnerable Groups Working Party to the International Conference at Mexico*, by Senior Immigration Judge Catriona Jarvis;
- *Guidelines on Procedures with Respect to Vulnerable Persons Appearing Before the IRB*, by Lois D. Figg, Assistant Deputy Chairperson of the Immigration and Refugee Board of Canada (IRB).

As noted above, Working Party parties and reports are posted on the IARLJ website at www.iarlj.org.

Dr James C. Simeon,
Co-ordinator
IARLJ Inter-Conference Working Party Process

Endpiece

Table Mount

Justice Ogoola

There it stands: solid, massive
unmistakable, unshakeable.
A gentle colossus dominating the skyline,
from every view; from every angle of Town:
telling the captivating tale of the Cape.

It stands confounding the imagination:
Is it a mountain? a table? or a volcano?
A table, yes – sitting atop a mountain.
A volcano, perhaps: but long gone to sleep
Like the desert camp of God's chosen people,
covered in the loving embrace
of a soft tablecloth of white clouds.

A sleeping genial giant -
majestic, regal, soaring into the high skies.
A sentinel with a hawk's eye:
watching over the picturesque city nestling beneath;
peering deep into the azure blue bay below;
contemplating the far horizon
where two oceans, like mighty adversaries, clash
and then meet to shake hands
in a maritime bond of brotherhood.

Far in the outer distance
sitting unmistakable beyond the shoreline of Table

Bay, cowering under the towering tabular Mount,
is Robben Island:

 captive home to anguished throngs of black prisoners.

For quarter a century the habitation

 of bondman No. 46664: *a.k.a* Nelson Mandela,
 Pioneering Patriarch of the Rainbow Nation.

There the Mount stands, resplendent in the middle of Town
 indisputably defining the landscape of the city of the Cape
 totally fused in the personality of the Town;
 lending its grace and grandeur
 to the radiance and resilience of Cape Town:
 telling the tantalising tale of the Town down under!

The Mount – quiet and tranquil:

 has sat thus, silent and mute for millennia
 watching, listening, whistling in the gusty winds from
 Antarctica lashing against its spectacular cliffs –
 absorbing the goings-on over time:
 the arrival of the exogenous, and the displacement
 and replacement of the indigenous dwellers.

The Mount: horrified witness to the brutal expulsion
 of the original tillers of the land
 by the upstart miners of minerals;
 numb witness to the disfigurement
 of the age-old Island of peace and serenity
 into the nightmare of oppressive suffocation –
 its hapless inhabitants quarantined
 in a wall of shark-infested waters of the deep.

But now, sweet relief in the air:

 The Island, the City and the whole Country

have swung back from insanity to rationality
mending the tattered shreds of history;
realigning the shattered shafts of the rainbow;
righting the wrong; reaching for the hand
from across the coloured wall –
Marching together to the jolly drumbeat of Reconciliation!
And all this to be plainly seen
from the Table on the Mountain!

Justice Ogoola
30 January, 2009
Table Bay Hotel, Cape Town
South Africa

*DEDICATED to The Hon. Mr. Justice Anthony M. North of the
Federal Court of Australia on the eve of his retirement from the
Presidency of the International Association of Refugee Law Judges
(IARLJ), at the Association's 8th World Conference, Cape Town,
South Africa: January 28 – 30, 2009.*